2012 IL App (1st) 112243-U

FIRST DIVISION
September 24, 2012

No. 1-11-2243

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ERIC HUANG,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 08 L 13445
	)	
CNA FINANCIAL CORPORATION,	)	Honorable
	)	Lynn M. Egan,
Defendant-Appellee.	)	Judge Presiding.

O R D E R

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

Held: Circuit court's orders granting defendant's motions to dismiss and motion for summary judgment affirmed, where: (1) plaintiff's defamation claim was waived for failure to replead it in amended complaint; (2) plaintiff's challenge to dismissal of other claims in amended complaint were based upon evidence not appearing therein; and (3) summary judgment was properly granted on malicious prosecution claim where defendant had probable cause to initiate criminal trespass proceedings. However, circuit court's order taxing costs to plaintiff is reversed in part where the order awarded defendant costs that were not statutorily authorized.

¶ 1 Plaintiff-appellant, Eric Huang, filed the instant lawsuit against his former employer,

defendant-appellant CNA Casualty Company (CNA),[1] seeking to recover damages for malicious prosecution, defamation, false imprisonment, false arrest, and intentional and negligent infliction of emotional distress. Each individual claim was premised upon the circumstances surrounding CNA's termination of plaintiff's employment. The circuit court granted CNA's motion for summary judgment on the malicious prosecution claim, motions to dismiss all of plaintiff's remaining causes of action, and motion to tax costs to plaintiff. Plaintiff has appealed from those rulings and, for the following reasons, we affirm in part and reverse in part.

¶ 2 I. BACKGROUND

¶ 3 On December 4, 2008, plaintiff filed his initial complaint against CNA. Plaintiff generally asserted that his complaint was "an action for damages and other relief against CNA arising out of its initiation of criminal charges against HUANG." More specifically, the complaint alleged that on December 6, 2007, plaintiff was terminated from his position at CNA. While plaintiff requested that he be escorted back to his work area to retrieve his personal belongings after his termination, CNA refused this request and its security personnel "held HUANG against his will and threatened to physically remove him from the premises without any of his belongings." CNA personnel also refused to allow plaintiff to use his personal cell phone.

¶ 4 Thereafter, CNA contacted Chicago police and made a complaint against plaintiff for criminal trespass. Police officers soon arrived, arrested plaintiff, placed him in handcuffs, and escorted plaintiff out of the building in front of his coworkers. Plaintiff was charged with criminal trespass based upon a written complaint made by CNA. However, the criminal proceedings against

[1] CNA has asserted, both in the circuit court and before this court, that it was incorrectly sued as "CNA Financial Corporation."

plaintiff were subsequently dismissed on January 30, 2008.

¶ 5 In his complaint, plaintiff alleged that the actions of CNA in holding him against his will, providing false information to police to support the allegedly improper criminal proceedings, and participating in his prosecution caused plaintiff to "suffer emotional distress, physical pain and suffering, lost future income, and other damages to be proved at trial as a result of his discharge, arrest, imprisonment and criminal prosecution against him." The complaint further alleged that the allegations supported claims for malicious prosecution, defamation, false imprisonment, false arrest, and intentional and negligent infliction of emotional distress.

¶ 6 CNA filed a motion to dismiss plaintiff's complaint for its failure to allege sufficient facts to properly plead any of his causes of action pursuant to section 2-615 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615 (West 2008). The motion was briefed by both parties, and the circuit court granted CNA's motion to dismiss, without prejudice, on May 18, 2009.

¶ 7 Plaintiff, thereafter, filed his first-amended complaint, which notably did not contain either a renewed claim for defamation, or a reference to the defamation claim contained in plaintiff's initial complaint. Instead, the amended complaint contained additional factual assertions in support of plaintiff's other claims. For example, plaintiff's complaint now also alleged that CNA signed a criminal complaint against plaintiff before he was arrested, and did so despite knowing that he had not committed the offense of trespassing. Following his arrest, plaintiff spent several hours at the police station against his will and was forced to hire a defense attorney.

¶ 8 It was only after CNA realized "it did not have probable cause to press criminal charges" against plaintiff and requested the charges be dismissed, that plaintiff appeared in court for the initial hearing on the criminal charge. No representative from CNA appeared in court, nor did any of the

arresting officers. Pursuant to a request made by the State, the charge against plaintiff was stricken with leave to reinstate. Plaintiff made a demand for a trial, and no effort was ever made to reinstate the criminal charge against plaintiff. Finally, plaintiff's amended complaint asserted that the factual assertions contained therein fully supported his claims for malicious prosecution, false imprisonment, false arrest, and intentional and negligent infliction of emotional distress.

¶ 9 In response to plaintiff's amended complaint, CNA filed another motion to dismiss under section 2-615 of the Code. CNA sought to have the amended complaint dismissed on the basis that it contained allegations that were "vague, conclusory, and nonsensical," and plaintiff could not "avoid the most important fact concerning this alleged dispute–he refused to leave CNA's property after being terminated from his employment and therefore was not lawfully on CNA's premises." Moreover, CNA contended the individual claims in plaintiff's amended complaint should be dismissed because the complaint did not sufficiently allege: (1) CNA did not have probable cause to suspect plaintiff of trespass, or that the criminal proceedings were terminated in a manner indicative of plaintiff's innocence, in support of the malicious prosecution claim; (2) CNA actually restrained plaintiff in any way or acted unreasonably, outrageously, or outside the bounds of decency, in support of the claims for false imprisonment, false arrest, and intentional infliction of emotional distress; and (3) CNA had a duty not to bring false charges against plaintiff in support of the claim for negligent infliction of emotional distress.

¶ 10 The motion to dismiss the amended complaint was briefed by both parties and set for hearing on December 16, 2009. Although it is not contained in the record on appeal, the appendix to plaintiff's initial brief on appeal contains a copy of a written order entered on that date. In that order, the circuit court granted the motion to dismiss as to plaintiff's claims for false imprisonment, false

arrest, and intentional and negligent infliction of emotional distress, but did so without prejudice and with leave to replead on or before January 15, 2010. CNA's motion was denied with respect to the claim for malicious prosecution.

¶ 11 Plaintiff did not avail himself of the opportunity to replead the amended claims that had been dismissed. Instead, CNA filed its answer and affirmative defenses to plaintiff's malicious prosecution claim and the parties engaged in written and oral discovery. CNA then filed a motion for summary judgment as to the malicious prosecution claim on May 3, 2011. After the motion for summary judgement was fully briefed, it was granted in an order entered on July 11, 2011, with the circuit court "specifically finding no genuine issue of material fact about the trespass prosecution not being terminated in plaintiff's failure [*sic*]; no issue of fact that defendant did not lack probable cause for instituting the criminal proceeding against plaintiff and no issue of fact suggesting malice by defendant."

¶ 12 Thereafter, the parties engaged in a flurry of activity. On July 19, 2011, plaintiff's counsel filed a motion to withdraw. On August 3, 2011, plaintiff–acting *pro se*–made two filings: (1) a notice of appeal as to the circuit court's ruling on the motion to dismiss portions of the amended complaint and the ruling on CNA's summary judgment motion; and (2) a motion to reconsider and vacate those same two rulings. In the motion to reconsider, plaintiff generally alleged that evidence obtained through recent discovery in this case and in plaintiff's separate federal employment discrimination lawsuit against CNA materially contradicted some of the statements made by CNA employees in their depositions. Plaintiff also alleged that CNA had "coerce[d] a [p]olice [o]fficer witness," used perjured statements in connection with the motion for summary judgment, and failed to timely disclose its "close financial relationship with City of Chicago and political connection with

City of Chicago and its [p]olice [d]epartment." In light of these allegations, plaintiff's motion asked the circuit court to "review additional documents, pre-trial deposition[s] and a[r]guments set forth below. With all due respect[], Plaintiff further requests that the order to dismiss (December 16, 2009) and subsequent summary judgment (July 11, 2011) be vacated, and that a trial date in this case be set."

¶ 13 The next day, CNA filed a motion for sanctions and a motion to tax certain of its costs to plaintiff. While CNA subsequently withdrew its motion for sanctions, the circuit court did ultimately grant CNA's motion to tax costs to plaintiff [2] and the motion to withdraw filed by plaintiff's counsel. Subsequently, the circuit court denied plaintiff's motion to reconsider on November 11, 2011, and plaintiff filed a second notice of appeal on November 18, 2011. Therein, plaintiff indicated he was "[j]oining [his] [p]rior [a]ppeal" and, further, indicated plaintiff was seeking to appeal from the circuit court's orders: (1) dismissing portions of his amended complaint; (2) granting CNA summary judgment on the malicious prosecution claim; (3) taxing certain of CNA's costs to plaintiff; and (4) denying plaintiff's motion to reconsider.

¶ 14 II. ANALYSIS

¶ 15 As noted above, plaintiff raises a number of issues on appeal. While we affirm in part and reverse in part, we also find that only some of these issues may actually be considered on the merits.

¶ 16 A. Preliminary Matters

¶ 17 Our analysis begins with a consideration of certain preliminary matters.

¶ 18 1. Jurisdiction

[2] This motion was only granted in part, with the circuit court rejecting CNA's claim for the recovery of any of its attorney fees.

¶ 19 First, this court has a duty to *sua sponte* determine whether we have jurisdiction to decide the issues presented. *Cangemi v. Advocate South Suburban Hosp.*, 364 Ill. App. 3d 446, 453 (2006).

¶ 20 We initially note, plaintiff's claims for defamation, false imprisonment, false arrest, and intentional and negligent infliction of emotional distress were dismissed without prejudice and with leave to replead, and those dismissals were later affirmed when the circuit court denied plaintiffs motion to reconsider. "Normally an order striking or dismissing a complaint is not final and therefore not appealable unless its language indicates the litigation is terminated and the plaintiff will not be permitted to replead. [Citation.] Even if a plaintiff subsequently elects to stand on his or her complaint, an order striking or dismissing a complaint is not final until the trial court enters an order dismissing the suit. [Citation.]" *Cole v. Hoogendoorn, Talbot, Davids, Godfrey and Milligan*, 325 Ill. App. 3d 1152, 1153-54 (2001).

¶ 21 While the original dismissal of these claims, therefore, did not result in a final appealable order, we find that the circuit court's order denying plaintiff's motion to reconsider satisfies the requirement of a final order dismissing this case. "A final order or judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely the rights of the parties to the litigation." *Hartford Fire Ins. Co. v. Whitehall Convalescent and Nursing Home, Inc.*, 321 Ill. App. 3d 879, 885 (2001). Moreover, "[t]he finality of an order is determined by an examination of the substance as opposed to the form of that order." *Cole*, 325 Ill. App. 3d at 1153.

¶ 22 When the circuit court denied plaintiff's motion to reconsider its prior dismissal of these claims, as well as the summary judgment granted to CNA on the malicious prosecution claim, there were no other claims or issues left for the circuit court to determine. Plaintiff's motion to reconsider

did not request leave to replead, and the circuit court's order denying that motion did not indicate in any way that leave to replead was granted. The order also struck a future "ruling date," leaving nothing scheduled on the court's calendar with respect to this matter. Under these circumstances, we find that the denial of plaintiff's motion to reconsider affirmed the circuit court's prior rulings, fixed the rights of the parties to this suit, resolved all of the remaining issues in the case, and represented a final order from which plaintiff could properly take his appeal.

¶ 23 As we noted above, however, plaintiff actually filed two notices of appeal in this matter. The first notice of appeal was filed on August 3, 2011 and sought review of the circuit court's orders dismissing portions of the amended complaint and granting CNA summary judgment on the malicious prosecution claim. On the same day, plaintiff also filed a motion to reconsider, asking the circuit court to vacate these same rulings. Because plaintiff filed a timely motion to reconsider, however, the effectiveness of his first notice of appeal was suspended until that motion was finally resolved pursuant to Illinois Supreme Court Rule 303(a)(2). Ill. S. Ct. R. 303 (a)(2) (eff. June 4, 2008).

¶ 24 Moreover, plaintiff's second notice of appeal was filed on November 18, 2011, and in addition to seeking review of the orders identified in the initial notice of appeal, also sought review of the orders taxing certain of CNA's costs to plaintiff and denying plaintiff's motion to reconsider. Because that notice of appeal was timely filed within 30 days of the circuit court's November 8, 2011, order denying plaintiff's motion to reconsider–the final judgment resolving the last claims still pending below–this court has jurisdiction over all of the claims plaintiff has raised on appeal pursuant to Rule 303(a)(1). Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). See also, *People ex rel. Alvarez v. Price*, 408 Ill. App. 3d 457, 465 (2011) ("In Illinois, a court of review has jurisdiction to

review an interlocutory order that constitutes a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken.").

¶ 25 2. Incomplete Record

¶ 26 Next, we note that one of the orders plaintiff has appealed from is not contained in the record on appeal. Specifically, the record does not contain the December 16, 2009, order in which the circuit court granted the motion to dismiss as to plaintiff's amended claims for false imprisonment, false arrest, and intentional and negligent infliction of emotional distress with leave to replead, and denied the motion to dismiss with respect to the claim for malicious prosecution. That order is only reproduced as an exhibit in the appendix to plaintiff's initial brief on appeal.

¶ 27 It is generally understood plaintiff, as the appellant, has the burden to present a sufficiently complete record to support his claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). However, an incomplete record does not preclude a reviewing court from determining whether a circuit court's findings or rulings are correct where that determination can be made from the incomplete record that is actually presented. *In re Dominique W.*, 347 Ill. App. 3d 557, 564 (2004).

¶ 28 Here, there are numerous references to the content of the circuit court's December 16, 2009, order in the record. The order is discussed and described repeatedly in subsequent filings–by both parties–in both the circuit court and in this court. Neither party disputes the content of that order. Under these circumstances, we do not find our review to be hampered in any way because the order itself is not contained in the record on appeal.

¶ 29 B. Motions to Dismiss

¶ 30 However, the fact that we have jurisdiction over plaintiff's appeal and the record is sufficiently complete does not mean that all of plaintiff's claims have been properly preserved for

appellate review. We find plaintiff has waived any right to appellate review of the dismissal of his claims for defamation, false imprisonment, false arrest, and intentional and negligent infliction of emotional distress.

¶ 31 These claims were all originally dismissed on May 18, 2009, without prejudice, when the circuit court granted CNA's motion to dismiss plaintiff's initial complaint. In response to this ruling, plaintiff filed an amended complaint which did not contain either a renewed claim for defamation, or any reference to the defamation claim contained in the initial complaint. As this court has recently stated:

> "It is well established that in Illinois, a party who files an amended pleading waives any objections to the trial court's ruling on prior complaints. [Citation.] The supreme court held in *Foxcroft*, ' "[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier proceeding ceases to be part of the record for most purposes, being in effect abandoned and withdrawn." ' [Citation.] The court further stated that '[t]here are significant policy considerations which favor adherence to this general rule. In particular is the interest in the efficient and orderly administration of justice. It is expected that a cause will proceed to trial on the claims set forth in the final amended complaint.' [Citation.] It then concluded that 'we perceive no undue burden in requiring a party to incorporate in its final pleading all allegations which it desires to preserve for trial or review.' [Citation.]". *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶ 29 (quoting *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983)).

Thus, because plaintiff neither referred to nor adopted his prior claim for defamation in his amended complaint, the dismissal of that claim has not been properly preserved for review. See also,

Bonhomme v. St. James, 2012 IL 112393, ¶ 31 (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)) (noting that under such circumstances, a plaintiff's challenge to the dismissal of prior claims " 'may be at once eliminated from the appeal.' ").

¶ 32 Moreover, plaintiff's claims for false imprisonment, false arrest, and intentional and negligent infliction of emotional distress were also dismissed–again without prejudice and with leave to replead–on December 16, 2009, when the circuit court granted CNA's motion to dismiss plaintiff's amended complaint. Plaintiff did not file a second amended complaint following this ruling, nor did he ever seek leave to do so. Instead, in both his motion to reconsider and in his briefs on appeal, plaintiff seeks to have the dismissal of these claims vacated and the matter set for trial on the basis of evidence subsequently obtained via discovery in this case and in his separate employment discrimination suit against CNA.

¶ 33 This argument is clearly improper, as our supreme court recognized in the case of *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997). In that case, the plaintiffs argued that they properly pled a claim for "unspecified property damage" because "subsequent discovery has produced and will continue to produce evidence" to support that claim. *Id*. at 202. Our supreme court found:

> "Of course, this argument lacks merit. This was a section 2-615 motion to dismiss. The motion attacks only the legal sufficiency of the complaint. The only matters for the court to consider in ruling on the motion are the allegations of the pleadings themselves, rather than the underlying facts. Thus, the court may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings, or other evidence in ruling on a section 2-615 motion. [Citations.]" *Id*. at 203.

¶ 34 Similarly, it is not proper for plaintiff to support his challenge to the circuit court's dismissal of the claims in his amended complaint with citation to evidence and allegations that were not actually contained in that pleading. Such allegations and evidence are simply irrelevant to the question of whether the circuit court properly dismissed plaintiff's amended complaint–*as it was actually pled*–pursuant to section 2-615 of the Code.[3]

¶ 35 Moreover, plaintiff has otherwise made no effort to challenge the propriety of the circuit court's dismissal of the claims in his amended complaint as they were actually pled. Supreme Court Rule 341(h)(7) (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)), provides parties waive any points not argued on appeal. Moreover, a "reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error [citation]." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). In light of plaintiff's failure to support his challenge to the dismissal of his claims with any relevant argument or authority, we find defendant has waived any such challenge, and we will not further address the circuit court's dismissal of these claims on appeal.

¶ 36 C. Summary Judgment

¶ 37 We now turn to plaintiff's challenge to the grant of summary judgment to CNA on the claim

[3] We reiterate plaintiff has *never* sought leave to replead the dismissed claims to incorporate these new allegations and evidence. Rather, he has contended the "trial court erred in dismissing [p]laintiff's counts prematurely before facts supporting [p]laintiff's claims were discovered." Indeed, and as discussed above, the fact that plaintiff has clearly elected to stand on these claims *as pled*–despite their having been originally dismissed without prejudice and with leave to replead–is a critical fact establishing our jurisdiction over this appeal.

of malicious prosecution.

¶ 38 Summary judgment is properly granted where the pleadings, depositions, and admissions on file, together with any affidavits, indicate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). Although a drastic means of disposing of litigation, summary judgment is, nonetheless, an appropriate measure to expeditiously dispose of a suit when the moving party's right to the judgment is clear and free from doubt. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009). The court must examine the evidentiary matter in a light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001)), and construe the evidence strictly against the movant and liberally in favor of the nonmovant. *Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995). When reviewing an order granting summary judgment, "we conduct a *de novo* review of the evidence in the record." *Id.*

¶ 39 "To establish malicious prosecution, a plaintiff must show: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) that the proceeding terminated in favor of the plaintiff; (3) the absence of probable cause; (4) malice; and (5) damages. [Citation.] The failure to establish any one of the foregoing elements precludes recovery for malicious prosecution. [Citation.]" *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶ 99. "If it appears that there was probable cause to institute the proceedings, such fact alone constitutes an absolute bar to an action for malicious prosecution." *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 73 (2003); see also *Joiner v. Benton Community Bank*, 82 Ill. 2d 40, 45 (1980) ("If the absence of one or more of these essential elements has been established to the point that it may fairly be said that no genuine issue of fact as to its absence exists, summary judgment was appropriate.").

¶ 40 "Probable cause has been defined in a malicious prosecution case involving criminal proceedings as a state of facts that would lead a person of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the person arrested committed the offense charged. [Citations.] It is the state of mind of the one commencing the prosecution, and not the actual facts of the case or the guilt or innocence of the accused, which is at issue. [Citations.]" *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 348 (2000). Moreover, a "mistake or error that is not grossly negligent will not affect the question of probable cause in an action for malicious prosecution when there is an honest belief by the complainant that the accused is probably guilty of the offense." *Johnson*, 341 Ill. App. 3d at 72.

¶ 41 The record reflects plaintiff was arrested and charged with violation of section 21-3 of the Code of Criminal Procedure of 1961 (Criminal Code). 720 ILCS 5/21-3 (West 2006). That section of the Criminal Code provides, in relevant part, that criminal trespass to real property is committed where a person "remains upon the land of another, after receiving notice from the owner or occupant to depart." 720 ILCS 5/21-3(a)(3) (West 2006).

¶ 42 Here, the evidence produced below–viewed in the light most favorable to plaintiff–clearly established that CNA had an honest belief or strong suspicion plaintiff had committed criminal trespass. Ms. Tina Nagle, a human resources employee of CNA, testified in her deposition that she was involved in plaintiff's termination. Following his termination, it was made clear to plaintiff that Mr. Michael Gibbs, another CNA employee, could retrieve whatever personal effects plaintiff might immediately need, and the remainder would be shipped to him. Plaintiff refused this offer, insisting that he be allowed to retrieve his belongings himself. It was only after plaintiff continued to make this demand that CNA security and, ultimately, the police were involved in the situation and plaintiff

was arrested.

¶ 43 Mr. Gibbs, plaintiff's supervisor, was also involved in plaintiff's termination. In general, Mr. Gibbs' deposition testimony reiterated Ms. Nagle's testimony and, further, indicated plaintiff was given several opportunities to leave the building and refused to do so. Additionally, Mr. Gibbs testified that prior to calling the police, CNA security personnel told plaintiff that he would be considered to be trespassing if he continued to refuse to leave. Mr. Gibbs also testified that the arresting police officers gave plaintiff the opportunity to leave the building before they arrested him, and plaintiff again refused.

¶ 44 None of the evidence provided or cited by plaintiff–either in response to the motion for summary judgment, in his motion to reconsider or, on appeal– materially contradicts this evidence. Indeed, plaintiff *himself* testified in his deposition that following his termination, he was asked to leave the building by Mr. Gibbs or Ms. Nagle. He also testified that he wanted to retrieve his personal belongings before he left, but that CNA would not permit him to do so and he, therefore, understood that "the only way [*sic*] they allow me to do is to exit the building with what I have and that's it." Ultimately, plaintiff agreed with the following characterization of the situation offered by CNA's counsel: "You didn't intend to stay, but you didn't intend to leave without your stuff; right?"

¶ 45 On this record, it is clear that–at a *minimum*–CNA had an honest belief or strong suspicion plaintiff had "remain[ed] upon the land of another, after receiving notice from the owner or occupant to depart." 720 ILCS 5/21-3(a)(3) (West 2006). As such, the circuit court correctly found there was "no issue of fact that defendant did not lack probable cause for instituting the criminal proceeding against plaintiff." While plaintiff makes a host of other arguments and argues a number of other issues of material fact exist with respect to his claim for malicious prosecution, none of these

arguments alter our conclusion that CNA had probable cause in this matter. Moreover, this finding alone is sufficient to affirm the circuit court's granting of summary judgment to CNA on this claim. We reiterate, "if it appears that there was probable cause to institute the proceedings, such fact alone constitutes an absolute bar to an action for malicious prosecution." *Johnson*, 341 Ill. App. 3d at 73.

¶ 46 D. Motion for Costs

¶ 47 Finally, we address plaintiff's challenge to the circuit court's order granting CNA's motion to tax certain costs to plaintiff.

¶ 48 "At common law, a successful litigant was not entitled to recover from his opponent the costs and expenses of the litigation. The allowance and recovery of costs is therefore entirely dependent on statutory authorization." *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 162 (1982). Thus, only those items designated by statute to be allowable can be taxed as costs. *Id*.

¶ 49 Section 5-109 of the Code provides, where a "judgment is entered against the plaintiff, then judgment shall be entered in favor of defendant to recover defendant's costs against the plaintiff." 735 ILCS 5/5-109 (West 2010). As this court recently recognized, section 5-109 does not define which costs are recoverable, but the supreme court has interpreted the same term in section 5-108 of the Code–which is section 5-109's companion section and deals with the recovery of costs by plaintiffs–"to mean 'court costs' such as filing fees, subpoena fees, and statutory witness fees." *Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 409 (2011) (quoting *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295, 302 (2003)). This interpretation has been applied to section 5-109 on at least two occasions. *Id*. at 409; *Burmac Metal Finishing Co. v. West Bend Mutual Insurance Co.*, 356 Ill. App. 3d 471, 485-86 (2005). We, similarly, do so here.

¶ 50 We also note that Illinois Supreme Court Rule 208(d) (Ill. S. Ct. R. 208(d) (eff. Oct. 1,

1975)) provides that deposition costs "may in the discretion of the trial court be taxed as costs." However, it has been determined that "the test for when the expense of a deposition is taxable as costs is its necessary use at trial." *Galowich*, 92 Ill. 2d at 167. Where a case is resolved before trial, such as upon a voluntary dismissal or a motion for summary judgment, deposition costs are not taxable under this rule because any such depositions "were not necessary for use at trial because there was no trial." *Premier Electrical Construction Co. v. Morse/Diesel, Inc.*, 257 Ill. App. 3d 445, 462 (1993).

¶ 51 Finally, we note that we review a circuit court's order on a petition for costs for an abuse of discretion. *Riley*, 408 Ill. App. 3d at 408.

¶ 52 Here, after disallowing defendant's request for attorney fees, the circuit court otherwise generally granted CNA's motion to tax plaintiff with certain costs. In part, CNA's motion sought to tax plaintiff with CNA's expenses for court filing fees and witness and subpoena fees. These costs were clearly authorized by section 5-109, and we find no abuse of discretion in that decision.

¶ 53 However, the circuit court also granted CNA's request to recover "duplication fees and production costs in the amount of $79.80 for costs associated with preparing filings and responses to discovery requests." These expenses were not the type of "court costs" authorized by section 5-109, however, and we find the circuit court, therefore, abused its discretion in granting CNA's request to tax them to plaintiff. See *Vicencio,* 204 Ill. 2d at 302 (distinguishing between "court costs" and "litigation costs," and finding that only the former were recoverable pursuant to section 5-108).

¶ 54 Moreover, CNA's motion for costs also sought to tax plaintiff with CNA's expenses with respect to the depositions taken in this case. This request was improper, however, as there was no

trial in this case. *Premier,* 257 Ill. App. 3d at 462.

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, we affirm the circuit court's rulings on CNA's motions to dismiss and its motion for summary judgment. However, while we affirm that portion of the circuit court's order granting CNA's motion to tax plaintiff with CNA's expenses for court filing fees and witness and subpoena fees, we vacate the remainder of that order.

¶ 57 Affirmed in part and reversed in part.