IN THE SUPREME COURT
STATE OF MISSOURI

STATE OF MISSOURI ex rel. PATRICK J. O'BASUYI,	)	
Relator,	)	Cause no. SC93652
v.	)	
HON. DAVID LEE VINCENT III,	)	
Respondent.	)	

On Prohibition from the Circuit Court of St. Louis County

Honorable David Lee Vincent III

RESPONDENT'S BRIEF

BLITZ, BARDGETT & DEUTSCH, L.C.

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STATEMENT OF FACTS

On November 3, 2010, Relator filed suit against underlying Defendant Rodney Thomas and an entity in a case styled *O'Basuyi v. BT Realty Development Co.*, 10SL-CC04435. *See Exhibit B to Defendants' Answer to Petition for Writ of Prohibition, Docket Sheet of 10SL-CC04435*. The case was assigned to Respondent, Judge David Lee Vincent III. *Id.* The case was litigated for over two years. *Id.* On December 7, 2012, ten days prior to the scheduled trial date, Relator dismissed the suit without prejudice. *Id.* On December 12, 2012, Relator re-filed the suit against Defendant Thomas and several other related entities and individuals. *See Relator's Brief Appendix* at p. APP16.

Respondent otherwise adopts the Statement of Facts from Relator's Brief.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SEPARATE TRIAL OF DEFENDANTS' COUNTERCLAIMS BECAUSE WHENEVER A CLAIM IS COGNIZABLE ONLY AFTER ANOTHER CLAIM HAS BEEN PROSECUTED TO A CONCLUSION, THE TWO CLAIMS MAY BE JOINED IN A SINGLE ACTION SO LONG AS RELIEF IS GRANTED IN ACCORDANCE WITH THE PARTIES' SUBSTANTIVE RIGHTS, IN THAT DEFENDANTS' MALICIOUS PROSECUTION COUNTERCLAIMS WERE JOINED IN A SINGLE ACTION AND THE TRIAL COURT HAS NOT VIOLATED PLAINTIFF'S SUBSTANTIVE RIGHTS.

Missouri Supreme Court Rule 55.06(b)

Missouri Supreme Court Rule 66.02

State ex rel. General Motors Acceptance Corp. v. Standridge, 181 S.W.3d 76 (Mo. banc 2006)

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SEPARATE TRIAL OF DEFENDANTS' COUNTERCLAIMS BECAUSE WHENEVER A CLAIM IS COGNIZABLE ONLY AFTER ANOTHER CLAIM HAS BEEN PROSECUTED TO A CONCLUSION, THE TWO CLAIMS MAY BE JOINED IN A SINGLE ACTION SO LONG AS RELIEF IS GRANTED IN ACCORDANCE WITH THE PARTIES' SUBSTANTIVE RIGHTS, IN THAT DEFENDANTS' MALICIOUS PROSECUTION COUNTERCLAIMS WERE JOINED IN A SINGLE ACTION AND THE TRIAL COURT HAS NOT VIOLATED PLAINTIFF'S SUBSTANTIVE RIGHTS.

STANDARD OF REVIEW

A writ of prohibition is an "extraordinary remedy to prevent exercise of extrajurisdictional power and not a writ of right." *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999). The Court may exercise its constitutional authority under Mo. Const. Art. V, Sec. 4, to grant a writ of prohibition in only three circumstances:

(1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction;

(2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or

(3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.

State ex rel. Womack v. Rolf, 173 S.W.3d 634, 636 (Mo. banc 2005) (quashing preliminary writs).

Rule 66.02 grants the trial court broad authority to determine whether separate trials are appropriate. "The decision of whether to allow severance of claims is within the sound discretion of the trial court, and [the reviewing Court] will not disturb the ruling of the court absent an abuse of discretion." *In re Competency of Parkus*, 219 S.W.3d 250, 253 (Mo. banc 2007); *Guess v. Escobar*, 26 S.W.3d 235, 239 (Mo. App. W.D. 2000) (affirming denial of motion for separate trials). "A discretionary ruling is presumed correct, and an abuse of discretion only occurs where [the reviewing Court] find[s] the ruling is clearly against the logic of the circumstance and so arbitrary and unreasonable that it shocks the sense of justice." *Id.*

Relator argues that Respondent "exceed[ed] its jurisdiction and abused its discretion" in denying the Motion, placing the scope of his appeal squarely and exclusively under the authority in section (2) of *Womack*. *See Relator's Brief* at p.4. Relator makes no argument, however, that Respondent "lacks the power to act as intended." *See Womack*, 173 S.W.3d at 636. There is no question that the trial court was acting within its power to rule on the Motion for Separate Trials; the trial court is vested with the discretion to grant or deny a motion for separate trials. Rule 66.02; *Guess*, 26 S.W.3d at 239. Relator is therefore arguing that the trial court lacked the power to *deny* the Motion, and that its denial was an abuse of its discretion. Relator's argument is directly contrary to the settled law in Missouri that vests discretion with the trial court. For this reason alone, the Court should quash the preliminary writ.

ARGUMENT

I. Rule 55.06(b) specifically grants the trial court discretion to join, and try, a malicious prosecution counterclaim with the underlying claim.

Relator seeks a change in substantive law by invalidating Rule 55.06(b) and this Court's opinion in *State ex rel. General Motors Acceptance Corp. v. Standridge*, 181 S.W.3d 76 (Mo. banc 2006) ("*GMAC*"). In *GMAC*, this Court held that a Malicious Prosecution claim may be brought as a counterclaim in the same action on which the counterclaim is based. "[T]he two claims may be joined in a single action[.]" *Id.* at 78 (quoting Rule 55.06(b)). Relator seeks to change the law by prohibiting trial courts from exercising discretion in determining whether the parties may try counterclaims in the same trial as the original claims.

Rule 55.06(b) specifically allows the trial court to permit trying counterclaims with the original claim. The Rule states in part that "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties." Relator focuses on the latter clause, arguing that, "[a]s a matter of substantive law," a malicious prosecution claim is "not cognizable until *after* a final disposition of the underlying claim[,]" and that this prevents *any* malicious prosecution counterclaim from being tried with the underlying claim. *Relator's Brief* at p.6. Relator ignores, however, that this is *specifically the situation contemplated* by Rule 55.06(b). Two claims may be "joined in a single action" when the claim is "cognizable only after another claim has been prosecuted

to a conclusion." Rule 55.06(b). That is precisely the situation here, as discussed in *GMAC*: the malicious prosecution claims are cognizable after disposition of the underlying claim, and they therefore may be joined to the underlying claims.

The Rule, and its explanation in *GMAC*, grants trial courts the discretion to join these actions together. Relator does not explain how an element of Defendants' cause of action is a "substantive right" of his that has been violated.[1] The argument mischaracterizes the nature of the Rule: that the counterclaim is not cognizable until the claim is prosecuted to a conclusion is provided for in the first clause of the Rule, and is not a "substantive right" separately considered in the second clause. The "substantive right" contemplated in the Rule is to prevent inconsistent verdicts. In this instance, there can be no recovery on the Malicious Prosecution counterclaims unless the Relator's claims fail, and the Rule is written to prevent recovery on the counterclaims without failure of the initial claims. Relator's interpretation of the Rule subverts all language of the Rule; there would be no possibility to join such claims in any case.

Missouri Courts have repeatedly tried Malicious Prosecution counterclaims along with the underlying claims upon which they are brought. In *Greer v. McDonald*, 232 S.W.3d 671 (Mo. App. E.D. 2007), the plaintiff brought multiple claims and the defendants asserted a Malicious Prosecution counterclaim. Following a jury trial, the

[1] Relator's only attempt to argue that this is a "substantive right" is to use the adjective "substantive" in describing the element as "a matter of substantive law." *Relator's Brief* at p.6.

trial court entered judgment in favor of the defendants on all of the plaintiff's counts, and in favor of the defendants on the Malicious Prosecution counterclaim. *Id.* at 671-72. Likewise, in *Strubberg v. Roethemeyer*, 941 S.W.2d 557 (Mo. App. E.D. 1997), the defendants' counterclaims, including for Malicious Prosecution of the contemporary petition, were tried along with the plaintiff's claims.

Relator cites no applicable authority supporting his argument in his Brief. Relator cites no case wherein a Malicious Prosecution counterclaim was tried separate from the cause of action upon which it is based. Relator does not cite any case in which a separate trial was granted for any counterclaim. The extrajurisdictional authority that Relator cites is directly contrary to Missouri's Malicious Prosecution law: he argues that, in other jurisdictions, Malicious Prosecution cannot be brought as a counterclaim. *Relator's Brief* at p.7. Missouri not only allows the practice, its Rules specifically provide for it. *GMAC*, 181 S.W.3d at 77-78 (stating that the modification of Rule 55.06(b) allows for a counterclaim for Malicious Prosecution). The trial court did not abuse its discretion in denying the Motion for Separate Trials.

Further, Relator's statement that the trial court's exercise of discretion would "extend" the Court's ruling in *GMAC* is not true. The Court in *GMAC* did not rule on admission of evidence of malicious prosecution. Rule 55.06(b) specifically provides for the claims to be "joined in a single action" and for relief to be granted under the trial court's discretion in accordance with the parties' substantive rights. This is illustrated by the example given in the rule: a party may join claims for both a money judgment and a

fraudulent conveyance of that money.[2] The claimant would therefore be permitted to enter evidence not only for breach of a contract in which he paid money to a non-performing party, but also that the other party then transferred the money in an attempt to delay collection. Similarly, here, the trial court has determined that, consistent with Rule 55.06(b) and *GMAC*, the Malicious Prosecution counterclaims may be joined in a single action with the underlying claims.

II. The trial court's discretion is paramount in determining whether to conduct separate trials.

Relator's appeal to public policy is flawed for two reasons: first, a writ prohibition can only issue in the three distinct circumstances outlined above, none of which include changing the law due to public policy. *See Womack*, 173 S.W.3d at 636. The requested relief is not possible through a writ of prohibition. Further, Relator's argument does not acknowledge that this Court has already clarified Missouri's policy position: the trial court, using its sound discretion, is in the best position to determine whether separate trials are appropriate. Relator's arguments that it will be prejudiced by introduction of evidence on the Counterclaims were taken into consideration by the trial court, which has

[2] "For example, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money." Rule 55.06(b). Relator has availed himself of precisely this clause in bringing claims for fraudulent transfer before having a judgment against the alleged debtor. *See Relator's Brief Appendix* at APP16-25.

the most knowledge of the case facts and what evidence is likely to be presented at trial. *See Black & Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 129-30 (Mo. App. W.D. 2009) (affirming denial of a motion to bifurcate a trial; trial court remedied any potentially prejudicial effect of certain evidence by instructing the jury not to consider the evidence in determining damages on the unrelated counts). There is no risk that counterclaims for Malicious Prosecution will run rampant across the State; the trial courts will have discretion in each and every case to do what is appropriate when ruling on a Motion for Separate Trials. If the trial court feels that the prejudice to the parties outweighs the benefits of a joint trial, then the trial court has the discretion to grant the motion. Respondent here followed that standard, evaluated the evidence and arguments, and found that separate trials were not appropriate.

Similarly, Relator's concern about "inconsistent verdicts" is unfounded and unsupported in his own Brief. *See Relator's Brief* at p.9. The trial court is entrusted with properly instructing the jury. As pointed out above, trial courts have experience in instructing juries in Malicious Prosecution counterclaims. *See, e.g., Greer*, 232 S.W.3d 671. The parties, and the trial court, are responsible for crafting instructions that the jury will follow, and it is a responsibility upon courts in every trial. No unique exception should be made in this instance.

III. The trial court is familiar with the facts in this case. Much of the same evidence will be presented on Plaintiff's claims and the Counterclaims.

The trial court was justified in not ordering separate trials because the evidence adduced in trying Plaintiff's case will be largely the same as the evidence adduced in

trying the Malicious Prosecution counterclaims. Judicial efficiency is served by having only one trial on these issues. *See Black & Veatch Corp.*, 302 S.W.3d at 129-30 (affirming denial of motion for separate trials where several witnesses would have to testify in both proposed trials). Here, Relator has alleged that Defendant Thomas verbally promised Plaintiff an interest in a development project. *See Petition* at ¶6, *Exhibit A to Defendants' Suggestions in Opposition to Petition for Writ of Prohibition*. The same evidence will support Defendants' defenses to Plaintiff's claims and Defendants' prosecution of their Counterclaims for Malicious Prosecution: Defendants will show that no person except Plaintiff has any knowledge of this alleged agreement, including each of the people Plaintiff identified as witnesses having knowledge of the agreement. This will support Defendants' refutation of the alleged agreement (as a defense to Plaintiff's claims) and the baselessness and malice of the lawsuit (in support of the Counterclaims). *See Counterclaims* at ¶7-8, *Exhibit B to Defendants' Suggestions in Opposition to Petition for Writ of Prohibition*. If the trial court ordered separate trials, the witnesses would have to testify twice, once in each case. Their testimony in each case would be the same: that there is no agreement between the two and that there never has been any such agreement. Judicial efficiency will be best served by trying the claims together. The trial court was well aware of the demands of its docket and the case facts,[3]

[3] Although the instant case was filed in December 2012, Plaintiff filed similar claims against several of the same Defendants in 2010, in a case styled *O'Basuyi v. BT Realty Development Co.*, 10SL-CC04435. *See Docket Sheet, Exhibit B to Answer to Petition for*

and its discretion to allow trial of the counterclaims together with the Relator/Plaintiff's claims was not abused.

IV. CONCLUSION

Respondent did not abuse his discretion in denying the Motion for Separate Trials. The decision was reasonable in light of Missouri law that expressly allows the concurrent litigation of a Malicious Prosecution counterclaim. Further, in the interest of judicial efficiency, the parties and the trial court are best served by trying the cases together, where much of the same evidence will be presented in both cases. The preliminary Writ of Prohibition should be quashed.

Writ of Prohibition. Respondent was the trial judge in the earlier case, which Plaintiff dismissed on December 7, 2012, only ten days before the trial date. *See Dismissal, Exhibit A to Answer to Petition of Writ of Prohibition*. Plaintiff filed the instant case on December 12, 2012, and the case was also assigned to Respondent. Respondent is therefore well aware of the facts involved.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of January, 2014, this Brief was filed with the Clerk of the Court using the electronic-filing system. Pursuant to Rule 103.08, service on registered users will be accomplished by the electronic-filing system. I understand that at least one attorney of record for each party is a registered user.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Pursuant to Rule 84.06(c), the undersigned hereby certifies that Respondent's Brief contains 2,893 words, exclusive of the cover, certificate of service, this certificate, and signature block, according the word-processing system's word count, and thus, complies with Rule 84.06(b). The Brief also contains the information required by Rule 55.03.

/s/ R. Thomas Avery