IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 11, 2023 Session

ELIZABETH CHRISTMAS v. JOHN M. KINGTON

Appeal from the Circuit Court for Hamilton County
No. 18-C-1066 W. Jeffrey Hollingsworth, Judge

No. E2022-00699-COA-R3-CV

Elizabeth Christmas and John M. Kington were romantically involved for many years. When the parties' relationship ended, Dr. Kington reported to the Hamilton County Sheriff's Office ("the Sheriff's Office") the theft of several items of jewelry from his home. At the conclusion of the Sheriff's Office's investigation, a grand jury indicted Ms. Christmas for theft of property valued at more than $250,000. The State of Tennessee ("the State") later dismissed the charge of theft before the case proceeded to trial. Ms. Christmas subsequently filed a complaint and an amended complaint against Dr. Kington in the Hamilton County Circuit Court ("Trial Court") alleging, *inter alia*, malicious prosecution and abuse of process. Dr. Kington filed a motion for summary judgment, which the Trial Court granted. Ms. Christmas appealed. Discerning no reversible error, we affirm the judgment of the Trial Court.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and KENNY W. ARMSTRONG, JJ., joined.

Ronald J. Berke, Chattanooga, Tennessee, for the appellant, Elizabeth Christmas.

Bryan H. Hoss, Chattanooga, Tennessee, for the appellee, John M. Kington.

OPINION

Background

Ms. Christmas and Dr. Kington began a romantic relationship in 2011 or 2012 and eventually became engaged. Dr. Kington claimed that the couple became engaged in August 2011, but Ms. Christmas claimed that they became engaged in April 2015 on her birthday. Regardless of the date of their engagement, the two ended their relationship within a few weeks of Ms. Christmas's birthday in 2015.

On May 12, 2015, Dr. Kington filed a complaint in the Trial Court against Ms. Christmas, alleging that the parties had been engaged, that the engagement had been called off, and that Ms. Christmas had kept the engagement ring. Dr. Kington valued the engagement ring at $87,450. Additionally, the complaint listed the following items as belonging to Dr. Kington and in Ms. Christmas's possession:

> The items of jewelry that Dr. Kington paid for and are now in [Ms. Christmas's] possession include, but are not limited to: (i) a ballerina diamond ring, for which Dr. Kington paid $6000.00; (ii) an 18-karat gold Rolex Lady's President Watch with diamond bezel and diamond face, for which Dr. Kington paid $11,000.00; (iii) a flower-shaped diamond broach, for which Dr. Kington paid $4500.00; (iv) an opal and diamond pendant, for which Dr. Kington paid $5000.00; (v) a pear-shaped diamond pendant with gold fitting, . . . for which Dr. Kington paid $5000.00; (vi) a platinum and multiple diamond pendant made from old Victorian bar pin broach, for which Dr. Kington paid $6500.00; (vii) a blue sapphire Victorian-style cross; (viii) one pair of chandelier earrings with white gold and diamonds, for which Dr. Kington paid $2500.00; and (ix) a gold pendant with holes containing dangling diamonds, for which Dr. Kington paid $2500.00.

In his complaint, Dr. Kington requested the return of his property and an award of damages. This action was voluntarily dismissed without prejudice by Dr. Kington on May 26, 2015, with an order confirming dismissal entered the following day.

Shortly thereafter, Ms. Christmas and Dr. Kington continued their relationship. In March 2016, Dr. Kington discovered that several pieces of jewelry were missing from his home in Hamilton County.[1] As a result, on July 12, 2016, Dr. Kington contacted the

[1] Dr. Kington's statement of undisputed material facts also refers to a separate burglary that occurred at his home in Memphis, Tennessee, in January 2016 where three different items of jewelry were stolen and subsequently reported to his insurance company. Ms. Christmas denied this fact, stating that more than three items were included on the list to the insurance company.

Sheriff's Office and reported to Deputy John Spaulding the following pieces of missing jewelry:

Property Description	**Color**	**Value**
Watch/Rolex 18 KT. President, Pearl, Diamonds	Gold	$50,000
Watch/Rolex Ladies 18 KT. President, Diamonds	Gold	$30,000
Watch/Rolex Gentlemans Stainless, Gold, Diamonds	Gold/Stainless	$25,000
Watch/Patek Philippe, 18 KT With Rosewood Case	Gold	$60,000
Watch/Rolex Stainless, Explorer 11	Stainless	$8,000
Ring/Ladies Platinum 42 Caret Diamond	Platinum	$65,000
Ring/18 KT Gold 2.8 Diamond European Cut	Gold	$25,000
Bracelet/10 KT Gold, 726 1.35 MM Diamonds	Gold	$30,000
Mens Breitling 18 KT Gold Pilots Watch, Diamond	Gold	$60,000

Dr. Kington explained to Deputy Spaulding that only his housekeeper and Ms. Christmas had been in his home. He also relayed that Ms. Christmas's son, McCleish Benham, had called him and informed him that Ms. Christmas sold the jewelry to a store called Nashville Gold and Diamond Market.

Detective Charles Sledge thereafter managed the case and interviewed Dr. Kington. Dr. Kington informed Detective Sledge that after receiving the telephone call from Mr. Benham, he planned on visiting Nashville Gold and Diamond Market in an attempt to locate his jewelry. The next day, Dr. Kington informed Detective Sledge that when he arrived at Nashville Gold and Diamond Market, he saw Ms. Christmas's vehicle in the parking lot. He waited to go inside until she left. While inside the store, Dr. Kington located a gold and silver Rolex, as well as "two (2) necklaces that he had given Elizabeth Christmas as gifts."

As part of his investigation, Detective Sledge interviewed Ms. Christmas twice, visited Nashville Gold and Diamond Market, interviewed the operator of the store, interviewed Dr. Kington, obtained a search warrant for Ms. Christmas's cell phone records, and filed an affidavit of complaint against Ms. Christmas. Detective Sledge stated the following in his "Supplemental Reports":

> At approximately 11:15, I met with Dr. Kington at my office at the Sheriff's Office West Annex. Mr. Kington[2] advised he had had a relationship with Ms. Christmas for several years[.] He advised that she runs a jewelry store, McCleish [A]ntiques and Jewelry, at 716 North Main Street in Shelbyville, TN[.] He also advised that Ms. Christmas is in the [w]alking horse business

[2] Dr. Kington is referred to as both "Mr." and "Dr." throughout the record. He is a retired psychiatrist.

and recently has had more financial difficulties. He advised that she is bipolar and has anger issues. Dr. Kington advised that the only people he has let into his home for quite a while would be Ms. Christmas and his housekeeper . . . . Kington advised that he does not suspect the housekeeper at all.

Kington advised that around the time the jewelry went missing, Christmas showed up at his house unexpected and unannounced. [H]e advised all that weekend, she was on the phone with her son, [Mr.] Benham arguing and fighting. Kington described Benham as having been in trouble with the law several times and his mother has a history of lending him large amounts of money and getting him out of trouble all the time. Kington said that this situation caused Ms. Christmas great stress throughout that weekend. He further advised that before she left Chattanooga, she gave him back a small pistol he kept for protection in a desk drawer which she took without permission, explaining "she wasn[']t in the right frame of mind when she took it." Shortly thereafter, Kington discovered his jewelry was missing.

Kington advised that right before he reported the theft to the police, he was contacted by McCleish Benham, Ms. Christmas' son. He advised that he has recently not been getting along with his mother, and that he had information that his mother had some pieces of jewelry that she said was given to her by Dr. Kington. Kington advised me that Benham described the jewelry in intricate detail, and this would be impossible for him to know as he had never been to his Chattanooga home nor seen Kington's jewelry collection. Kington then said Benham told him of the above described jewelry store in Nashville. Kington told me on 7/13/16, he went to the Nashville Gold and Diamond Market to see if any of his jewelry was there. He stated when he arrived, he saw a car in the lot that looked exactly like the one Christmas drives; He said he knew this because she drove a distinctive Mercedes convertible sports car.

* * *

Later that day at approximately 1330, I called and interviewed Christmas on the telephone. She denied knowing anything about the theft, stating she did not know who would have taken the jewelry. She stated that she has in the past conducted business with Nashville Gold and Diamond Market, but she stated she only bought, and never sold any jewelry to that establishment, and had not had contact with anyone at that business for several months. She stated to me that she has had problems in the past with her son, McCleish, and that they are currently not on speaking terms.

> Based on my investigation, I have discovered that Ms. Elizabeth Christmas had access to the [m]issing [j]ewelry, and her behavior in regards to her dealings with the Nashville jewelry store, the conversation I had with the jewelry store representative, and her discovery of my investigation mere minutes after my call to the jewelry store, as well as the details of the jewelry provided to Kington by [Mr. Benham], leads me to believe that the stored phone records will contain evidence of Christmas' contacts and visits to the Nashville Jewelry store in question, as well as possible text content in regards to the alleged theft.
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> * * *
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> On 07/21/2016, I responded along with Deputy Minges to the Nashville Gold and Diamond Market. There, we met with Det. Al Thompson with Metro Nashville Police Pawn unit. At the location, we talked with Bart Dennis, [w]ho runs the store. Mr. Dennis presented us with a Rolex with diamonds on the numbers, a male watch, which was sterling and gold. He also presented me with two necklaces. I took photographs of the items, and sent them to Dr. Kington's [c]ellphone. He identified the necklaces as items he had gave Ms. Christmas as gifts. Based on this information, I had Det. Thompson place a hold on the items for the investigation. While I [w]as at the store, Dennis did advise that she did sell the items to him.
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> After we left the store, we responded to Shelbyville to Ms. Christmas['s] business. She again denied taking any [j]ewelry from Dr. Kington. When I confronted her about her selling the items to the store, under her name, and the business owner verifying she sold the watch to them, she said she could not provide a good explanation as to why the watch is in the store in her name, she then changed her story and said she did sell a ladies rolex, but the watch at the store was clearly a male watch.
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> * * *
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> Based on the evidence, I called Assistant District Attorney Amanda Morrison, [a]nd it was agreed that Ms. Christmas need[ed] to be charged with the theft.

After speaking with an assistant district attorney, Detective Sledge filed an affidavit of complaint against Ms. Christmas for theft of property valued over $60,000 in the Hamilton County General Sessions Court on July 25, 2016. Ms. Christmas was arrested on August 16, 2016, and transported to the Hamilton County Jail. She was released the same day after posting bond. On November 14, 2016, Ms. Christmas appeared in the Hamilton County General Sessions Court and waived her right to a preliminary hearing.

The case was bound over to the Hamilton County Grand Jury. It is undisputed that Dr. Kington did not testify before the Hamilton County General Sessions Court, Hamilton County Criminal Court, or grand jury, and did not provide any documents or records to the grand jury. The grand jury indicted Ms. Christmas for one count of theft of property valued over $250,000. On March 3, 2017, Ms. Christmas was arraigned, and the case was set for trial. The trial was continued. According to Ms. Christmas, Dr. Kington was present for most or all of the court hearings but was often outside the courtroom.

In August 2018, the State dismissed the criminal action against Ms. Christmas. Ms. Christmas did not recall the reasoning behind the dismissal provided by the prosecution. There is no court order dismissing the criminal charge against Ms. Christmas. Instead, the dismissal appears on the Hamilton County Criminal Rule Docket and Minutes, stating that "by agreement of the parties, and with approval of the Court, this case is dismissed on motion of the State." Nothing is mentioned that indicates the case was dismissed on the merits or due to a lack of evidence. Following the State's decision not to pursue the criminal action against Ms. Christmas, Dr. Kington became upset that the State was "taking [him] very lightly."

While the criminal investigation was ongoing, Dr. Kington filed a second civil complaint against Ms. Christmas on July 20, 2016, seeking damages and the return of the same items of property as in the previous complaint. In addition to the previous allegations, Dr. Kington alleged that Ms. Christmas had taken possession of the following additional items from his home without his knowledge or permission:

> Among other items, [Ms. Christmas] took possession of the following items: (i) gentleman's Rolex 18-karat gold President watch with mother of pearl face round diamonds at hour places; (ii) lady's Rolex 18-karat gold President watch with diamond bezel around the dial and four green emeralds at fifteen-minute markers; (iii) gentleman's Rolex stainless disk gold oyster perpetual wristwatch with tuxedo dial with round diamonds at each five-minute marker with date at 3:00 position; (iv) gentleman's 18-karat Patek Philippe "Golden Ellipse" wristwatch with oval movement arranged vertically with gold mesh bank, which was stored in a rosewood colored wooden case; (v) Rolex stainless steel "Explorer II" wristwatch with white face; (vi) lady's platinum ring with 3.33-karat center diamond more particularly described . . . in the appraisal attached hereto as *Exhibit 2* [an appraisal valuing the ring at $61,450]; (vii) a 10-karat gold unisex bracelet more particularly described in the appraisal attached hereto as *Exhibit 3*; (viii) gentleman's Breitling 18-karat gold pilot's chronograph wristwatch with white-cream face and light blue subsidiary dials and 18-karat gold diamond link band; and (ix) gentleman's 18-karat gold engraved ring with 2.8 diamond.

Dr. Kington later filed a notice of voluntary dismissal on December 22, 2016, which was subsequently followed by a court order dismissing the action without prejudice.

Ms. Christmas filed a complaint against Dr. Kington on September 24, 2018, in the Trial Court, alleging, among other things, malicious prosecution and abuse of process.[3] Ms. Christmas subsequently filed an amended complaint on April 30, 2019, in which she alleged that Dr. Kington was a "pathological liar," that many of the items Dr. Kington had accused Ms. Christmas of taking were stolen from his home in Memphis, that some items were in repair shops, that some items were badly damaged and their value exaggerated, that Dr. Kington had collected insurance proceeds on certain stolen items, and that some of the items Dr. Kington had alleged were stolen were given to Ms. Christmas as gifts during their relationship. Dr. Kington filed an answer to the amended complaint denying the substantive allegations against him and providing several defenses to the allegations, including failure to state a claim for which relief can be granted, unclean hands, the statute of limitations, civil abuse by Ms. Christmas, doctrine of estoppel, fraud by Ms. Christmas, and the affirmative defense of payment.

In December 2021, Dr. Kington filed a motion for summary judgment, a memorandum of law in support, and a statement of undisputed material facts. Dr. Kington argued that there were no material facts in dispute and that he was entitled to judgment as a matter of law. With regard to the abuse of process claim, Dr. Kington argued that Ms. Christmas "cannot point to any act committed by Dr. Kington which show[s] that Dr. Kington did anything improper or abused any process within the criminal justice process or Ms. Christmas' criminal case." As to the malicious prosecution claim, Dr. Kington argued that Ms. Christmas would be unable to prove that the underlying criminal action had been terminated in her favor or that he had initiated criminal proceedings against her. Dr. Kington further argued that the grand jury returned an indictment based on probable cause without his participation, and Ms. Christmas had presented no evidence that it was procured by fraud or false testimony. In support, Dr. Kington cited to case law for the proposition that a grand jury indictment creates a rebuttable presumption that probable cause exists to institute the criminal proceeding.

Ms. Christmas filed a response to the summary judgment motion, response to Dr. Kington's statement of undisputed material facts, and her own statement of undisputed material facts. According to Ms. Christmas, it was clear Dr. Kington was using both civil and criminal processes as retaliation for breaking up with him. Ms. Christmas asserted that

[3] Prior to summary judgment, the Trial Court granted Dr. Kington's motion to dismiss in part and dismissed all of Ms. Christmas's claims except for her claims for malicious prosecution and abuse of process related to the criminal charge of theft. The Trial Court dismissed Ms. Christmas's claims for malicious prosecution and abuse of process as they related to the two civil suits based upon the expiration of the statute of limitations. Ms. Christmas has not challenged the Trial Court's order granting Dr. Kington's motion to dismiss these claims.

Dr. Kington knew that the items he had reported stolen were actually gifts to Ms. Christmas, including the engagement ring and the ladies' Rolex watch. Ms. Christmas argued that the criminal charges filed against her "were based upon the lies told to the sheriff's department" by Dr. Kington. Ms. Christmas did not agree that the indictment created a rebuttable presumption of probable cause and contended that even if it did, she had rebutted the presumption.

The Trial Court entered its order on May 5, 2022, granting summary judgment in favor of Dr. Kington. The Trial Court determined that it was clear that there was probable cause for Ms. Christmas's arrest and that she would be unable to prove that essential element of malicious prosecution. With respect to Ms. Christmas's abuse of process claim, the Trial Court found:

> The evidence produced demonstrates that the only thing Mr. [Kington] did was to show up for court hearings when ordered to do so and to question the Assistant District Attorney as to why the criminal charges were being dismissed before trial. Neither of those actions improperly prolonged the proceedings or kept the charges pending for malicious reasons. Showing up for court and questioning a public official's actions do not constitute abuse of the legal process.

Ms. Christmas timely appealed to this Court.

Discussion

Although not stated exactly as such, Ms. Christmas raises multiple issues which we consolidate as one: whether the Trial Court erred by granting Dr. Kington's motion for summary judgment and dismissing Ms. Christmas's claims of malicious prosecution and abuse of process. This case involves summary judgment awarded in favor of Dr. Kington. As our Supreme Court has instructed:

> Summary judgment is appropriate when "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. 56.04. We review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *see also Abshure v. Methodist Healthcare–Memphis Hosp.*, 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013) (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012)).

* * *

> [I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.* [*v. Zenith Radio Corp.*], 475 U.S. [574] at 586, 106 S.Ct. 1348 [89 L.Ed.2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 250, 264-65 (Tenn. 2015).

Malicious Prosecution

"In order to establish the essential elements of malicious prosecution, a plaintiff must prove that (1) a prior suit or judicial proceeding was instituted without probable cause, (2) defendant brought such prior action with malice, and (3) the prior action was finally terminated in plaintiff's favor." *Roberts v. Fed. Express Corp.*, 842 S.W.2d 246, 247-48 (Tenn. 1992). The Trial Court granted Dr. Kington's summary judgment motion upon determining that Ms. Christmas would be unable to prove the first element, that the criminal action had been instituted against her without probable cause. Upon our review of the record and relevant law, we agree with the Trial Court.

Ms. Christmas first challenges the Trial Court's purported application of "old law." Ms. Christmas states in her appellate brief that the "law regarding whether the judge or jury should decide questions of fact in a summary judgment motion regarding probable cause changed in 1992," quoting extensively from our Supreme Court's decision in *Roberts v. Fed. Express Corp.*, 842 S.W.2d 246 (Tenn. 1992). The Tennessee Supreme Court in *Roberts* held that "where reasonable minds can differ as to the existence of probable cause a jury is to decide the issue." *Id.* at 249. This Court has elaborated on *Roberts* as follows:

> As our Supreme Court stated in *Roberts*, "[p]robable cause is established where 'facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe that the accused was guilty of the crime charged.'" Until the *Roberts* decision, Tennessee courts have always considered probable cause to be a question of law. However, in *Roberts* the Supreme Court reasoned that the probable cause determination, the conduct of a reasonable man under the circumstances, is in essence no different than the determination of negligence. Thus, the Court held that "where reasonable minds can differ as to the existence of probable cause a jury is to decide the issue."

Swindle v. Krystal Co., No. 02A01-9406-CV-00136, 1995 WL 262419, at *2 (Tenn. Ct. App. May 8, 1995) (internal citations omitted).

Therefore, since *Roberts*, "the reasonableness of the beliefs of the defendant in a malicious prosecution claim is a factual determination that is ordinarily made by the jury." *Coleman v. Lauderdale Cnty.*, No. W2011-00602-COA-R3-CV, 2012 WL 475606, at *5 (Tenn. Ct. App. Feb. 15, 2012). Nevertheless, the rule established by *Roberts* does not invariably or always mean that the issue of probable cause cannot be resolved on a motion for summary judgment. Since the rule in *Roberts* was established, this Court has concluded: "When reasonable minds could not differ on the existence of probable cause, summary judgment (or directed verdict) is appropriate." *Smith v. Kwik Fuel Ctr.*, No. E2005-00741-COA-R3-CV, 2006 WL 770469, at *7-8 (Tenn. Ct. App. Mar. 27, 2006)

(concluding that based upon the undisputed facts, "a reasonable jury could only conclude" that the defendant had probable cause to prosecute the plaintiff); *see Hibbard v. Receivables Mgmt. Bureau, Inc.*, No. E2007-00152-COA-R3-CV, 2007 WL 4117268, at *3 (Tenn. Ct. App. Nov. 20, 2007) (affirming a trial court's grant of a motion for summary judgment dismissing a claim of malicious prosecution in part because there was "no proof that the warrant was instituted without probable cause").

In the present case, there is no indication that the Trial Court did not apply the law as established in *Roberts*. In its final order, the Trial Court, in effect, concluded that this was not a situation in which reasonable minds could differ as to the issue of probable cause, stating: "It is clear that there was probable cause for the arrest and Ms. Christmas would not be able to prove that essential element of the malicious prosecution claim." We therefore fail to discern how the Trial Court applied "old law" or how its decision contradicted *Roberts*.

Ms. Christmas appears to contend that the present case is one such situation in which reasonable minds could differ as to the existence of probable cause and that the Trial Court should have accordingly allowed a jury to determine whether there had been probable cause. As did the Trial Court, we respectfully disagree. This Court has previously summarized the definition of probable cause as follows:

> "Properly defined, probable cause requires only the existence of such facts and circumstances sufficient to excite in a reasonable mind the belief that the accused is guilty of a crime charged." *Roberts v. Fed. Express Corp.*, 842 S.W.2d 246, 248 (Tenn. 1992). When we deal with probable cause, we are concerned with probabilities rather than certainty. *See State v. Bell*, 429 S.W.3d 524, 530 (Tenn. 2014). Thus, "[i]n the context of an action for malicious prosecution, the question is not whether the plaintiff was actually guilty of the crime alleged against him, but whether reasonable grounds existed for the defendant's belief that he was guilty." *Smith v. Kwik Fuel Ctr.*, No. E2005-00741-COA-R3-CV, 2006 WL 770469, at *7 (Tenn. Ct. App. Mar. 27, 2006) (citing *Peoples Protective Life Ins. Co. v. Neuhoff*, 407 S.W.2d 190, 199 (Tenn. Ct. App. 1966)).
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> Generally, the existence of probable cause is a factual inquiry that must be assessed based on an objective examination of the surrounding circumstances. *Roberts*, 842 S.W.2d at 248. However, a grand jury's indictment can establish the existence of probable cause as a matter of law. *Bovat v. Nissan N. Am.*, No. M2013-00592-COA-R3-CV, 2013 WL 6021458, at *3 (Tenn. Ct. App. Nov. 8, 2013); *see Crowe v. Bradley Equipment Rental & Sales, Inc.*, No. E2008-02744-COA-R3-CV, 2010 WL 1241550, at *5 (Tenn. Ct. App. Mar. 31, 2010).

Gordon v. Tractor Supply Co., No. M2015-01049-COA-R3-CV, 2016 WL 3349024, at *9 (Tenn. Ct. App. June 8, 2016).

In *Gordon*, this Court confirmed that "a grand jury's indictment creates a rebuttable presumption that probable cause to institute the criminal proceeding existed unless the indictment was procured by fraud or by a defendant who did not believe in the guilt of the plaintiff." *Id.* at *10. The *Gordon* Court further explained:

> At the summary judgment stage, evidence of a grand jury's indictment negates the element of lack of probable cause if the indictment is uncontested. *See Bovat*, 2013 WL 6021458, at *3; *Crowe*, 2010 WL 1241550, at *3. To avoid this result, the nonmovant must produce evidence, at the summary judgment stage, that the indictment was procured by fraud. *See Rye*, 477 S.W.3d at 264-65. If the nonmovant fails to do so, then the fact that a grand jury issued an indictment "equates to a finding of probable cause." *See Bovat*, 2013 WL 6021458, at *3.

Id. Therefore, given that it was undisputed that Ms. Christmas was indicted by the grand jury for theft of property, the dispositive issue is whether Ms. Christmas presented evidence that the indictment was procured by fraud. Upon our careful review of the record and the parties' competing statements of undisputed material facts, we conclude that Ms. Christmas failed to do so.

Here, the following facts are undisputed and demonstrate probable cause: (1) Ms. Christmas acknowledged that not all of Dr. Kington's missing items of jewelry were gifts to her; (2) Dr. Kington drove to Nashville Gold and Diamond Market on July 13, 2016, and saw Ms. Christmas's car in the parking lot; (3) Bart Dennis, operator of Nashville Gold and Diamond Market, presented to Detective Sledge a men's Rolex watch; (4) Dr. Kington identified the watch as one of the watches stolen from his Hamilton County home and the one he had seen at Nashville Gold and Diamond Market on July 13; and (5) Mr. Dennis informed Detective Sledge that Ms. Christmas had sold the watch as well as other items to Nashville Gold and Diamond Market. Moreover, Dr. Kington averred in his statement of undisputed material facts that Mr. Benham had called him, described his missing jewelry in detail, and informed him that Ms. Christmas had sold his missing jewelry. Although Ms. Christmas denied that her son ever called Dr. Kington in her response to Dr. Kington's statement of undisputed material facts, she failed to provide specific citations to the record or otherwise present any evidence to contradict Dr. Kington's averment. *See* Tennessee Rule of Civil Procedure 56.03 ("Any party opposing the motion for summary judgment must . . . file a response to each fact set forth by the movant . . . (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record.").

Significantly, in her response to Dr. Kington's statement of undisputed material facts, Ms. Christmas did not deny that the watch she sold to Nashville Gold and Diamond

Market belonged to Dr. Kington, but rather she denied only that the watch was manufactured by Rolex and that it was worth $50,000 as purported by Dr. Kington. She also did not claim that the Rolex was a gift given to her by Dr. Kington. These undisputed facts may not establish Ms. Christmas's guilt, but they certainly demonstrate that Dr. Kington had reasonable grounds for his belief that she was guilty of taking at least one of his watches. *See Smith*, 2006 WL 770469, at *7 (citing *Peoples Protective Life Ins. Co. v. Neuhoff*, 407 S.W.2d 190, 199 (Tenn. Ct. App. 1966)).

Moreover, these undisputed facts fail to demonstrate that the grand jury's indictment was procured through fraud. Ms. Christmas stated in her own statement of undisputed material facts that Dr. Kington "knew that the information he gave to the police and/or sheriff's department was false for the reasons listed above and other reasons." This statement is based on the fact that Dr. Kington gave "some of the items as presents" to her. While Dr. Kington acknowledged that some of the items had been given to Ms. Christmas as gifts, Ms. Christmas did not claim in either her response or her own statement of undisputed material facts that the men's Rolex watch discovered at Nashville Gold and Diamond Market was given to her as a gift. By her own admission, only some of the items were given to her as gifts, meaning that others were not. A reasonable jury could only conclude, as did the grand jury, that there was probable cause that Ms. Christmas was guilty of the theft of at least one of Dr. Kington's watches.

We affirm the Trial Court's finding that Ms. Christmas would be unable to prove that the criminal action against her was initiated without probable cause, an essential element of malicious prosecution. We therefore affirm the Trial Court's order granting Dr. Kington's motion for summary judgment with respect to this claim.

Abuse of Process

With respect to the claim of abuse of process, our Supreme Court has provided the following guidance:

> To establish a claim for abuse of process in Tennessee, as in a majority of other jurisdictions, two elements must be alleged: "(1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge." *Priest* [*v. Union Agency*], 174 Tenn. [304] at 307, 125 S.W.2d [142] at 143 [1939] (internal quotations and citations omitted); 1 Am. Jur. 2d *Abuse of Process* § 5 (1994).
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> 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 (emphasis added) (internal citations and quotations omitted); *see also* Restatement (Second) of Torts § 682 (1977) ("The subsequent misuse of the

process, though properly obtained, constitutes the misconduct for which the liability is imposed . . . ."); Fowler V. Harper et al., *The Law of Torts* § 4.9 at 4:84 (3rd ed. 1995) ("The action is not for the wrongful bringing of an action or prosecution, but for the improper use, or rather 'abuse,' of process in connection therewith . . . .")[.]

As this Court emphasized in *Priest*,

> 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. Abuse of process does not occur unless the "process is perverted, i.e., directed outside of its lawful course to the accomplishment of some object other than that for which it is provided." *Id.* The mere existence of an ulterior motive in doing an act, proper in itself, is not sufficient. *Id.* An action for abuse of process cannot be sustained where the process was employed to perform no other function than that intended by law. *Id.* The bad intent must culminate in an actual abuse of the process "by perverting it to a use to obtain a result which the process was not intended by law to effect." *Id.* at 308, 125 S.W.2d at 144. "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." Keeton et al., *supra* § 121 at 898.

Mere initiation of a law suit, though accompanied by a malicious ulterior motive, is not abuse of process.

Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., 986 S.W.2d 550, 555 (Tenn. 1999).

In its final order, the Trial Court determined that Ms. Christmas would be unable to prove the elements of abuse of process, specifically finding that the evidence demonstrated only that Dr. Kington was present at court hearings and questioned the assistant district attorney as to why the State was dismissing the criminal charge against Ms. Christmas. The undisputed material facts support the Trial Court's determination.

It is undisputed that Dr. Kington never testified before the Hamilton County General Sessions Court, Hamilton County Criminal Court, or Hamilton County Grand Jury. It is undisputed that he did not provide documentation or records to either a prosecutor in the

Hamilton County General Sessions Court or the Hamilton County Grand Jury. Beyond Dr. Kington's initial report to the Sheriff's Office, interview with Detective Sledge, and visit to Nashville Gold and Diamond Market, the most that can be said of Dr. Kington's activity as it relates to the criminal proceeding is that he was present at hearings and discussed the case with an assistant district attorney about why the State was dismissing the criminal charge against Ms. Christmas. Ms. Christmas has failed to adequately explain how this activity constitutes improper use of process. We therefore affirm the Trial Court's order granting summary judgment as it relates to Ms. Christmas's abuse of process claim as well.

Conclusion

The Trial Court's final order granting Dr. Kington's motion for summary judgment is affirmed, and this cause is remanded to the Hamilton County Circuit Court for the collection of costs below. Costs on appeal are taxed to the appellant, Elizabeth Christmas, and her surety, if any.

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D. MICHAEL SWINEY, CHIEF JUDGE