MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Petersons Home Improvements Inc.,

Appellant-Plaintiff,

v.

Michael L. Einterz, Jr.,

Appellee-Defendant.

November 23, 2021

Court of Appeals Case No. 21A-PL-946

Appeal from the Hamilton Superior Court

The Honorable J. Richard Campbell, Special Judge

Trial Court Cause No. 29D04-2002-PL-1285

Bailey, Judge.

Case Summary

[1] Petersons Home Improvements Inc. ("PHI") sued attorney Michael L. Einterz, Jr. ("Einterz"), alleging that Einterz committed malicious prosecution in his representation of a former employee of PHI (the "Employee"). The trial court entered summary judgment in favor of Einterz. PHI now appeals the entry of summary judgment. Moreover, on appeal, Einterz requests that we assess appellate damages against PHI "for its frivolous and bad faith pursuit of this appeal" and "retributive actions against" the Employee. Br. of Appellee at 36.

[2] We affirm summary judgment and decline to assess appellate damages.

Facts and Procedural History

[3] Einterz represented the Employee in an action against PHI for the alleged violation of the Indiana Wage Payment Act. Among the allegations was that PHI had improperly reduced the Employee's wages in an amount equal to PHI's share of federal payroll taxes. The Employee sought approximately $21,500 in the alleged underpayment of wages, the bulk of which—$17,400—was purportedly associated with the tax-related sums. The Employee also sought statutory damages and attorney's fees for the alleged underpayment.

[4] In defending against the claim for the $17,400, PHI focused on the following provision of the Internal Revenue Code: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for

refund or credit has been duly filed." 26 U.S.C. § 7422(a). PHI asserted that, with no indication that the Employee had pursued a claim for a tax refund or credit, the Employee could not seek the $17,400. According to the Employee, although the $17,400 corresponded to PHI's payroll tax liability, at bottom, the claim was a state-law claim of breach of contract. The Employee argued that there was an agreement between the Employee and PHI requiring PHI to pay 40% of the revenue the Employee generated less expenses "attributed solely to performance of . . . job functions." App. Vol. 2 at 70. The Employee asserted that PHI had "improperly labeled their own taxes as 'expenses,'" *id.* at 71, and that "[t]he inclusion of [PHI's] employer payroll taxes as an expense charged to [the Employee] was improper under the terms of the agreement struck by the parties and improper under federal tax law," *id.* at 80. The Employee further asserted that, "[b]ecause [PHI] withheld wages due to [the Employee] to pay for their own taxes, those wages are now due and owed" to the Employee. *Id.*

[5] The matter proceeded to a bench trial, with the trial court determining that, although the Employee was entitled to recover certain sums, the Employee was not entitled to the $17,400. At one point, the court noted that "there may have been ambiguity in the compensation agreement . . . as it relates to the issue of . . . taxes[.]" *Id.* at 31. The court also noted that any "claim for a violation of the Internal Revenue Code may be a claim under federal law, but it does not seem proper to bring such a claim as wages under" Indiana law. *Id.* at 32.

[6] PHI then filed a two-count complaint alleging malicious prosecution and abuse of process. Although PHI initially named the Employee as the sole defendant,

PHI later obtained the court's permission to substitute Einterz as the defendant. In its amended complaint, PHI alleged that "[t]he sole issue that propelled [the first action] to trial was [the] facially illegitimate tax claim that Einterz attached to the lawsuit and stubbornly clung to despite the total and obvious lack of merit associated with such a claim." *Id.* at 133. PHI further alleged that, "[a]s a result of [this] stubborn pursuit of the illegitimate tax claim, [PHI] was obliged to incur over $45,000 in attorneys' fees in order to defend against a lawsuit that was legitimately worth only a small fraction of that value." *Id.* at 134.

[7] As to malicious prosecution, PHI alleged that it was "impossible for probable cause to have existed that [PHI] was liable under the tax claim because that claim was totally illegitimate as a matter of law." *Id.* According to PHI, Einterz "willfully initiated and prosecuted an action against [PHI] based on the tax claim despite clear, black-letter law precluding such a claim." *Id.* PHI further alleged that Einterz brought the claim solely to "trap[] [PHI] into choosing between costly litigation and paying an extortionate settlement." *Id.*

[8] Before Einterz was substituted as a party for the Employee, the Employee filed a motion to dismiss, which was treated as a motion for summary judgment. PHI also filed a motion for summary judgment wherein PHI asserted that Einterz lacked probable cause to bring the claim regarding the reduction of wages related to payroll taxes because, although the claim was "dressed up" as a state-law wage claim, it was "premised on an alleged violation of the Internal Revenue Code[.]" *Id.* at 52. PHI argued that, based on the federal statute and authority from several federal circuit courts, "one may not pursue a state[-]law

claim against a private entity for alleged violations of the Internal Revenue Code." *Id.* at 50. PHI noted that it had cited the adverse authority in the prior action and the case had proceeded to trial despite Einterz having "the benefit of being fully on notice of [PHI's] arguments against [the] tax claim." *Id.* PHI also contended that there was "a legal impossibility . . . to have had probable cause to bring [the] claim because no such cause of action exists." *Id.* at 52.

[9] The trial court entered partial summary judgment in favor of Einterz on the claim of malicious prosecution. PHI then sought and obtained dismissal of the remaining claim of abuse of process, so that the judgment was a final judgment.

[10] PHI now appeals.

Discussion and Decision

Summary Judgment

Standard of Review

[11] When reviewing the grant or denial of summary judgment, "our well-settled standard is the same as it is for the trial court[.]" *Stafford v. Szymanowski*, 31 N.E.3d 959, 961 (Ind. 2015). That is, summary judgment is appropriate only if "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). "We construe all evidence in favor of and resolve all doubts as to the existence of a material issue in favor of the non-moving party." *Stafford*, 31 N.E.3d at 961. Moreover, we review questions of

law de novo and "will reverse if the law has been incorrectly applied to the facts." *Markey v. Est. of Markey*, 38 N.E.3d 1003, 1006 (Ind. 2015) (quoting *Woodruff v. Ind. Fam. & Soc. Servs. Admin.*, 964 N.E.2d 784, 790 (Ind. 2012)). "Otherwise, we will affirm a grant of summary judgment upon any theory supported by evidence in the record." *Woodruff*, 964 N.E.2d at 790.

Analysis

[12] "The action of malicious prosecution, which was first developed as a remedy against the unjustified initiation of criminal proceedings, has undergone a slow process of extension into the field of the wrongful initiation of civil suits." *Wong v. Tabor*, 422 N.E.2d 1279, 1283 (Ind. Ct. App. 1981). Although this tort claim is now more broadly available, the claim is generally "not . . . favored in our legal system, and thus its requirements are construed strictly against the party bringing the action[.]" *Id.* Ultimately, to prevail on a claim of malicious prosecution, the plaintiff must prove that "(a) the defendant instituted, or caused to be instituted, a prosecution against the plaintiff; (b) the defendant acted maliciously in doing so; (c) the prosecution was instituted without probable cause; and (d) the prosecution terminated in the plaintiff's favor." *Id.*

[13] As to probable cause, where—as here—the claim is that an attorney committed malicious prosecution, "[m]ere negligence in asserting a claim is not sufficient to subject an attorney to liability for the bringing of suit." *Id.* at 1286. That is because "creat[ing] liability only for negligence . . . for the bringing of a weak case" would "destroy an attorney's efficacy as advocate of his client and his

value to the court, since only the rare attorney would have the courage to take other than the easy case." *Mirka v. Fairfield of Am., Inc.*, 627 N.E.2d 449, 452 (Ind. Ct. App. 1994), *trans. denied.* In *Wong*, this Court adopted a test for probable cause that involves both subjective and objective components, which are measured at the time the attorney instituted litigation. *See Wong*, 422 N.E.2d at 1287-88. That is, the attorney must have subjectively believed that the claim warranted litigation and that belief must have been reasonable. *Id.* The attorney's belief is unreasonable if "no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney[.]" *Id.* at 1288.

[14] As the Indiana Supreme Court has explained, "[i]n the abstract, probable cause is a pure question of law, but its existence in a given case is a mixed question of law and fact, when one or more of the elementary facts thereof relied upon is controverted." *Indianapolis Traction & Terminal Co. v. Henby*, 97 N.E. 313, 317 (Ind. 1912). Thus, "[r]esolving the question of the existence of probable cause . . . requires isolation of the factual and legal elements of probable cause. If the facts relied upon are uncontroverted, the question of probable cause is for the court." *Wong*, 422 N.E.2d at 1285 (affirming the trial court's decision to set aside a verdict in favor of the plaintiff on a claim of malicious prosecution, determining that "as a matter of law the evidence failed to establish [that the attorney] lack[ed] . . . probable cause to commence the action"). Moreover, "[t]he status of the law at the time the action was filed is a question of law." *Willsey v. Peoples Fed. Sav. & Loan Ass'n of E. Chicago*, 529 N.E.2d 1199, 1206

(Ind. Ct. App. 1988) (affirming summary judgment in favor of the defendant because, as a matter of law, the defendant "had probable cause"), *trans. denied*.

[15] In this case, PHI asserts that the trial court erred in granting summary judgment to Einterz. PHI also claims that it is entitled to partial summary judgment on the issue of probable cause. As to probable cause, PHI focuses only on whether it was objectively reasonable for Einterz to pursue the tax-related claim.[1]

[16] PHI focuses on the status of the law at the time Einterz pursued the litigation, directing us to the following provision of the Internal Revenue Code: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed." 26 U.S.C. § 7422(a). PHI also directs us to caselaw from federal circuit courts. PHI asserts that those cases unanimously indicate that, where a plaintiff files a state-law wage claim that relates to the employer's collection of payroll taxes, the provision of the Internal Revenue Code applies and the plaintiff must first file a refund claim with the Internal Revenue Service. *See, e.g.*, Br. of Appellant at 16-17 (discussing, among other cases, *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 360 (6th Cir. 2015)). In light of these authorities, PHI contends that "an attorney familiar with applicable law would know that his client was required to file a claim for refund of those taxes . . . as a condition precedent to litigation."

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[1] Because the issue of probable cause is dispositive, we do not address PHI's arguments as to any other issue.

Br. of Appellant at 17. PHI asserts that, rather than file such a claim, Einterz "ran directly to state court and shoehorned the tax claim into a state[-]law cause of action that provides for [statutory] damages and attorney fees." *Id.* at 16-17. According to PHI, "[a]s a matter of law, Einterz could not have had probable cause to bring a claim that was barred by clear and unequivocal law." *Id.* at 18.

[17] Based upon our review of the cited authorities, it appears that PHI had a viable defense to the Employee's claim to the $17,400. Critically, however, the federal cases interpreting and applying the Internal Revenue Code were not binding on the Indiana trial court. Moreover, there is no indication that the interaction between the Internal Revenue Code and the Indiana Wage Payment Act was well settled, especially where, as here, the claim was that reducing wages in an amount equivalent to payroll tax liability amounted to a breach of contract.

[18] "The vitality of our common law system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." *Wong*, 422 N.E.2d at 1288. Moreover, it is fundamental that litigants—even those with relatively weak claims—must have access to the courts. Were we to adopt PHI's position regarding the breadth of the tort of malicious prosecution, there would be a chilling effect. That is, litigants and their attorneys would fear pursuing a claim in Indiana whenever a similar claim had been adversely decided in another jurisdiction. *See id.* at 1286. As this Court observed in *Wong*, the public-policy concerns that favor open access to courts override the concerns underpinning the tort of malicious prosecution. *Id.* (noting that "the chilling effect that a broad rule of attorney liability would have upon the legal

system . . . appears to outweigh the value of the protection it would afford to those who might be deemed 'innocent' defendants"). Therefore, to adequately protect access to justice, "some innocent persons may suffer the publicity, expense and other burdens of defending ill-founded lawsuits." *Id.*; *cf. Willsey*, 529 N.E.2d at 1206 (noting that, where the law is unsettled in an area, the "fact that a party is ultimately proven wrong in his interpretation of the law . . . does not lead to the conclusion [that] the party had no probable cause to file suit.").[2]

[19] All in all, we conclude under the circumstances that, as a matter of law, it was objectively reasonable for Einterz to pursue the claim related to the $17,400 when the interplay between the Internal Revenue Code and tax-related wage claims had been resolved in only a handful of other jurisdictions that offered mere persuasive authority. We hold that the claim under the Indiana Wage Payment Act was not such that no competent and reasonable attorney familiar with the applicable law would consider that the claim was worthy of litigation.

[20] Having determined that it was objectively reasonable for Einterz to pursue the tax-related claim to the $17,400 and there being no contention that Einterz lacked a subjective belief that the claim warranted litigation, we conclude that probable cause existed to pursue the claim. Thus, because a lack of probable

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[2] Of course, Indiana law contains procedural tools "to provide aid against unduly protract[ed] litigation." *Wong*, 422 N.E.2d at 1290. Indeed, "[i]f a claim is without merit in the law, or is factually insufficient, our procedural rules" permit the filing of an early motion to dismiss or a motion for summary judgment, thereby "provid[ing] a basis for expediting the result and crystallizing any issue for appellate review." *Id.* at 1288.

cause is an essential element of a claim of malicious prosecution, we conclude that the trial court did not err in granting summary judgment to Einterz.

Damages

[21] According to Einterz, this case presents an "egregious example of the type of abuse that may be wrought upon a party by those motivated by retribution." Br. of Appellee at 31. Einterz asks that we exercise our discretion to assess "reasonable damages against [PHI] for its frivolous and bad faith pursuit of this appeal and its vindictive and retributive actions against" the Employee, and that we ultimately "remand this matter for execution." *Id.* at 36. Einterz directs us to Indiana Appellate Rule 66(E), which provides that this Court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith." This rule specifies that appellate damages "shall be in the Court's discretion and may include attorneys' fees." Ind. Appellate Rule 66(E).[3]

[22] Although we have the authority to assess appellate damages in appropriate cases, we nevertheless use "extreme restraint" in exercising this authority because of the potential "chilling effect upon the exercise of the right to appeal." *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987). Having reviewed the matter, we conclude that this is not an appropriate case for the rare award of damages under Appellate Rule 66(E). In so concluding, we note

[3] Einterz also refers to Indiana Code Section 34-52-1-1, which permits the trial court to award attorneys' fees in certain circumstances.

that assessing damages and remanding the case would only prolong litigation. *Cf.* Br. of Appellee at 35 (noting that the Employee and "Einterz . . . have pled for the end to this action"). All in all, we decline to assess appellate damages.

Conclusion

[23] The trial court did not err in granting summary judgment to Einterz on the claim of malicious prosecution. We decline to assess appellate damages.

[24] Affirmed.

Crone, J., and Pyle, J., concur.