COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1465 **Cir. Ct. No. 2013CV11762**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JUDITH M. TUTKOWSKI,

PLAINTIFF-APPELLANT,

KATHLEEN SEBELIUS, SECRETARY OF DEPARTMENT OF HEALTH & HUMAN SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

JAMES A. RUDESILL, ANDREW J. NIEBLER, NIEBLER, PYZYK, ROTH & CARRIG, LLP AND CONTINENTAL CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed in part; reversed in part*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. Judith M. Tutkowski commenced this action for malicious prosecution and abuse of process against James A. Rudesill, Attorney Andrew J. Niebler, and Niebler, Pyzyk, Roth & Carrig, Niebler's law firm (collectively, the defendants). Her claims arise from a prior lawsuit wherein Rudesill sought damages from Tutkowski for intentionally interfering with his prospective inheritance from his mother, June Rudesill, and an action for a temporary restraining order (TRO) against Tutkowski to prevent her from having contact with June. The circuit court dismissed Tutkowski's claims on summary judgment. We affirm the circuit court dismissing the malicious prosecution cause of action as Tutkowski did not show special damages, but we reverse the dismissal of Tutkowski's abuse of process cause of action as material issues of fact remain.

Background

¶2 The facts of this case are highly contested. The nonparty at the heart of this action is June Rudesill. Rudesill is June's adult son, and Tutkowski is June's long-time friend—a friendship dating back to the 1960s. In December 2011, June was eighty-five years old and had been diagnosed with Alzheimer's Disease. Rudesill engaged Niebler to develop an estate plan for June. The estate plan gave all of June's assets to Rudesill upon her death and gave Rudesill the power to control all of her assets during her lifetime. Rudesill and Niebler claimed she was competent to execute the estate documents, and on December 16, 2011, Rudesill brought June to Niebler where June signed a Last Will and Testament, a Revocable Living Trust, and a financial Power of Attorney. June had never met Niebler before Rudesill brought her to him.

¶3 Tutkowski was a lifelong friend of June and was concerned as to Rudesill's actions, so she brought June to Leonard Schulz, June's long-time

attorney, to review the documents. June revoked Rudesill's power of attorney.[1] Rudesill responded by suing Tutkowski for interfering with his inheritance, filed an ex parte injunction against Tutkowski to prevent her from having contact with his mother, and filed a guardianship proceeding in which he alleged that his mother was incompetent and had no ability to revoke his power of attorney or execute a will. A time line of the pertinent events is as follows:

- **December 16, 2011:** Niebler met with June who signed a Last Will and Testament, a Revocable Living Trust, and a financial Power of Attorney all benefiting Rudesill. Niebler testified that June had full "testamentary capacity" to sign the documents and she "knew exactly what she was doing."

- **December 29, 2011:** June had Tutkowski review the estate documents that Niebler prepared.

- **December 30, 2011:** June would not let Rudesill inside her home, telling him that "Tutkowski said not to let you in." Rudesill returned a short time later, but June had left her home and gone to Tutkowski's home.

- **December 31, 2011:** Rudesill involved the New Berlin and West Allis police in his search for June. West Allis police department records show that Rudesill contacted the department on December 31, 2011, and January 1, 2012, to "check the welfare" of June.

[1] Tutkowski printed the form off the internet and June signed it. Rudesill apparently believed that Tutkowski had drafted a power of attorney naming herself as the replacement agent, but that was later revealed not to be the case.

- **January 1, 2012:** Tutkowski reported receiving phone calls from both departments inquiring about June's location, but she ignored the calls.

- **January 2, 2012:** A New Berlin police officer made contact with June at Tutkowski's residence. The officer determined that June was "alright and not being held … against her will." According to the report, "June … was staying with [Tutkowski] voluntarily as she was trying to avoid having contact with [Rudesill] due to the fact that she felt that [Rudesill] and his lawyer had been harassing her and attempting to force her into signing paperwork giving [Rudesill] power of attorney over her estate and medical matters." Rudesill was onsite when the officer conducted the safety check at Tutkowski's residence, and the officer's report indicates that this information was conveyed to Rudesill at the time and in a follow-up conversation. Rudesill testified that the officer told him that June was scared of him. The New Berlin police department records indicate that later in the evening on January 2, 2012, an attorney came into the station requesting "another safety check." The report stated that "[w]e advised we went out there today and she was fine and [we] would not do another check."

- **January 3, 2012:** Tutkowski and Rudesill had a verbal confrontation in the parking lot of June's bank. According to Tutkowski, Rudesill was "waiting for [her] in the parking lot" when she went to drop off paperwork revoking Rudesill's power of attorney. That same day, Rudesill, via Niebler, filed a summons and complaint against Tutkowski in Milwaukee County Circuit Court, seeking injunctive relief and claiming damages for "intentional interference with expected inheritance" via undue influence, conversion, and theft.

- **January 4, 2012:** Rudesill filed an ex parte motion for a TRO with the circuit court, claiming that June was incapacitated by Tutkowski, who had removed June from her home; was keeping June at Tutkowski's home; and was denying June her medication. The court granted the TRO without a hearing or notice to Tutkowski. On the evening of January 4, 2012, two New Berlin police officers came to Tutkowski's home to serve her with the TRO. After an altercation between Tutkowski and the police, June left voluntarily with Rudesill's son.

- **January 5, 2012:** Rudesill commenced a guardianship proceeding seeking an order appointing him as the legal guardian of his mother. In the petition, Rudesill alleged that June's incapacity was due to "[d]evelopment of dementia and [A]lzheimer," and he requested that "the court declare the individual has incapacity to exercise one or more of the following rights and remove such right to … execute a will." We note that Rudesill's request came just twenty-one days after Rudesill and Niebler had June sign estate documents, including a will.

- **February 9, 2012:** In a settlement offer, Niebler demanded $5000 from Tutkowski and her agreement to the entry of a permanent injunction restraining her or other members of her family from any further contact with June. Tutkowski refused the offer.

- **March 22, 2012:** Rudesill, via Niebler, moved to dismiss the complaint against Tutkowski with prejudice, lift the TRO, and agreed with Tutkowski's request that she have until May 4, 2012, to seek costs for Rudesill filing a frivolous action.

- **March 27, 2012:** Rudesill was appointed as guardian of June's estate and her person. The court-appointed psychologist opined that June was not capable of making decisions regarding her estate or independently taking care of herself.

- **November 30, 2012/January 22, 2013:** When Tutkowski did not file any request for frivolous costs, the circuit court ordered the case dismissed and entered a judgment dismissing the case and awarding $705.70 in costs to Tutkowski.

- **December 27, 2013:** Tutkowski filed her summons and complaint in this case, asserting (1) malicious prosecution and (2) abuse of process. The circuit court granted the defendants' motions for summary judgment. Tutkowski appeals.[2]

Standard of Review

¶4 We review a grant or denial of summary judgment de novo. ***Mach v. Allison***, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A moving party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08 (2015-16).[3]

[2] During the pendency of this case, on January 4, 2015, June passed away. *See* ***In the Estate of June R. Rudesill***, Waukesha Cty. Case No. 2015-PR-380.

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Malicious Prosecution

¶5 In Wisconsin, the tort of malicious prosecution is traditionally not favored and "we have taken a restrictive position" on its application, requiring a plaintiff to meet a "stringent burden." ***Krieg v. Dayton-Hudson Corp.***, 104 Wis. 2d 455, 460, 311 N.W.2d 641 (1981); *see also* 52 AM. JUR. 2D *Malicious Prosecution* § 5 (2011). Six elements are necessary for an action for malicious prosecution:

> 1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution.
>
> 2. Such former proceedings must have been by, or at the instance of, the defendant in this action for malicious prosecution.
>
> 3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.
>
> 4. There must have been malice in instituting the former proceedings.
>
> 5. There must have been want of probable cause for the institution of the former proceedings.
>
> 6. There must have been injury or damage resulting to the plaintiff from the former proceedings.

Schier v. Denny, 9 Wis. 2d 340, 342, 101 N.W.2d 35 (1960). "The burden of proof is upon the plaintiff to establish all six elements; and, if [he or she] fails with respect to any one of them, the defendant prevails." ***Tower Special Facilities, Inc. v. Investment Club, Inc.***, 104 Wis. 2d 221, 227, 311 N.W.2d 225 (Ct. App. 1981). As we find the sixth element dispositive we do not address the remaining elements, although we note that material issues of fact exist as to elements three through five which would preclude a grant of summary judgment.

¶6 Malicious prosecution is an intentional tort. ***Turner v. Sanoski***, 2010 WI App 92, ¶12 n.5, 327 Wis. 2d 503, 787 N.W.2d 429. In order to recover for malicious prosecution, a plaintiff must prove "special damages." ***Johnson v. Calado***, 159 Wis. 2d 446, 460-61, 464 N.W.2d 647 (1991). "[A] cause of action for malicious prosecution, is not stated by a complaint which alleges solely expenses incurred in defending against a prior prosecution." ***Schier***, 9 Wis. 2d at 345; *see also* ***Calado***, 159 Wis. 2d at 448-49. "Embarrassment, inconvenience, loss of work and leisure time, stress, strain, and worry … fail to qualify as substantial interference and do not constitute special damages" and "[w]hile counsel fees and costs may be an element of damages in a successful malicious prosecution action, they do not by themselves constitute the special grievance necessary to make out the cause of action." 54 C.J.S. *Malicious Prosecution* § 8 (2017)[4]; *see also* ***Schier***, 9 Wis. 2d at 341.

¶7 "Special damages" are defined as "damages that arise from the special circumstances of the case, which if properly pleaded, may be added to the general damages which the law presumes or implies from the mere invasion of the plaintiff's rights. Special damages are the natural, but not the necessary, result of an injury…. [T]hey must be a proximate result thereof." 22 AM. JUR. 2D *Damages* § 43 (2011). In this action, the special damages consist of the physical injuries Tutkowski suffered from her altercation with the police on January 4, 2012.

[4] *See also* 52 AM. JUR. 2D *Malicious Prosecution* § 84 (2011) ("There must be some physical interference with the claimant's person or property in the form of an arrest, attachment, injunction, or sequestration…. [I]t is not enough to have suffered only the ordinary losses incident to defending a civil suit such as inconvenience, embarrassment, discovery costs, and attorney's fees.").

¶8 Tutkowski claims that she suffered injuries to her thumb and shoulder when the police officer served the TRO on January 4, 2012. Tutkowski claims the officer "yanked [the door] out of my hands and barged into my home," charged toward her, took her arm and swung it around her back, causing her physical injuries. Tutkowski was treated by an orthopedic surgeon for her thumb injury and was prescribed physical therapy for her shoulder. The question before us is whether the physical injuries suffered at the hands of the police officer meet the requirement that the injuries sustained were as a result of the "former proceeding."

¶9 In Wisconsin, a plaintiff must establish two types of "cause": "cause-in-fact" and "proximate cause." ***Fandrey v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶¶10, 12-13, 272 Wis. 2d 46, 680 N.W.2d 345; *see also* RESTATEMENT (SECOND) OF TORTS § 430 cmt. e. As to "cause-in-fact," our supreme court has determined that the test for cause-in-fact is whether the defendant's actions were a "'substantial factor' in producing the plaintiff's injury."[5] ***Fandrey***, 272 Wis. 2d 46, ¶12 (citation omitted). A substantial factor is described as conduct that "has such an effect in producing the injury as to lead a reasonable person to regard it as a cause, using that word in the popular sense." ***Cefalu v. Continental W. Ins. Co.***, 2005 WI App 187, ¶11, 285 Wis. 2d 766, 703 N.W.2d 743. In any given case there may be many substantial factors, but in order for the plaintiff to recover "it must be shown that there was an 'unbroken sequence

[5] As Tutkowski correctly explained in her brief, the "substantial factor" causation test subsumed the doctrine of superseding and intervening cause. *See* ***Fandrey v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶12 & n.8, 272 Wis. 2d 46, 680 N.W.2d 345. Contrary to Tutkowski's argument, however, the remoteness factor under the public policy considerations has revived the intervening or superseding cause doctrine. ***Cefalu v. Continental W. Ins. Co.***, 2005 WI App 187, ¶21, 285 Wis. 2d 766, 703 N.W.2d 743.

of events'" where the actions of the defendant "actively operat[ed]" to produce the injury. ***Id.*** (citation omitted).

¶10 "Proximate cause," in contrast, is a public policy determination on our part. *See* ***id.***, ¶12; *see also* ***Fandrey***, 272 Wis. 2d 46, ¶10 ("In Wisconsin, when 'public policy' is used in the context of precluding tort liability, the term is being used as a synonym for 'proximate cause.'"). "'Proximate cause' involves public policy considerations and is a question of law solely for judicial determination." ***Fandrey***, 272 Wis. 2d 46, ¶12 (citation omitted). The public policy considerations, addressed on a case-by-case basis, are as follows:

> (1) the injury is too remote from the negligence, (2) the injury is too wholly out of proportion to the tortfeasor's culpability, (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm, (4) allowing recovery would place too unreasonable a burden on the tortfeasor, (5) allowing recovery would be too likely to open the way for fraudulent claims, or (6) allowing recovery would enter a field that has no sensible or just stopping point.

Cefalu, 285 Wis. 2d 766, ¶12. "When we preclude liability based on 'public policy factors,' … we are simply stating that the cause-in-fact of the injury is legally insufficient to allow recovery. In doing so, we are engaged in judicial line drawing, 'endeavor[ing] to make a rule in each case that will be practical and in keeping with the general understanding of mankind.'" ***Fandrey***, 272 Wis. 2d 46, ¶15 (alteration in original) (quoting ***Palsgraf v. Long Island R.R. Co.***, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting)).

¶11 We acknowledge that Wisconsin's common law formulation of the substantial factor test is broad and traditionally reserved to a jury determination, ***Fandrey***, 272 Wis. 2d 46, ¶¶12, 14 & n.9, and one could certainly argue that but for the defendants' actions, Tutkowski would not have suffered physical injury at

the hands of the police officer. We conclude, however, that even if elements one through five were met by Tutkowski, we would refuse to impose liability on the grounds of public policy as the special damages relate to the police officer's interaction with Tutkowski and her injuries from that interaction are too remote from the "former proceedings."

¶12 "The remoteness factor revives the intervening or superseding cause doctrine." ***Cefalu***, 285 Wis. 2d 766, ¶21. Essentially, a determination that a defendant's wrongful conduct and the plaintiff's injury are too remote is "a determination that a superseding cause should relieve the defendant of liability." ***Id.*** "A superseding cause is an intervening force which relieves an actor from liability for harm which his [wrongful conduct] was a substantial factor in producing." ***Stewart v. Wulf***, 85 Wis. 2d 461, 475, 271 N.W.2d 79 (1978) (citing RESTATEMENT (SECOND) OF TORTS § 440). An intervening cause is a force that "actively operates in producing the harm to another after the actor's [wrongful conduct] has been committed." ***Id.*** (quoting RESTATEMENT (SECOND) OF TORTS § 441(1)). To assess remoteness, we consider "the time, place or sequence of events" and also "whether the chain of causation was direct and unbroken." ***Kidd v. Allaway***, 2011 WI App 161, ¶14, 338 Wis. 2d 129, 807 N.W.2d 700.

¶13 We conclude that the sequence of events between Rudesill's alleged malicious prosecution and Tutkowski's injury demonstrates remoteness. Where law enforcement exercises its own discretion and its independent judgment in determining the amount of force utilized under the circumstances presented, the officer's actions constitute a superseding intervening cause that breaks the chain of causation for malicious prosecution purposes. *See, e.g.*, ***Johnson v. Ray***, 99 Wis. 2d 777, 782, 299 N.W.2d 849 (1981) ("The principle is clear that one who has police authority to maintain the peace has a privilege to use force, and the

question then becomes simply whether the force was excessive for the accomplishment of the purpose."); ***Moldowan v. City of Warren***, 578 F.3d 351, 399-400 (6th Cir. 2009) (discussing, in the context of a criminal proceeding, that "the exercise of independent judgment and discretion on the part of the police and the prosecutor precludes, as a matter of law, a malicious prosecution claim against" a private person who furnished information to the police); ***Hendrickson-Brown v. City of White Plains***, 938 N.Y.S.2d 331, 332 (N.Y. App. Div. 2012) ("[A] civilian defendant who merely furnishes information to law enforcement authorities who are then free to exercise their own independent judgment as to whether an arrest will be made and criminal charges filed will not be held liable for malicious prosecution." (citation omitted)).

¶14 We affirm the grant of summary judgment on the malicious prosecution claim as Tutkowski's special damages were not proximately caused by the defendants' conduct.

Abuse of Process

¶15 In contrast to the malicious prosecution claim, we see no reason that Tutkowski's claim for abuse of process cannot go forward as Tutkowski has pled the required elements and material issues of fact are present. Malicious prosecution and abuse of process are not claims that are one in the same; "[t]he latter grew out of the former." ***Brownsell v. Klawitter***, 102 Wis. 2d 108, 112, 306 N.W.2d 41 (1981). "[A]buse of process is broader than malicious prosecution and may provide a remedy where malicious prosecution will not." ***Strid v. Converse***, 111 Wis. 2d 418, 426, 331 N.W.2d 350 (1983) (citing ***Maniaci v. Marquette Univ.***, 50 Wis. 2d 287, 299, 184 N.W.2d 168 (1971)).

¶16 A claim for abuse of process exists where "one 'uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed.'" ***Tower Special Facilities***, 104 Wis. 2d at 229 (quoting ***Brownsell***, 102 Wis. 2d at 114). Abuse of process has two elements: (1) "a willful act in the use of process not proper in the regular conduct of the proceedings" and (2) "an ulterior motive." ***Brownsell***, 102 Wis. 2d at 115 (citation omitted); WIS JI—CIVIL 2620. "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." ***Thompson v. Beecham***, 72 Wis. 2d 356, 362, 241 N.W.2d 163 (1976).

¶17 Tutkowski alleged that Rudesill knowingly used false allegations of wrongdoing (imprisonment, fraud, theft) as a pretext to his claim of intentional interference with an expected inheritance and false allegations in the petition for the TRO with the ulterior motive to make sure June did not revoke the estate documents that were signed on December 16, 2011. Facts in the record indicate that Rudesill was informed by the police on January 2, 2012, that June was fine, that she had voluntarily gone to Tutkowski's home, and that she was not being held against her will. This information was known by Rudesill and Niebler *before* they filed the lawsuit and TRO.

¶18 Rudesill asserts that he knew nothing about the claim Niebler brought for intentional interference with an expected inheritance. Rudesill testified that he thought the claims in the lawsuit were being made to obtain a restraining order, not to claim money damages, and in doing so Niebler "went beyond the mandate" of what Rudesill asked of his lawyer. The facts raise

significant issues as to the defendants' motives. June was Niebler's client and Niebler was satisfied that on December 16, 2011, June was competent to give all of her assets to Rudesill (also his client) as well as give a power of attorney to Rudesill to control her assets during her life. After having June sign those estate documents, Rudesill and Niebler then changed their tune twenty-one days later, arguing that June was not competent to revoke Rudesill's power of attorney. It bears noting that as an adult son, Rudesill had no legal "entitlement" to June's assets and that June had no legal obligation to leave her son anything.

¶19 Rudesill claims that the purpose of the lawsuit was "all to protect his mother." He argues that under WIS. STAT. § 813.123(4)(a)2.b., a court can grant a restraining order if a "respondent engaged in or threatened to engage in the abuse, financial exploitation, neglect … of an individual at risk," and in seeking the TRO he was using it for "its regular and legitimate function" in protection of his mother. At best, given the police interaction informing the defendants that June was acting voluntarily, was not being held against her will, and was trying to avoid contact with Rudesill and Niebler, who were "harassing" her to sign paperwork giving Rudesill power over June, material issues of fact exist as to what

defendants' "ulterior motives" were in making the allegations they did against Tutkowski.[6]

¶20 We conclude that Tutkowski has stated a claim for abuse of process by alleging facts which demonstrate that the defendants may have engaged in a willful act in the use of process that was not proper and that they may have had an "ulterior motive" for doing so. It is for a jury to determine these issues, and, accordingly, we reverse the decision of the circuit court granting summary judgment on the abuse of process cause of action.

By the Court.—Order affirmed in part and reversed in part.

Not recommended for publication in the official reports.

[6] Niebler claims that the absolute litigation privilege applies to shield him from the abuse of process claim. We recognize that there is a general rule of immunity for an attorney "[b]ased on the quasi-judical character of an attorney's duties." ***Strid v. Converse***, 111 Wis. 2d 418, 428, 331 N.W.2d 350 (1983). As our supreme court has explained, however,

> the immunity of an attorney who is acting in a professional capacity is qualified rather than absolute. The immunity from liability to third parties extends to an attorney who pursues in good faith his or her client's interests on a matter fairly debatable in the law. However, the immunity does not apply when the attorney acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled.

Id. at 429-30; *see also* WIS JI—CIVIL 2620. The facts as alleged raise the issue of whether the Niebler defendants acted in bad faith or acted to obtain something for Rudesill that he was not justly entitled to, which creates a jury question of whether the Niebler defendants are immune from liability.