FIFTH DIVISION
December 5, 2014

No. 1-12-3601

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTOPHER BONDS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 L 07184
	)	
DETECTIVE EDWIN FIZER and THE CITY OF CHICAGO,	)	
	)	Honorable
	)	Thomas E. Flanagan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying plaintiff's motion for a judgment notwithstanding the verdict because the evidence on all elements of malicious prosecution did not overwhelmingly favor plaintiff and plaintiff forfeited his arguments relating to his motion for a new trial because he failed to argue that the trial court erred in striking the motion as a prohibited successive posttrial motion.

¶ 2 Plaintiff Christopher Bonds filed a two-count complaint against defendants, Detective Edwin Fizer and the City of Chicago (the City), for malicious prosecution based on plaintiff's prosecution for aggravated battery of a senior citizen. Following a jury trial, the jury found in

favor of defendants, but in an answer to a special interrogatory found that Detective Fizer did not have probable cause to arrest plaintiff. The trial court entered judgment on the jury's verdict. Plaintiff filed a motion for judgment notwithstanding the verdict (JNOV), which the trial court denied. Plaintiff later filed a motion for a new trial. Defendants moved to strike the motion for new trial as improper, which the trial court granted.

¶ 3 Plaintiff appeals, arguing that: (1) the trial court erred in denying his motion for JNOV because the evidence, when viewed in light most favorable to defendants, overwhelmingly favored plaintiff; (2) the trial court erred in denying his motion for a new trial; and (3) the trial court erred in denying plaintiff's oral motion for default based on Detective Fizer's failure to file an answer to the complaint.

¶ 4 In June 2008, plaintiff was charged with the aggravated battery of a senior citizen under section 12-4.6 of the Criminal Code of 1961 (720 ILCS 5/12-4.6 (West 2008), now codified at 720 ILCS 5/12-3.05(d)(1) (West 2012)) related to an incident with his wife's 94 year old great aunt Suzie Smith on May 18, 2008. Smith died on October 6, 2008. The State subsequently nol-prossed the charge against plaintiff. In June 2010, plaintiff filed a three-count complaint against defendants alleging malicious prosecution, indemnification, and a state law claim of respondeat superior.

¶ 5 The following evidence was presented at the September 2012 jury trial.

¶ 6 In the spring of 2008, Suzie Smith was 94 years old. Smith was the great aunt of plaintiff's wife. Smith had been diagnosed with dementia, possible early stages of Alzheimer's. She moved in plaintiff's family's home with plaintiff, his wife, and their three children in March 2008.

¶ 7 Plaintiff testified that on May 18, 2008, Smith became agitated and started to swear. He took her to her room in her wheelchair. A short time later, Smith asked for something to drink. When plaintiff went to bring Smith a drink, he saw that she had wheeled into the hallway. Smith then yelled at plaintiff and struck him in his groin area. Smith continued to strike plaintiff and knocked his glasses off. He stated that he told her to calm down, took hold of her wrists, and placed her wrists in her lap. Plaintiff then dialed 911. His six-year-old daughter Sarah was the only witness to the incident.

¶ 8 Two police officers and two paramedics arrived at the house shortly after the 911 call. The officers spoke with plaintiff and Smith separately and the paramedics assessed Smith. No police report was filed and Smith was not transported to the hospital. The paramedics did not observe any injuries and their report indicated, "family dispute, no injuries." One of the police officers testified at trial that she did not observe any injuries and no crime was committed that day.

¶ 9 Stephanie Williams testified that she worked as Smith's caretaker. She stated that she knew plaintiff's family from church and they recommended she become certified to become a home caretaker. Williams stated that she spoke with Smith the day after the incident. She said Smith told her that plaintiff tried to kill her. Williams examined the area that Smith indicated she was injured and did not see any visible bruising or tenderness. Williams testified that she did not believe Smith's statements.

¶ 10 On May 21, 2008, Smith complained to plaintiff that she was feeling chest pain. Plaintiff testified that he called 911 and Smith was transported to Little Company of Mary Hospital via an ambulance. The emergency room doctor testified that Smith's dementia interfered with her

ability to diagnose Smith. The emergency room physician did not diagnose any physical harm to Smith, but opted to admit Smith because of her age and complaint of chest pain.

¶ 11 Dr. Amer Husseini testified that he is an attending cardiologist at Little Company of Mary Hospital. He examined Smith on May 22, 2008. His report stated he believed that Smith was "of excellent mental capacity for her age, although she has episodes of forgetfulness, but in [his] judgment she is able to give an adequate history [in] which she said that her niece's husband hit her on the chest on Sunday." Dr. Husseini also stated that Smith initially stopped at that point, but later she told him that plaintiff "tried to choke her, even tried to kill her." The doctor expressed doubt about the latest part of her statement, but he stated at trial that her dementia did not change his belief that her account was truthful because of his physical findings that were consistent with her statement.

¶ 12 Dr. Husseini testified that he examined Smith's chest and observed a trauma on her left upper chest wall. He stated, as in his report, that the area was "mildly swollen" and "very tender." Dr. Husseini admitted that he did not observe any bruising, but that did not affect his opinion. Dr. Husseini further testified that he did not have any doubt about Smith being hit in the chest, but only had doubt about whether Smith had been choked because he did not observe any physical injury. Dr. Husseini also said that while his report stated that an X-ray "showed no evidence of trauma," he should have said that the X-ray showed no evidence of fracture because an X-ray would not detect trauma. Smith's admission and discharge diagnosis from Dr. Husseini listed chest pain, chest trauma, and hypertension. Dr. Husseini's discharge report indicated that a social worker contacted the proper authorities. Officer Thomas Shannon interviewed Smith in the hospital and filed a police report.

¶ 13 After Smith's statement against plaintiff was referred to the police, Detective Fizer was assigned the case on May 30, 2008. Detective Fizer stated that he worked as a detective with the Chicago police department for 12 years and in May 2008, he specialized in handling elder abuse and domestic violence cases. He said that in this area the victims have been through a traumatic situation, requiring sensitivity, and sometimes in domestic violence cases, "sometimes people line up against the person that's making the complaint." Detective Fizer testified that he had never met plaintiff or Smith prior to being assigned to the case.

¶ 14 Detective Fizer reviewed the police report which described the incident that occurred on May 18, 2008, at approximately 4:30 p.m. between plaintiff and Smith. Detective Fizer stated the report said that plaintiff "went crazy and roughed her up." Detective Fizer investigated the report, focusing on aggravated battery of a senior citizen.

¶ 15 Detective Fizer interviewed Smith twice. The first meeting was on June 12, 2008, at Area 2. Detective Fizer testified that he spent time to ascertain Smith's veracity and lucidity. He stated that Smith was "very insistent" about what happened and about signing a complaint. He did not see what he considered "any mental incapacity." He explained that Smith gave consistent statements about the same thing on two occasions. Detective Fizer met with Smith a second time with assistant State's Attorney (ASA) Martha Kross present on June 28, 2008. He stated that Smith's statements remained the same. He also said that he wanted ASA Kross to observe Smith to judge whether Smith had any mental incapacity or lacked veracity.

¶ 16 Detective Fizer testified that he reached a probable cause determination after considering Smith's statements, Dr. Husseini's report, and what some of the outcry witnesses said. Detective Fizer spoke with Dr. Husseini over the telephone about Smith's statement and his reports. The outcry witnesses he considered were Smith's son Henry Smith and her niece Sarah Roach. He

also found it significant that Smith signed the complaint because often individuals will make allegations and then "back away" when it is time to sign. He considered Smith's dementia, but he believed her statement because she gave a consistent statement when she was asked, including to him, ASA Kross, and in her hospital reports.

¶ 17 Detective Fizer also considered the statement of plaintiff's six-year-old daughter Sarah, who witnessed the incident. ASA Kross interviewed Sarah with the detective and her mother present. During the interview, Sarah said that "she saw her dad choke Suzie Smith." Detective Fizer noted that Sarah then "made this spontaneous choking motion," which "surprised" him and ASA Kross. Both Detective Fizer and ASA Kross testified at trial as to this statement. At trial, Sarah denied that her father choked Smith.

¶ 18 Detective Fizer explained his reasoning for probable cause:

> "We put together statements from the doctor, you put together statements from the victim, the complaining witness, you put statements of medical reports to a doctor's diagnosis, you listen to the outcry witnesses, and you combine those things together, like I said, I didn't need much for probable cause. It's what a reasonable person would believe."

¶ 19 Detective Fizer admitted that he did not speak to Officer Shannon or the initial police officers and paramedics that came to the house on May 18, 2008. The responding officers did not file a police report and the focus of his investigation was narrow. He also did not speak with the emergency room physician for his investigation. When plaintiff arrived at the police station on June 28, 2008, Detective Fizer placed him under arrest and handcuffed one hand to a ring in

his office. He did not take a statement from plaintiff because plaintiff invoked his *Miranda* rights and could only communicate with plaintiff's attorney.

¶ 20 ASA Martha Kross testified that she was assigned to the felony review unit of the state's attorney's office in June 2008. She was called to Area 2 on June 28, 2008, to assess whether to file charges in the case. She reviewed the information from Detective Fizer and conducted a telephone interview of Dr. Husseini and in-person interviews of Smith, plaintiff's daughter, and outcry witnesses including Smith's son and niece and Smith's caretakers Williams and Phyllis Walker.

¶ 21 ASA Kross stated that she found Smith credible and lucid. She said that she asked Smith to relate the details of the incident to her and once Smith finished, ASA Kross asked her questions about different points in the statement. She then asked Smith to tell the incident again. ASA Kross testified that Smith "told the story the same each time and no matter how [she] asked the questions, the facts were the same." ASA Kross noted that people who are not lucid tell different details or versions.

¶ 22 She admitted that she did not speak with responding officers, paramedics or the emergency room physician because the events at the hospital were not part of the incident, which was the focus to determine whether to file charges. ASA Kross approved a felony charge of aggravated battery of a senior citizen, which ended her involvement in the case.

¶ 23 ASA Sherie DeDore testified that she worked with the seniors and persons with disabilities unit of the state's attorney's office. She was assigned the case in early July 2008. She stated that she was unable to attend the preliminary hearing, but asked another ASA to attend the hearing and have Smith testify. When she called to find out what happened that day, she was told the court entered a continuance and Smith did not testify.

¶ 24 ASA DeDore sent out subpoenas as part of discovery. She later learned that Smith passed away on October 6, 2008. She never began to prepare for trial due to Smith's death. ASA DeDore testified that she believed she had sufficient evidence to meet her burden of proof prior to Smith's death. After Smith died, she and her supervisor decided to dismiss the case because without Smith's testimony, which had not been preserved, the only witness to the incident was plaintiff's daughter, and she no longer felt she could prove the case beyond a reasonable doubt. The case was dismissed without prejudice on November 17, 2008.

¶ 25 Following deliberations, the jury returned a verdict in favor of defendants and against plaintiff. However, they answered "no" to the special interrogatory asking if Detective Fizer had probable cause to commence criminal proceedings against plaintiff on June 28, 2008. The trial court found that the jury's verdict was not irreconcilable with the general verdict and entered judgment on September 27, 2012. Plaintiff's attorney then orally moved for a JNOV instanter and later filed a memorandum in support of motion for a directing finding, for judgment notwithstanding the verdict, and to reconsider the denial of the motion for judgment notwithstanding the verdict on October 2, 2012.

¶ 26 On October 26, 2012, plaintiff filed a motion for a new trial. On November 1, 2012, defendants filed a motion to strike plaintiff's successive posttrial motion for a new trial. On November 2, 2012, the trial court denied plaintiff's motion for a JNOV. The trial court took the motion for a new trial and the motion to strike under advisement. On December 5, 2012, the trial court granted defendants' motion to strike "per 735 ILCS 5/2-1202."

¶ 27 This appeal followed.

¶ 28 On appeal, plaintiff argues that the trial court erred in denying his motion for a JNOV because the evidence overwhelmingly favored plaintiff.

¶ 29 "A motion for judgment notwithstanding the verdict should only be granted when the evidence and inferences, viewed in the light most favorable to the nonmoving party, 'so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Thornton v. Garcini*, 237 Ill. 2d 100, 107 (2010) (quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992)). "In ruling on a motion for a [JNOV], a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Maple*, 151 Ill. 2d at 453. " 'This is clearly a very difficult standard to meet, limiting the power of the circuit court to reverse a jury verdict to extreme situations only.' " *Velarde v. Illinois Central Railroad Co.*, 354 Ill. App. 3d 523, 537 (2004) (quoting *People ex rel. Department of Transportation v. Smith*, 258 Ill. App. 3d 710, 714 (1994)). "The court has no right to enter a [JNOV] if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple*, 151 Ill. 2d at 454. We review a trial court's ruling on a JNOV motion *de novo*. *Thornton*, 237 Ill. 2d at 107.

¶ 30 "A malicious prosecution action is brought to recover damages suffered by one against whom a suit has been filed maliciously and without probable cause." *Miller v. Rosenberg*, 196 Ill. 2d 50, 58 (2001). In order for plaintiff's motion for JNOV to succeed, evidence for all of the elements for malicious prosecution, when viewed in the light most favorable to defendants, must overwhelming favor him.

¶ 31 "To state a claim for malicious prosecution, a plaintiff must prove five elements: '(1) the commencement or continuation of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of

probable cause for such proceeding; (4) the presence of malice on the part of defendant; and (5) damages resulting to the plaintiff. *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 934 (1980).' " (Emphasis omitted.) *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 72 (2003), quoting *Illinois Nurses Association v. Board of Trustees of the University of Illinois*, 318 Ill. App. 3d 519, 533-34 (2000). If one of these elements is lacking, a plaintiff is barred from pursuing the claim of malicious prosecution. *Swick v. Liautaud*, 169 Ill. 2d 504, 512 (1996).

¶ 32 In this case, plaintiff submitted a special interrogatory asking the jury if Detective Fizer had probable cause to arrest him and the jury answered in the negative, finding that Detective Fizer lacked probable cause. However, defendants contend that plaintiff failed to satisfy two other elements at trial, which resulted in the verdict in favor of defendants. Specifically, defendants maintain that plaintiff failed to show that (1) the termination of the criminal proceeding in his favor; and (2) the presence of malice on the part of defendants.

¶ 33 We first consider whether the evidence presented overwhelmingly showed that the termination of the criminal proceedings was in plaintiff's favor. "In regard to the second element, a malicious prosecution action cannot be predicated on underlying criminal proceedings which were terminated in a manner not indicative of the innocence of the accused." *Swick*, 169 Ill. 2d at 512. "In a criminal context, a *nolle prosequi* 'is not a final disposition of a case but *** is a procedure which reverts the matter to the same condition which existed before the commencement of the prosecution.' " *Id*. at 512-13 (quoting *People v. Woolsey*, 139 Ill. 2d 157, 163 (1990)). "In the civil malicious prosecution context, the majority rule is that a criminal proceeding has been terminated in favor of the accused when a prosecutor formally abandons the proceeding via a *nolle prosequi*, unless the abandonment is for reasons not indicative of the innocence of the accused." *Id.* at 513 (citing Restatement (Second) of Torts §§ 659, 660, 661

(1977); *McKenney v. Jack Eckerd Co.*, 402 S.E.2d 887, 888 (S.C. 1991); *Wynne v. Rosen*, 464 N.E.2d 1348 (Mass. 1984)).

> "The abandonment of the proceedings is not indicative of the innocence of the accused when the *nolle prosequi* is the result of an agreement or compromise with the accused, misconduct on the part of the accused for the purpose of preventing trial, mercy requested or accepted by the accused, the institution of new criminal proceedings, or the impossibility or impracticability of bringing the accused to trial." *Id.* (citing Restatement (Second) of Torts §§ 660, 661 (1977)).

¶ 34 It is plaintiff's burden to prove a favorable termination of proceedings. *Id.* "Only when a plaintiff establishes that the *nolle prosequi* was entered for reasons consistent with his innocence does the plaintiff meet his burden of proof. The circumstances surrounding the abandonment of the criminal proceedings must compel an inference that there existed a lack of reasonable grounds to pursue the criminal prosecution." *Id.* at 513-14.

¶ 35 Here, defendants presented an exhibit of plaintiff's certified statement of conviction/disposition. This document indicated that a *nolle prosequi* was entered on November 17, 2008. At trial, ASA DeDore testified about her prosecution of the case and how the determination was reached to nol-pros the charge against plaintiff.

> "My office, that being myself, my supervisor and my bureau chief, Robert Egan, we were then the Public Interest Bureau, made a decision upon the death of Suzie Smith, who was the person assaulted by Mr. Bonds in this case, that we did not

> have sufficient evidence to go forward, that it was wrong to proceed, based on upon the testimony only of Mr. Bonds 6 year old daughter, that it would be inappropriate. That it might cause the child harm to have to testify against her father. Further, that having this child still at home with Mr. Bonds, that there was a good chance that her testimony would not be the same when the case went to trial. We didn't want to be in a position of putting someone to trial if we did not have sufficient evidence. And we all agreed that we had a legal and ethical obligation to not proceed on a prosecution where we did not at that moment have sufficient evidence to prove our case beyond a reasonable doubt."

¶ 36 ASA DeDore further stated that she was unable to preserve Smith's testimony prior to her death and the only testimony regarding Smith's outcry would have possibly been from medical doctors in the course of treatment under certain hearsay exceptions. However, she said that her "thought process was that [she] would have liked to have prosecuted someone who would choke and elbow a 95 year old woman." Finally, ASA DeDore specifically testified that "[t]he only thing that lead [*sic*] to a dismissal was the death of Suzie Smith." She stated apart from Smith's death and the fact that the only witness was plaintiff's daughter, "there was no other reason that [she] terminated [the] case other than those two factors."

¶ 37 ASA DeDore also clarified that plaintiff was not acquitted in this case. She stated that the form letter was generated by a computer and indicated an "acquittal by dismissal." This letter did "not accurately reflect what [she] did in this case." She testified that the word "acquitted is incorrect" and there "no such thing" as acquittal by dismissal because "[a]cquitted would be a

finding of not guilty, and that did not happen in this case. And that is why this letter is incorrect."

¶ 38 Under the favorable termination exceptions outlined in *Swick*, ASA DeDore's testimony illustrated an "impossibility or impracticability of bringing the accused to trial." *Swick*, 169 Ill. 2d at 513. ASA DeDore definitively stated that the main reason she entered the *nolle prosequi* was Smith's death and the impracticality of having plaintiff's daughter as the sole occurrence witness against him.

¶ 39 According to plaintiff, ASA DeDore testified that "the case was terminated as the state would be unable to meet their burden of proof and Plaintiff was acquitted by dismissal." Plaintiff has mischaracterized ASA DeDore's testimony. It was plaintiff's burden to show that the *nolle prosequi* was entered for reasons indicative of his innocence. Plaintiff failed to present any evidence at trial to rebut ASA DeDore's testimony indicating that the prosecution was impossible or impractical following Smith's death. As outlined in *Swick*, the circumstances of the entry of the *nolle prosequi* determine whether its entry qualified as a favorable termination for a malicious prosecution case. Since impossibility or impracticality are exceptions to a favorable termination, the evidence at trial did not overwhelmingly favor plaintiff such that plaintiff was entitled to an entry of JNOV.

¶ 40 Because plaintiff must prove every element to succeed in a malicious prosecution case and the evidence at trial failed to prove that the criminal proceedings ended in a favorable termination for plaintiff, we need not reach whether the evidence showed that the criminal proceedings were pursued with malice. Accordingly, the trial court properly denied plaintiff's request for a JNOV.

¶ 41 Next, plaintiff raises several bases to support his argument that the trial court erred in denying his motion for a new trial. However, as defendants point out, the trial court did not deny plaintiff's motion for a new trial. Rather, plaintiff's motion for a new trial was struck on defendants' motion that the motion was an improper successive posttrial motion. Plaintiff failed to challenge the trial court's striking of the motion in his opening brief. In his reply brief, plaintiff argues that the "denial" of his motion for new trial is properly before the court because he "clearly raised this issue [in his opening brief] when stating that the Trial Court erred when it denied the Motion and further arguing that the motion for a new trial was timely filed [29] days after the verdict was entered."

¶ 42 Despite plaintiff's assertion that he filed a timely motion for a new trial, the question is not whether he filed a timely motion, but whether he was statutorily permitted to file a second posttrial motion after his motion for a JNOV. Defendant has failed to offer any argument on this point.

¶ 43 " '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].' " *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50 (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). Supreme Court Rule 341(h)(7) requires an appellant to include in its brief an "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 44 Section 2-1202(b) of the Code of Civil Procedure provides:

> "(b) Relief desired after trial in jury cases, heretofore sought by reserved motions for directed verdict or motions for judgment notwithstanding the verdict, in arrest of judgment or for new trial, must be sought in a single post-trial motion. Relief after trial may include the entry of judgment if under the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury, even though no motion for directed verdict was made or if made was denied or ruling thereon reserved. The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief. Relief sought in post-trial motions may be in the alternative or may be conditioned upon the denial of other relief asked in preference thereto, as for example, a new trial may be requested in the event a request for judgment is denied." 735 ILCS 5/2-1202(b) (West 2012).

¶ 45 Further, section 2-1202(e) states: "Any party who fails to seek a new trial in his or her post-trial motion, either conditionally or unconditionally, as herein provided, waives the right to apply for a new trial, except in cases in which the jury has failed to reach a verdict." 735 ILCS 5/2-1202(e) (West 2012). Also, Supreme Court Rule 274 provides: "A party may make only one postjudgment motion directed at a judgment order that is otherwise final." Ill. S. Ct. Rule 274 (eff. Oct. 14, 2005).

¶ 46 Plaintiff does not argue on appeal that his failure to raise his claims for a new trial in his motion for JNOV did not waive them or that his motion for a new trial did not qualify as a prohibited successive posttrial motion. Since the trial court never reached the merits of plaintiff's motion for a new trial and plaintiff does not challenge the trial court's striking of his motion, he has forfeited our consideration of his claims relating to his motion for a new trial.

¶ 47 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 48 Affirmed.