FILED
AUG 16 2012
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
2011-SC-0005~~650~~-D 550
(2009-CA-001407 AND 2009-CA-001508

BOBBY GARCIA
dba AUTOBAHN AUTOMOTIVE — APPELLANT/MOVANT

VS: **APPEAL FROM PULASKI CIRCUIT COURT**
CIVIL ACTION NO. 07-CI-00183

LARRY WHITAKER, — APPELLEE/ RESPONDENT

* * * * *

APPELLANT'S BRIEF

RECEIVED
AUG 16 2012
CLERK
SUPREME COURT

CERTIFICATE:

I hereby certify that this Appellant's Brief has been served by mailing a true copy hereof to the Hon. Judge Jeffrey T. Burdette, PO Box 664, Somerset, KY 42502; Hon. Nicholas C.A. Vaughn, 444 Enterprise Drive, Somerset, KY 42501; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, this 14 day of August 2012.

MARCIA A. SMITH

INDEX

INTRODUCTION ii

STATEMENT CONCERNING ORAL ARGUMENT iii

STATEMENT OF POINTS AND AUTHORITIES iv

STATEMENT OF THE CASE 1-19

ARGUMENTS

I. THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN APPELLEE'S FAVOR FOR MALICIOUS PROSECUTION AND THE COURT OF APPEALS ERRED IN AFFIRMING SAME 19-29

II: THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN APPELLEE'S FAVOR FOR ABUSE OF PROCESS AND THE COURT OF APPEALS ERRED IN AFFIRMING SAME 29-33

CONCLUSION 34

APPENDIX:

(A) Court of Appeals Opinion rendered August 19, 2011
(B) Pulaski Circuit Judgment entered April 15, 2009
(C) Pulaski Circuit Order entered July 2, 2009
(D) Autobahn Automotive Invoice for $7,978.74
(E) Criminal Complaint dated December 6, 2006
(F) Porsche of Lexington Invoice for $6,689.40
(G) Autobahn Statement for $600.00 for Sublet
(H) KRS 514.070
(I) Note from Jury to Trial Judge
(J) 7 AmJur POF2d 181, §14 (2009)
(K) Rest 2d Torts §681 Damages (2009)
(L) KRS 376.270
(M) Rest 2d Torts §666 Effect of Advice of Counsel (2012)

INTRODUCTION

This was an appeal from a Directed Verdict in Appellee's favor on Appellant's tort claims of malicious prosecution and abuse of process, at the end of Appellant's case at trial, even though Appellant had presented a prima facie case, establishing the elements of both torts.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant would be happy to attend oral argument in this case and believes it might be helpful to the Court if there any issues that need to be elucidated.

STATEMENT OF POINTS AND AUTHORITIES

I. THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN APPELLEE'S FAVOR FOR MALICIOUS PROSECUTION AND THE COURT OF APPEALS ERRED IN AFFIRMING SAME

Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981). 19, 20
Farris v. Sears, Roebuck & Co., 455 F.Supp. 162 (W.D.Ky. 1978); 19
Davidson v. Castner-Knott Dry Goods Co., Inc., 202 S.W.3d 597 (Ky.App. 2006) 19
Hayes v. Ketron, 223 Ky. 119, 3 S.W.2d 172 (1928). 20
Harter v. Lewis Stores, Inc., 240 S.W.2d 86 (Ky. 1951) 20
Rest., Torts2d, Sec. 681. 20
7 AmJur POF2d 181, §14 (2009) 20
KRS 514.070 . . . . . 21- 23
KRS 376.270 24
Rest., Torts2d, Sec. 666 Effect of Advice of Counsel (2012) 25
Smith v. Kidd, 246 S.W.2d 155 (Ky.1952). 26, 27, 28
KRS 434.210 26
Cincinnati, N.O. & T. P. Ry. Co. v Bedow, 189 Ky. 140, 224 S.W. 674 (1920). 27
Dyer v. Singer Sewing Mach. Co., 164 Ky. 538, 175 S.W. 1037 (1915). 27
Figuccion v. Prudential Ins.Co., 273 Ky. 287, 116 S.W.2d 291 (1938). 28
Hendrie v. Perkins, 240 Ky. 366, 42 S.W.2d 502 (1931). 28
Shoemaker v. Southwestern Petroleum Co., 213 Ky. 603, 281 S.W. 533 (1926). 28
Gatz v. Harris, 134 Ky. 550, 121 S.W. 462 (1909). 28
Bowman v. Combs, 210 Ky. 1, 273 S.W. 719 (1925) 28
Peel v. Bramblett, 305 Ky. 577, 204 S.W.2d 565 (1947). 28

II: THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN APPELLEE'S FAVOR FOR ABUSE OF PROCESS AND THE COURT OF APPEALS ERRED IN AFFIRMING SAME

Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765 (Ky.App. 1980). 30-31
Flynn v. Songer, 399 S.W.2d 491 (1966) 31
Williams v. Central Concrete, Inc., 599 S.W.2d 460 (Ky.App. 1980). 32
Rest 2d Torts §681 Damages (2012). 32
Sprint Communications Company v. Leggett, 307 S.W.3d 109 (Ky. 2010) 32-33
KRS 376.270 32
Simpson v. Laytart, 929 S.W.2d 392 (Ky. 1998) 33

STATEMENT OF THE CASE

For purposes of citation in this Brief, references to the record of Pulaski Civil Action No. 07-CI-00183 shall be designated "R, p. __" with the appropriate page referenced. Appellant/Cross-Appellant/Movant, Bobby Garcia d/b/a Autobahn Automotive, shall be referred to herein as Garcia or Appellant. Appellee/Cross-Appellant/Respondent, Larry Whitaker, shall be referred to herein as Whitaker or Appellee. There is one (1) DVD video recording of the jury trial held March 17, 2009, and it shall be designated, pursuant to CR 98(4)(a), with the letters "VR," followed by the month, day, year; hour, minute, and second at which the reference begins as recorded on the video tape recording, but with no number as there is only one DVD video recording. There are two (2) depositions in the record, but they were excluded by Appellant's Designation of the Record as they were discovery depositions, not read into evidence at the jury trial, and therefore no reference shall be made to them in this Brief.

Insofar as is relevant to the issues on appeal, the pleadings and procedural events can be summarized as follows. Garcia filed a Complaint against Whitaker in the Pulaski Circuit Court on February 9, 2007. (R.,pp. 1-13). In that Complaint, Garcia alleged that Whitaker was indebted to him in the sum of $8,028.74 for work performed, including parts, labor, materials, and towing, on a 1995 Porsche 928 owned by Whitaker. Garcia claimed a statutory lien against the vehicle, and sought damages for malicious prosecution, abuse of process, slander and libel, the intentional infliction of emotional distress and outrage, on the grounds that Whitaker had him arrested for the purpose of taking possession of the Porsche without paying him for the repairs to the vehicle. An

Answer and Counterclaim were filed by Whitaker on March 6, 2007. (R., pp. 18-22). In his Answer, Whitaker generally denied the allegations of the Complaint. In his Counterclaim, Whitaker alleged abuse of process arising from Whitaker's filing a lien against his vehicle, and sought damages for slander and libel, and the intentional infliction of emotional distress and outrage, on the grounds that the lien placed "a cloud on the title of the vehicle."

On March 17, 2009, the case was tried by a jury. The trial testimony relevant to the issues raised by this appeal can be summarized as follows. Whitaker was called as if on cross as Garcia's first witness. He testified that he was an attorney practicing law in Somerset Kentucky, that he had practiced law for about 25 years, and that the majority of his practice was criminal defense. (VR; 3/17/09; 10:57:55). Whitaker testified that he owned a 1995 Porsche 928 GTS, that the sticker price was $85,444.00, and that he paid about that for the vehicle. Whitaker testified that in about August 2006, the Porsche stopped running and he contacted a friend, Troy Beshir, hereinafter Troy, who worked at Somerset Automotive in Somerset. He stated that Troy had the vehicle towed to Somerset Automotive. (VR; 3/17/09; 11:00:28). Whitaker testified that the mechanics at Somerset Automotive looked at the Porsche and thought that the timing belt might be the problem, but they could not fix it. He stated that Troy recommended that Garcia look at the vehicle. (VR; 3/17/09; 11:03:23). Whitaker testified that he agreed and Garcia moved the Porsche from Somerset Automotive to his shop. (VR; 3/17/09; 11:04:18). Whitaker stated that he talked to Garcia by phone several times during the 3 to 4 months that Garcia had the Porsche. He denied that Garcia told him the car had "bent valves." He

stated that Garcia had his permission to fix the timing belts, but that was all. He stated that he wanted to look at the vehicle but he could never get up with Garcia. He stated that he did not see the Porsche from the time it was taken to Somerset Automotive in August 2006 until December 2006. (VR; 3/17/09; 11:05:30). Whitaker agreed that he never asked Garcia for the car back and that he had no reason to doubt that Garcia would fix the car. He stated that even though it took a long time, he did not want to cause a "hassle" and he gave Garcia "the benefit of the doubt." (VR; 3/17/09; 11:09:10). .

Whitaker testified that Garcia finally called him one weekend and told him the car would be ready. He stated that Garcia drove the Porsche to Whitaker's office, told him it was ready, and offered him the keys to "test drive" it. Whitaker stated that he did not take the keys and did not test drive the car because Garcia wanted $10,000,00 in cash and Garcia did not have any receipts for the work he had done. (VR; 3/17/09; 11:11:03). Whitaker stated that he wanted to look at the receipts to see what parts had been put in and that he told Garcia to bring the car back the next day at noon with the receipts. [The first meeting took place on Monday December 4, 2006]. The next day [Tuesday, December 5, 2006], Whitaker testified that Garcia came to his office at noon, and that he brought him his Autobahn invoice, with the parts and charges listed, but that he had no receipts. Garcia's Autobahn invoice for $7,978.74 was introduced as Plaintiff's Exhibit #2, and it is attached in the Appendix hereto. (VR; 3/17/09; 11:18:45) (R., pp. 202-203). (Appendix "D").

Whitaker explained that this invoice was not sufficient for him because he wanted actual receipts for the parts that Garcia claimed were purchased. (VR; 3/17/09; 11:19:20).

At that meeting, Whitaker agreed that there were two other men present, Frank McKee and Kevin Reynolds. Whitaker denied that he told Garcia at that meeting that these gentlemen were there to get his car for him. Whitaker agreed that when he took other vehicles to a dealership to be repaired, they only provided him with an invoice, not receipts, and that he did not require receipts, but he stated that he found it suspicious that Garcia was demanding $10,000.00 in cash and had no receipts. He agreed that after this meeting Frank may have gone to look for the car but he did not remember if he told Frank to do that or not. He stated that he did not pay Garcia after he received the Autobahn invoice. (VR; 3/17/09; 11:14:12).

Whitaker testified that the next day [Wednesday, December 6, 2006], he went to the County Attorney's office and executed a Criminal Complaint against Garcia. (VR; 3/17/09; 11:20:40). A copy of the Criminal Complaint was introduced as Plaintiff's Exhibit #5, and a copy is attached in the Appendix hereto. (R., pp. 217-218) (Appendix "E"). In his Criminal Complaint, Whitaker stated: "Defendant [Garcia] has refused to show the Affiant [Whitaker] any receipts on the purchase of parts for the automobile. Affiant [Whitaker] asked to see the receipts to pay for the work and Defendant [Garcia] has refused to show any receipts. Assistant County Attorney [Thompson] called the Defendant and told him to turn over the car or the receipts by 12:00 today at the County Attorney's Office and Defendant [Garcia] has failed to do so. Affiant [Whitaker] has caught the Defendant [Garcia] in several lies regarding the hereabouts [sic] of the car while being worked on and the car was also seen being hauled on a car trailer Monday [December 4, 2006]. Defendant [Garcia] told the Affiant [Whitaker] it has not been

moved. When he [Whitaker] told the Defendant [Garcia] he had a witness to this incident Defendant [Garcia] stated he took it to London to get [it] detailed." (R., pp. 217-218).(Plaintiff's Exhibit #5)(Appendix "E").

Whitaker testified that ***after*** he "got the warrant," the County Attorney provided him with a "receipt" from Porsche [of Lexington], for $6,689.00 to Garcia, which was marked "paid" and that this was the first he had heard of Porsche of Lexington. This invoice from Porsche to Garcia was introduced as Plaintiff's Exhibit #3, and a copy is attached in the Appendix hereto. (VR; 3/17/09; 11:22:23)(R., p.204)(Appendix "F"). The Porsche of Lexington invoice shows that Porsche billed Garcia for parts and labor in the total amount of $6,689.40 for Whitaker's 1995 Porsche 928. The Porsche invoice and Garcia's invoice both stated that the "timing belt must be checked in 1,000 miles." Whitaker agreed that he took his Porsche back to Porsche of Lexington for the timing belt to be checked a year later, in December 2007, and for other adjustments to be made. (VR; 3/17/09; 11:24:00). He admitted that the car had driven fine ever since he received it from Garcia. (VR; 3/17/09; 11:25:27). He admitted that he had never paid Garcia for the repairs, nor even the Porsche bill.(VR; 3/17/09; 11:34:07).

Whitaker testified that on December 6, 2006 he executed a felony warrant for Garcia because the County Attorney had told Garcia to bring the car or the receipts by noon, and Garcia had not done so. He stated that he did not see Garcia at the County Attorney's Office and that he was given the Porsche bill AFTER he signed the felony warrant by the County Attorney. (VR; 3/17/09; 11:29:09). He stated that he was aware that a lien could be placed on a vehicle by a mechanic, but that he believed Garcia's lien

on the vehicle was defective because Garcia did not perform any services or work himself. ***When asked whether he was aware that he could have filed a civil action and had the vehicle returned, he stated: "I didn't think about it."*** (VR; 3/17/09; 11:43:52). ***Whitaker testified that he had agreed to a bond reduction for Garcia because he had his car and he found out that Porsche had done the work. He stated he never appeared against Garcia at any hearing in the District Court and he did not appear before the grand jury to indict Garcia. He stated that he did not do anything to prosecute Garcia for failure to make required disposition of property after he obtained the car because there was no point in doing that. (VR; 3/17/09; 11:49:20). He denied that he ever told the County Attorney that if Garcia would plead guilty to a reduced charge he would pay him. (VR; 3/17/09; 11:50:20). Whitaker stated that as soon as the warrant was issued, he went with the detective and got his car . He stated that the car was "hid." (VR; 3/17/09; 11:58:08).***

Whitaker was asked to read KRS 514.070, the statute pursuant to which Garcia was arrested. A copy of the statute is attached in the Appendix hereto. (Appendix "G"). He stated that he thought the crime fit the statute because he got no receipts and Garcia did not bring his car back. (VR; 3/17/09; 11:53:55). Upon examination by his attorney, ***Whitaker stated that his initial intent for getting the arrest warrant against Garcia was to prosecute him because "we were supposed to meet at noon on that Wednesday [December 6, 2006] and he didn't show up."*** (VR; 3/17/09; 1:07:25). ***On re-cross, Whitaker testified that on the third day [Wednesday, December 6, 2006], when Garcia did not meet him at his office at noon as they had agreed, to bring him the receipts or***

the car, he waited about 15 minutes and then called Garcia . He stated that Garcia told him he did not have to bring him the receipts. At that point, Whitaker testified that he filed the criminal warrant because the County Attorney's Office had already called Garcia. When asked how he knew the County Attorney's office had already called Garcia when he issued the warrant, he stated that that he believed a secretary in the County Attorney's Office had told him that. (VR; 3/17/09; 1:20:52).

Garcia testified next. He stated that in 2006, he was self-employed, repairing European cars under the name of Autobahn Automotive, and that he had a garage at his residence where he worked on cars. (VR; 3/17/09; 1:31:25). He stated that he obtained the Porsche in late September 2006, after Troy contacted him from Somerset Automotive about the car. He stated that he looked at the car at Somerset Automotive and that the technicians told him they had looked at it but were not sure what was wrong with it. After determining that the battery was dead, he had the vehicle towed to his home on a rollback. (VR; 3/17/09; 1:35:02). After he got it home, Garcia testified that he conducted a "cylinder leak down test" and determined that the timing belt was broken. He also determined that there was an "interference engine." He stated that he told Troy that it was an interference engine and it could be damaged badly. He explained that an "interference engine" means that there is no clearance between the pistons because the timing belt is broken, and that the valves can be bent, causing catastrophic damage to the engine. (VR; 3/17/09; 1:36:54).

Garcia stated that he purchased a Bosch battery from Autozone for the vehicle, and a copy of the invoice for $339.39 for the Bosch battery was introduced as Plaintiff's

Exhibit #7 . (VR; 3/17/09; 1:39:13). He testified as to how he performed the cylinder leak down test and that after checking each cylinder, he found extensive leakage. (VR; 3/17/09; 1:40:53). Garcia testified that since all eight cylinders leaked, this told him there was catastrophic damage to the valve train. (VR; 3/17/09; 1:42:20). He stated that he informed Troy of all the issues at hand and told him that they needed to see how many valves were bent. He testified that he told Troy that it would be very expensive to fix the car because it was so rare and the tools would be expensive. He stated that Troy told him he would talk it over with Whitaker and get back to him. Garcia testified that Troy asked him how much the repair would be and that he told him it would cost between $5,000.00 and $8,000.00. (VR; 3/17/09; 1:42:34).

Garcia testified that Troy told him he thought it would be all right to get the car fixed, and give him the bill and he would have Whitaker pay it when the car was fixed. (VR; 3/17/09; 1:43:34). Garcia testified that he told Troy he could not do it that way, and that he needed to talk to Whitaker. (VR; 3/17/09; 1:44:00). He stated that Whitaker called him and that this was a few weeks after he received the car. He testified that he told Whitaker that he was "looking at between $5,000 and $8,000" and that "until you take it apart, you don't know for sure." ***He testified that he told Whitaker he did not need the money up front because the car would be collateral for the job. He testified that Whitaker told him to do whatever it takes to get it fixed. He testified that he also told Whitaker that he wanted to get a second opinion from the Porsche dealer in Lexington, due to the amount of money it would cost to fix.*** (VR; 3/17/09; 1:44:50).

Garcia testified that he took the car to the Porsche dealer in Lexington and they

confirmed his diagnosis. He stated that they told him that if they did the work on the vehicle, they could guarantee the repair for two years . He testified that Porsche had to order tools from Germany to "time" the car, and that he decided that it was best to let Porsche fix it, because then it would have a two year, unlimited mileage, warranty . (VR; 3/17/09; 1:46:20). Garcia testified that Whitaker never called to inquire about his car and never asked him where it was or what he was doing with it. He testified that Whitaker never requested that the car be returned. He stated that in December [2006], Porsche had completed their repairs and had road tested the car, and he had the car hauled back from Lexington. (VR; 3/17/09; 1:48:22).

Garcia testified that he contacted Whitaker on Monday [December 4, 2006] after he had received the car. (VR; 3/17/09; 1:49:40). Garcia reiterated that he let Porsche in Lexington fix the car because of the warranty, since it was such an expensive car and such an expansive repair. He stated that at the top of the invoice, the service advisor at Porsche, Randy, wrote that the timing belt should be checked within 1,000 miles, so he put this on his Autobahn invoice also. He testified that he wrote a cashier's check to Porsche for $6,689.40. A copy of his check for $6,689.40 to Porsche of Lexington, dated December 4, 2006, was introduced as Plaintiff's Exhibit #8. (VR; 3/17/09; 1:50:28). Garcia testified that he test drove the car when he got back to Somerset, and it ran perfectly. He stated that after test driving the car, he contacted Whitaker and they agreed to meet at noon at Whitaker's office on that day [Monday, December 4, 2006]. (VR; 3/17/09; 1:54:45).

At that meeting [December 4, 2006], Garcia stated that he had a bill for Whitaker

on his a Autobahn Automotive invoice (Plaintiff's Exhibit 2)(Appendix "D") and that he requested that Whitaker pay him the amount on the invoice [$7,978.74] and not $10,000.00. He stated that he put the Porsche keys on Whitaker's desk. (VR; 3/17/09; 1:56:05). He testified that he and Whitaker talked about the car and other things, and then Whitaker told him he wanted receipts because he did not know whether the parts Garcia had listed on his invoice were in his car or not . So Garcia stated that they "parted ways" and he drove the Porsche back to his home. (VR; 3/17/09; 1:56:58).

Garcia testified that he went back the next day [Tuesday, December 5, 2006], and met Whitaker at his office and at that time there were two gentlemen present. ***He stated that Whitaker told him he wanted his car and that these two gentlemen were going to go get the car. Garcia testified that he told Whitaker that they could not get it because that was his collateral . He stated that the conversation got "heated" and that Whitaker did not offer to pay him anything on the bill.*** (VR; 3/17/09; 1:59:14). Garcia testified that he was afraid Whitaker was going to go get the car, so he contacted his neighbor and had the car put into his neighbor's garage. (VR; 3/17/09; 2:01:01).

Garcia testified that the next day [Wednesday, December 6, 2006], Whitaker called him between 12:00 and 12:30, again demanding receipts. (VR; 3/17/09; 2:01:35). He stated that between 1:00 and 2:00 that day, he was called by Thompson, the County Attorney, who told Garcia to bring his receipts to the County Attorney's Office . When asked if there was a time he was supposed to be there, Garcia stated he was to bring them as soon as he could. Garcia testified that he took his Autobahn invoice he had already given to Whitaker and his Porsche invoice and gave them to the

receptionist at the County Attorney's Office. (VR; 3/17/09; 2:02:24). Garcia testified that Whitaker was at the office, "filling the warrant out" while he was there. He testified that he did not talk to anybody, because he was just instructed to leave the receipts and that's what he did because that's all he had been instructed to do.(VR; 3/17/09; 2:04:10).

Garcia testified that a deputy showed up at his home that evening and he was placed under arrest for theft for not making required disposition of property. He stated that Whitaker was present, in a blue Grand Cherokee Jeep. Garcia stated that he was told that Whitaker was there to get his car and to tell him where it was. He testified that he showed Whitaker where the car was and that Whitaker got in the car and left. He stated that the officer then handcuffed him and placed him in the back of the police car, put him under arrest and took him to the detention center. (VR; 3/17/09; 2:04:18). He stated his bond was set at $10,000 cash and that he was told that he had to stay overnight in the jail because there was no one there who could count the cash. (VR; 3/17/09; 2:06:55).

Garcia testified that the next day he was placed in a squad car and taken to District Court. He stated that he did not see Whitaker there. He stated that his bond was reduced to $1,000 and he was released. He stated that he had to go back to court several times but ***Whitaker never appeared***, and that the charges were ultimately dismissed. (VR; 3/17/09; 2:07:50). ***He testified that Bill Thompson, the County Attorney, told him that Whitaker wanted him to plead to a lesser charge and that if he did, he would get his money, but that Garcia refused the offer.***

Garcia testified that he billed Whitaker on his own invoice because he would have stood by the work done on the car. He stated that he put the two year warranty on his invoice as well as the 1,000 mile timing belt checkup recommendation. He testified that he billed for the work he had done and parts he had purchased, in addition to the Porsche bill he had paid. He stated that he was asking to be paid and he wanted his lien the vehicle to be enforced. (VR; 3/17/09; 2:14:38). On cross-examination, Garcia stated that this was his first arrest. (VR; 3/17/09; 2:28:00). He agreed that he had never shown Whitaker the Porsche invoice until he produced it at the County Attorney's Office, but he stated that the Autobahn invoices were what he used for billing. He agreed that he did not personally purchase the parts for the vehicle and he did not have receipts for the individual items purchased by Porsche of Lexington. (VR; 3/17/09; 2:30:18).

Garcia agreed that the $95.00 battery on his Autobahn invoice was a mistake [because he had purchased a $339.00 battery]. He testified that the battery he purchased was included in the "sublet" charge of $600.00 on his invoice. (VR; 3/17/09; 2:33:32). Garcia testified that he told Whitaker that he needed a second opinion and that he was told by Whitaker to do whatever it took to fix the vehicle d.(VR; 3/17/09; 2:40:50). He agreed that he told Whitaker that the car had not been moved (VR; 3/17/09; 2:40:42). When asked why he denied that the car had been moved, he stated that he was afraid that he was not going to get paid and he would need to move it to protect his collateral. (VR; 3/17/09; 2:49:33).

Garcia stated that his invoice was good enough for Alton Blakely Ford and other dealerships and it should have been good enough for Whitaker. (VR; 3/17/09; 2:37:37).

He stated that he had never had a receipt problem previously. (VR; 3/17/09; 2:45:10). He agreed that when he gave Whitaker his invoice he told him that he was out the money for the car repair, although he did not disclose at that time that he had taken the car to Porsche of Lexington. (VR; 3/17/09; 2:47:02). On redirect, Garcia agreed, again, that the $95.00 for the battery was "most likely an error" (VR; 3/17/09; 2:58:22), but he testified that he had failed to charge Whitaker for the timing belt, which cost $145.96 and this was also an error. (VR; 3/17/09; 2:58:37). He introduced as Plaintiff's Exhibit #9, a detailed summary of the $600.00 "sublet" charge on his Autobahn invoice. It included a battery that cost Garcia $339.39 plus $50.00 for towing, plus labor at $70.00 per hour for testing, cleaning and replacing the battery, inspecting the starting system, and other diagnostic tests. A copy of Plaintiff's Exhibit #9 is attached in the Appendix hereto. (Appendix "H"). (VR; 3/17/09; 2:59:38). He testified that he did not include his time for the leak down test, which took about 12 hours. He testified that no one had ever requested receipts for parts from him before.

Garcia testified that he turned in the Porsche invoice as well as his Autobahn invoice in the early afternoon of the third day [December 6, 2006], and that he was arrested between 6:00 and 8:00 pm that night. (VR; 3/17/09; 3:00:48)

At the end of Garcia's case, Whitaker moved for a directed verdict on malicious prosecution on the grounds that when Whitaker filed the criminal complaint, the facts he stated were true and the fact that he did not proceed with the prosecution of the case was irrelevant. Garcia's counsel argued that there was ample evidence that Whitaker obtained a criminal warrant for the sole purpose of obtaining his car and after he got his car he had

no reason to pursue the matter. Garcia's counsel argued that Whitaker used the criminal process to obtain his car, a civil remedy, and then refused to pay for the work on the vehicle. He argued that it was unbelievable that Whitaker, an attorney, did not know that he could file for a civil writ of possession to obtain this civil remedy . (VR; 3/17/09; 3:10:00). ***The Trial Judge granted Garcia's motion for directed verdict on the grounds that there were no materially false statements made by Whitaker in his criminal complaint, that the arrest warrant was issued by a judge [District Judge Kathryn G. Wood][Appendix "E"], and that this provided Whitaker with a complete defense. The Trial Judge ruled that all of the other torts, including abuse of process, "sprang from the malicious prosecution claim" so that they would all be dismissed. (VR; 3/17/09; 3:15:12).***

Garcia moved for a directed verdict as to the amount of his remaining claim, since there was no evidence that the car was not fixed nor that the charges were unreasonable, but his Motion for Directed Verdict was denied. Garcia also moved for a judgment declaring his lien to be valid, which was granted by the Court in the final Judgment. During this discussion, counsel for Garcia stated that the charges for the car repair were the $7,978.74 charged by Garcia on his Autobahn invoice minus $95.00 for the mistake on the battery plus $145.96 for the cost of the timing belt, for a total of $8,029.70. (VR; 3/17/09; 3:25:13). Whitaker's counsel argued that it was a *quantum meruit* case due to "Plaintiff's fraud" and that there was a jury question as to how much work was authorized by Whitaker. (VR; 3/17/09; 3:29:07). The Trial Judge agreed that it was a jury question. (VR; 3/17/09; 3:28:42). Garcia's counsel moved to dismiss

Whitaker's Counterclaim, based upon "discovery issues," and counsel for Whitaker agreed to voluntarily dismiss the Counterclaims. (VR; 3/17/09; 3:30:12). The Trial Judge indicated that he hoped the parties could settle the case now that the only remaining issue was the amount owed by Whitaker to Garcia for the repairs, but the parties advised the Court that they were "far apart on money." (VR; 3/17/09; 3:30:50).

There was then a discussion between counsel and the Trial Judge about what further evidence might be appropriate given the directed verdict in Whitaker's favor. Whitaker wanted to present the two witnesses who were present at the second meeting between Whitaker and Garcia. The Trial Judge concluded that the only testimony that would be allowed was testimony about the bill, since that was the only remaining issue, and Whitaker put on no further evidence. (VR; 3/17/09; 3:36:47). The Court instructed the jury, there was closing argument, and the jury went out to deliberate.(VR; 3/17/09; 4:25:00). Within 20 minutes, the jury returned with a written note for the Court. That written note was read and filed in the record (R., p. 225), and a copy of it is attached in the Appendix hereto. (Appendix "I"). The jury's note was: ***"Our wishes would be that the amount $8,029.70 be increased to pay for Mr. Garcia's court costs and interest accrued for money he was owed through December of 06. Our wishes would also be that any felony record be cleared. This may not be possible, but we thought we would ask."*** The Trial Court then instructed the jury that they simply had to follow the instructions. (VR; 3/17/09; 4:48:50). The jury deliberated another 7 minutes and returned with its verdict. (VR; 3/17/09; 4:55:57). The verdict was unanimous in Garcia's favor.

As per the Judgment entered on April 15, 2009 (R., pp. 226-229), a copy of which is attached in the Appendix hereto (Appendix "B"), in answer to the question "Do you believe from the evidence that the Defendant [Whitaker] owes the Plaintiff [Garcia] for services rendered and costs/money expended repairing the car owned by Defendant?" the jury unanimously answered "Yes." In answer to the question "What sum of money do you believe from the evidence will fairly and reasonably compensate the Plaintiff [Garcia] for his labor and his costs/money expended in repairing the car owned by Defendant (not to exceed $8,029.70)?" the jury answered unanimously "$8,029.70." The Judgment further states that the Court directed a verdict in Whitaker's favor on malicious prosecution because: "A review of the testimony of the Plaintiff does not reveal that the Defendant [Whitaker] made any materially false statement for which either the County Attorney or the judicial officer would have relied." The Judgment states that "the claim of false and malicious prosecution and any claims arising therefrom, including ...abuse of process... are dismissed." The Judgment did award Garcia a Judgment against Whitaker in the sum of $8,029.70 plus interest and held that Garcia's lien on Whitaker's vehicle was valid.

On April 20, 2009, Garcia filed a Rule 59 Motion to Alter, Amend or Vacate or for new trial and a Rule 52 Motion for Additional Findings. (R., pp.230-250). Garcia argued, *inter alia*, that the Trial Court should not have directed a verdict against Garcia on malicious prosecution or abuse of process. Garcia moved for specific facts that would justify the Trial Court's ruling as to the claim for abuse of process. Garcia argued, *inter alia*, that he had presented a prime facie case of abuse of process and malicious prosecution. Garcia argued that the Court's finding that Whitaker had truthfully stated all

material facts to the Judicial Officer was not accurate and that advice of counsel was only a complete defense if there had been a full and fair disclosure. By Order entered July 2, 2009, a copy of which is attached in the Appendix hereto (R., pp. 251-253). (Appendix "C"), the Trial Court denied the Motion to Alter, Amend or Vacate or for new trial, and specifically found that the testimony did not support a claim for abuse of process, or that the Defendant's motive was not to promote justice but to avoid paying a lawful debt. It is from this Order of July 2, 2009 and Judgment of April 15, 2009 that Garcia filed his Notice of Appeal on July 14, 2009. (R., pp. 254-255).

The Court of Appeals in its Opinion rendered August 19, 2011, a copy of which is attached hereto as Appendix "A," affirmed the Trial Court's directed verdict as to malicious prosecution, following the Trial Court's reasoning that because Whitaker had not misrepresented any facts in his Criminal Complaint (Appendix "E"), this was a complete defense to malicious prosecution. The Court of Appeals held that Whitaker's failure to disclose all of the facts concerning the disputed bill on the Porsche did not make his statements misleading or incomplete because he disclosed there was a dispute over a repair bill. Further, the Court of Appeals held that since Garcia did not speak to Whitaker or anyone at the time he dropped the receipts off with the secretary at the County Attorney's Office, there was no evidence that Whitaker knew Garcia had turned over the receipts at the time he prepared the warrant. The Court of Appeals concluded: "Thus, while Whitaker's statement in the warrant [that Garcia had refused to "show any receipts"] may have been inaccurate, Garcia cannot show that it was knowingly false or misleading at the time he [Whitaker] made it." [Opinion, page 3][Appendix "A"]. For

this reason, the Court of Appeals affirmed the Trial Court's Judgment directing a verdict against Garcia on malicious prosecution, finding that Garcia did not lack probable cause to believe Whitaker had committed the crime of theft by failure to make required disposition because he could rely upon Judge Wood's issuing the warrant based upon his complete and truthful statements.

With regard to abuse of process, the Court of Appeals affirmed the Trial Court's judgment directing a verdict against Garcia on abuse of process but on grounds other than those relied upon by the Trial Court. The Court of Appeals disagreed with the Trial Court's conclusion that "the abuse of process claim directly flows from the malicious prosecution claim." The Court of Appeals noted that lack of probable cause is not an element of the tort of abuse of process and therefore it is not a defense to abuse of process that the defendant relied upon advice of counsel or upon the judicial officer's issuing the warrant. However, the Court of Appeals concluded that there was "nothing irregular in the proceeding" that Whitaker had done. Despite the fact that the Court of Appeals noted that "Whitaker admits that he sought the arrest warrant to obtain possession of his automobile," he never did anything outside of the regular course of the proceeding. The Court of Appeals concluded that the fact that Garcia accompanied the Sheriff's deputy when the Sheriff's deputy served Garcia with the warrant and then took his Porsche from Garcia without paying anything for it was not an irregularity in the proceeding because the police and the County Attorney were responsible for this action, not Garcia. The Court stated: "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

[KRS 376.270], 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." [Opinion, pages 3-4] [Appendix "A"].

It is from this ruling and opinion by the Trial Court and as affirmed by the Court of Appeals that Garcia has sought Discretionary Review by this Court.

ARGUMENTS

I. THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN APPELLEE'S FAVOR FOR ABUSE OF PROCESS AND THE COURT OF APPEALS ERRED IN AFFIRMING SAME

This issue was preserved for appellate review by virtue of Appellant's foregoing Civil Rule 59 and 52 Motions (R., pp.230-250), and his arguments at trial in opposition to the Motion for Directed Verdict (VR; 3/17/09; 3:10:00).

It is well established that the elements of the tort of malicious prosecution are (1) the institution or continuation of a prior judicial proceeding, (2) by or at the instance of the defendant, (3) a determination of the prior criminal proceeding in the plaintiff'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 damages as a result of the proceeding. See, e.g., Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Farris v. Sears, Roebuck & Co., 455 F.Supp. 162 (W.D.Ky. 1978); Davidson v. Castner-Knott Dry Goods Co., Inc., 202 S.W.3d 597 (Ky.App. 2006).

It is well established that damages may be inferred from the criminal action. Thus, actual proof of monetary loss is not required, as damages are inferred or assumed

from the criminal malicious prosecution action itself. See, e.g., Raine v. Drasin, supra, at 900, where the Supreme Court held: "It is clear, in Kentucky, that a plaintiff in a malicious prosecution action may recover for humiliation, mortification and loss of reputation. Hayes v. Ketron, 223 Ky. 119, 3 S.W.2d 172 (1928). Harter, supra [Harter v. Lewis Stores, Inc., 240 S.W.2d 86 (Ky. 1951)]." This view is supported by the Restatement. See, Rest., Torts2d, §681, a copy of which is attached in the Appendix hereto (Appendix "K"). See, also, 7 AmJur POF2d 181, §14 (2009), a copy of which is attached in the Appendix hereto (Appendix "J") which states: "In a malicious prosecution action based on the initiation of a criminal action, it is generally presumed that injuries to the plaintiff's reputation and mental well-being necessarily result from the fact that the plaintiff has been formally accused of a crime. Thus, in such cases the great majority of jurisdictions allow the recovery of damages for loss of reputation and mental distress as general damages, without any special pleading or proof of actual damages. As a result, in a malicious prosecution action based on the instigation of criminal proceedings the plaintiff may recover a large sum for these elements of damages with little or no real proof of them." Thus, where one has been subjected to an arrest, as a result of a wrongful criminal prosecution, the person has incurred damages such as loss of reputation, mental pain, suffering, anguish and humiliation, regardless of any actual monetary loss he suffered in securing the favorable termination of the prosecution.

It is also well established, that it is a complete defense to a case of malicious prosecution, if the defendant has relied upon the advice of counsel, provided, however, that the defendant has made a complete and fair disclosure of all of the relevant facts to

said counsel in procuring the advice. With regard to the criminal warrant in this case, that means that Whitaker must have made a full and fair disclosure of all relevant facts to District Judge Woods in obtaining the felony warrant.

In this case all of the above six (6) elements of malicious prosecution were present. Whitaker instituted a criminal proceeding against Garcia when he executed the criminal complaint that charged Garcia with a felony. The criminal charges against Garcia were dismissed . As a result of the criminal charges, Garcia was arrested and spent the night in jail, had to post bail, and had to appear at several court proceedings before the case against him was dismissed. 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 without reasonable cause to believe that Garcia had committed a crime because (1) Garcia was an attorney with over 25 years of experience, practicing criminal defense, who, a jury 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 contract with Garcia that required Garcia to furnish Whitaker with receipts or (2) there was evidence from which a jury could have concluded that Garcia knew the County Attorney had not notified Garcia to turn over his receipts by noon, as set out in his Criminal Complaint.

Further, contrary to the Trial Court's finding, 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 for "theft by failure to make required disposition of property" in violation of KRS 514.070, and set his bond at $10,000.00 cash, of all the facts in this case. In his Criminal Complaint, Whitaker did not inform her that Garcia had given him his company's invoice for $7,978.74 detailing $5,545.99 in parts, $1,500.00 in labor and another $600.00 in "sublet" for work performed on his 1995 Porsche 928, he did not inform her that Garcia had fixed his car and returned it to him in good working order and had offered him the keys to it, he did not inform her that he had refused to pay Garcia for the vehicle until he could see all the receipts for all parts used in the repair of the car, he did not inform her that this was not part of his original agreement with Garcia, AND he informed her that Garcia had failed to turn over the car or the receipts by 12:00 noon on December 6, 2006, after the Assistant County Attorney had called and told Garcia to do this, when this was a fact clearly in dispute.

Whitaker testified that the County Attorney's Office called Garcia and told him to bring the car or the receipts by noon, and Garcia refused. However, ***Whitaker also testified that Garcia was supposed to bring these receipts to his office by noon on December 6, 2006, and had failed to do so and that it was after that that he had called the County Attorney's Office to have Garcia bring the receipts to the County Attorney's office.*** Garcia testified that as soon as the County Attorney's Office called him, sometime in the early afternoon, and requested the receipts, he took his Autobahn invoice, which had already been provided to Whitaker, as well as the paid Porsche of

Lexington invoice to the County Attorney's Office and that Whitaker was there filling out the arrest warrant as he left the papers. Thus, there was a fact issue as to whether Whitaker told the judicial officer, in his Criminal Complaint, the complete truth and facts surrounding the controversy. In fact, in light of Whitaker's conflicting testimony, it was actually more believable that Whitaker did not call the County Attorney's Office until after noon on December 6, 2006 that he wanted Garcia to bring in all his receipts for parts or the Porsche to the County Attorney's Office, and that the County Attorney's Office did not call Garcia until early afternoon to bring them in, and that Garcia complied with that request and brought them in, making Whitaker's sworn statement to Judge Wood that Garcia was told by the Assistant County Attorney to turn over the car or the receipts by noon today at the County Attorney's Office and Garcia has failed to do so a false statement.

When Judge Wood issued the arrest warrant, she assumed that Whitaker's statements were a complete and truthful account of the situation. There was ample evidence, however, that Whitaker's statements were not complete nor truthful, nor did Whitaker have a reasonable basis for believing that Garcia was guilty of the crime with which he was charged.

The Court will note in the annotations to KRS 514.070 (Appendix "H"), that the crime of theft by failure to make required disposition is a crime that is used for conversion and embezzlement, where, according to the clear wording of the statute, a person "obtains property upon agreement or subject to a known obligation to make specified payment or other disposition whether from such property or its proceeds" or

where the person "intentionally deals with the property as his own and fails to make the required payment or disposition." In this case, Garcia had a statutory right to retain the Porsche until Whitaker paid his bill and he had a lien thereon. KRS 376.270, a copy of which is attached as Appendix "L," awards to any person engaged in the business of repairing motor vehicles a lien on the motor vehicle for the "reasonable or agreed charges" for the repairs and awards that person the right to "detain any motor vehicle in his possession on which work has been done by him until the reasonable or agreed charge therefor has been paid."

Although an ordinary person, who is not an attorney, would have the right to rely upon advice of counsel, or the Court, as in this case, as to whether a crime had been committed or whether Garcia had the right to retain the Porsche for his bill, Appellant submits that Whitaker, as an experienced attorney, specializing in criminal law, did not. There was no agreement requiring Garcia to give Whitaker detailed receipts for parts purchased. Garcia had already given Whitaker his detailed Autobahn invoice. Clearly, if Whitaker thought he was being overcharged, his remedy was civil and not criminal. Under these circumstances, Appellant submits that the fact that Judge Wood issued the arrest warrant is not a complete defense to malicious prosecution for Whitaker because he is an attorney and a jury could believe that Whitaker knew he had a civil remedy and that he had no reasonable grounds to believe that Garcia had committed the crime of theft by failure to make required disposition, according to the wording of the statute.

However, even if Whitaker can rely upon advice of counsel as a defense in this case, he clearly did not make a complete and full and truthful disclosure of the relevant

facts. See, e.g. Restatement 2d of Torts §666 Effect of Advice of Counsel (2012), a copy of which is attached as Appendix "M": ***"f. Full disclosure. The advice of an attorney is a protection to one who initiates criminal proceedings only if he fully discloses to the attorney all facts that are within his information and which a reasonable man would regard as pertinent. Concealment of a fact that should be recognized as material, or the statement as to a known fact of something for which he merely entertains suspicion or which as a reasonable man he should recognize as requiring further investigation (see Comment j on §662) destroys the protection given by the advice of counsel under the rule stated in this Section. Furthermore, the client must state the sources of his belief, whether derived from his own knowledge or from the information of others. There must be a full disclosure of all matters that a reasonable man would regard as material for the attorney to know in order that he may give a sound opinion. No facts that a reasonable man would regard as material may be suppressed. Not only must the questions of the attorney be fully and fairly answered, but the client must volunteer a sufficiently detailed and accurate statement of what he believes that he knows and what he suspects, together with all exonerating circumstances, to permit intelligent judgment on the part of the attorney. He must, in short, tell the attorney what a reasonable layman would understand to be important in securing honest and informed advice."***

As set forth above, Whitaker did not make a complete disclosure of all the relevant facts. Further, there was clearly a fact question about the truthfulness of what Whitaker told Judge Wood. If the jury believed Garcia, Whitaker's statement that the

Assistant County Attorney had called Garcia to turn over his receipts to the County Attorney's office by noon was false.

The case closest on point is the case of Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952). In that case, which is nearly a mirror image of the case at bar, it was the person who repaired the vehicle who took out the warrant against the owner of the vehicle that was repaired. In that case, Kidd left his 1947 Ford automobile with Smith Motor Sales to be repaired. Smith made the repairs, and Kidd attempted to pay for the repairs with a check from his insurance company, but because it was made out to Kidd and a former mortgagee, Smith Motor Sales could not accept it. Later, Kidd left his car with Smith Motor Sales to repair what Kidd claimed was a defectively installed radiator. When he went to pick up the car, there was a dispute as to whether he was told he could move it from the garage. An employee of Smith Motor Sales testified that he told Kidd he could not remove the car from the garage until his bill was paid. Kidd denied that anyone told him he could not remove the car. Kidd got in his car and drove it away without paying the outstanding repair bill. The manager of Smith Motor Sales swore out a warrant for his arrest for violating KRS 434.210, for the fraudulent concealment or disposition of property against which Smith held a lien. The grand jury refused to indict on the charge and the charge was dismissed. After that, Kidd brought an action for malicious prosecution against Smith Motor Sales and its manager, Lawson Walters. The jury returned a verdict for $1,000 in favor of the Plaintiff, Kidd, and the Defendants appealed. One of the Defendant's arguments on appeal was that because they had relied on the advice of counsel and had probable cause to believe that Kidd had committed a felony by

removing the automobile from the garage, they had a complete defense. The Court of Appeals ruled, however, that there was a jury issue as to malice and lack of probable cause, and as to whether there had been a complete and truthful disclosure of the relevant facts to the prosecutor. Specifically, the Court stated: "There was ample evidence in this case from which the jury could have concluded that the appellants [Smith Motor Sales and Walters] were activated by a desire for revenge, and that their motive in prosecuting Lawrence Kidd was not to promote justice, but to coerce the collection of the debt owed them by J.T. Kidd." Id., at 159.

This is very similar to the facts of the case at bar. There was certainly ample evidence in this case from which a jury could have concluded that Whitaker was activated by a desire for revenge for Garcia's refusal to comply with his request to give him detailed receipts for the parts purchased for the repair before he would pay him and that his motive in having Garcia arrested was not to promote justice, but to get his Porsche back without paying Garcia, which, of course, is exactly what happened.

The Court of Appeals in Smith v. Kidd, supra, further stated, with regard to the defense of advice of counsel: " It is the established rule in this state that advice of counsel is a complete defense to an action for malicious prosecution, if all the facts bearing upon the guilt or innocence of the accused person which the prosecutor or informant knew or could have ascertained by reasonable inquiry are fully and fairly disclosed to counsel. Cincinnati, N.O. & T. P. Ry. Co. v Bedow, 189 Ky. 140, 224 S.W. 674 (1920). The rule applies regardless of whether the counsel is a private attorney or a public prosecuting attorney. Dyer v. Singer Sewing Mach. Co., 164 Ky. 538, 175 S.W. 1037 (1915). There

is no question in this case but that appellants acted upon advice of counsel - the only question is whether they made a full and fair disclosure of the actual facts to the counsel. Under conflicting evidence, this is a jury question. Figuccion v. Prudential Ins.Co., 273 Ky. 287, 116 S.W.2d 291 (1938); Hendrie v. Perkins, 240 Ky. 366, 42 S.W.2d 502 (1931); Shoemaker v. Southwestern Petroleum Co., 213 Ky. 603, 281 S.W. 533 (1926)." Id., at 159. The Court in Smith v. Kidd, supra, concluded that there was a fact issue about whether there was a full and complete disclosure to counsel in that case, since Walter's affidavit, upon which the warrant of arrest was issued, stated that Kidd took the car "without the consent" of Smith Motor Sales, whereas Kidd testified that no one told him that he could not take the car. The Court of Appeals concluded : "It is clear, therefore, that one of the facts upon which the attorney's advice was based was the stated fact that the car was removed from the garage in direct violation of a specific order that it not be removed until the bill was paid. This fact would be a most important one bearing on the question of whether the Kidd brothers intended to defeat the lien by selling, concealing, disposing of, or removing the car from the state. It must be considered a material fact." Id., 160. See, also, Gatz v. Harris, 134 Ky. 550, 121 S.W. 462 (1909)(whether there was a full and fair disclosure to counsel was a jury issue); Bowman v. Combs, 210 Ky. 1, 273 S.W. 719 (1925)(reliance upon the county attorney's action was no defense where defendant did not tell the county attorney all of the relevant facts); Peel v. Bramblett, 305 Ky. 577, 204 S.W.2d 565 (1947)(advice of counsel was no defense where not all of the facts were laid before him).

In this case, Garcia was only guilty of a criminal act, according to the criminal

complaint and warrant that was issued by Judge Wood, if Garcia had failed to turn over receipts for the work he had performed or the car by noon at the County Attorney's Office ***after*** being informed to do so by the Assistant County Attorney. Garcia testified that as soon as the County Attorney called and made the request, he complied. Whitaker, on the other hand, testified that he did not, and swore out a criminal complaint stating that he had not. When Judge Wood signed the warrant on December 6, 2006, she obviously relied upon the truth of the statements contained in the criminal complaint, and just as obviously there was a fact issue as to the material facts contained in that criminal complaint.

Further, the facts as recited by Whitaker in his criminal complaint were far from complete. As stated above, Whitaker did not inform her that Garcia had given him his company's invoice detailing $5,545.99 in parts, $1,500.00 in labor and another $600.00 in "sublet" for work performed on his 1995 Porsche 928, he did not inform her that Garcia had fixed his car and returned it to him in good working order and had offered him the keys to drive it, he did not inform her that he had refused to pay Garcia for the vehicle until he could see all the receipts for all parts used in the repair of the car, AND he did not inform her that this was not part of his original agreement with Garcia and Garcia had no obligation to turn over such receipts to him.

For all of these reasons, the Trial Court's judgment directing a verdict in favor of Whitaker against Garcia on the tort of malicious prosecution and the Court of Appeal's Opinion affirming same should be reversed.

ARGUMENT II: THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN APPELLEE'S FAVOR FOR ABUSE OF PROCESS WHERE APPELLANT HAD MADE A PRIMA FACIE CASE

This issue was preserved for appellate review by virtue of Appellant's foregoing Civil Rule 59 and 52 Motions (R., pp.230-250), and his arguments at trial in opposition to the Motion for Directed Verdict (VR; 3/17/09; 3:10:00).

Even more compelling may be Garcia's argument that the tort of abuse of process should not have been dismissed by directed verdict. This case is actually a textbook example of abuse of process. Whitaker actually admitted at trial that he did not pursue any criminal charges against Garcia when he got his vehicle back because "there was no point." His sole reason in taking the criminal warrant was to get his vehicle back. The Court of Appeals did not believe that Whitaker's accompanying the Deputy Sheriff when he served the warrant for the purpose of finding out where his Porsche was and taking it back without paying Garcia's bill for repairs was not an irregularity in the proceeding, or using the proceeding for a collateral advantage, but Garcia submits that it is and this Court should so find since it is not a regular part of the criminal process.

The elements of abuse of process are (1) an ulterior purpose or motive and (2) a willful act in the use of legal process not proper in the regular conduct of the proceedings. Abuse of process can be of a criminal or a civil process. The process does not have to be concluded in the favor of the plaintiff. The defendant can have probable cause. However, the defendant must have acted with an ulterior purpose or motive and committed some act or threat not authorized by the process, and aimed at an objective not legitimate in the use of the process. See, e.g. Bonnie Braes Farms, Inc. v. Robinson, 598

S.W.2d 765 (Ky.App. 1980).

In this case, there was ample evidence from which the jury could conclude that Whitaker had an ulterior motive and purpose in having Garcia arrested, which was to get his vehicle back without paying Garcia's bill. Further, there was ample evidence from which the jury could conclude that there was a willful act in the use of the process that was not proper in the regular conduct of the proceedings, when, for example, Whitaker accompanied the Deputy Sheriff and after the Deputy found out where Garcia had put his car took the Porsche without paying Garcia's bill, or, for example, when the prosecutor told Garcia that if he would plead guilty to some charge, Whitaker would pay his bill, or, for example, when Whitaker failed to appear for any of the proceedings against Garcia and let the charges be dismissed, admitting that there "was no point" in appearing because he had his car back.

This is actually a classic case of abuse of process, and the Trial Court erred in directing a verdict in Whitaker's favor on abuse of process. The Trial Court's reasoning was that Whitaker had a complete defense due to reliance upon counsel because he did not issue the arrest warrant, the judicial officer did. This reasoning is flawed. It is well-established that for the tort of abuse of process, reliance upon counsel is no defense whatsoever. See, e.g., Flynn v. Songer, 399 S.W.2d 491 (1966), where the Court of Appeals held: " The advice of counsel is a defense in an action for malicious prosecution, but it is not so with respect to abuse of process. That is because advice of counsel really is a form of probable cause, and probable cause is not a defense to an action on abuse of process." Id. at 494.

It is well-established that for abuse of process, where there has been an actual seizure of the property of the plaintiff or an order arresting the person of the plaintiff as the direct result of the defendant's wrongful abuse of process, an injury is presumed and compensable by damages, and malice needs only to be proved if punitive damages are sought. See, e.g. Williams v. Central Concrete, Inc., 599 S.W.2d 460 (Ky.App. 1980); Rest 2d Torts §681 Damages (2012), a copy of which is attached in the Appendix hereto (Appendix "K").

Although there is not a Kentucky case with similar facts, the Court's attention is directed to the recent Supreme Court case of Sprint Communications Company v. Leggett, 307 S.W.3d 109 (Ky. 2010), in which this Court reversed the Trial Court's summary judgment in favor of Sprint Communications for abuse of process where there was evidence that Sprint had brought an eminent domain case to condemn Leggett's property in order to pressure Leggett into selling Sprint his land and where Sprint had threatened Leggett prior to the filing of the lawsuit with a condemnation case if Leggett did not sell Sprint the entire property, and not just a right of way, and brought a condemnation case that was more broad than what Sprint had authority to bring. The Supreme Court concluded that "the legal process was employed to achieve a purpose for which it was not intended - to enable Sprint to obtain complete, fee simple control of Leggett's property." *Id.* at 119. ***By analogy to this case, Whitaker used the criminal process to achieve a purpose for which it was not intended - to enable Whitaker to obtain his motor vehicle without paying for it in violation of Garcia's statutory lien of KRS 376.270 and his right to hold the vehicle as collateral. Per Garcia, he threatened***

to get the car on December 5, 2006, and this is exactly what he accomplished by use of the criminal process on December 6, 2006.

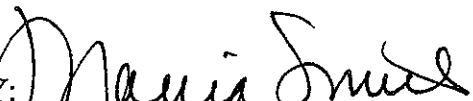
In Sprint, supra at 114, this Court held: "We addressed the issue most recently in Simpson v. Laytart, 929 S.W.2d 392 (Ky. 1998), reiterating that an action for abuse of process is 'the irregular or wrongful employment of a judicial proceeding[,]' and has two essential elements: 1) an ulterior purpose, and 2) a willful act in the use of the process not proper in the regular conduct of the proceeding.... The act or threat usually manifested by some 'form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property on [sic] the payment of money,' using the process as a threat or a club." In this case, Garcia submits that, according to his testimony, Whitaker, after threatening to get his vehicle back without paying for it, used the criminal process as a club to get his vehicle back without paying for it. Garcia only recently, in 2012, was paid for the work he performed in 2006 and pursuant to the Judgment rendered by the jury in 2009. Yet, Whitaker has had his Porsche back since December 6, 2006.

For all these reasons, the Trial Court clearly erred in directing a verdict in Whitaker's favor for abuse of process, and the Court of Appeals likewise erred in affirming that judgment. A prima facie case of abuse of process was presented, and the jury could easily have found that Whitaker used the criminal process to obtain a civil result to which he was not entitled. The jury's note to the Trial Judge, in which the jurors stated: "Our wishes would also be that any felony record [of Garcia] be cleared" is some indication of that. (Appendix "I").

CONCLUSION

On the basis of the above authorities and facts of this case, the judgment of the Pulaski Circuit Court and the decision of the Court of Appeals affirming should be reversed and the case remanded for a new trial as to Garcia's tort claims against Whitaker for abuse of process and malicious prosecution.

Respectfully Submitted,
DAVID O. SMITH and
MARCIA A. SMITH
208 Gordon Street
P. O. Box 699
Corbin, KY 40702
(606) 528-5001
ATTORNEYS FOR APPELLANTS

BY: 
MARCIA A. SMITH

G:\MAS-OFFICE FILES\Appeal\Garcia, Bobby v. Whitaker\Supreme Court\brief appellant.wpd

APPENDIX

(A) Court of Appeals Opinion rendered August 19, 2011

(B) Pulaski Circuit Judgment entered April 15, 2009

(C) Pulaski Circuit Order entered July 2, 2009

(D) Autobahn Automotive Invoice for $7,978.74

(E) Criminal Complaint dated December 6, 2006

(F) Porsche of Lexington Invoice for $6,689.40

(G) KRS 514.070

(H) Autobahn Statement for $600.00 for Sublet

(I) Note from Jury to Trial Judge

(J) 7 AmJur POF2d 181, §14 (2009)

(K) Rest 2d Torts §681 Damages (2009)

(L) KRS 376.270

(M) Rest 2d Torts §666 Effect of Advice of Counsel (2012)

M:\Appeal\Garcia, Bobby v. Whitaker\Supreme Court\appendix list.wpd