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Compromise Agreement as a Bar to Suit for Malicious Prosecution - Leonard v. George

COMPROMISE AGREEMENT AS A BAR TO SUIT FOR MALICIOUS PROSECUTION

Leonard v. George[1]

Plaintiff, the manager of defendant's turkey farm, was arrested on a warrant sworn out under the direction of defendant, charging breach of trust with fraudulent intent, a felony under the law of South Carolina. After being kept in jail a few hours, he was released on bail; and, after he had made payment to defendant's representative Boykin to cover part of an alleged shortage in the number of turkeys entrusted to his keeping, the prosecution against him was dismissed. There was evidence tending to show that defendant told Boykin to get at least partial reparation before dismissing the prosecution; that Boykin threatened to keep plaintiff in jail for 72 hours or until he could count all the turkeys and that Boykin told plaintiff that he knew plaintiff was not guilty of the crime charged. Plaintiff went through with the settlement but repeatedly protested his innocence and claimed the payment was a "hold up" which he had to submit to in order to get away to obtain another position offered him.

In the District Court plaintiff brought actions for abuse of criminal process and for malicious prosecution. The two actions were consolidated and upon the completion of plaintiff's evidence, defendant's motion for dismissal was granted on the ground that where the prosecution is terminated

[1] 178 F. 2d 312 (4th Cir., 1949).

by agreement between the parties no action for malicious prosecution will lie.

The plaintiff's motion for a new trial was granted in subsequent hearings.[2] The Court, recognized the general rule as laid down by the Supreme Court of South Carolina, which said:[3]

> ". . . if a prosecution is terminated by agreement between the parties, or at any instance, or upon the consent, of the accused, there is no such termination as will support an action for malicious prosecution, . . ."[4]

However, the District Court also stated that an exception to the general rule recognized by the South Carolina court was applicable; that the general rule is not applied where the compromise is not voluntary, but the result of coercion or duress. The trial was had before a jury which found for plaintiff in both cases and the appeal was taken in the malicious prosecution case.

On the appeal, the court reversed, holding that a compromise and settlement arrived at without duress negatives the essential element of lack of probable cause, and an action for malicious prosecution would not lie. Thus, the compromise and settlement of the criminal action estopped the plaintiff from contending it was instituted without probable cause. The Court cited an Iowa case which held:

> ". . . where the termination of the case is brought about by a compromise or settlement . . . understandingly entered into, it is such an admission that there was probable cause that the plaintiff cannot afterwards retract it and try the question which by settlement he waived."[5]

The Court recognized that where the settlement is made through duress, coercion or without understanding of its nature, it has no effect as an estoppel, but rejected plaintiff's argument that the settlement here was made under duress, citing a Mississippi case which held that where plaintiff was out on bail under no sort of duress other than liability to answer a criminal charge which had been made against him, such duress is no basis for holding settlement was not

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[2] George v. Leonard, 71 F. Supp. 662 (E. D. S. C., 1947); George v. Leonard, 71 F. Supp. 665 (E. D. S. C., 1947).

[3] Jennings v. Clearwater Mfg. Co., 171 S. C. 498, 172 S. E. 870 (1934).

[4] *Ibid*, 873.

[5] White v. International Text-Book Co., 156 Iowa 210, 136 N. W. 121, 123 (1912).

voluntary, since it is necessarily present in every settlement or compromise of this character.[6]

A dissenting opinion, however, stated that the general rule that an action for malicious prosecution is barred if the dismissal of the criminal prosecution was brought about by voluntary agreement of parties did not apply here. The evidence showed that plaintiff had protested his innocence of the crime charged and had stated he was paying under protest; it left the question of whether settlement was voluntary to the jury, and it could not be held as a matter of law that settlement constituted estoppel.

Subsequently, the plaintiff's petition for certiorari to the Court of Appeals was denied by the United States Supreme Court.[7]

The elements of the tort of malicious prosecution are: a criminal proceeding instituted or continued by the defendant against the plaintiff; termination of the proceeding in favor of the accused; absence of probable cause for the proceeding; malice, or a primary purpose in instituting the proceeding other than that of bringing an offender to justice.[8]

Termination of the criminal action in favor of the accused is essential. In *Hyde v. Greuch*,[9] the Court stated:

> "In an ordinary action for malicious prosecution, it is essential to aver in the declaration, and to prove at the trial, that the prosecution has terminated in favor of the party against whom it was instituted."[10]

The great weight of American authority holds that where a criminal proceeding is dismissed or abandoned by procurement of the party prosecuted, by settlement or compromise with the prosecutor, it is not such a final determination of the matter in the accused's favor as will support an action for malicious prosecution.[11]

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[6] Jones v. Donald Co., 137 Miss. 602, 102 So. 540 (1925).

[7] George v. Leonard, 339 U. S. 965 (1950).

[8] PROSSER, TORTS (1941), Sec. 96.

[9] 62 Md. 577 (1884).

[10] *Ibid*, 582.

[11] Morton v. Young, 55 Me. 24, 92 Am. Dec. 565 (1861); Lamprey v. H. P. Hood & Sons, 73 N. H. 384, 62 A. 380 (1905); Smith v. Markensohn, 29 R. I. 55, 69 A. 311 (1908); Lowande v. Eisenberg Farms, 286 N. Y. 634, 36 N. E. 2d 684 (1941); Alexander v. Lindsay, 230 N. C. 663, 55 S. E. 2d 470 (1949); Smith v. Otwell, 51 Ga. App. 741, 181 S. E. 493 (1935); Davis v. Brady, 218 Ky. 384, 291 S. W. 412 (1927); Lyons v. Davy-Pocahontas Coal Co., 75 W. Va. 739, 84 S. E. 744 (1915); Nelson v. National Casualty Co., 179 Minn. 53, 228 N. W. 437, 67 A. L. R. 509 (1929); Jones v. Donald Co., 137 Miss. 602, 102 So. 540 (1925); Curls v. Lenox Garage Co., 68 Ohio App. 285, 40 N. E. 2d 213 (1941); Ewe v. Angland, 325 Ill. App. 677, 60 N. E. 2d 774 (1945); Bristol v. Eckhardt, 254 Wisc. 297, 36 N. W. 2d 56

This view is also uniformly followed by text writers.[12] In an annotation in the American Law Reports, it is stated that:

> "It has been almost, though not quite, universally held that no such termination of a criminal proceeding as may be availed of for the purpose of an action for malicious prosecution can be predicated upon the dismissal of that proceeding, without regard to its merits, as the result of a compromise or settlement of the parties, particularly where such disposition of the matter has been induced by, or effected at the instance of, the person accused, or, as it has been frequently said, procured by him."[13]

Although American authorities are numerous, no Maryland Court of Appeals case on the point has been found. There is also a dearth of English and Canadian authorities. Such absence was noted in a Canadian case which followed the American weight of authority in holding that a mere release or discharge of one charged criminally as a result of a compromise whereby a certain sum was paid, was not such a favorable termination as to justify suit.[14] In an English decision, it was held that an action for malicious arrest could not be maintained where a cause had been terminated by a *Stet Processus* with the consent of the parties.[15]

Cases contrary to the general rule are few and not quite directly on point. In a California case, the evidence disclosed that the criminal proceeding was dismissed upon the statement of counsel for the accused, that the accused would refrain from committing certain threatened injuries and it was held that the dismissal of the proceeding was not at the procurement of the accused, and that an action for malicious prosecution could be maintained thereon.[16]

Two other cases concern suit for maliciously suing out attachment without probable cause. In both cases it was

(1949); Stauffacher v. Brother, 67 S. D. 314, 292 N. W. 432, 128 A. L. R. 925 (1940); Bell Lumber Co. v. Graham, 74 Colo. 149, 219 P. 777 (1923); First State Bank v. Denton, 82 Okla. 137, 198 P. 874 (1921); Campbell v. Bank & Trust Co., 30 Ida. 552, 166 P. 258 (1917); Saner v. Bowker, 69 Mont. 463, 222 P. 1056 (1924); Forster v. Orr, 17 Or. 447, 21 P. 440 (1889); Eustace v. Dechter, 53 Cal. App. 2d 726, 128 P. 2d 367 (1942).

[12] 54 C. J. S., MALICIOUS PROSECUTION, Sec. 58, p. 1026; PROSSER, TORTS (1941), Sec. 96; RESTATEMENT, TORTS (1938), Sec. 660.

[13] 67 A. L. R. 513.

[14] Baxter v. Gordon Ironsides, etc. Co., 13 Ont. L. Rep. 598, 7 A. & E. Ann. Cas. 452 (1907).

[15] Wilkinson v. Howel, 1 M. & M. 495, 173 Eng. Rep. 1236 (1830).

[16] Holliday v. Holliday, 123 Cal. 26, 55 P. 703 (1898).

held that the fact the attachment debtor settled the debt, did not prevent his maintenance of the suit.[17]

The reason for the general rule varies; some courts hold that the compromise is an admission of probable cause. The accused admits the justice of the claim, the existence of probable cause for instituting the proceeding and is therefore estopped to deny the existence of probable cause.[18] However, the Restatement states the reason as follows:

> "Although the accused by his acceptance of a compromise does not admit his guilt, the fact of compromise indicates that the question of his guilt or innocence is left open. Having bought peace the accused may not thereafter assert that the proceedings have terminated in his favor."[19]

A recognized limitation to the rule is that the compromise must not be induced by duress but must be voluntary on the part of the accused. Of this exception by way of limitation, one text writer has stated:

> "If the consent (to the termination) is found to have been given under protest because of 'duress', however, the Courts have refused to hold the cause of action is lost. The distinction is at best a vague one, and it may be that the Courts' opinion as to probable guilt of the accused has entered into it."[20]

In an annotation in the American Law Reports concerning the above limitation, the writer states:

> "The rule as outlined . . . is not applied in cases where the settlement was not voluntarily and understandingly made, but was made under coercion or duress; nor where the dismissal is not shown to have been the result of a valid compromise or settlement."[21]

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[17] Harper v. Cox, 113 Kan. 357, 214 P. 775 (1923); Scovera v. Armbruster, 257 Mich. 340, 241 N. W. 231 (1932). But see another Michigan case, Cascarella v. National Grocer Co., 151 Mich. 15, 114 N. W. 857 (1908), in which the general rule was upheld, and see also Green v. Warnock, 144 Kan. 170, 58 P. 2d 1059 (1936), where the Court held for defendant on the ground that the plaintiff's attorney, with the plaintiff's knowledge had persuaded the county attorney to dismiss the case without bringing it to trial.

[18] White v. International Text-Book Co., 156 Iowa 210, 136 N. W. 121 (1912); Saner v. Bowker, 69 Mont. 463, 222 P. 1056 (1924); Morton v. Young, 55 Me. 24, 92 Am. Dec. 565 (1867); Forster v. Orr, 17 Or. 447, 21 P. 440 (1889).

[19] RESTATEMENT, TORTS (1938), Sec. 660, Comment c.

[20] PROSSER, TORTS (1941), Sec. 96, p. 869. Parenthetical material inserted.

[21] 67 A. L. R. 519.

The leading case which has recognized the general rule, but noted its exception, is *White v. International Textbook Co.*[22] In that case the plaintiff who was a sales agent for defendant company was discharged because of a disagreement over sums due from plaintiff. Defendant's agent swore out a warrant for embezzlement and then contacted plaintiff and warned him unless he turned over the sum claimed to be due, he would be arrested. Plaintiff refused and was taken into custody. He was later taken by the police to defendant's office where he was again urged to turn over the money. Plaintiff's brother-in-law was present at this interview, defendant's agent having previously urged him to appear and help persuade the plaintiff to turn over the money. Plaintiff at first refused to pay, denying the indebtedness but was at last persuaded, through the concerted appeal of the police, defendant's agent and his brother-in-law, who told plaintiff his wife was greatly upset over his imprisonment. The trial Court refused to submit the question of duress to the Jury and directed verdict for defendant. The Appellate Court in reversing pointed out that from the testimony, a jury was justified in finding that the alleged settlement was not by plaintiff's procurement; that the money was paid under protest and to secure plaintiff's release; that the payment was not voluntary but under duress, and that the whole proceeding was resorted to, not for the purpose of vindicating the law, but to compel the plaintiff to make such a settlement of his accounts as the company's agent believed should be made. The Court also gave weight to the fact that the accounts were not completely settled, and that certain matters were left open. The Court said:

> "Assuming, without deciding, that one charged with a crime may, without authority of Court, compromise and compound it, or procure his release from the charge in such a manner as to bar him from maintaining an action for malicious prosecution, it must appear, we think, that the one accused voluntarily procured his release, that his payment was in full settlement of his accounts and for the purpose of extinguishing a conceded indebtedness, and that this payment was freely and voluntarily made; that is to say, not under protest or by reason of duress. Any other rule would encourage resort to the criminal law for the purpose of enforcing a debt. . . ."[23]

[22] White v. International Text-Book Co., *supra*, n. 18.
[23] *Ibid*, 128.

Several other jurisdictions have followed this exception and refused to recognize a compromise settlement as barring the action where duress or coercion was involved in the procurement of the compromise payment.[24]

The factual threads running through most of these cases involve: institution of a criminal proceeding by defendant for purposes of coercion rather than vindication of the criminal law; a showing that the defendant did not believe or did not have reason to believe the truth of the charges presented; imprisonment of the plaintiff; a settlement proposed or initiated by the defendant to which plaintiff assents, under protest, to end his imprisonment.

The Court in *Leonard v. George,* however, while noting the exception to the rule, followed a Mississippi case in holding that plaintiff's liability to answer the criminal charge against him, was not the sort of duress necessary to prevent the compromise from barring the suit for malicious prosecution.

In the Mississippi case, the plaintiff was arrested on a charge of having obtained defendant's goods under false pretenses, and was released on his payment of Court costs and money due defendant for the goods. The Court dismissed the malicious prosecution suit despite plaintiff's averment that payment was involuntary and made under duress. The Court held that mere liability in the criminal prosecution was not such duress as would make settlement involuntary.[25]

In *Leonard v. George,* the Court in holding that a compromise settlement voluntarily entered into is not such a favorable termination of the criminal action as to enable the accused to maintain a suit for malicious prosecution followed a well settled rule. The action for malicious prosecution is not favored in the law. To allow a plaintiff to maintain such suit after he had voluntarily compromised and settled the criminal action, would establish an undesirable precedent which might lead to the institution of a suit for malicious prosecution upon any sort of termination of the crimnial action except actual conviction.

However, whether or not the compromise in the particular case was made under such duress as to be involuntary, would seem to be a question for the jury, and the Court here perhaps erred in holding that the settlement

[24] Morton v. Young, *supra,* n. 18; Burkett v. Lanata, 15 La. Ann. 337 (1860); Smith v. Markensohn, 29 R. I. 55, 69 A. 311 (1908); Schwartz v. Schwartz, 206 Wisc. 420, 240 N. W. 177 (1932); Lyons v. Davy-Pocahontas Coal Co., 75 W. Va. 739, 84 S. E. 744 (1915).

[25] Jones v. Donald Co., 137 Miss. 602, 102 So. 540 (1925).

constituted estoppel as a matter of law. Whether duress exists in a particular transaction is usually a question of fact.[26] Duress by imprisonment was one of the two divisions of duress of the person recognized at common law. A Supreme Court case stated:

> ". . . it is well settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency. . . ."[27]

Duress by imprisonment is held to exist where an arrest is made for an improper purpose although for just cause and under lawful authority.[28] It would be possible to find an improper purpose present here. There was evidence tending to establish that defendant had told Boykin, his manager who swore out the warrant, to get at least partial reparation before dismissing the action. On the basis of this the District Court in ordering a new trial on an appeal in the malicious abuse of process case stated:

> ". . . when all conflicts are resolved in favor of plaintiff and the evidence viewed in the light most favorable to his contentions, we cannot say that there is nothing to take the case to the jury on the theory that the criminal process of the Court was used for an ulterior purpose rather than for the sole purpose of vindicating the law."[29]

In the light of this, it is possible that the majority opinion was grounded on public policy which is unfavorable to malicious prosecution suits rather than on a strict determination of whether or not the settlement was in fact voluntary.

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[26] 17 AM. JUR., DURESS, Sec. 31, p. 906.

[27] Baker v. Morton, 12 Wall. 150, 157-158 (1870).

[28] *Op. cit., supra*, n. 26, Sec. 5, p. 876.

[29] George v. Leonard, 169 F. 2d 177, 178 (4th Cir., 1948).