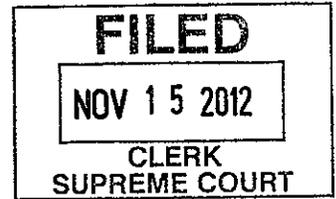


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO. 2011-SC-000550-DR



BOBBY GARCIA  
D/B/A AUTOBAHN AUTOMOTIVE

APPELLANT

VS. APPEAL FROM KENTUCKY COURT OF APPEALS  
NOS. 2009-CA-001407-MR & 2009-CA-001508-MR

LARRY WHITAKER

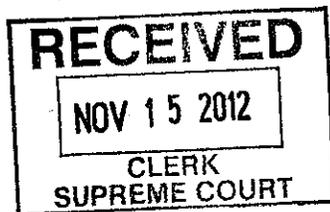
APPELLEE

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BRIEF FOR APPELLEE

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Respectfully submitted,



  
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served by U.S. regular mail upon Hon. Jeffrey T. Burdette, Judge, Pulaski Circuit Court, Pulaski County Judicial Center, Third Floor, 50 Public Square, Post Office Box 664, Somerset, Kentucky 42502; Sam Givens, Jr., Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and David O. Smith, Esq. and Marcia A. Smith, Esq., 208 Gordon Street, Post Office 699, Corbin, Kentucky 40702; and the original and ten copies have been filed with Susan Stokely Clary, Clerk, Kentucky Supreme Court, 700 Capital Avenue, Room 235, Frankfort, Kentucky 40601-3415, via U.S. registered mail, on this the 14<sup>th</sup> day of November, 2012. I further certify that the record on appeal has not been withdrawn for this appeal.

  
NICHOLAS C. A. VAUGHN

## INTRODUCTION

This is an appeal from a directed verdict in favor of Appellee on Appellant's claims for malicious prosecution and abuse of process. As the Appellant presented no evidence regarding material elements of these two tort claims, the Pulaski Circuit Court did not err in granting Appellee a directed verdict on these claims, as was correctly and unanimously determined by the Court of Appeals in a not-to-be-published decision rendered on August 19, 2011.

STATEMENT CONCERNING ORAL ARGUMENT

Although oral argument is not likely to be significantly helpful in this matter, Appellee and his counsel would be happy to participate in oral argument if the Court desires same.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION.....i

STATEMENT CONCERNING ORAL ARGUMENT.....ii

STATEMENT OF POINTS AND AUTHORITIES.....iii

COUNTERSTATEMENT OF THE CASE.....1

ARGUMENT.....4

    I.    NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS  
          ERRED IN UPHOLDING THE DIRECTED VERDICT  
          OF THE MALICIOUS PROSECUTION CLAIM.....4

*Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998).....4

*O' Bryan v. Cave*, 202 S.W.3d 585 (Ky. 2006).....4

*Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981).....4

*Prewitt v. Sexton*, 777 S.W.2d 891 (Ky. 1989).....5

*Christopher v. Henry*, 143 S.W.2d 1069 (Ky. App. 1940).....8

*Prather v. Providian Nat. Bank*,  
          2006 WL 1868335, at \*4 (Ky. App. 2006).....8

    II.   NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS  
          ERRED IN UPHOLDING THE DIRECTED VERDICT  
          OF THE ABUSE OF PROCESS CLAIM.....9

*Bonnie Braes Farms Inc. v. Robinson*,  
          598 S.W.2d 765 (Ky. App. 1980).....9

*Simpson v. Laytart*, 962 S.W.2d 392 (Ky. 1998).....10

CONCLUSION.....10

APPENDIX.....A

**APPENDIX**

Court of Appeals' August 19, 2011, Opinion Affirming.....A-1

Trial Court's July 2, 2009, Order.....A-2

## COUNTERSTATEMENT OF THE CASE

In his Brief, the Appellant begins by presenting a rather extensive and altogether self-serving version of the alleged facts of the case, some of which are supported by the evidentiary record and some of which are not. Fortunately, the resolution of this appeal cannot, and does not, depend upon the resolution of the many potential factual or evidentiary-based contentions contained in the first eighteen (18) pages or so of the beginning of Appellant's Brief. This is for good reason, as Appellant's malicious prosecution and abuse of process claims were dismissed by directed verdict, and a directed verdict motion admits the truth of Appellant's evidence, and construes that evidence in a light most favorable to Appellant. *See, e.g., Gibbs v. Wickersham*, 133 S.W.3d 494, 495-496 (Ky. App. 2004). As a result, the Appellee here will not, and cannot, prevail in this appeal merely by contradicting, or even significantly undermining, Appellant's alleged evidence as recited in his Statement of the Case. Instead, Appellee continues to assert herein, as he has twice successfully argued in this case, that even accepting Appellant's interpretation of the evidence, there is still a total absence of evidence regarding material elements of the torts of malicious prosecution and abuse of process.

With respect to the malicious prosecution claim, Appellant has never presented any evidence that Appellee commenced the criminal action with malice or without probable cause. Similarly, with respect to the abuse of process claim, there is no evidence that Appellee used the criminal action to secure an improper advantage over Appellant, as it was, in the indisputable words of the Court of Appeals, "the County Attorney and the police [who] were responsible" for the alleged deprivation of Appellant's lien rights, rather than Appellee. See Court of Appeals' Opinion Affirming, p. 9. Therefore, for purposes of this appeal, the

Appellee will not dispute the factual assertions contained in Appellant's Statement of the Case, as any such factual disputes are mooted by the fact that it has been, and remains, clear and undisputed that Appellant could not prevail upon his malicious prosecution and abuse of process claims even if the Court accepts all of his alleged facts. Nevertheless, for the record and any future purposes in this case, Appellee does not stipulate to accuracy of Appellant's Statement of the Case.

It may also be worthwhile to review the procedural history of this case and the decisions of the courts below. More specifically, the Trial Court in this case entered an Order on July 2, 2009, which explained the dismissal of Appellant's malicious prosecution and abuse of process claims as follows:

Next, Plaintiff argues a verdict should not have been directed on the malicious prosecution claims because the Defendant, Larry Whitaker ("Defendant"), "did not fairly nor completely disclose all of the pertinent and relevant facts to the county attorney or his agents and employees"(citing Appellant's Motion to Alter, Amend or Vacate filed on 4/20/09 at p. 2). Plaintiff, however, does not point to any specific testimony or evidence showing a failure to reveal all pertinent and relevant facts. Plaintiff simply asserts the testimony revealed such was not the case and relies on *Smith v. Kidd*, 246 S.W.2d 155 (Ky. 1952), for the proposition that advice of counsel is a defense to malicious prosecution only if there has been a full and fair disclosure of all relevant and pertinent facts. Without pointing to specific testimony or evidence, this argument is not persuasive.

Next, the abuse of process claim requires, in part, a showing that "the Defendant's motive was not to promote justice, but to avoid paying a lawful debt (citing Appellant's jury instructions filed on 3/17/09, at p. 4). The Court found the testimony did not support this claim and directed a verdict. Again, the Plaintiff has not point to any specific testimony or evidence which indicates this Court's ruling is in error.

See Appendix C to Appellant's Brief, p. 2. On August 19, 2011, the Court of Appeals unanimously affirmed the Trial Court's directed verdict of Appellant's malicious prosecution and abuse of process claims. In explaining its rationale, the Court of Appeals stated as follows:

In this case, the trial court found no evidence that Whitaker had made any materially false statements on which the County Attorney or the district court judge would have relied. Garcia argues that Whitaker failed to disclose that there was an outstanding repair bill on the Porsche. Garcia also alleges that Whitaker falsely stated that he refused to provide the receipts for the purchase of parts for the automobile. Garcia testified that he turned those receipts over to the County Attorney's office prior to the issuance of the warrant. Garcia contends that the warrant was false and misleading without these omitted facts. Consequently, he maintains that Whitaker was not entitled to rely on the advice of the County Attorney.

However, *Whitaker clearly alleged in the warrant that he had Garcia to work on his automobile and that the dispute concerned Garcia's failure to provide detailed receipts for the parts. As the trial court noted, these facts are true and clearly indicate that there was a dispute over a repair bill. Furthermore, Garcia testified that he dropped off the receipts with a secretary at the County Attorney's office. Garcia did not speak with anyone at the time, but he saw Whitaker while he was there. There was no evidence that Whitaker knew Garcia had turned over the receipts at the time he prepared the warrant. Thus, while Whitaker's statement in the warrant may have been inaccurate, Garcia cannot show that it was knowingly false or misleading at the time he made it. Consequently, Whitaker was entitled to rely on the advice of the County Attorney in seeking the warrant.*

...[Also,] we conclude that the trial court properly granted a directed verdict on th[e] [abuse or process] claim.. Garcia alleges that Whitaker obtained the warrant to recover his vehicle without paying the repair bill. In its order denying Garcia's motion for a new trial, the trial court stated that the testimony did not support this claim.

However, Whitaker admits that he sought the arrest warrant to obtain possession of his automobile. We question whether this is a proper use of a criminal warrant. Nevertheless, the gist of the tort of abuse of process is the use of the legal process as a means to secure a collateral advantage outside of the regular course of the proceeding. *Flynn v. Songer*, 399 S.W. 2d at 495. While advice of counsel is not a defense to an abuse of process claim, *id.*, *Whitaker is not liable for the County attorney's or the police's mistake of law concerning the appropriate remedy.*

*In this case, the sheriff's deputy required Garcia to turn over the Porsche to Whitaker when he was arrested. Even if this was in violation of Garcia's lien rights, the County Attorney and the police were responsible for the action. There is no evidence that Whitaker took any action outside of the course of the criminal process. Therefore, Whitaker is not liable for abuse of process.*

See Appendix A to Appellant's Brief, p. 3-4 (emphases added).

Despite the assertions and arguments contained in his Brief, Appellants has not shown that either the Trial Court or the Court of Appeals erred in any whatsoever in either of their respective opinions. Indeed, other than attempt to make a new, apparently unpreserved, argument (*i.e.*, that Appellee is not entitled to the “advice of counsel” defense relative to the Pulaski District Judge who issued the arrest warrant against Appellee), Appellant’s Brief does nothing but restate the exact same arguments which were rightfully and unanimously rejected by the Court of Appeals.

### ARGUMENT

#### I. NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS ERRED IN UPHOLDING THE DIRECTED VERDICT OF THE MALICIOUS PROSECUTION CLAIM

**Standard of Review:** “Once the issue [of directed verdict] is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.” *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998)(citing *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984)).

“This Court has often stated that ‘speculation and supposition are insufficient to justify a submission of a case to the jury; and that the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation.’” *O’ Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006)(quoting *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). The Appellant’s Brief (p. 19) correctly notes that the decision in *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981) stands for the proposition that “[g]enerally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action.” *Id.* at

899. "They are: (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding." *Id.* (citations omitted). However, Appellant's Brief fails to mention that the decision in *Raine* also contains other language that is important to this appeal. More specifically, *Raine* instructs further as follows:

The doctrine of malicious prosecution is an old one in our Commonwealth. Historically, it has not been favored in the law. Public policy requires that all persons be able to freely resort to the courts for redress of a wrong, and the law should and does protect them when they commence a civil or criminal action in good faith and upon reasonable grounds. It is for this reason that one must strictly comply with the prerequisites of maintaining an action for malicious prosecution.

*Id.* (citations omitted).

Here, Appellant argues that a directed verdict on his malicious prosecution claim was improper for the following reasons:

In this case all of the above six (6) elements of malicious prosecution were present. . . . A jury could have found that Whitaker acted with malice toward Garcia when he executed the criminal complaint because there was evidence that he was angry that Garcia had not given him receipts to justify his bill for the Porsche and he expected more than just Garcia's invoice before he was willing to pay him. A jury could have found that Whitaker acted with reasonable cause to believe that Garcia had committed a crime because (1) Garcia (*sic*) was an attorney with over 25 years of experience, practicing criminal defense, who, a could have believed, would know that Garcia's alleged failure to turn over all his receipts for parts to him could not be considered theft for failure to make required disposition pursuant to KRS 514.070 because Whitaker had no contact with Garcia that required Garcia to furnish Whitaker with receipts or (2) there was evidence from which a jury could have concluded that Garcia (*sic*) knew the County Attorney had not notified Garcia to turn over his receipts by noon, as set out in his Criminal Complaint.

Appellant's Brief, p. 21. However, contrary to Appellant's contention otherwise, a jury is not free to infer "malice" simply because Appellee may have been "angry" at Appellant at the

time he swore out the complaint, *Cf. Prewitt v. Sexton*, 777 S.W.2d 891, 897 (Ky. 1989)(a defendant's "unfavorable opinion . . . has no bearing on the threshold question of probable cause."), or merely because Appellee was not willing to pay Appellant until Appellant produced the true, actual invoice from Porsche of Lexington (rather than the invoice manufactured by Appellee which falsely suggested that he himself had performed the repairs). Additionally, and again contrary to Appellant's claim, there was (and is) no evidence that Appellee "knew the County Attorney had not notified [Appellant] to turn over his receipts by noon." (Appellant's Brief, p. 21). In this regard, it is highly significant that Appellant cites no evidence whatsoever that supports the notion that Appellee knew that the County Attorney had not notified Appellant to submit the true receipts from Porsche of Lexington by noon.

Perhaps realizing this total failure of proof regarding malice, Appellant attempts to confuse the issue by countering that "there was a jury issue as to whether Whitaker fairly and completely informed the Judicial Officer, Judge Kathryn G. Wood, who issued the criminal felony warrant . . . of all the facts in this case." (Appellant's Brief, p. 22). Apparently, Appellant makes this claim because he maintains that Appellee's alleged failure to disclose all the facts in this case deprives Appellee of his otherwise potentially meritorious "advice of counsel" defense in this case (Appellant's Brief, p. 22-29).

First, however, it is significant that Appellee has not shown that he previously made an "advice of counsel" argument vis-à-vis Appellee's disclosures to Judge Wood before the Trial Court. In fact, it does not appear that Appellant made this argument to the Trial Court, as that Court specifically found that Appellant had argued only that "a verdict should not have been directed on the malicious prosecution claims because the Defendant, Larry

Whitaker (“Defendant”), ‘did not fairly nor completely disclose all of the pertinent and relevant facts to the county attorney or his agents and employees’” See Trial Court’s Order entered July 2, 2009, attached as Appendix C to Appellant’s Brief, p. 2 (citing Appellant’s Motion to Alter, Amend or Vacate filed on 4/20/09 at p. 2). Accordingly, it appears that Appellant’s argument with respect to Appellee’s disclosures to Judge Wood were waived and are not properly before this Court. Furthermore, even if this argument had not been waived, it is largely beside the point, as Judge Wood was not serving as counsel in this case, and Appellee is not relying on any “advice of counsel” defense relative to Judge Wood. Rather, and as correctly noted by the Court of Appeals, Appellee relies on the undisputed fact “there was no evidence that Whitaker knew Garcia had turned over the receipts at the time he prepared the [criminal complaint]” or that he made any other knowing misstatement to Judge Wood (or anybody else, for that matter). See Court of Appeals’ Opinion entered on August 19, 2011, attached as Appendix A to Appellant’s Brief, p. 3. This is because, as noted by the Court of Appeals, Appellant admitted that he elected not to “talk to anybody” (VR; 3/17/09; 2:04:10) when he dropped off the true receipts at the County Attorney’s office while Appellee was still there preparing the criminal complaint. “Consequently, Whitaker was entitled to rely on the advice of the County Attorney in seeking the warrant.” See Court of Appeals’ Opinion entered on August 19, 2011, attached as Appendix A to Appellant’s Brief, p. 3. Appellant has presented no authority or cogent argument to the contrary, and his argument that “an experienced attorney” is never entitled to rely on the “advice of counsel” defense in this context (Appellant’s Brief, p. 24) is conspicuously without precedent.

Finally, with respect to Appellant’s malicious prosecution claim, although “malice” may, in certain circumstances, be inferred from the lack of probable cause, *see Prewitt*, 777

S.W.2d at 894, the Appellant did not present any evidence that Appellee lacked probable cause at the time he signed the criminal complaint in this matter. Indeed, the Appellant never presented any evidence that the facts, as Appellee testified he believed them to be at the time he executed the criminal complaint (as reflected in the Criminal Complaint and Arrest Warrant attached as Attachment E to Appellant's Brief) were insufficient to constitute a criminal offense under KRS § 514.070. On this point, it should be observed further that "a defendant is exempt from liability for damages to plaintiff in a malicious prosecution action if the facts upon which he acted in his participation in the prosecution of plaintiff were such as to induce a reasonably prudent man to believe that the plaintiff was guilty as charged." *Christopher v. Henry*, 143 S.W.2d 1069, 1073-1074 (Ky. App. 1940)(citations omitted).

In the final analysis, neither the Trial Court nor the Court of Appeals have been shown to have committed any error in issuing or affirming the directed verdict of Appellant's malicious prosecution claims. This is because the evidence of record did not disclose any evidence that the Appellee acted with malice or without probable cause in filing a criminal complaint against Appellant. Malice or want of probable cause may not be deduced alone from the mere fact that the criminal action was terminated in favor of Appellant. See *Prewitt*, 777 S.W.2d at 896; *Prather v. Providian Nat. Bank*, 2006 WL 1868335, at \*4 (Ky. App. 2006). Otherwise, the Court would fail to ensure that the law protects those, such as Appellee here, who commenced criminal actions in good faith based upon reasonable grounds, in violation of one of the cardinal tenets of Kentucky's common law governing malicious prosecution claims. See *Raine*, 621 S.W.2d at 899. The bottom line here, however, is that Appellant failed to produce any other evidence that would have enabled a jury to reasonably conclude that Appellee acted maliciously or without probable cause in filing a criminal

complaint against Appellee. And where, as here, the evidence is so unsatisfactory to “require a resort to surmise and speculation,” the lower courts must direct a verdict in favor of the party not bearing the burden of proof. *See O’Bryan*, 202 S.W.3d at 588. Hence, the Trial Court did not err (much less, clearly err) in issuing, and the Court of Appeals did not err in unanimously affirming, the directed verdict of Appellant’s malicious prosecution claim. Appellant has not clearly shown otherwise.

II. NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS  
ERRED IN UPHOLDING THE DIRECTED VERDICT OF THE ABUSE OF  
PROCESS CLAIM

**Standard of Review:** “Once the issue [of directed verdict] is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.” *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998)(citing *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984)).

As set forth previously herein, the Court of Appeals affirmed the Trial Court’s directed verdict of Appellant’s abuse of process claim because “[t]here is no evidence that Whitaker took any action outside of the course of the criminal process.” See Court of Appeals’ Opinion entered August 19, 2011, attached at Appendix A to Appellant’s Brief, p. 4. Appellant has not established that, as a matter of fact or law, this conclusion was in error. Additionally, Appellant has failed to prove that the Trial Court or the Court of Appeals overlooked any evidence that Appellee committed “a willful act in the use of the process not proper in the regular conduct of the proceeding.” *Bonnie Braes Farms Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. App. 1980). Furthermore, and as correctly determined by the Trial Court (Trial Court’s Order entered on July 2, 2009, attached as Appendix C to Appellant’s Brief, p. 2), there was no evidence that Appellee acted with “an ulterior purpose” here, as a legitimate use of criminal proceedings under KRS § 514.070 is for a theft victim to obtain the

return of his confiscated or wrongfully held property. Moreover, “[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion even though with bad intentions.” See *Simpson v. Layart*, 962 S.W.2d 392, 394-395 (Ky. 1998). Appellant has pointed to no proof in this regard. Therefore, for the reasons found by the Trial Court and the Court of Appeals, the Appellant has not shown that the Trial Court erred (much less, that it clearly erred) in directing a verdict regarding this claim.

### CONCLUSION

For the reasons set forth above, the Appellee respectfully requests that this Court affirm the Court of Appeals’ Opinion Affirming in this matter, and for any and all other favorable relief to which Appellee may appear entitled.

Respectfully submitted:

  
NICHOLAS C. A. VAUGHN