

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex. rel.)	
PATRICK J. O'BASUYI,)	
)	
Relator,)	
)	No. 93652
v.)	
)	
HON. DAVID LEE VINCENT, III)	
)	
Respondent.)	

On Prohibition from the Circuit Court of St. Louis County

Honorable David Lee Vincent, III, Judge

RELATOR'S BRIEF

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TABLE OF AUTHORITIES

Rule 55.06(b) [6,7,8]

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Pallisades Collection, LLC v. Watson, 375 SW 2d 857 (Mo App 2012) [6]

Teefey v. Cleaves, 73 SW 3d 813 (Mo App 2002) [6,8]

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30 ALR 4th 572, 583 (1984) [7]

52 Am. Jur. 2d *Malicious Prosecution*, Section 126 [7]

JURISDICTIONAL STATEMENT

This is a Petition for Writ of Prohibition by Relator Patrick J. O'Basuyi against Respondent the Honorable David Lee Vincent, III seeking to prohibit said Respondent from permitting the trial of counterclaims of Defendants for malicious prosecution to take place simultaneously with the trial of Relator's underlying claims against Defendants for breach of contract, *quantum meruit* and transfers in fraud of creditors rights.

As this appeal involves a petition for an original writ of prohibition under Rules 97 and 84.22-84.24, it is within the jurisdiction of the Missouri Supreme Court under Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff Patrick J. O'Basuyi filed this action in the Circuit Court of St. Louis County against Defendants Rodney Thomas and TriStar Property Associates for breach of oral contract (Count I), *quantum meruit* (Count II) and against Thomas, TriStar and several other Defendants for transferring property in fraud of Plaintiff's rights as a creditor (Count III). (Petition included in Appendix at APP 16-25) Defendants have filed a two count counterclaim for malicious prosecution, alleging that the underlying claims are without merit. (Counterclaim included in Appendix at APP 4-10)

Plaintiff filed his Motion for Separate Trial of Defendants' counterclaims to be conducted only after an adverse determination of his underlying claims. (Motion included in Appendix at APP 2-3) The trial court denied Plaintiffs' Motion on August 1, 2013. (Order denying Motion included in Appendix at APP 1).

This Court entered a preliminary writ of prohibition on October 29, 2013.

POINT RELIED ON

THE TRIAL COURT EXCEEDED ITS JURISDICTION AND ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR SEPARATE TRIAL OF DEFENDANTS' COUNTERCLAIMS FOR MALICIOUS PROSECUTION IN THAT DEFENDANTS COUNTERCLAIMS ARE NOT COGNIZABLE UNTIL AFTER AN ADVERSE DETERMINATION OF PLAINTIFF'S UNDERLYING CLAIMS

Rule 55.06(b)

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

State ex rel Proctor v. Bryson, 100 SW 3d 775 (Mo banc 2003)

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ARGUMENT

THE TRIAL COURT EXCEEDED ITS JURISDICTION AND ABUSED ITS DISCRETION IN DENYING PLAINTIFF’S MOTION FOR SEPARATE TRIAL OF DEFENDANTS’ COUNTERCLAIMS FOR MALICIOUS PROSECUTION IN THAT DEFENDANTS’ COUNTERCLAIMS ARE NOT COGNIZABLE UNTIL AFTER AN ADVERSE DETERMINATION OF PLAINTIFF’S UNDERLYING CLAIMS

STANDARD OF REVIEW

Prohibition lies where a trial court acts in excess of its jurisdiction, abuses its discretion, or where an important question of law has been erroneously decided which would otherwise escape review or appeal and the aggrieved party may suffer considerable hardship or expense as a result. Even in matters in which the trial court has discretion, such as whether to conduct separate trials, prohibition is proper where the trial court’s ruling is clearly against the logic of the circumstances and would cause a party severe prejudice and expense. *State ex rel Proctor v. Bryson*, 100 SW 3d 775 (Mo banc 2003); *State ex rel Rockwood School District v. Romines*, 63 SW 3d 682 (Mo App 2001).

ARGUMENT

In *State ex. rel. General Motors Acceptance Corp. v. Standridge*, 181 SW 3d 76 (Mo banc 2006), this Court granted a Writ of Prohibition, holding that, *inter*

alia, Rule 55.06(b) permits a counterclaim for malicious prosecution to be *filed* in the same action as the underlying claim on which the counterclaim is based. The opinion is silent as to whether such a malicious prosecution counterclaim may be *tried* simultaneously with the trial of the underlying claims on which the malicious prosecution is based, or must await an adverse determination of the underlying claims, since the underlying claims in *Standridge* had already been adversely determined against plaintiff by a dismissal with prejudice. *Id.* at 78.

While not directly addressing the issue presented here, the Court does note that Rule 55.06(b) itself further provides that “...the court shall grant relief in that action *only in accordance with the relative substantive rights* of the parties.” (emphasis added). As a matter of substantive law, it is well-established in Missouri and elsewhere that a claim for malicious prosecution is not cognizable until *after* a final disposition of the underlying claim on its merits. Indeed, an adverse determination of the underlying claim is a necessary element of the cause of action. *Pallisades Collection, LLC v. Watson*, 375 SW 2d 857 (Mo App 2012); *Teefey v. Cleaves*, 73 SW 3d 813 (Mo App 2002).

Rule 55.06(b) reads as follows:

“(b) Joinder of Remedies; Fraudulent Conveyances.

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. 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.

Even though the expansive language of this Rule appears to authorize the filing of malicious prosecution counterclaims before the underlying claims have been adversely determined, this Court’s opinion in *Standridge* places this state in the distinct minority. Almost every other court addressing this issue has held that a malicious prosecution claim would be premature and *may not even be filed* until the underlying claims have been finally determined. 30 *ALR* 4th 572, 583 (1984); 52 *Am. Jur. 2d Malicious Prosecution*, Section 126.

Respondent’s ruling below here would extend this Court’s limited holding in *Standridge* to allow not only the *filing* of an anticipatory malicious prosecution claim under *Rule 55.06(b)*, but also the *introduction of evidence* supporting

these claims *before* the underlying claims have been determined. Among other matters, this would allow Defendants here to present evidence of their alleged damages, principally their attorneys fees and expenses in defending against the underlying action. Such evidence would clearly not be admissible in a trial of Plaintiff's underlying claims alone, since Defendants' attorneys fees and expenses are irrelevant to any of the issues in Plaintiffs' breach of contract, *quantum meruit* or fraudulent conveyances claims, and introduction of such evidence would clearly be prejudicial to Plaintiff.

Under the trial court's ruling, Defendants would also be permitted to introduce evidence of another element of their malicious prosecution claims, namely Plaintiff's alleged malice toward Defendants in prosecuting the underlying action. Once again, evidence of malice is clearly irrelevant to any issue in Plaintiff's claims against Defendants, and prejudicial to Plaintiff, but in a the combined trial sought by Defendants here, it would allow Defendants to accuse Plaintiff of bad faith and improper motive in bringing his claims, hoping thereby to undermine Plaintiff and his claims in the eyes of the jury.

Malicious prosecution suits contravene the public policy that the law should encourage all citizens to have unfettered access to the courts and aid in the uncovering of any wrongdoing. *Sanders v. Daniel Int'l Corporation*,

682 SW 2d 803 (Mo banc 1984); *Teefey v. Cleaves, supra*. If this court permits not only the filing, but also the introduction of evidence of a malicious prosecution claim before a final determination of the underlying claims, it is not difficult to envision how defendants' attorneys across this state will soon file malicious prosecution counterclaims as a matter of strategy in order to present otherwise irrelevant and prejudicial evidence to juries with the hope of impacting the jury's verdict on the underlying claims.

For example, in this case, should the jury find in favor of Plaintiff on any of his claims herein, the malicious prosecution claims will become moot, but that jury will have heard evidence of Defendants' attorneys fees and expenses in defending against Plaintiff's claims, and may choose to reduce or offset the damages awarded to Plaintiff as a result. That is precisely the prejudicial result these Defendants hope to achieve by the presentation of such evidence in this case.

The intermingling of malicious prosecution with the underlying claims in the same trial would also raise the strong possibility of inconsistent verdicts, such as where the jury renders a verdict both for plaintiff on its claims as well as for defendant on its counterclaim for malicious prosecution.

This Court should clarify its opinion in *Standridge* to the effect that while *Rule 55.06(b)* allows the *filing* of a malicious prosecution claim as a counterclaim

before the claims in the underlying action have been finally determined, it does not alter the substantive law of malicious prosecution claims, which requires an adverse determination of the underlying claims before the malicious prosecution counterclaim can be tried.

CONCLUSION

This Court should enter a Writ Of Prohibition to prohibit Respondent from allowing Defendants' counterclaims for malicious prosecution to proceed to trial unless and until the underlying claims on which they are based are determined adversely to Plaintiff.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed 2 copies of the foregoing to the Hon. David Lee Vincent, III, Circuit Judge, Div. 9 of the St. Louis County Circuit Court , at 7900 Carondelet, Clayton, MO, 63105, and Thomas Avery, Esq., Attorney for Defendants, at Blitz Bargett, 120 S Central Ste 1650, Clayton, MO 63105, on the 27th day of December, 2013.

/s/ Steven W. Koslovsky

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

The undersigned hereby certifies that this Brief complies with the limitations contained in Rule 86.06 (b) and contains 1937 words, and that the disk filed herewith pursuant to Rule 84.06(g) has been scanned for viruses and is virus free.

/s/ Steven W. Koslovsky

APPENDIX

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