**Rel: 01/08/2016**



# ALABAMA COURT OF CIVIL APPEALS

**OCTOBER TERM, 2015-2016**

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**2140939**

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**Fernessa McConico**

**v.**

**Eric Patterson and Brandon Falls**

**Appeal from Jefferson Circuit Court**
**(CV-14-904108)**

THOMPSON, Presiding Judge.

Fernessa McConico appeals from a judgment of the Jefferson Circuit Court ("the trial court") dismissing her action against Eric Patterson, the former mayor of the City of Leeds ("the city"), and Brandon Falls, the district attorney

for Jefferson County.[1] In her second amended complaint--the complaint that was before the trial court at the time the action was dismissed--McConico made the following assertions.

McConico had worked as a municipal-court magistrate for the city for approximately 10 years when, on August 10, 2008, she was placed on administrative leave while the financial records of the municipal court were audited. The audit, which McConico said had been commissioned by Patterson and conducted by an "unknown third party," concluded that $94,861.72 had been taken from the municipal court. McConico asserted that a second independent audit was conducted by Robert L. Jones of the "Alabama Public Accountants Office."[2] That audit, too, "presumably discovered" that $94,861.72 had been taken or "misappropriated" by McConico. On September 11, 2009, the city terminated McConico's employment.

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[1]At various times in this litigation, other people had been included as defendants in this action, but they were no longer involved in the case at the time the action was dismissed. Therefore, facts and allegations involving those other defendants will not be discussed in this opinion. Gary Clark was also a plaintiff in this action. Clark did not appeal from the judgment.

[2]The entity's correct name is the Alabama Department of Examiners of Public Accounts.

In her complaint, McConico stated that, in November 2009, she learned she was pregnant. On January 15, 2010, she said, she suffered a miscarriage approximately five months into the pregnancy.

McConico asserted that on January 7, 2010, a week before the miscarriage, she filed an action against the city alleging claims of wrongful termination and discrimination. On April 1, 2010, McConico said, Falls "charged and prosecuted" her for second-degree theft of property and "several other charges." On May 23, 2013, the complaint stated, all the criminal charges against McConico were dismissed by an assistant district attorney.

On September 30, 2014, McConico filed her initial complaint in this action. Ultimately, she alleged claims against Patterson and Falls of negligence/malice, wrongful death of her unborn child, malicious prosecution, libel/defamation, and conspiracy. Patterson and Falls each filed a motion to dismiss the action, arguing, among other things, that the claims against them were time-barred. On June 23, 2015, the trial court granted the motions to dismiss, finding that the claims, "with the possible exception of the malicious prosecution claim," were time-barred. The trial

court also dismissed the malicious-prosecution claim, stating that because a Jefferson County grand jury had indicted McConico, "[t]hat, in and of itself, defeat[ed McConico's] malicious prosecution claim." McConico timely filed a notice of appeal to the Alabama Supreme Court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

The standard that appellate courts use in reviewing a judgment dismissing an action based on the plaintiff's failure to state a claim for which relief can be granted, see Rule 12(b)(6), Ala. R. Civ. P., is well settled.

> "'In considering whether a complaint is sufficient to withstand a motion to dismiss under Rule 12(b)(6), Ala. R. Civ. P., a court "must accept the allegations of the complaint as true." Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002) (emphasis omitted). "'The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief.'" Smith v. National Sec. Ins. Co., 860 So. 2d 343, 345 (Ala. 2003) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)). In determining whether this is true, a court considers only whether the plaintiff may possibly prevail, not whether the plaintiff will ultimately prevail. Id. Put another way, "'a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" Id. (emphasis added).'"

Walter Energy, Inc. v. Audley Capital Advisors LLP, 176 So. 3d 821, 824-25 (Ala. 2015)(quoting Crosslin v. Health Care Auth. of Huntsville, 5 So. 3d 1193, 1195 (Ala. 2008)). Furthermore, a trial court's order of dismissal is afforded no presumption of correctness, and an appellate court reviews the sufficiency of the complaint de novo. DGB, LLC v. Hinds, 55 So. 3d 218, 223 (Ala. 2010) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)) ("'On appeal, a dismissal is not entitled to a presumption of correctness.'").

McConico first contends that the trial court erred in dismissing her claim of malicious prosecution because, she says, she was not given the opportunity to rebut the presumption of probable cause to prosecute created by the grand jury's indictment. The elements of a claim of malicious prosecution are: (1) that a judicial proceeding was initiated by the defendants, (2) that the judicial proceeding was instituted without probable cause, (3) that the judicial proceeding was instituted by the defendants maliciously, (4) that the judicial proceeding was terminated in favor of the plaintiff, and (5) that the plaintiff suffered damage as a proximate cause of the judicial proceeding. Eidson v. Olin

Corp., 527 So. 2d 1283, 1284 (Ala. 1988) (citing Smith v. Wendy's of the S., Inc., 503 So. 2d 843, 844 (Ala. 1987)).

In entering the judgment dismissing McConico's malicious-prosecution claim, the trial court properly noted that

> "such a claim must be predicated on a showing, inter alia, that the defendant initiated a prior action without probable cause. See, e.g., Delchamps, Inc. v. Bryant, 738 So. 2d 824, 831 (Ala. 1999). Here, we have an indictment against the plaintiff, endorsed by the foreman of a Jefferson County grand jury as a True Bill. That, in and of itself, defeats the plaintiff's malicious prosecution claim."

It is true that,

> "'[i]n malicious prosecution the general rule is that the finding of an indictment by a grand jury against one charged with crime is prima facie evidence of the existence of probable cause, and that the acquittal of a defendant upon the trial does not tend to show a want of probable cause for believing him guilty of the offense charged when the arrest [was] made or prosecution initiated....'"

Alabama Power Co. v. Neighbors, 402 So. 2d 958, 967 (Ala. 1981) (quoting Union Indem. Co. v. Webster, 218 Ala. 468, 478, 118 So. 794, 803 (1928)). However,

> "[t]his prima facie showing of the existence of probable cause created by an indictment by a grand jury can be overcome by a showing that the indictment was 'induced by fraud, subornation, suppression of testimony, or other like misconduct of the party seeking the indictment.' National Security Fire & Casualty Co. v. Bowen, 447 So. 2d 133, 140 (Ala. 1983)."

Smith, 503 So. 2d at 844.

In their respective briefs to this court, Patterson and Falls argue that the malicious-prosecution claim was due to be dismissed because, they say, McConico "failed to prove" Falls acted without probable cause or failed to provide "reasonable and competent evidence" to rebut the presumption of probable cause based upon a grand-jury indictment. The case cited in Patterson's brief for the latter proposition, Johnson v. Haynie, 414 So. 2d 946 (Ala. 1982), involved the appeal of a judgment entered on a jury verdict in favor of a plaintiff in a malicious-prosecution case. However, this appeal is from a judgment granting a motion to dismiss for failure to state a claim for which relief can be granted, and the quantum of proof necessary to sustain a jury verdict is irrelevant. Instead, we are required to view McConico's complaint most strongly in her favor, and dismissal of her malicious-prosecution claim would be proper only if it "appears beyond doubt" that she can prove no set of facts to support her claim that would entitle her to relief. Walter Energy, Inc., 176 So. 3d at 825. We note that the record indicates that the parties did not include any exhibits to their respective pleadings that might have converted the motions to dismiss to

motions for summary judgments. See Hoff v. Goyer, 160 So. 3d 768, 770 (Ala. Civ. App. 2014). At this stage of the litigation, McConico is not required to present any evidence to support her contentions. We consider only whether she could prove any set of circumstances that would entitle her to relief. Nance, 622 So. 2d at 299.

In her complaint, McConico alleged that Patterson and Falls "knew or should have known there was no misappropriated money and used the unlawful and malicious prosecution as an attempt to mete out summary punishment on the plaintiff," presumably because she had filed a civil action against the city alleging wrongful termination and discrimination. If she can prove that the grand-jury indictment was "'induced by fraud, subornation, suppression of testimony, or other like misconduct of the party seeking the indictment,'" Alabama Power Co., 402 So. 2d at 967, McConico can overcome the presumption that probable cause existed to prosecute her. She is entitled to an opportunity to overcome that presumption. Thus, we conclude that the trial court erred in dismissing McConico's claim for malicious prosecution under the facts of this case as they are alleged in McConico's complaint.

Because this court may affirm a judgment, or a portion of a judgment, that is correct for any reason, Boykin v. Magnolia Bay, Inc., 570 So. 2d 639, 640 (Ala. 1990), we also consider whether McConico's malicious-prosecution claim was barred by the applicable limitations period. In Barrett Mobile Home Transport, Inc. v. McGugin, 530 So. 2d 730, 733 (Ala. 1988), our supreme court wrote: "We hold that a malicious prosecution action does not accrue until the time for filing a notice of appeal in the underlying case has expired; and, if an appeal is taken, the action for malicious prosecution will not accrue until the appeal has been finally decided." In E.R.J. v. L.D.B., 702 So. 2d 151, 152 (Ala. Civ. App. 1997), this court affirmed a trial court's dismissal of E.R.J.'s claim of malicious prosecution. In doing so, we noted that the complaint in that case had been filed prematurely because E.R.J.'s appeal of the underlying criminal case was still pending in the Alabama Supreme Court and, therefore, the malicious-prosecution claim had not yet accrued.

In this case, the underlying criminal action pending against McConico was nol-prossed on May 23, 2013--the earliest possible date the malicious-prosecution claim would have accrued. E.R.J. and Barrett Mobile Home Transp., supra.

McConico filed her initial complaint on September 30, 2014. The statutory limitations period applicable to actions alleging malicious prosecution is two years. § 6-2-38(h), Ala. Code 1975. Because McConico filed her claim of malicious prosecution within two years of the earliest date the claim could have accrued, that claim cannot be time-barred and the judgment dismissing the claim cannot be affirmed on that basis.

McConico also contends that, under the doctrine of equitable tolling, her claims of negligence/malice, libel/defamation, and conspiracy were timely. In her brief to this court, McConico acknowledges that, pursuant to § 6-2-38(k) and (l), Ala. Code 1975, the limitations period for each of those claims expired two years after April 1, 2010, when the grand-jury returned its indictment against her. The initial complaint was not filed until September 2014, more than two years after the expiration of the applicable limitations period. Nonetheless, McConico argues, during the time the limitations period was running as to those claims, she was being prosecuted in criminal court, and the speed with which the criminal case proceeded and the results of the criminal case were beyond her control. Thus, McConico

contends, the doctrine of equitable tolling should be applied to the claims of negligence/malice, libel/defamation, and conspiracy.

In her brief to this court, McConico cites no authority to support her contention that the applicable statutes of limitations were tolled because the criminal case was being litigated while her time to file those claims was running. She also fails to provide us with any explanation as to why the criminal case would prevent her from moving forward with a civil action on the claims other than the malicious-prosecution claim.

> "It is the appellant's burden to refer this Court to legal authority that supports its argument. Rule 28(a)(10), Ala. R. App. P., requires that the argument in an appellant's brief include 'citations to the cases, statutes, [and] other authorities ... relied on.' Consistent with Rule 28, '[w]e have stated that it is not the function of this court to do a party's legal research.' Spradlin v. Spradlin, 601 So. 2d 76, 78 (Ala. 1992) (citing Henderson v. Alabama A & M University, 483 So. 2d 392, 392 (Ala. 1986) ('"Where an appellant fails to cite any authority, we may affirm, for it is neither our duty nor function to perform all the legal research for an appellant." Gibson v. Nix, 460 So. 2d 1346, 1347 (Ala. Civ. App. 1984).'))."

Board of Water & Sewer Comm'rs of City of Mobile v. Bill Harbert Constr. Co., 27 So. 3d 1223, 1254 (Ala. 2009).

McConico also argues that the statutory limitations period on her claims of negligence/malice, libel/defamation, and conspiracy should have been tolled pursuant to § 6-2-3, Ala. Code 1975, known as "the savings clause," because of what she says was Falls's fraudulent concealment that the underlying case against her should have been brought as a civil action and not as a criminal prosecution. We first note that § 41-5-22, Ala. Code 1975, the authority McConico relies on in support of her contention that criminal prosecution was inappropriate in her case, provides:

> "The Chief Examiner shall keep a docket in which shall be entered, in favor of the state, county or municipality, as the case may be, cases against persons who have not properly and lawfully accounted for all sums of money coming into their hands as public officers, agents or employees. If an amount found to be due the state, county or other governmental unit or agency as a result of an examination or audit is not settled upon demand by the examiner, the Chief Examiner shall immediately thereafter issue notice to the person in default and require him to appear on a day certain and show cause why the amount due should not be paid. If the defaulting officer fails to settle or to show just cause why the amount due should not be collected, the Chief Examiner shall certify such facts and the amount due the state to the Attorney General, and the Attorney General shall bring a civil action in the name of the State of Alabama against said officer and his bondsmen. If the amount due by said officer is in favor of the county or municipality, then the Chief Examiner shall certify to the district attorney of the circuit the amount or

> amounts so due, and such district attorney shall proceed to collect the same by a civil action against the officer and his bondsmen."

That statute, captioned "settlement of charges," governs the procedure to be followed when a government employee cannot account for all the money for which he or she is responsible and is required to repay the missing money. There is nothing in § 41-5-22 that prohibits the parallel criminal prosecution of an employee who may have engaged in illegal conduct. Thus, Falls could not have concealed a "fact" that is untrue or does not exist.

Furthermore, although it is true that § 6-2-3 equitably tolls the statute of limitations on tort claims when the defendant has fraudulently concealed from the plaintiff his or her cause of action, see DGB, LLC, 55 So. 3d at 224-26,

> "[t]o invoke the savings clause, the plaintiff may not rely on a mere generalized allegation that the defendant concealed the plaintiff's cause of action; rather, the plaintiff must state with sufficient particularity how the defendant prevented the plaintiff from discovering the true facts upon which the plaintiff's claim is based. DGB, 55 So. 3d at 227. A plaintiff 'must allege the time and circumstances of the discovery of the cause of action.' Id. at 226 (citing Angell v. Shannon, 455 So. 2d 823, 823-24 (Ala. 1984), and Papastefan v. B & L Constr. Co., 356 So. 2d 158, 160 (Ala. 1978)). 'The complaint must also allege the facts or circumstances by which the defendants concealed the cause of action or injury and what prevented the

> plaintiff from discovering the facts surrounding the injury.' Id. (citing Smith v. National Sec. Ins. Co., 860 So. 2d 343, 345, 347 (Ala. 2003), Lowe v. East End Mem'l Hosp. & Health Ctrs., 477 So. 2d 339, 341-42 (Ala. 1985), Miller v. Mobile Cnty. Bd. of Health, 409 So. 2d 420, 422 (Ala. 1981), and Amason v. First State Bank of Lineville, 369 So. 2d 547, 550 (Ala. 1979))."

Dodd v. Consolidated Forest Prods., LLC, [Ms. 2140506, Aug. 21, 2015] ___ So. 3d ___, ___ (Ala. Civ. App. 2015). After reviewing McConico's complaint, we conclude that she did not sufficiently allege facts that would indicate that either Falls or Patterson concealed from her the causes of action of negligence/malice, libel/defamation, or conspiracy, and she did not allege any facts or circumstances regarding what prevented her from "discovering" those claims. Id. Therefore, the trial court did not err in refusing to apply the doctrine of equitable tolling to those claims and in dismissing them as time-barred.

Finally, McConico contends that the fetus that she miscarried was a child who, pursuant to § 6-2-8, Ala. Code 1975, was entitled to the suspension of the two-year limitations period for asserting the wrongful-death claim "until the relief of disability or within nineteen years." Under § 6-2-8(a), a person younger than 19 years of age is

allowed 3 years (or the period allowed by law for the commencement of an action if it be less than 3 years) after reaching the age of majority to commence or defend a civil action. We find this issue to be without merit.

In Cofer v. Ensor, 473 So. 2d 984, 993 (Ala. 1985), our supreme court held that "the two-year period fixed by § 6-5-410 [, Ala. Code 1975, the wrongful-death statute,] is a statute of creation, and, therefore governs all suits for wrongful death, whether the death is that of a minor or an adult and whether the plaintiff is an adult, a minor, or a representative." (Some emphasis added.)[3] In her complaint, McConico avers that she miscarried the fetus "on or about January 15, 2010." Therefore, she had until January 2012 to file her claim of wrongful-death in connection with the death of the fetus. The initial complaint alleging a claim of wrongful death was not filed until September 30, 2014, more than two years after the limitations period had expired as to the wrongful-death claim. Accordingly, the trial court

[3]See Cofer, 473 So. 2d at 987-91 for a discussion of the distinction between a "true" statute of limitations and a statute of creation, that is, a statute that creates a new right of action with an express restriction on a time within which an action may be brought to enforce the right.

properly dismissed McConico's claim of wrongful death on the ground that it was time-barred.

For the reasons set forth above, that portion of the judgment dismissing McConico's claim of malicious prosecution is reversed, and the cause is remanded for further proceedings. In reversing the judgment as to that claim, we are not expressing an opinion as to whether McConico should prevail on the malicious-prosecution claim, we hold only that the claim was improperly dismissed at this stage of the litigation. The remainder of the judgment, in which the claims of negligence/malice, libel/defamation, conspiracy, and wrongful death are dismissed, is affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Pittman, Thomas, Moore, and Donaldson, JJ., concur.