In the
Missouri Court of Appeals
Western District

PAUL VESCOVO,	)	
	)	
Appellant,	)	**WD83324 Consolidated with**
	)	**WD83335 and WD83349**
v.	)	
	)	**OPINION FILED:**
ROBERT D. KINGSLAND, JR. AND	)	**December 29, 2020**
DEMPSEY & KINGSLAND, P.C.,	)	
	)	
Respondents,	)	
	)	
CHAD GARDNER AND LAW	)	
OFFICE OF CHAD GARDNER,	)	
	)	
Respondents-Cross Claim	)	
Respondents;	)	
	)	
LINDA JEPSEN,	)	
	)	
Respondent-Cross Claim	)	
Appellant,	)	
	)	
v.	)	
	)	
LAUREN MABERRY,	)	
	)	
Defendant-Cross Claim	)	
Appellant.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Justine E. Del Muro, Judge

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Mark D. Pfeiffer, Judge and Edward R. Ardini, Jr., Judge

Paul Vescovo ("Vescovo") appeals from the trial court's entry of summary judgment in favor of attorneys Chad G. Gardner and The Law Office of Chad G. Gardner, P.C. ("Gardner") and Robert D. Kingsland, Jr. and Dempsey & Kingsland, P.C. ("Kingsland"), and their client, Linda Jepsen ("Jepsen"), on Vescovo's claims of malicious prosecution and abuse of process. Jepsen and Lauren Maberry ("Maberry") each appeal the trial court's entry of judgment on the pleadings in favor of Gardner on their cross-claims for legal malpractice. Finding no error, we affirm.

Factual and Procedural Background[1]

During 2012, Matthew Hunter ("Hunter"), a deputy with the Clay County Sheriff's Office, worked after hours with Star Investigations, LLC, a private investigation business. James Murray ("Murray") owns Star Investigations. Murray initiated a private investigation into Jepsen in the spring of 2012. Jepsen attended several meetings with Murray, after he advised that it was in her best interest to do so. Hunter attended these meetings in his sheriff's uniform, introduced himself as a sheriff's deputy, and drove his patrol vehicle.

Hunter and Murray also initiated a private investigation into the death of Murray's daughter. Hunter and Murray went to Maberry's home and spoke to her minor daughter,

[1]The factual background is drawn from uncontroverted facts set forth in the parties' summary judgment pleadings that were either admitted or deemed admitted by operation of Rule 74.04(c)(2).

who gave them Maberry's phone number and place of employment. On August 28, 2012, Hunter called Maberry and identified himself as a Clay County sheriff's deputy who was helping another police department investigate the death of Murray's daughter. Maberry refused to answer his questions. Murray also contacted Maberry and asked her questions which Maberry described as inappropriate and private.

On September 24, 2012, Maberry filed a complaint with the Clay County Sheriff's Office regarding Hunter's conduct. On November 5, 2012, the Clay County Sheriff's Office issued a "Professional Standards" summary report in response to Maberry's complaint, finding that Hunter had used county resources when performing private investigations.

On November 5, 2012, Vescovo was elected as the Clay County Sheriff, and was set to take office on January 1, 2013. Vescovo defeated the incumbent Clay County Sheriff, Robert Boydston. While he was sheriff-elect, Vescovo performed transition functions from November 5 through December 31, 2012, including the selection of an undersheriff, major, and captains. Specifically, Vescovo interviewed and selected Hunter for a promotion to Captain in December 2012, effective January 1, 2013. During this same time frame, Vescovo counselled Hunter regarding Maberry's complaint, though Vescovo stated he was not disciplining Hunter.

After Vescovo became Sheriff, he stated that he took no further action to address Maberry's pending complaint. In January, 2013, Vescovo directed Hunter to obtain a Clay County Sheriff's Office ID badge for Murray. In April 2013, Vescovo approved a policy change allowing the employment of Clay County Sheriff's Office deputies as

private investigators. Hunter then obtained permission from the Clay County Sheriff's Office to work as a private investigator for Murray's company, Star Investigations. Maberry stated that she continued to be concerned for her and her children's safety throughout 2013 because Hunter had not been disciplined and was instead promoted.

Maberry retained Gardner to investigate her concerns about Hunter's conduct. During this investigation, Gardner reviewed the November 5, 2012 report that had been prepared in response to Maberry's complaint. Gardner learned about Hunter's contacts with Jepsen from that report.

On October 20, 2014, Gardner filed suit in the United States District Court for the Western District of Missouri ("federal district court") on behalf of Maberry and Jepsen ("federal lawsuit"). The federal lawsuit named as defendants Vescovo in his official and individual capacities, Hunter in his official and individual capacities, the Clay County Sheriff's Office, Murray, and Star Investigations.

The claims against Hunter were resolved by settlement and dismissed with prejudice on March 29, 2015. In April, Kingsland joined Gardner in representing Jepsen and Maberry in the federal lawsuit. During a deposition of Maberry on April 3, 2015, Vescovo's trial attorney informed Maberry and Gardner that Vescovo intended to file suit for malicious prosecution. On May 20, 2015, the claims against Murray and Star Investigations were dismissed with prejudice, after a settlement.

On June 18, 2015, Gardner and Kingsland filed an amended complaint alleging claims for common law invasion of privacy and for violation of 42 U.S.C. section 1983 ("section 1983") against Vescovo in his official capacity and against Clay County,

Missouri. The amended complaint also asserted the section 1983 claim against Vescovo in his individual capacity.

The federal district court granted summary judgment in favor of Clay County, Missouri and Vescovo in his official capacity with respect to all of the claims asserted in the amended complaint. The federal district court also entered an order granting judgment on the pleadings in favor of Vescovo in his individual capacity, because the factual allegations in the amended complaint depended on finding Vescovo vicariously liable for Hunter's actions, which the court held would not support recovery on a section 1983 claim.

On January 31, 2017, Vescovo filed suit in the Circuit Court of Jackson County, Missouri against Jepsen, Maberry, Gardner, and Kingsland. Vescovo asserted claims of malicious prosecution (Count II) and abuse of process (Count III) against Gardner and Kingsland. Vescovo asserted a claim of malicious prosecution against Jepsen and Maberry (Count I). All of Vescovo's claims complained about the fact that Vescovo had been named in the federal lawsuit in his individual capacity. Vescovo's lawsuit did not allege that it was malicious prosecution or an abuse of process to name him in his official capacity, or the other defendants, in the federal lawsuit.

Jepsen and Maberry each retained counsel to answer Vescovo's malicious prosecution claim and, among other things, asserted the affirmative defense of reliance on the advice of counsel. Jepsen and Maberry also filed cross-claims against Gardner asserting legal malpractice. The cross-claims alleged that Gardner pursued the section 1983 claim against Vescovo in his individual capacity without probable cause.

Alternatively, the cross-claims alleged that even if there was probable cause to sue Vescovo in his individual capacity, Gardner abandoned Jepsen and Maberry by failing to appeal the dismissal of the section 1983 claim against Vescovo in his individual capacity, and by failing to advise Jepsen or Maberry of the potential ramifications of failing to appeal.

The parties filed multiple dispositive motions. Gardner and Kingsland filed motions for summary judgment alleging that Vescovo could not, as a matter of law, establish one or more of the essential elements of his claims of malicious prosecution and abuse of process. Specifically, Gardner and Kingsland alleged that Vescovo could not establish the essential elements of absence of probable cause and malice for the malicious prosecution claim, and that Vescovo could not establish the essential elements of improper use of process and illegal purpose for the abuse of process claim. Jepsen filed a motion for summary judgment alleging that Vescovo could not prevail as a matter of law on his claim of malicious prosecution because of the affirmative defense of reliance on the advice of counsel. Gardner filed motions for judgment on the pleadings with respect to Maberry's and Jepsen's cross-claims, asserting they had not alleged and could not establish proximate cause between the failure to appeal dismissal of the federal lawsuit against Vescovo in his individual capacity and damages alleged to have been incurred due to the filing of Vescovo's lawsuit.

On October 9, 2019, the trial court entered its judgment and order ("Judgment") granting summary judgment in favor of Gardner and Kingsland on Counts II and III of Vescovo's lawsuit, and in favor of Jepsen on Count I of Vescovo's lawsuit. The

Judgment also granted Gardner's motions for judgment on the pleadings on Jepsen's and Maberry's cross-claims.

The Judgment concluded that based on the uncontroverted facts and the applicable law "there existed probable cause to file a claim under Section 1983 and that [Gardner] and [Kingsland] pursued said claim on behalf of [] Maberry and Jepsen with the purpose of obtaining a proper adjudication for their clients." The Judgment also concluded that Vescovo "failed to establish a lack of probable cause to support his claim for malicious prosecution. Thus, [Vescovo's] claim for malicious prosecution against [Jepsen] must also fail." Finally, the Judgment concluded that "the filing of a Section 1983 claim by [] Gardner and Kingsland was confined to its regular and legitimate function of pursuing said [claim] . . . . As such, [Vescovo's] claim of abuse of process fails." The Judgment did not provide a rationale for the grant of Gardner's motions for judgment on the pleadings on the cross-claims of Jepsen and Maberry. Shortly after the entry of Judgment, Vescovo voluntarily dismissed his malicious prosecution claim against Maberry.[2]

Vescovo, Jepsen, and Maberry each filed notices of appeal, and the appeals have been consolidated.

[2]Maberry did not file a motion for summary judgment. Nevertheless, the trial court noted in its Judgment "that because [] Gardner and Kingsland filed a legitimate Section 1983 claim supported by probable cause, the claim for malicious prosecution against [] Maberry must fail as well." Any issue that the trial court's Judgment erroneously granted Maberry relief she had not sought, or that the trial court's Judgment failed to resolve all claims as to all parties, was resolved by the fact that Vescovo voluntarily dismissed his claim against Maberry after the trial court's Judgment was entered.

Standard of Review

Vescovo asserts seven points on appeal, each challenging the grant of summary judgment on his claims of malicious prosecution and abuse of process because of the presence of genuine issues of material fact in dispute.

We review the grant of summary judgment *de novo*. *Truman Med. Ctr., Inc. v. Progressive Cas. Ins. Co.*, 597 S.W.3d 362, 365 (Mo. App. W.D. 2020). "Summary judgment shall be entered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Messina v. Shelter Ins. Co.*, 585 S.W.3d 839, 842 (Mo. App. W.D. 2019) (quotation omitted). The moving party establishes the right to judgment as a matter of law by demonstrating one of the following:

> (1) facts negating any one of the claimant's elements necessary for judgment; (2) that the claimant, after an adequate period of discovery, has not been able to—and will not be able to—produce evidence sufficient to allow the trier of fact to find the existence of one of the claimant's elements; or (3) facts necessary to support his properly pleaded affirmative defense.

Clark v. Ruark, 529 S.W.3d 878, 881-82 (Mo. App. W.D. 2017) (quoting *Roberts v. BJH Health Sys.*, 391 S.W.3d 433, 437 (Mo. banc. 2013)). Once the movant has established this showing, the burden shifts to the non-movant, who must demonstrate "that one or more of the material facts relied upon by the [moving] party is genuinely disputed." *Impey v. Clithero*, 553 S.W.3d 344, 349 (Mo. App. W.D. 2018) (quotation omitted). We review "the record in the light most favorable to the party against whom judgment was entered, and give[] the non-movant the benefit of all reasonable inferences from the record." *Truman Med. Ctr., Inc.*, 597 S.W.3d at 365-66 (quotation omitted).

Jepsen and Maberry each appealed the grant of Gardner's motion for judgment on the pleadings on their respective cross-claims for legal malpractice asserting that their pleadings adequately alleged the essential elements of a claim of legal malpractice.

"We review a court's grant of judgment on the pleadings *de novo*." *Blackwood, Langworthy & Tyson, LLC, v. Knipp*, 571 S.W.3d 108, 114 (Mo. App. W.D. 2019).

> Review of a grant of a motion for judgment on the pleadings requires this Court to decide whether the moving party is entitled to judgment as a matter of law on the face of the pleadings. For purposes of the motion, the well-pleaded facts pleaded by the nonmoving party are treated as admitted. The trial court's grant of judgment on the pleadings will be affirmed only if review of the totality of the facts pleaded by the petitioner and the benefit of all reasonable inferences drawn therefrom reveals that petitioner could not prevail under any legal theory.

Id. (quoting *Morgan v. Saint Luke's Hosp. of Kansas City*, 403 S.W.3d 115, 117 (Mo. App. W.D. 2013)). Because we are "'primarily concerned with the correctness of the result,'" rather than the course taken in order to reach it, we will affirm the trial court's judgment "'if it is correct on any ground supported by the record regardless of whether the trial court relied on that ground.'" *Id.* (quoting *Barrett v. Greitens*, 542 S.W.3d 370, 376 (Mo. App. W.D. 2017)).

Summary of Issues on Appeal

Vescovo asserts seven points on appeal. In points one and two, Vescovo alleges that genuine issues of material fact in dispute prevented the trial court from finding that probable cause existed (or that its absence could not be established) as an essential element of his claim of malicious prosecution against Gardner and Kingsland. In points three and four, Vescovo alleges that genuine issues of material fact in dispute prevented

the trial court from finding that malice could not be established as an essential element of his claim of malicious prosecution against Gardner and Kingsland. In point five, Vescovo alleges that it was error to find that Jepsen established the affirmative defense of reliance on advice of counsel as a matter of law as that defense is intertwined with the analysis of probable cause, as to which there are genuine issues of material fact in dispute. In points six and seven, Vescovo alleges that genuine issues of material fact in dispute prevented the trial court from finding that improper use of process could not be established as an essential element of his claim of abuse of process against Gardner and Kingsland.

Jepsen and Maberry filed separate, but virtually identical, briefs in connection with their appeals. They each assert in a single point on appeal that it was error to grant Gardner's motion for judgment on the pleadings because their respective cross-claims adequately pled all of the essential elements of a legal malpractice claim.

We analyze the appeals separately, and the points collectively where appropriate.

Vescovo's Appeal

The trial court did not err in granting summary judgment in favor of Gardner, Kingsland, and Jepsen on Vescovo's malicious prosecution claims (Counts I & II) because, as a matter of law, probable cause existed (or its absence could not be established) to file the federal lawsuit (Points one, two, and five)

In order to prevail on a claim for malicious prosecution a plaintiff must prove:

> (1) the commencement or prosecution of the proceedings against the present plaintiff; (2) its legal causation or instigation by the present defendant; (3) its termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage by reason thereof.

Impey, 553 S.W.3d at 352. "Actions for malicious prosecution are disfavored under Missouri law," thus, "'strict and clear proof' of all [] elements" is required. *Id.* at 352-53. (quoting *Clark*, 529 S.W.3d at 882).

The trial court's Judgment concluded that the fourth essential element of a claim of malicious prosecution, the absence of probable cause, could not be established as a matter of law, supporting the grant of summary judgment in favor of Gardner, Kingsland, and Jepsen. Specifically, the Judgment found both that probable cause existed to file the federal lawsuit, and that its absence could not be established, as a matter of law.

In points one and two, Vescovo asserts that the trial court erred in reaching these conclusions because genuine issues of material fact remain in dispute regarding the absence of probable cause to "initiate/continue" the federal lawsuit against Vescovo in his individual capacity. In point five, Vescovo asserts that because the trial court erred in reaching its probable cause conclusions, it further erred in relying on those conclusions to grant summary judgment on Jepsen's affirmative defense of reliance on advice of counsel.

"'Probable cause to instigate a civil suit' means a reasonable belief in the facts alleged plus a reasonable belief that the claim may be valid under the applicable law.'" *Impey*, 553 S.W.3d at 353 (quoting *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 318 (Mo. App. W.D. 2010)). "Probable cause depends 'upon the honest and reasonable belief of [the] one who instigated its prosecution'" rather than "'what may have ultimately proved to be the actual state of facts embraced in the previous action or proceeding.'" *Id.* (quoting *Diehl*, 309 S.W.3d at 318). Probable cause is established "[i]f it appears that a

reasonably prudent person would have believed and acted under the circumstances as did the person who instigated the previous action." *Id.* (quotation omitted). "Because establishing the absence of probable cause requires proof of a negative, slight evidence is sufficient." *Diehl*, 309 S.W.3d at 319. But, "[w]here there is no dispute as to the facts underlying a claim for malicious prosecution, the question of probable cause is one of law for the court." *Zahorsky v. Griffin, Dysart, Taylor, Penner & Lay, P.C.*, 690 S.W.2d 144, 152 (Mo. App. W.D. 1985).

Vescovo contends that genuine issues of material fact in dispute precluded finding that an absence of probable cause to name Vescovo in his individual capacity in the federal lawsuit could not be established. Before addressing this contention, however, we must first address whether the trial court's entry of summary judgment in favor of Gardner, Kingsland, and Jepsen can be affirmed on a basis that renders Vescovo's contention irrelevant. *Septagon Constr. Co. v. Indus. Dev. Auth. of Moberly*, 521 S.W.3d 616, 622 (Mo. App. W.D. 2017) ("Summary judgment can be affirmed on appeal on an entirely different basis than that posited at trial and by any appropriate theory supported by the record." (citing *Mo. Bankers Assoc., Inc. v. St. Louis Co.*, 448 S.W.3d 267, 270-71 (Mo. banc 2014))); *Payne v. St. Joseph*, 58 S.W.3d 84, 86 (Mo. App. W.D. 2001) ("We will affirm the trial court's summary judgment on any ground supported by the record, whether relied upon by the trial court or not." (citing *Comstock v. Walsh*, 848 S.W.2d 7, 9 (Mo App. W.D. 1992))).

Vescovo's malicious prosecution claims against Gardner, Kingsland, and Jepsen challenge only that Vescovo was named in his individual capacity in the federal lawsuit.

But the summary judgment pleadings argued that pursuant to *Joseph H. Held & Associates v. Wolff*, 39 S.W.3d 59 (Mo. App. E.D. 2001), Vescovo was required to establish the absence of probable cause with respect to the ***entire*** federal lawsuit, and that because Vescovo did not plead and could not establish an absence of probable cause with respect to the claims asserted in the federal lawsuit against Hunter, Murray, Star Investigations, the Clay County Sheriff's Office, Clay County, Missouri, and Vescovo in his official capacity, Vescovo could not establish an absence of probable cause in the instant case as a matter of law. It appears the trial court accepted this argument as it found, generally, that probable cause existed, and that its absence could not be established, to file a section 1983 claim. The trial court did not commit legal error.

In *Held*, our Eastern District held that an "[u]nderlying proceeding gives rise to, at most, only one claim for malicious prosecution." 39 S.W.3d at 63 (citing *Muegler v. Berndsen*, 964 S.W.2d 459, 461 n.1 (Mo. App. E.D. 1998)). "The separate counts in an underlying petition do not support separate actions for malicious prosecution." *Id*. (citing *Muegler*, 964 S.W.2d at 461 n.1). "To make a submissible case for malicious prosecution, the plaintiff must prove lack of probable cause for the *entire* proceeding." *Id*. (emphasis added in case) (quoting 1 *Mo. Tort Law*, section 3.4 (MoBar 2d ed. 1990)). "An action in malicious prosecution therefore requires the plaintiff to show want of probable cause for the proceeding. The plaintiff does not meet his burden by showing the defendant's lack of probable cause in one of the number of theories underlying the proceeding where other theories are supported by probable cause." *Id*. (quoting *Zahorsky*, 690 S.W.2d at 151).

Held acknowledged that *Zahorsky* and *Muegler* involved scenarios where the parties asserting a claim of malicious prosecution were the only defendants in the underlying litigation. *Id*. But *Held* concluded that the holdings in *Zahorsky* and *Muegler* were of equal application to a claim of malicious prosecution asserted by fewer than all of the defendants named in an underlying lawsuit and as to less than all claims or theories asserted. *Id*. The rationale for extending the holdings in *Zahorsky* and *Muegler* centered on the fact that the first essential element of a malicious prosecution claim is "the commencement of a judicial 'proceeding.'" *Id*. (citing *Zahorsky*, 690 S.W.2d at 150-51).

In *Zahorsky*, a jury found in favor of Zahorsky and his medical clinic on all three claims asserted in a medical malpractice suit. 690 S.W.2d at 150. Zahorsky and his clinic then brought suit against the underlying plaintiffs and their attorneys for malicious prosecution. *Id*. They argued that so long as they made a prima facie showing of lack of probable cause as to any one of the three underlying causes of action, the defendants would not be entitled to judgment as a matter of law. *Id*. We disagreed, stating:

> [T]he elements for a cause of action in malicious prosecution refer to the commencement of a "proceeding" by the defendant. Likewise, the language of . . . the malicious prosecution verdict directing instruction, requires the jury to find that "defendant instigated a *judicial proceeding* against plaintiff which terminated in favor of plaintiff . . . ." The references are to a "proceeding" and in no way indicate that any of the theories underlying a particular proceeding could render the entire action one without probable cause.

Id. (citation omitted).

Held concluded that the "a judicial proceeding" rationale for requiring an absence of probable case for an entire underlying proceeding was equally applicable where a

malicious prosecution action is filed by less than all defendants in an underlying proceeding, where that proceeding involved the assertion of multiple claims against multiple defendants in multiple capacities, as doing so involved "no more than another theory of liability arising out of common facts in the same proceeding." *Held*, 39 S.W.3d at 63. Thus, in *Held*, because "the undisputed facts demonstrated that plaintiffs could not show that the entire [underlying] proceeding terminated in their favor ***or that there was a lack of probable cause for the entire proceeding***[,]" summary judgment was appropriately entered. *Id*. at 63-64 (emphasis added).

Here, it is uncontroverted that the multiple claims asserted in the federal lawsuit against multiple defendants in multiple capacities involved "no more than another theory of liability arising out of common facts in the same proceeding." *Id*. at 63. Yet, Vescovo has not pled, nor made any effort to demonstrate, the absence of probable cause as to the entire proceeding filed in the federal district court. Pursuant to *Held*, and as a matter of law, Vescovo cannot establish the essential element of the absence of probable on his claim of malicious prosecution against Gardner and Kingsland when he complains only about the fact that he was sued in his individual capacity in the federal lawsuit. Therefore, the trial court did not err by entering summary judgment in favor of Gardner and Kingsland on Vescovo's malicious prosecution claim. By extension, the trial court did not err in entering summary judgment in favor of Jepsen on Vescovo's malicious prosecution claim, as the affirmative defense to an action in malicious prosecution of reliance on the advice of counsel is "inextricably bound up with the plaintiff's burden to demonstrate the lack of probable cause." *Zahorsky*, 690 S.W.2d at 152 (quoting *Hernon*

v. Revere Copper & Brass Inc., 494 F.2d 705, 707 (8th Cir. 1974)). Our conclusion is consistent with the fact that "[a]ctions for malicious prosecution are disfavored under Missouri law," thus "'strict and clear proof' of all [] elements" is required. *Impey*, 553 S.W.3d at 352 (quoting *Clark*, 529 S.W.3d at 882).

Vescovo argues that *Held* should not be followed because if its reasoning is applied too broadly, it would permit a plaintiff to name plainly unrelated defendants, while securing immunity from a subsequent malicious prosecution suit so long as there is probable cause for at least one named defendant. But Vescovo fails to cite a single case from any jurisdiction which has adopted a "claim-specific" or "party-specific" approach to assessing the absence of probable cause in a malicious prosecution action involving an underlying ***civil*** lawsuit.[3] And in any event, *Held* forecloses Vescovo's unsubstantiated concern. *Held* concluded that the extension of *Zahorsky* and *Muegler* to malicious prosecution actions filed by fewer than all defendants and as to less than all claims in an underlying lawsuit only applies where the multiple theories of liability asserted against multiple parties in multiple capacities arose out of common facts alleged in a single lawsuit. *Held*, 39 S.W.3d at 63. Vescovo does not challenge that the federal lawsuit fits

[3]The ***civil*** rule that an underlying proceeding gives rise to only one malicious prosecution claim has not been extended to malicious prosecution actions arising out of ***criminal*** proceedings in the majority of courts that have considered the issue, and instead, a "charge-specific" approach to the probable cause element of a malicious prosecution case has been adopted on public policy grounds unique to the nature of criminal proceedings. *See, e.g.*, *Costello v. Milano*, 20 F. Supp. 3d 406, 415 (S.D.N.Y. 2014); *Harrington v. Wilber*, 743 F. Supp. 2d 1006, 1011 (S.D. Iowa 2010), *rev'd on other grounds*, 678 F.3d 676 (8th Cir. 2012); *Bertram v. Viglas*, No. 19-11298-LTS, 2020 WL 1892187, at *6-7 (D. Mass. Apr. 16, 2020); *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991); *Johnson v. Knorr*, 477 F.3d 75, 85 (3d Cir. 2007); *Holmes v. Vill. of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007). *But see*, *Howse v. Hodus*, 953 F.3d 402, 408 (6th Cir. 2020) (holding in section 1983 malicious prosecution action, plaintiff could not move forward with malicious prosecution claims where probable cause existed for at least one of multiple criminal charges). This court recently examined whether the civil rule addressed in *Held* should be applied to malicious prosecution claims arising out of criminal proceedings, and concluded it should not, though that holding is not final, and remains subject to an application for transfer that is pending before the Missouri Supreme Court. *See Daniels v. Terranova*, No. WD82785, 2020 WL 4758599, at *10-12 (Mo. App. W.D. Aug. 18, 2020).

squarely within these parameters. The hypothetical policy concern Vescovo raises has no application here.

In addition, even if we were to apply a narrower lens than that authorized by *Held* to focus only on the claims asserted against Vescovo in the federal lawsuit, all of which were terminated in Vescovo's favor, Vescovo has not challenged that there was an absence of probable cause to name him in the federal lawsuit in his official capacity. Just as in *Zahorsky*, where defendants in an underlying proceeding prevailed on all claims asserted against them, and contended in their malicious prosecution action that they need only establish an absence of probable cause for one of the multiple theories alleged against them, we would be bound to conclude that the "reference[] . . . to a 'proceeding'. . . in no way indicate[s] that any of the theories underlying a particular proceeding could render the entire action one without probable cause." *Zahorsky*, 690 S.W.2d at 151.

Because Vescovo cannot establish the absence of probable cause with respect to the entire underlying proceeding, or even as to only those claims asserted against him in the underlying proceeding, we are not required to address his contention that genuine issues of material fact in dispute prevent the trial court from finding him unable to establish an absence of probable cause with respect only to the section 1983 claim asserted against Vescovo in his individual capacity. Vescovo's contention ignores that the trial court broadly found that probable cause existed, and that its absence could not be established, to "file a claim under [s]ection 1983." But, even if we were to construe the Judgment's plain language to intend a narrower (and unstated) conclusion that probable cause existed and its absence could not be established only as to the section 1983 claim

asserted against Vescovo in his individual capacity, (which we do not), we would not find error.

Civil actions against public officials in their official capacity are treated as suits against the state. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("the real party in interest in an official-capacity suit is in the governmental entity and not the named official"). Whereas, "[s]uits against officials in their individual capacity 'seek to impose personal liability upon a government official for actions he takes under color of state law.'" *Williston v. Vasterling*, 536 S.W.3d 321, 337 (Mo. App. W.D. 2017) (quoting *Handt v. Lynch*, 681 F.3d 939, 943 (8th Cir. 2012)). "To establish liability, the plaintiff must show that the official, acting under color of state law, caused a deprivation of a federal right." *Handt*, 681 F.3d at 943 (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). One acts under color of state law when he misuses his power, which is "possessed by virtue of state law and made possible only because the wrong doer is clothed with the authority of state law." *Bishop v. Circuit Court of Cole Cty.*, 702 S.W.2d 554, 556 (Mo. App. W.D. 1985) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

While the issue of immunity is not before us,[4] the doctrine is closely intertwined when issues of liability in an individual capacity arise. Official immunity insulates public officials from liability in their individual capacity for injuries arising out of their discretionary acts, but it does not protect them from suit for alleged torts committed during the performance of ministerial duties. *Laughlin v. Perry*, 604 S.W.3d 621, 627

[4]As a general proposition, state-law immunity defenses are not applicable to section 1983 cases. *See Howlett v. Rose*, 496 U.S. 356, 375-78 (1990). But, the parameters of the qualified immunity defense are nonetheless relevant here to assist in describing the parameters of a government official's potential liability in his or her individual capacity.

(Mo. banc 2020). Discretionary acts require a "'degree of reason and judgment'" as to "'how or whether an act should be done or course pursued.'" *Id.* at 628 (quoting *Southers v. Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008)). Whereas ministerial acts are "'merely clerical'" and of "'a routine and mundane nature that is likely to be delegated to subordinate officials.'" *Id.* (quoting *State ex rel. Alsup v. Kanatzar*, 588 S.W.3d 187, 191 (Mo. banc 2019)). Hiring and supervising are typically discretionary acts which give rise to official immunity. *Flora v. Moniteau Cty.*, No. 05-4244-CV-C-NKL, 2006 WL 2707347, at *7 (W.D. Mo. Sept. 19, 2006) (citing *Gavan v. Madison Memorial Hosp.*, 700 S.W.2d 124, 128 (Mo. App. E.D. 1985)). Though generally insulated, even discretionary acts "will not be protected by official immunity if the conduct is willfully wrong or done with malice or corruption." *Southers*, 263 S.W.3d at 610. "An allegation of 'malicious motive or purpose or of conscious wrongdoing' is sufficient under Missouri law." *Mauzy v. Mexico School Dist.*, 878 F. Supp. 153, 156 (E.D. Mo. 1995) (quoting *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 447 (Mo. banc 1986)).

The uncontroverted facts establish that during 2012 and 2013, Hunter, a deputy with the Clay County Sheriff's Office, worked after hours with Star Investigations, a private investigation business. During 2012, he participated in private investigations of Jepsen and Maberry while holding himself out as a Clay County Sheriff's deputy. On September 24, 2012, Maberry filed a complaint with the Clay County Sheriff's Office regarding Hunter's conduct, which later confirmed that Hunter had utilized county resources while performing private investigations.

It is uncontroverted that the circumstances addressed in Maberry's complaint predated Vescovo's election on November 5, 2012. It is also uncontroverted that between the day of the election and January 1, 2013 when Vescovo took office, Vescovo performed transition functions including interviewing and promoting Hunter, and "counselling" Hunter regarding Maberry's complaint. And it is uncontroverted that after Vescovo took office on January 1, 2013, he took no action to terminate or close the file opened in response to Maberry's complaint, and instead approved a policy change that authorized the employment of Clay County Deputies as private investigators; directed Hunter to obtain a Clay County Sheriff's Office ID badge for Murray, the owner of Star Investigations; and specifically gave Hunter permission to work as a private investigator for Star Investigations.

Vescovo has not alleged how or why it would have been inappropriate for Gardner or Kingsland to rely on these uncontroverted facts to support a reasonable belief that Vescovo might be found to have engaged in "conscious wrongdoing" sufficient under Missouri law to hurdle Vescovo's official immunity, thereby exposing him to liability in his individual capacity. *See Mauzy*, 878 F. Supp. at 156 (quoting *Twiehaus*, 706 S.W.2d at 447). *See also Impey*, 553 S.W.3d at 353 ("[P]robable cause does not require that a plaintiff initiating a suit would have prevailed on its claim but instead only requires that a reasonable person have an honest belief that pursing the claim is proper."). That is particularly so since some of Vescovo's uncontroverted actions were undertaken before he officially took office as the Clay County Sheriff, and thus when he could be argued to have been acting in other than an official capacity for Clay County, Missouri.

"Where there is no dispute as to the facts underlying a claim for malicious prosecution, the question of probable cause is one of law for the court." *Zahorsky*, 690 S.W.2d at 152. It would not have been error for the trial court to conclude that based on the uncontroverted facts, probable cause existed to initiate a section 1983 action against Vescovo in his individual capacity.

In arguing that genuine issues of material fact in dispute would have prevented this conclusion, Vescovo relies on factual assertions about Gardner's and Kingsland's purported political intentions or motivations in pursuing the section 1983 suit against him in his individual capacity. But Vescovo offers no reasoned explanation connecting these factual assertions about motive or intent to the ability to determine whether there was an absence of probable cause. While Vescovo's assertions about motive and intent are material to determining whether malice as an essential element of a claim of malicious prosecution can be established, they are immaterial to determining whether probable cause existed to name Vescovo in his individual capacity. *See Impey*, 553 S.W.3d at 352-53.

Vescovo also argues that his expert's unrefuted opinion that Jepsen, Maberry, Gardner, and Kingsland acted without probable cause creates a genuine issue of material fact. However, "[o]nly evidentiary materials that are admissible or usable at trial can sustain or avoid a summary judgment." *American Family Mut. Ins. Co. v. Lacy*, 825 S.W.2d 306, 311 (Mo. App. W.D. 1991). "It is well established that witnesses are incompetent to testify as to the intentions of other parties. A witness's 'attempt to state what was in someone else's mind is either sheer speculation or unadulterated hearsay.'"

Bryant v. Bryan Cave, LLP, 400 S.W.3d 325, 333 (Mo. App. E.D. 2013) (quoting *Uhle v. Sachs Elec.*, 831 S.W.2d 774, 777 (Mo. App. E.D. 1992)). "If an expert's opinion is premised on such guesswork, or is mere conjecture or imagination, then it is insufficient to demonstrate a genuine issue of material fact necessary to avoid summary judgment." *Brown for Estate of Kruse v. Seven Trails Investors, LLC*, 456 S.W.3d 864, 873-74 (Mo. App. E.D. 2014). In other words, "[e]xpert opinions founded on speculation are not sufficient to raise disputed issues of fact." *Frontenac Bank v. T.R. Hughes, Inc*., 404 S.W.3d 272, 279 (Mo. App. E.D. 2012) (quotation omitted). Vescovo's reliance on an expert's opinion that purported to speculate about whether Gardner and Kingsland possessed a reasonable belief that the facts alleged supported a section 1983 claim necessarily requires speculation about their state of mind that is inadmissible, and is thus insufficient to raise a genuine issue of material fact.

Vescovo also argues that the federal district court found that Jepsen and Maberry lacked probable cause to sue Vescovo in his individual capacity, and that Jepsen, Maberry, Gardner and Kingsland are collaterally estopped by the finding. We disagree. The federal district court's order granting judgment on the pleadings in favor of Vescovo in his individual capacity did not address probable cause, and addressed only the sufficiency of the factual allegations in the amended complaint to support recovery. "[C]ollateral estoppel applies to facts, not to legal reasoning . . . ." *Goldsby v. Lombardi*, 559 S.W.3d 878, 887 (Mo. banc 2018) (citing *Hudson v. Carr*, 668 S.W.2d 68, 70 (Mo. banc 1984)). The federal district court made no factual findings addressing the presence of probable cause to initiate the section 1983 action against Vescovo in his individual

capacity, and was not asked to address the issue. In any event, Vescovo did not raise the purported collateral estoppel effect of the federal district court's dismissal order with the trial court, leaving his argument unpreserved for appellate review. *FH Partners, LLC v. Complete Home Concepts, Inc.*, 378 S.W.3d 387, 398 n.7 (Mo. App. W.D. 2012) (holding that an argument not raised with the trial court and first raised on appeal is not preserved for appellate review).

Finally, Vescovo asserts that after trial counsel threatened Gardner and Maberry with a malicious prosecution action during the underlying federal lawsuit, it became unreasonable for them to continue their suit against Vescovo in his individual capacity, even if they had probable cause to initiate the suit. Vescovo has not cited any authority for the proposition that trial counsel's threats to pursue a claim of malicious prosecution are in any manner material to determining whether the legal standard for establishing an absence of probable cause has been met. "When an appellant cites no authority and offers no explanation why precedent is unavailable, appellate courts consider the [argument] waived or abandoned." *Grant v. Sears*, 379 S.W.3d 905, 917 (Mo. App. W.D. 2012) (quotation omitted). Regardless, the uncontroverted facts identified, *supra*, which we have concluded support the reasonable belief that Vescovo might be found to have engaged in "conscious wrongdoing" sufficient under Missouri law to expose him to liability in his individual capacity, remained uncontroverted throughout the pendency of the federal lawsuit, despite trial counsel's threats to pursue a malicious prosecution action.

For the multiple reasons herein explained, the trial court did not error in granting summary judgment in favor of Gardner, Kingsland, and Jepsen on Vescovo's malicious prosecution claims based on its findings that probable cause existed, and that its absence could not be established, to file a section 1983 claim in the federal lawsuit. Points one, two and five are denied.

Because the trial court did not err when it granted summary judgment on Vescovo's claims for malicious prosecution based on an inability to establish the essential element of an absence of probable cause, Vescovo's contention that genuine issues of material fact prevented a finding that he could not establish the essential element of malice is rendered moot (Points three and four)

In Vescovo's third and fourth points on appeal, he claims that genuine issues of material fact regarding whether Gardner and Kingsland, respectively, acted with malice in instituting a section 1983 suit against him in his individual capacity prevent the entry of summary judgment on his claims of malicious prosecution. "Because we have already found that [Vescovo] cannot show that [Gardner, Kingsland, and Jepsen] lacked probable cause in initiating the [1983] action and thus cannot prevail on his malicious prosecution claim[s], we need not address [these] point[s]." *Impey*, 553 S.W.3d at 356.

Points three and four are denied.

The trial court did not err in entering summary judgment in favor of Gardner and Kingsland on Vescovo's claim of abuse of process (Count III) because the uncontroverted facts establish as a matter of law that Gardner and Kingsland did not make an illegal, improper, perverted use of process, neither warranted nor authorized by the process, in instituting the section 1983 claim (Points six and seven)

In Vescovo's sixth and seventh points on appeal, he asserts that the trial court erred in concluding that the section 1983 claim asserted against Vescovo in his individual capacity was confined to its regular and legitimate function because genuine issues of

material fact remain which establish that Gardner and Kingsland, respectively, improperly utilized process.

In order to prove an abuse of process claim, a plaintiff must establish that "'(1) the present defendant made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulted.'" *Trs. of Clayton Terrace Subdivision v. 6 Clayton Terrace, LLC*, 585 S.W.3d 269, 277 (Mo. banc 2019) (quoting *Ritterbusch v. Holt*, 789 S.W.2d 491, 493 (Mo. banc 1990)). "The essence of a claim for abuse of process is the use of process for some collateral purpose." *Teefey v. Cleaves*, 73 S.W.3d 813, 818 (Mo. App. W.D. 2002) (quotation omitted).

Here, the trial court's Judgment concluded that "the filing of a Section 1983 claim by [] Gardner and Kingsland was confined to its regular and legitimate function of pursuing said [claim] . . . . As such, [Vescovo's] claim of abuse of process fails." The trial court thus found, as a matter of law, that the uncontroverted facts established that Vescovo could not establish the ***first*** essential element of an abuse of process claim--that Gardner and Kingsland used process in an unwarranted or unauthorized manner. As with the trial court's probable cause findings, the Judgment's abuse of process finding was ***not*** narrowly tailored to apply only to the assertion of a claim against Vescovo in his individual capacity. Vescovo's sixth and seventh points on appeal improvidently presuppose to the contrary. Even if we could read the Judgment as Vescovo's points on appeal presume, which we do not, Vescovo cites no authority for the proposition that an

abuse of process claim can be asserted as to less than all claims or parties named in an underlying lawsuit. *Grant*, 379 S.W.3d at 917 ("When an appellant cites no authority and offers no explanation why precedent is unavailable, appellate courts consider the [argument] waived or abandoned." (quotation omitted)).

Even if we overlook this obstacle, we would not find merit in Vescovo's contention that it was error to find that he could not establish the first essential element of an abuse of process claim with respect to the section 1983 claim asserted against him in his individual capacity. Vescovo argues that disputed facts exist as to whether Gardner and Kingsland used process for the collateral purpose of exposing Vescovo's personal assets "when [Gardner and Kingsland] had no facts or legal basis for the suit against Vescovo personally as a means to force Vescovo to resign." Of course, we have already generally explained that is was not legally erroneous for the trial court to conclude that probable cause existed, or that its absence could not be established, in connection with the federal lawsuit. Even without this conclusion, however, Vescovo's contention would not support reversal of the trial court's grant of summary judgment in favor of Gardner and Kingsland on Vescovo's abuse of process claim.

Accepting, *arguendo*, that genuine issues of material fact remain in dispute regarding Gardner's and/or Kingsland's motive or purpose in pursuing the section 1983 claim against Vescovo in his individual capacity, these disputed facts are only material to the ***second*** essential element of an abuse of process claim, which requires proof that use of process was employed for an improper purpose. These disputed facts are not material to determining whether process was used in an unwarranted or unauthorized manner.

This critical distinction was the basis for our Supreme Court's reversal of an abuse of process judgment in *Trustees of Clayton Terrace Subdivision*, 585 S.W.3d at 278-79. In that case, the seller of a residential subdivision secured a judgment for abuse of process against the subdivision trustees. *Id*. at 275-76. On appeal, the Supreme Court noted that the trial court's judgment relied on the seller's assertion that the trustees' purpose in seeking to set aside her sale of a residential lot "was wholly pretextual and was brought solely for the allegedly improper collateral purpose of coercing [the lot's buyer] into abandoning or withdrawing its request to subdivide the property." *Id*. at 278. The Supreme Court observed that although this evidence did support a finding that the second essential element of an abuse of process claim had been establish (proof of an improper purpose), it was error to rely on the same evidence to support a finding that the first essential element had been established (unauthorized or unwarranted use of process). *Id*. "The test for liability in an abuse of process claim is 'whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not legally be compelled to do.'" *Id*. (quoting *Moffett v. Commerce Tr. Co*., 283 S.W.2d 591, 600 (Mo. 1955)). "The ulterior motive may be inferred from the wrongful use made of the process, but the use itself may not be inferred from the motive." *Id*. (quotation omitted). "It is improper to conflate these two separate elements by inferring an improper use of process from bad motive." *Id*.

Thus, "[t]he test employed to see whether there has been a misuse of process 'is whether process has been used to accomplish some unlawful end or to compel the opposite party ***to do some collateral thing which he [or she] could not be compelled to***

do legally.'" *Id*. (emphasis added) (quoting *Ritterbusch*, 789 S.W.2d at 493 n.1). "But '[n]o liability attaches where a party has done nothing more than pursue the lawsuit to its authorized conclusion ***regardless of how evil a motive he possessed at the time***.'" *Id.* (emphasis added) (quoting *Pipefitters Health & Welfare Tr. v. Waldo R., Inc.*, 760 S.W.2d 196, 198-99 (Mo. App. E.D. 1988)). "Abuse of process is not appropriate where the action is confined to its regular function ***even if the plaintiff had an ulterior motive in bringing the action, or if the plaintiff knowingly brought the suit upon an unfounded claim***." *Id.* at 279 (emphasis added) (quotation omitted).

Vescovo's contention that in bringing the section 1983 action against Vescovo in his individual capacity, Gardner and Kingsland had the ulterior or evil motive to force him out of office is indistinguishable from the seller's contention in *Trustees of Clayton Terrace Subdivision* that the trustees had the ulterior motive of discouraging the lot buyer from continuing its pursuit of approval of a lot split. 585 S.W.3d at 278. Vescovo's contention is insufficient as a matter of law to establish that Gardner and Kingsland used process in an unauthorized or unwarranted manner to "accomplish some end not envisioned by the legal process used." *Id.* Gardner and Kingsland had the right to sue to determine whether their clients' rights had been violated pursuant to section 1983. *See id*. at 278-79 (holding that "[t]he trustees had the right to sue to enforce the 'right of first refusal' provision" in deed restrictions). Vescovo was arguably an appropriate person against whom this claim could be brought, as we have previously explained. *See id*. at 279 (holding that "the seller[] was the only person against whom [the trustees'] claim could be brought"). The section 1983 claim sought monetary damages--"a purpose for

which that cause of action is designed." *Id*. Just as the Supreme Court concluded in *Trustees of Clayton Terrace Subdivision*, Gardner's and Kingsland's "actions may have been strategic, caused stress and concern to [Vescovo], and, ultimately, failed, but they were not an unauthorized use of a [section 1983 action]." *Id*. It is "the rare case[] in which a valid abuse of process claim will lie." *Id*. at 278. This is not that rare case, as there is no evidence the section 1983 action was brought against Vescovo in his individual capacity solely "'to obtain a result which the process was not intended by law to effect.'" *Id*. (quoting *Thompson v. Farmers' Exch. Bank*, 62 S.W.2d 803, 810 (Mo. 1933)). Stated another way, so long as an objective sought to be obtained by the use of process is authorized and warranted, the first essential element of an abuse of process claim cannot be established as a matter of law, even if evidence suggests the use of process was also undertaken for an improper, collateral purpose.

The trial court did not err in granting summary judgment in favor of Gardner and Kingsland on Vescovo's abuse of process claim. Points six and seven are denied.

Jepsen's and Maberry's Appeals

The trial court did not err in granting Gardner's motion for judgment on the pleadings on Jepsen's and Maberry's cross-claims for legal malpractice (Point one)

Jepsen and Maberry each appeal the trial court's grant of Gardner's motion for judgment on the pleadings on their respective cross-claims for legal malpractice. Both assert in a single point on appeal that it was legal error to grant judgment on the pleadings because their cross-claims set forth sufficient factual allegations to state a claim against Gardner for legal malpractice. Jepsen's and Maberry's cross-claim allegations, and their

appellate briefs, are virtually identical. We therefore address their single point on appeal collectively.

Jepsen's and Maberry's cross-claims sought to assert a claim of legal malpractice against Gardner premised on two theories: (i) that Gardner lacked probable cause to initiate and continue the section 1983 suit against Vescovo in his individual capacity; and alternatively, (ii) that even if Gardner had probable cause to sue Vescovo in his individual capacity, Gardner abandoned them by failing to appeal the dismissal of the section 1983 claim against Vescovo in his individual capacity and by failing to advise them of the ramifications of not appealing. We address these alternative theories separately.

With respect to the theory that Gardner committed legal malpractice because he lacked probable cause to file suit against Vescovo in his individual capacity, Jepsen's and Maberry's assertions to this effect in their cross-claims is not a "factual" allegation, and is instead a legal conclusion. "Where there is no dispute as to the facts underlying a claim for malicious prosecution, the question of probable cause is one of law for the court." *Zahorsky*, 690 S.W.2d at 152. Although when a party moves for judgment on the pleadings, he admits all well-pleaded facts, he does not admit to conclusions of law. *Mitchell v. Nixon*, 351 S.W.3d 676, 680 (Mo. App. W. D. 2011).

This is important, as we have already explained that the trial court did not error in concluding, as a matter of law, that probable cause to file a section 1983 claim existed, and that its absence could not be established. As such, and as a matter of law, Jepsen and Maberry cannot establish a claim of legal malpractice against Gardner grounded in an

assertion that he lacked probable cause to file the section 1983 action, whether or not said action included naming Vescovo in his individual capacity. *Blackwood, Langworthy & Tyson, LLC,* 571 S.W.3d at 114 ("We review a court's grant of judgment on the pleadings *de novo[,]*" and we will affirm the trial court's judgment "'if it is correct on any ground supported by the record regardless of whether the trial court relied on that ground.'" (quoting *Barrett*, 542 S.W.3d at 376)).

Alternatively, Jepsen's and Maberry's cross-claims alleged that even if Gardner had probable cause to file a section 1983 claim against Vescovo in his individual capacity, Gardner nevertheless committed legal malpractice because he abandoned Jepsen and Maberry by failing to appeal the dismissal of the claim against Vescovo, and by failing to advise them of the ramifications of not appealing. Jepsen and Maberry allege they were damaged by Gardner's negligence because they had to hire counsel at their expense to defend Vescovo's malicious prosecution claim.

"To establish a claim for legal malpractice, a plaintiff must prove negligence and a causal connection between his or her attorney's negligence and the resulting injury." *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 732 (Mo. App. W.D. 2005). The causation element requires that a plaintiff prove "causation in fact, or 'but-for' causation, as well as proximate causation." *Nail v. Husch Blackwell Sanders, LLP*, 436 S.W.3d 556, 562 (Mo. banc 2014).

> In legal malpractice cases, causation in fact and proximate causation are often both subsumed within the "case within a case." By proving that the result of the underlying proceeding would have been different 'but for' the attorney's negligence, the plaintiff also proves that the damages—the

> difference between what the result *would have been* and what it *was*—were the reasonable and probable consequence of the defendant's negligence.

Id. Although the issue of proximate cause is typically a question of fact, which would preclude our review on a motion for judgment on the pleadings, "where the evidence connecting the injury to the negligence amounts to mere conjecture and speculation . . . the question becomes one of law for the court." *Coin Acceptors, Inc. v. Haverstock, Garrett & Roberts LLP*, 405 S.W.3d 19, 24 (Mo. App. E.D. 2013).

Gardner's motion for judgment on the pleadings challenges the essential element of proximate cause for a legal malpractice claim. Gardner's motion asserted that Jepsen's and Maberry's cross-claims failed to allege facts that would support the conclusion that damages incurred due the filing of Vescovo's malicious prosecution action were proximately caused by Gardner's failure to appeal the dismissal of Vescovo in the federal lawsuit. Gardner also argued that the causal connection between his alleged negligence and Jepsen's and Maberry's alleged damages is mere conjecture and speculative. We agree.

While Jepsen's and Maberry's cross-claims specifically allege that Gardner was negligent in his failure to appeal the section 1983 district court order, and in his failure to advise them of the potential ramifications of not appealing, the cross-claims fail to allege any facts which could establish that an appeal would have been successful as required for a legal malpractice claim premised on a failure to appeal. *See Pool v. Burlison*, 736 S.W.2d 485, 486 (Mo. App. E.D. 1987) (client alleged that appointed counsel failed to appeal his section 1983 action, or notify client of his failure to appeal, and court found

that the client failed to state a claim upon which relief could be granted in that he had not plead that but for the attorney's inaction, that he would have been successful in his subsequent appeal). As a result, any suggestion that Vescovo's malicious prosecution action was the natural and probable result of Gardner's alleged negligence is purely conjecture and speculative, as there is no basis to conclude from the factual allegations in the cross-claims that an appeal from dismissal of Vescovo in his individual capacity would have been successful.

The trial court did not commit error in granting judgment on the pleadings in favor of Gardner as to Jepsen's and Maberry's assertions that Gardner committed legal malpractice because he did not have probable cause to sue Vescovo in his individual capacity. The trial court did not commit error in granting judgment on the pleadings in favor of Gardner as to Jepsen's and Maberry's assertions that Gardner committed legal malpractice by not appealing the dismissal of the section 1983 action against Vescovo in his individual capacity.

Jepsen's and Maberry's single points on appeal are denied.

Conclusion

The trial court's Judgment is affirmed.

Cynthia L. Martin, Judge

All concur