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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Middle Section, at  
Nashville.

James L. SEWELL, Plaintiff/Appellant,

v.

PAR CABLE, INC. and Glenn Miller, Individually and as  
agent for Par Cable, Inc., Defendants/Appellees.

Oct. 26, 1988.

Sumner Circuit App. No. 87-266-II, Appeal From the Circuit Court for Sumner County, Tennessee at Gallatin. Thomas Boyers, IV, Judge.

Mary Ann Reese, Nashville, for plaintiff/appellant.  
Stephen E. Cox, James D. Kay, Jr., Manier, Herod, Hollabaugh & Smith, Nashville, for defendants/appellees.

#### OPINION

KOCH, Judge.

\*1 This appeal involves a homeowner's suit for malicious prosecution against a cable television company and one of its employees. The homeowner filed the suit in the Circuit Court for Sumner County after a criminal prosecution commenced by the cable company was dismissed in accordance with an informal agreement between the homeowner and the district attorney general. The defendants moved for summary judgment on the ground that the criminal charges had not been resolved in the homeowner's favor. The trial court granted the defendants' motion and dismissed the case. The homeowner has appealed. We affirm the trial court's judgment.

#### I.

James L. Sewell and his family moved into a home in Hendersonville in late 1981. They ordered cable television service from the local subsidiary of Par Cable, Inc. shortly after they moved in. The service, including one premium movie channel, was installed in December, 1981. Approximately one month later, the Sewells subscribed to a second premium movie channel. However, they discontinued their subscription to the two premium channels sometime in early 1982.

In July, 1982, Glenn Miller, a cable company employee, discovered an illegal trap device on the line serving the Sewells' house while he was on another service call in the area. The trap enabled the Sewells to receive the unscrambled signals from the premium movie channel channels even though they no longer subscribed to them. Mr. Miller placed a note on the Sewells' front door stating "You have been discontinued due to an illegal connection." The next morning, Mr. Miller and another cable employee removed the trap device and disconnected the Sewells' cable service. Mrs. Sewell also telephoned the cable company, denying any wrongdoing and insisting that the cable service be restored.

Approximately two weeks later, Mr. Miller obtained a general sessions warrant against Mr. Sewell, charging him with violating [Tenn.Code Ann. § 7-59-108 \(1985\)](#) <sup>FNI</sup>. Mr. Sewell was arrested and released on bond after being bound over to the Sumner County grand jury on a plea of not guilty. The grand jury indicted him in October, 1982 for unlawfully removing equipment used for the distribution of television signals without the consent of Par Cable.

Mr. Sewell's trial was set for June, 1983. However, it was continued by the Office of the District Attorney General after Mr. Sewell refused an offer of pretrial diversion. Several weeks later, two assistant district attorneys general and Mr. Sewell's lawyer entered into a "Memorandum of Understanding" which was filed in the criminal court on July, 18, 1983. The Memorandum of Understanding stated:

On the 21st day of June, 1983, the Defendant, by and through his counsel, Mary Ann Reese, entered into this Memorandum of Understanding with the Office of the District Attorney General for the Ninth Judicial Circuit, General Dee Gay and General Wayne Hyatt, as is evidenced by their signatures hereto.

The District Attorney General's Office agrees to defer or continue any prosecution of the above-styled cause for a period of six months. The Defendant shall continue to conduct himself as a good citizen, and should the defendant continue as a good citizen, at the end of six months the District Attorney General's Office will recommend to the Court that the above-styled case be dismissed without any cost to

the Defendant and that upon said dismissal, the records including the arrest record of the Defendant will be expunged in its [sic] entirety.

\*2 Sometime in January, 1984, the Criminal Court for Sumner County entered an order reciting:

Upon the agreement of counsel and upon the recommendation of the Office of the District Attorney General, as is evidenced by their signatures hereto, and in accordance with the Memorandum of Understanding entered into between the parties and filed on July 18, 1983, the Court finds that this case against the Defendant should be dismissed without any cost and that upon said dismissal that the records including the arrest record of the Defendant should be expunged in its [sic] entirety.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the records, including the arrest record of the Defendant as to the charge placed against him on August 9, 1982, namely a violation of [T.C.A., 7-59-108](#), tampering or removing any security device, be and the same are hereby expunged, removed, and destroyed.

Mr. Sewell filed a malicious prosecution action against the cable company and Mr. Miller in October, 1984. The defendants moved for a summary judgment in July, 1986 on the ground that "pre-trial diversion is not a termination of judicial proceedings in the plaintiff's favor." In October, 1986, the trial court entered an order dismissing Mr. Sewell's complaint.

## II.

There are four essential elements in a malicious prosecution case arising from an arrest for an alleged criminal act. They include: (1) the defendant instituted a criminal prosecution against the plaintiff; (2) the criminal proceeding was terminated in favor of the plaintiff; (3) the defendant lacked probable cause to institute the proceeding; and (4) the defendant acted maliciously or for some reason other than to bring the plaintiff to justice. [Kerney v. Aetna Casualty & Sur. Co.](#), 648 S.W.2d 247, 250-51 (Tenn.Ct.App.1982); [Landers v. Kroger Co.](#), 539 S.W.2d 130, 131-32 (Tenn.Ct.App.1976).

Two elements of the malicious prosecution cause of action

involve mixed questions of law and fact that present no jury issues unless there are disputed facts. The existence of probable cause is one of these elements. [Logan v. Kuhn's Big K Corp.](#), 676 S.W.2d 948, 952 (Tenn.1984); [Lewis v. Williams](#), 618 S.W.2d 299, 301 (Tenn.1981). The favorable termination element is the other. While the circumstances under which the underlying proceeding were terminated are questions of fact for the jury, whether the proceedings were terminated favorably is a question of law for the court. See [Restatement \(Second\) of Torts §§ 673\(1\)\(b\), \(2\)\(c\) \(1976\)](#).

The plaintiff has the burden of proving that the underlying criminal prosecution was terminated in its favor. [Kaufman v. A.H. Robbins Co.](#), 223 Tenn. 515, 519-20, 448 S.W.2d 400, 402 (1969); [Swepson v. Davis](#), 109 Tenn. 99, 107, 70 S.W. 65, 67 (1905); [Restatement \(Second\) of Torts §§ 658, 672 \(1\)\(b\) \(1976\)](#).

Tennessee courts have never fully determined what type of disposition satisfies the favorable termination requirement. Obviously, an acquittal suffices. However, Tennessee courts have also found several dispositions short of an acquittal to be sufficient. [Scheibler v. Steinburg](#), 129 Tenn. 614, 617-18, 167 S.W. 866, 866-67 (1914) (nolle prosequi); [Williams v. Norwood](#), 10 Tenn. (2 Yer.) 329, 336 (1829) (magistrate's dismissal of a warrant); [Tennessee Valley Iron & R.R. v. Greeson](#), 1 Tenn.Civ.App. 369, 388-89 (1910) (grand jury's failure to indict); [Townsell v. Louisville & N. R.R.](#), 4 Tenn.Civ.App. 211, 214 (1912) (return of a search warrant stating that no stolen property was found); [Miller v. Martin](#), 10 Tenn.App. 149, 151 (1929) (district attorney general's decision not to prosecute after determining that the accused was innocent).

\*3 Based on their facts, these cases have three common elements. First, each disposition goes to the merits of the charge; second, each disposition prevents the criminal charge from being revived without the institution of new proceedings; and third, each disposition indicates that the defendant was innocent of the charges.

For the purposes of a malicious prosecution action, a favorable termination must be one indicating that the accused is innocent. [Singleton v. City of New York](#), 632 F.2d 185, 193 (2d Cir.1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1368

(1981); *Davis v. Chubb/Pac. Indem. Group*, 493 F.Supp. 89, 91 (E.D.Pa.1980); *Joiner v. Benton Community Bank*, 82 Ill.2d 40, 411 N.E.2d 229, 232 (1980); *Williams v. Page*, 160 N.J.Super. 354, 389 A.2d 1012, 1017 (App.Div.1978); *Hollender v. Trump Village Coop., Inc.*, 58 N.Y.2d 420, 448 N.E.2d 432, 435, 461 N.Y.S.2d 765, 768 (1983); *Junod v. Bader*, 312 Pa.Super. 92, 458 A.2d 251, 253 (1983); see also *Restatement (Second) of Torts § 658* comment c (1976); *Restatement (Second) of Torts § 660* comment a (1976); 1 F. Harper, F. James & O. Gray, *The Law of Torts* § 4.4 (2d ed. 1986).

A disposition that does not indicate the plaintiff's innocence is not considered a favorable termination. Accordingly, *Restatement (Second) of Torts § 660 (1976)* provides:

A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if

(a) the charge is withdrawn or the prosecution is abandoned pursuant to an agreement of compromise with the accused; or

(b) the charge is withdrawn or the prosecution abandoned because of misconduct on the part of the accused or in his behalf for the purpose of preventing proper trial; or

(c) the charge is withdrawn or the proceeding abandoned out of mercy requested or accepted by the accused; or

(d) new proceedings for the same offense have been properly instituted and have not been terminated in favor of the accused.

An indecisive termination, without more, will not support a malicious prosecution action. The plaintiff must go further and present evidence concerning the circumstances surrounding and the reasons for the dismissal of the charges. *Russo v. State of New York*, 672 F.2d 1014, 1020 (2d Cir.1982), modified, 721 F.2d 410 (2d Cir.1983); *Hickland v. Endee*, 574 F.Supp. 770, 779 (N.D.N.Y.1983), aff'd, 732 F.2d 142 (2d Cir.1984).

The termination of the charges against Mr. Sewell is inde-

cisive because it resulted from an agreement between the district attorney general and Mr. Sewell's attorney. See *Restatement (Second) of Torts § 660(a)*. Thus, Mr. Sewell's case must stand or fall on his proof that the charges against him were dismissed because of his innocence and not for some other reason.

### III.

Mr. Sewell attacks the trial court's decision to grant the summary judgment on two fronts. First, he insists that there is a material factual dispute concerning whether he agreed to statutory pretrial diversion. Second, he insists that the dismissal of the charges against him was a favorable termination. While the manner in which the charges against Mr. Sewell were dismissed is not consistent with statutory pretrial diversion, we do not agree that he has offered sufficient evidence that the criminal proceedings were terminated in his favor.

#### A.

\*4 The defendants characterized the disposition of the charges against Mr. Sewell as pretrial diversion pursuant to *Tenn.Code Ann. § 40-15-105 (Supp.1988)*. Mr. Sewell disagreed, insisting that he rejected the District Attorney's offer of statutory pretrial diversion. Now, he asserts that this dispute precludes summarily dismissing his malicious prosecution action. We disagree.

The trial court's decision did not rest on a finding that Mr. Sewell accepted pretrial diversion pursuant to *Tenn.Code Ann. § 40-15-105*. Indeed, a finding on this issue was unnecessary since the statutory pretrial diversion procedure is not the only way to dispose of pending criminal cases. District attorneys general also have the authority to use informal, non-statutory procedures. See *Dearborne v. State*, 575 S.W.2d 259, 263 n. 1 (Tenn.1978).

The manner in which the criminal charges against Mr. Sewell were dismissed is not consistent with the requirements of *Tenn.Code Ann. § 40-15-105*. However, the label placed on the procedure agreed to by the two assistant district attorneys general and Mr. Sewell's attorney is immaterial. The material issue is whether the dismissal of the

charges against Mr. Sewell—no matter how it is characterized—is a termination of the criminal proceedings in his favor.

B.

A motion for summary judgment is not a disfavored procedural shortcut. It is an integral part of the Tennessee Rules of Civil Procedure which are designed “to secure the just, speedy and inexpensive determination of every action.” See [Tenn.R.Civ.P. 1](#). It tests the merits of a complaint, [Fowler v. Happy Goodman Family](#), 575 S.W.2d 496, 498 (Tenn.1978); [Ferguson v. Tomerlin](#), 656 S.W.2d 378, 382 (Tenn.Ct.App.1983), and requires the trial court to determine whether there is a genuine issue for trial.

There can be no genuine issue for trial unless there is sufficient evidence for a jury to return a verdict for the plaintiff. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986).<sup>FN2</sup> Thus, if the plaintiff is unable to establish the existence of an essential element of its case on which it will bear the burden of proof at trial, the defendant is entitled to a judgment as a matter of law. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 (1986); [Moman v. Walden](#), 719 S.W.2d 531, 533 (Tenn.Ct.App.1986).

The existence of probable cause and the nature of the termination of the underlying proceedings are questions for the court. The American Law Institute points out:

The court determines whether ... the termination is sufficiently favorable to the accused, and whether the defendant had or had not probable cause. If there is no conflict in the testimony as to what the circumstances were, the court has no need for a finding of the jury. The jury is not called upon to act unless there is a conflict of testimony that presents an issue of fact for its determination.

[Restatement \(Second\) of Torts § 673](#) comment e. Therefore, in the absence of disputed facts, a summary judgment is a particularly useful device for resolving these issues prior to trial.

C.

\*5 Parties facing a summary judgment motion are not required to produce evidence in a form that would be admissible at trial. [Celotex Corp. v. Catrett](#), 477 U.S. at 324, 106 S.Ct. at 2553-54. [Tenn.R.Civ.P. 56.03](#) permits the proof to take the form of depositions, answers to interrogatories, admissions, or affidavits. However, no matter what form the proof takes, [Tenn.R.Civ.P. 56.05](#) requires that it “be made on personal knowledge,” that it “set forth such facts as would be admissible in evidence,” and that it “show affirmatively that the affiant is competent to testify to the matters stated therein.”

Hearsay statements in affidavits, depositions, or answers to interrogatories do not satisfy [Tenn.R.Civ.P. 56.05](#) and are not admissible to support or oppose a motion for summary judgment. [Sellers v. M.C. Floor Crafters, Inc.](#), 842 F.2d 639, 643 (2d Cir.1988); [Martin v. John W. Stone Oil Distrib., Inc.](#), 819 F.2d 547, 549 (5th Cir.1987); 6 J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.22[1], 56-743 to 56-746 (2d ed. 1988); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2738 n. 18 (1983); see also [Soldano v. Owens-Corning Fiberglass Corp.](#), 696 S.W.2d 887, 890 (Tenn.1985); [Baker v. Lederle Laboratories](#), 696 S.W.2d 890, 892-93 (Tenn.Ct.App.1985).

Our role on appeal is to make a fresh determination concerning whether the requirements of [Tenn.R.Civ.P. 56](#) have been met. [Hill v. City of Chattanooga](#), 533 S.W.2d 311, 312 (Tenn.Ct.App.1975). The statements attributed to the two assistant district attorneys general are hearsay. They do not fit within one of the recognized exceptions to the hearsay rule. Therefore, they are incompetent and cannot be considered in determining whether the summary judgment should have been granted.

The only competent proof Mr. Sewell introduced on the favorable termination issue consisted of: (1) copies of the memorandum of understanding and the order dismissing the criminal charges, (2) his protestations of innocence, (3) his denial that he accepted the district attorney general's offer of statutory pretrial diversion, and (4) his lawyer's insistence that they were prepared to go to trial in June, 1983.

The Memorandum of Understanding and the order dismissing the charges are neutral on their face. Not every decision

Not Reported in S.W.2d

Not Reported in S.W.2d, 1988 WL 112915 (Tenn.Ct.App.)

(Cite as: Not Reported in S.W.2d)

to dismiss criminal charges before they are brought to trial is based on the prosecutor's belief that the accused is innocent. District attorneys general may have any number of legitimate reasons for agreeing to dispose of a criminal case informally. Their decisions may be based on concerns about technical defects in the State's proof, legitimate enforcement priorities, or the allocation of prosecutorial resources.

The prosecutor's reasons for not proceeding with a criminal prosecution are relevant to the favorable termination issue. Proof on this issue has been admitted in other malicious prosecution cases. See *Miller v. Wahl*, 17 Tenn.App. 192, 202-03, 66 S.W.2d 608, 613 (1933); *Miller v. Martin*, 10 Tenn.App. 149, 151-52 (1929). However, in order to be considered, the proof must be in admissible form. We have already determined that the statements Mr. Sewell and his attorney attributed to the two assistant district attorneys general are hearsay and do not meet the requirements of [Tenn.R.Civ.P. 56.05](#).

\*6 Mr. Sewell's complaint had been pending for over eighteen months when the motion for summary judgment was filed. During this time, the parties deposed Mr. Sewell, his wife, and two cable company employees. Mr. Sewell used these depositions, as well as numerous affidavits, to oppose the summary judgment motion. Apparently he did not attempt to obtain affidavits or depositions from the two assistant district attorneys general who agreed to dismiss the criminal charges against him. Since Mr. Sewell has never asserted that he was unable to obtain these affidavits, he is not entitled to the relief available in [Tenn.R.Civ.P. 56.06](#).

We have considered the competent proof supporting and opposing the summary judgment motion in the most favorable light to Mr. Sewell. *Blocker v. Regional Medical Center*, 722 S.W.2d 660, 660 (Tenn.1987); *Poore v. Magnavox Co.*, 666 S.W.2d 48, 49 (Tenn.1984). The informal disposition of the charges against him is indecisive. It is not indicative of either guilt or innocence. Therefore, in accordance with [Restatement \(Second\) of Torts § 660\(a\)](#), it is not sufficient as a matter of law to support a malicious prosecution action. Since Mr. Sewell has not established that the criminal proceedings against him were terminated in his favor, the trial court properly granted the defendants' motion for summary judgment.

#### IV.

The judgment of the trial court is affirmed, and the case is remanded for further proceedings. The costs of the appeal are taxed to James L. Sewell and his surety for which execution, if necessary, may issue.

LEWIS and CANTRELL, JJ., concur.

[FN1. Tenn.Code Ann. § 7-59-108\(a\)](#) proscribes making or using "any unauthorized connection ... for the purpose of enabling himself or others to receive or use any television signal, radio signal, picture, program or sound, without payment to the owner of the system."

[FN2.](#) This Court's construction of the Tennessee Rules of Civil Procedure is assisted by the federal courts' construction of analogous federal rules. *Continental Casualty Co. v. Smith*, 720 S.W.2d 48, 49 (Tenn.1986); *Bowman v. Henard*, 547 S.W.2d 527, 530 (Tenn.1977); *Marlowe v. First State Bank of Jacksboro*, 52 Tenn.App. 99, 105, 371 S.W.2d 826, 828-29 (1962).

Tenn.App.,1988.

Sewell v. Par Cable, Inc.

Not Reported in S.W.2d, 1988 WL 112915 (Tenn.Ct.App.)

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