

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Paul Oliver,

Appellant / Plaintiff / Counterclaim Defendant / Cross-Appeal Appellee,

v.

FLH Mill, LLC, and Jeremy Ferree,

Appellees / Defendants,

and

Crystal Ferree,

Appellee / Defendant / Counterclaim Plaintiff / Cross-Appeal Appellant.



March 4, 2024

Court of Appeals Case No.
23A-CT-2265

Appeal from the Greene Superior Court
The Honorable Robert J. Cline, Special Judge

Memorandum Decision by Judge Bradford
Chief Judge Altice and Judge Felix concur.

Bradford, Judge.

Case Summary

- [1] Paul Oliver entered into a contract (“the Contract”) with FLH Mill, LLC, and Jeremy Ferree (the owner of FLH Mill) pursuant to which they agreed to build him a log home in Greene County, which they did. In August of 2019, over a year after completion of the log home, Oliver sued FLH Mill, Jeremy, and Jeremy’s then-wife Crystal Ferree for breach of contract and home-improvement fraud. In August of 2020, Crystal countersued Oliver for abuse of process, malicious prosecution, and frivolous and groundless litigation. In January of 2022, over two years after filing suit, Oliver dismissed his claim against Crystal. As for Crystal’s counterclaim, the trial court denied Oliver’s motion for summary judgment, and, following a bench trial, entered final judgment in favor of Crystal and awarded her attorney’s fees. Oliver contends that the trial court erred in denying his summary-judgment motion, the trial court’s judgment is not supported by sufficient evidence, and the trial court’s award of attorney’s fees is without basis. Crystal requests that, in addition to

affirming the judgment of the trial court, we award her appellate attorney's fees. We affirm and remand with instructions.

Facts and Procedural History

[2] We related some of the facts underlying this appeal in disposing of an earlier appeal in this case, which had originally been filed in August of 2019.

[2] Oliver entered into a contract with Jeremy to build a log home in Linton for \$323,900. The contract lists the "Builder" as "Jeremy Ferree (FLH Mill LLC)." Oliver and Jeremy signed the contract, which reflects the word "Builder" next to Jeremy's signature but contains no explicit reference to FLH in the signature section. Crystal's name does not appear on the contract and the record contains no indication that she was involved in FLH's operations.

[3] Oliver eventually filed suit against Jeremy, FLH, and Crystal, alleging breach of contract and home improvement fraud. The complaint asserted Oliver had paid \$313,681 of the \$323,000 contract price to the defendants, who allegedly used the funds for other purposes and did not complete his log home.

Oliver v. FLH Mill, LLC, 2021 WL 1182906 at *1–2 (Ind. Ct. App. Mar. 30, 2021). In this first appeal, Oliver appealed from the trial court's setting-aside of default judgments it had entered against FLH Mill, Jeremy, and Crystal pursuant to Trial Rule 60(B), and we ordered the trial court to reinstate the default judgments against FLH Mill and Jeremy but affirmed the trial court's setting-aside of the default judgment against Crystal. *Id.* at *5.

[3] Meanwhile, in August of 2020, Crystal had filed a response to Oliver's complaint and had included a counterclaim for abuse of process, malicious

prosecution, and frivolous and groundless litigation. In March of 2021, Crystal moved for summary judgment on Oliver's claim and her counterclaim, which motion the trial court ultimately denied. In January of 2022, Oliver moved to dismiss his claims against Crystal, which motion the trial court granted. In November of 2022, Oliver moved for summary judgment on Crystal's counterclaim, which motion the trial court denied.

[4] In April of 2023, Crystal's counterclaim was tried to the bench, and, in August, the trial court entered judgment in favor of Crystal in the amount of \$22,500.00 and awarded her \$22,500.00 in attorney's fees. The trial court's order provides, in part, as follows:

9. Defendant, Jeremy Ferree, was the sole organizer of FLH Mill, LLC. Only Jeremy Ferree's name appears on the Articles of Organization and the Indiana Secretary of State website for FLH Mill, LLC. Crystal Ferree's name does not appear on either document and the uncontroverted testimony of Crystal Ferree and Jeremy Ferree was that Crystal Ferree was not a shareholder or member of FLH Mill, LLC, and that Jeremy Ferree was the sole shareholder and member of the corporation. Jeremy Ferree and only Jeremy Ferree was also listed as the Registered Agent and President for FLH Mill, LLC.

10. The Complaint filed by the Plaintiff makes no allegation of piercing the corporate veil, and the only names mentioned in the Contract are Paul Oliver, Jeremy Ferree, and FLH Mill, LLC. Absent an allegation to pierce the corporate veil, the Complaint on its face is deficient as to Crystal Ferree and fails to state a cause of action against Crystal Ferree since she was not a signatory on the contract.

11. At the trial no evidence was presented that Crystal Ferree was an owner, organizer, shareholder or employee of FLH Mill, LLC. Crystal Ferree's previous marriage to

Defendant, Jeremy Ferree, or any alleged relationship with Jeremy Ferree's previous sole proprietorship alone is not sufficient to conclude her as having any ownership stake in FLH Mill, LLC or to be liable for its obligations.

12. Crystal Ferree once worked for Jeremy Ferree as an employee under his sole proprietorship, but she stopped working for him as an employee in 2016. This was approximately one year before the Contract was executed between Plaintiff, Paul Oliver, and Defendant, FLH Mill, LLC.

13. Crystal Ferree's name does not appear anywhere on the Contract between Plaintiff, Paul Oliver, and Defendant, FLH Mill, LLC, nor did Crystal Ferree sign the Contract.

14. Crystal Ferree did not enter into any contract with Plaintiff, Paul Oliver, regarding the construction of his log home, and could not be held liable under any theory alleged in Plaintiff's Complaint. Since there was no allegation of piercing the corporate veil, even had Crystal Ferree been a shareholder of FLH Mill, LLC, the Court finds that the Complaint on its face was a frivolous filing as against Defendant, Crystal Ferree.

15. That the filing of the Complaint by the Plaintiff against Crystal Ferree lacked merit and demonstrated that little or no investigation was made as to the liability of Crystal Ferree in this matter. Plaintiff offered vague testimony that he thought they ran the business together as a proprietorship family business, but this ignores the plain language of the Contract.

16. A minimal amount of research with the Indiana Secretary of State would have shown that Crystal Ferree was not a member of FLH Mill, LLC, and Paul Oliver, knew or should have known at the time of filing the Plaintiff's Complaint that Crystal Ferree was not a shareholder or member of FLH Mill, LLC.

Appellant's App. Vol. II p. 55.

Discussion and Decision

Direct Appeal Issues

I. Summary Judgment

[5] Oliver argues that the trial court erred in denying his motion for summary judgment on Crystal’s counterclaim. “A party seeking appellate reversal of the denial of summary judgment must demonstrate that the designated evidentiary matter negates the existence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Auto-Owners Ins. Co. v. Shroyer*, 127 N.E.3d 1200, 1204 (Ind. Ct. App. 2019), *trans. denied*. Where the challenge to the denial of summary judgment raises questions of law, we review them de novo. *Id.* “A trial court’s decision on a motion for summary judgment enters the process of appellate review clothed with a presumption of validity.” *Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871, 874 (Ind. Ct. App. 1998), *trans. denied*. “When reviewing the denial of a summary judgment motion, this Court applies the same standard as the trial court.” *Tippecanoe Valley Sch. Corp. v. Landis*, 698 N.E.2d 1218, 1220 (Ind. Ct. App. 1998), *trans. denied*.

[6] Oliver contends that the designated evidence entitles him to summary judgment on Crystal’s counterclaim as a matter of law. “The two elements of abuse of process are: (1) ulterior purpose or motives; and (2) a willful use of process not proper in the regular conduct of the proceedings.” *I.A.E., Inc. v. Hall*, 49 N.E.3d 138, 157 (Ind. Ct. App. 2015), *trans. denied*. “A plaintiff claiming abuse of process must show a misuse or misapplication of process for an end other than that which it was designed to accomplish.” *Id.* ““The gravamen of [abuse of

process] is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends.” *Nat. City Bank, Ind. v. Shortridge*, 689 N.E.2d 1248, 1252 (Ind. 1997) (quoting *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994)). “There must be evidence that an attorney filed a claim for a purpose other than aiding his or her client in adjudicating his or her claim.” *I.A.E.*, 49 N.E.3d at 157.

[7] As for claims of malicious prosecution, the elements are: “(1) the defendant instituted or caused to be instituted an action against the plaintiff; (2) the defendant acted maliciously in so doing; (3) the defendant had no probable cause to institute the action; and (4) the original action was terminated in the plaintiff’s favor.” *Est. of Mayer v. Lax, Inc.*, 998 N.E.2d 238, 249–50 (Ind. Ct. App. 2013) (citing *Crosson v. Berry*, 829 N.E.2d 184, 189 (Ind. Ct. App. 2005), *trans. denied*), *trans. denied*. “The essence of malicious prosecution rests on the notion that the plaintiff has been improperly subjected to legal process.” *Ingram v. Diamond Equip., Inc.*, 118 N.E.3d 1, 6–7 (Ind. Ct. App. 2018), *trans. denied*. “Malice may be inferred from a total lack of probable cause necessary to bring suit.” *Id.* at 8. Probable cause exists “when a reasonably intelligent and prudent person would be induced to act as did the person who is charged with the burden of having probable cause.” *Id.* “More simply stated, the inquiry is whether the defendant acted reasonably in believing the plaintiff was somehow responsible for the tortious actions.” *Id.*

[8] It is true that Oliver designated some evidence at least suggesting that Crystal was a partner-in-fact with Jeremy, the corporate form of FLH Mill could be

disregarded, and Crystal was an implied party to the Contract. The question before the court, however, is not whether Oliver’s original claim against Crystal would have survived a summary-judgment motion, but whether Crystal’s counterclaim should have. We start with the general observation that because the motive of the claimant (a fact-sensitive inquiry) is of paramount importance in abuse-of-process and malicious-prosecution claims, it seems to us that they are, in general, ill-suited to disposition by summary judgment.

[9] Turning to the evidence that was designated in this case, there is no dispute that Crystal “did not sign the contract and there are no allegations in the Plaintiff’s complaint that the Plaintiff specifically contracted with Crystal Ferree or that Crystal Ferree was an owner of FLH Mill, LLC.” Appellant’s App. Vol. III p. 142. Crystal summarized her view of the undisputed facts as:

[F]irst, she was not an owner of the limited liability company named FLH Mill, LLC; second, she was not an employee of Jeremy Ferree or FLH Mill, LLC; third, she is not a signatory on the construction contract at issue in Plaintiff’s Complaint (See Crystal Ferree’s Answers to Third Set of Interrogatories); and fourth, it cannot be concluded, merely by the fact that Crystal Ferree is married to Jeremy Ferree, that she would have any legal liability for the contract that her husband, Jeremy Ferree, or FLH Mill, LLC may have entered into.

Appellant’s App. Vol. II p. 144. Crystal argued that Oliver had known all of this pre-suit, or at least based on Crystal’s word once she had testified at a February 2020 hearing. Crystal further noted that that “[a] simple search of the Indiana Secretary of State’s business search website shows the signatures of

only Jeremy Ferree as principal and member of FLH Mill, LLC.” Appellant’s App. Vol. II p. 147.

[10] The above is sufficient to generate a genuine issue of material fact as to whether Oliver’s prosecution of his suit against Crystal constituted an abuse of process and/or malicious prosecution. While we agree with Oliver that Crystal could have potentially been liable despite not being Jeremy’s official business partner, the question is not whether Oliver’s lawsuit lacked any conceivable basis for recovery, but, rather, whether it was pursued for an improper purpose or with malice. In light of Oliver’s continued prosecution of his lawsuit against Crystal despite her undisputed lack of official connection to FLH Mill and his failure to uncover evidence of a strong unofficial connection, the designated evidence does not conclusively establish that it was not pursued for an improper or malicious purpose. Because we conclude that the designated evidence generated a genuine issue of material fact regarding Oliver’s motives in continuing to pursue Crystal as long as he did, we further conclude that the trial court did not abuse its discretion in denying Oliver’s summary-judgment motion.

II. Judgment Following Trial

[11] Oliver contends that the trial court’s judgment entered in favor of Crystal is fatally flawed because it is based on a false premise of law, *i.e.*, that Crystal would have either had to have signed the Contract in her personal capacity or have been a member of FLH Mill in order to have been liable to Oliver. Where, as here, a trial court has entered findings of fact and conclusions

thereon pursuant to a party's request, we engage in the following two-tiered standard of review:

We must first determine whether the evidence supports the findings of fact and then whether the findings support the judgment. We will not reverse the trial court's findings and judgment unless they are clearly erroneous. Findings of fact are clearly erroneous when the record lacks any facts or reasonable inferences from the evidence to support them. The judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions entered on the findings. In making these determinations, we will neither reweigh the evidence nor judge witness credibility, considering only the evidence favorable to the judgment and all reasonable inferences therefrom.

While we defer substantially to findings of fact, we do not do so for conclusions of law. We apply a *de novo* standard of review to conclusions of law and owe no deference to the trial court's determination of such questions.

Mueller v. Karns, 873 N.E.2d 652, 657 (Ind. Ct. App. 2007) (citations omitted).

Even if Oliver is correct that the trial court made an error of law, “[o]n appellate review, [...] a trial court judgment may be affirmed if sustainable on any basis in the record, even though not on a theory used by the trial court.”

Benham v. State, 637 N.E.2d 133, 138 (Ind. 1994). We find such a basis in this record, any legal error by the trial court notwithstanding.

[12] At trial, Crystal testified that she had not signed, drawn up, or otherwise had anything to do with the Contract between Oliver, Jeremy, and FLH Mill, had not been involved with any type of construction involving Oliver, and was not an owner of—nor had ever worked for—FLH Mill. Records from the Indiana Secretary of State indicated that Jeremy was the only member of FLH Mill.

While Crystal acknowledged that she had received money from Jeremy, she clarified that she meant “just [that] he was the bread winner[.]” Tr. Vol. II p. 17.

[13] Moreover, Crystal testified that Oliver’s multiple discovery requests had been invasive, including five sets of interrogatories, which had included requests for such things as information regarding all of her electronic accounts; where she went grocery shopping; her personal Facebook account; her personal e-mails; and all text messages sent or received from any telephone owned, possessed, or used by her or the other defendants after March 1, 2017. Exhibits indicate that Oliver had requested information regarding all of Crystal’s personal bank accounts and statements even though he did not have a judgment against her at the time.

[14] Crystal opined that the litigation against her was pursued maliciously and that Oliver had had an ulterior motive in pursuing her, *i.e.*, “that they were trying to get something out of me towards Jeremy’s case[.]” Tr. Vol. II p. 27. In support of this belief, Crystal testified that Oliver had contacted her attorney with an offer of money in exchange for working “with him against Jeremy[.]” which caused her to feel “like I was being blackmailed to work against Jeremy at the time.” Tr. Vol. II p. 30. In fact, during cross-examination, Oliver essentially admitted as much, testifying that “I was not actively pursuing her I was trying to gather information, assets that I could continue to pursue FLH [Mill] and Jeremy.” Tr. Vol. II p. 145.

[15] Jeremy also provided evidence of Crystal's lack of involvement in FLH Mills's affairs, testifying that by January of 2016, he had fired Crystal from FLH Mill and hired a replacement, he and she had not communicated after that, she had not signed the Contract, she was not an owner or shareholder of FLH Mill, and Oliver had had no reason to sue her. As for Oliver's motive, Jeremy also indicated that the original lawsuit against him, FLH Mill, and Crystal had been filed shortly after Jeremy and Crystal had received a large insurance settlement, which, in Jeremy's opinion, had prompted it. Jeremy indicated that he had "sensed something shady" about Oliver and that Oliver had been in the home "at least a year and everything was fine" before suing. Tr. Vol. II p. 121.

[16] As mentioned, the elements of abuse of process are ulterior purpose or motives and a willful use of process not proper in the regular conduct of the proceedings, *I.A.E.*, 49 N.E.3d at 157, and the elements of malicious prosecution are that the defendant had instituted or caused to be instituted an action against the plaintiff, had acted maliciously in so doing, had had no probable cause to institute the action, and the original action was terminated in the plaintiff's favor. The evidence, specifically Oliver's attorney's offer to pay Crystal to help with their case against Jeremy and Oliver's admission that he had pursued Crystal to get to Jeremy's assets, amply supports the trial court's findings that Oliver's use of process against Crystal had been done with an ulterior motive and that he had improperly used process against Crystal to get a result for which the process was not intended.

[17] As for malicious prosecution, the first and last elements are not in dispute; only the presence of malice and lack of probable cause are at issue. First, the record readily supports a finding that Oliver pursued his claims against Crystal with malice. Crystal acknowledges that there is no evidence of personal animosity between her and Oliver and admits that she knows of no reason for Oliver's malicious behavior. In *Brown v. Indianapolis Housing Agency*, 971 N.E.2d 181 (Ind. Ct. App. 2012), however, we recognized that malice could be inferred from a total lack of probable cause, the failure to make a reasonable or suitable inquiry, *or* a showing of personal animosity. *Id.* at 186. In this case, as in *Brown*, the middle two elements of malicious prosecution are intertwined.

[18] “Probable cause exists ‘when a reasonably intelligent and prudent person would be induced to act as did the person who is charged with the burden of having probable cause.’” *Maynard v. 84 Lumber Co.*, 657 N.E.2d 406, 409 (Ind. Ct. App. 1995) (quoting *Willsey v. Peoples Fed. Sav. & Loan*, 529 N.E.2d 1199, 1207 (1988), *trans. denied*), *trans. denied*. Crystal's name does not appear on the Contract or on any FLH Mill documentation, and she never had any direct dealings with Oliver relating to the log home. Moreover, both Jeremy and Crystal testified as early as January of 2020 that she had never had anything to do with FLH Mill, and Crystal's responses to Oliver's first set of interrogatories in June of 2020 had reiterated that she had had nothing to do with FLH Mill or the Contract. Having not received the hoped-for damning admissions to the first set of interrogatories, Oliver, instead of dropping his suit against Crystal, had tried four more times over the next two years, without ever getting his

smoking gun. We conclude that Oliver’s malicious intent may have been inferred from his persistence in continuing to pursue Crystal after a reasonable person would have stopped. We affirm the trial court’s entry of judgment in favor of Crystal, whether based on abuse of process or malicious prosecution, or both.¹

III. Fees

[19] The Indiana General Recovery Rule is as follows:

(a) In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.

(b) In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or
- (3) litigated the action in bad faith.

¹ It is worth noting that recovery for compensatory damages beyond the amount of attorney’s fees recoverable pursuant to Indiana Code section 34-52-1-1 (commonly known as the Indiana General Recovery Rule) is permissible in a malicious-prosecution claim. As we have stated,

[a] plaintiff in a malicious prosecution action is not limited to a recovery for attorney fees as he would be under Ind. Code § 34-52-1-1(b). In an action for malicious prosecution the plaintiff may recover “all damages which are the natural probable consequences of the malicious prosecution[.]” *James v. Picou*, 162 Ind. App. 134, 137, 318 N.E.2d 377, 379 (1974).

Crosson, 829 N.E.2d at 191 n.4. Moreover, while the Indiana General Recovery Rule bars double recovery of the same attorney’s fees, it specifically allows for a separate abuse-of-process claim to be brought on any part of the same facts used to recover pursuant to the Rule. *See* Ind. Code § 35-52-1-1(c). Put another way, while one may not recover the same attorney’s fees twice in an abuse-of-process proceeding, one may recover damages in addition to attorney’s fees.

(c) The award of fees under subsection (b) does not prevent a prevailing party from bringing an action against another party for abuse of process arising in any part of the same facts. However, the prevailing party may not recover the same attorney's fees twice.

Ind. Code § 34-52-1-1.

[20] At the very least, the record supports the award of attorney's fees on the basis that Oliver pursued Crystal in bad faith pursuant to Indiana Code subsection 34-52-1-1(b)(3), *i.e.*, that he had pursued her in order to secure her assistance in his suit against Jeremy, not because he had actually believed her to be liable for anything. "Bad faith is demonstrated where the party presenting the claim is affirmatively operating with furtive design or ill will." *Kitchell v. Franklin*, 26 N.E.3d 1050, 1057 (Ind. Ct. App. 2015), *trans. denied*. Oliver himself testified that "[he] was not actively pursuing [Crystal, he] was trying to gather information, assets that [he] could continue to pursue FLH [Mill] and Jeremy." Tr. Vol. II p. 145. Oliver's testimony is consistent with Crystal's testimony that he had offered her money in exchange for her assistance in going after Jeremy and his assets. This evidence supports a finding that Oliver was affirmatively operating with furtive design or ill will, which is sufficient to support the trial court's award of attorney's fees.

Cross-Appeal Issue

I. Appellate Attorney's Fees

[21] Crystal cross-appeals, requesting that we award her appellate attorney's fees pursuant to Ind. Appellate Rule 66(E), which provides that we may "assess

damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees.” An award of appellate attorney’s fees is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Manouse v. Manousogianakis*, 824 N.E.2d 756 (Ind. Ct. App. 2005); *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

[22] Although we acknowledge that the award of appellate attorney’s fees is rarely appropriate, we conclude that it is warranted in this case. As discussed, Oliver’s continued prosecution of Crystal long after a reasonable person would have abandoned it, along with his admission regarding his true motivations, readily supported the trial court’s entry of judgment in favor of Crystal and its award of attorney’s fees. In our view, forcing Crystal to defend this appeal is a continuation of the conduct that supported the trial court’s judgment, and we see no reason to treat it any differently. We remand for the limited purpose of determining an appropriate award of reasonable appellate attorney’s fees to Crystal.

[23] We affirm the judgment of the trial court and remand with instructions.

Altice, C.J., and Felix, J., concur.

ATTORNEYS FOR APPELLANT

Jeffrey D. Stemerick
Vivek R. Hadley
Taft Stettinius & Hollister LLP
Indianapolis, Indiana

Lucas Rowe
The Rowe Law Firm, LLC
Sullivan, Indiana

ATTORNEY FOR APPELLEES

Scott E. Racop
Racop Law Offices, P.C.
Terre Haute, Indiana