

IN THE SUPREME COURT OF OHIO

07-2165

DOUG WIEDEMAN :

Plaintiff/Appellant :

v. :

Sky Bank, Inc., et al. :

Defendants/Appellees :

On Appeal from the Greene
County Court of Appeals
Second District

Court of Appeals Case No. 2007CA0017

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DOUG WIEDEMAN

J. Pierre Tismo, Esq. (0067924)
DYER, GAROFALO, MANN & SCHULTZ
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937)223-8888
COUNSEL FOR APPELLANT, Wiedeman

Stephen C. Findley, Esq.
Freund, Freeze & Arnold
Capitol Square Office Building
Columbus, OH 43215-7300
COUNSEL FOR APPELLEES, SKY BANK, CARSEY, & SMITH

Wilson G. Weisenfelder, Jr., Esq.
Rendigs, Fry, Kiely & Dennis
900 Fourth & Vine Tower
Cincinnati, OH 45202
COUNSEL FOR APPELLEES, CITY OF SPRINGBORO, SHARTS, BARTON, & WHEELER

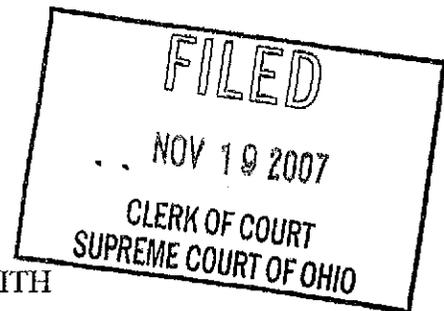


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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case addresses a substantial constitutional question and , likewise, is of great public or great general interest because of the constitutional issues involved with the propositions of law set forth below including the right to a speedy trial, equal protection, and due process requiring probable cause before an arrest.

As set forth in detail below, one of the issues for this Court to decide is whether the dismissal of a criminal case on speedy trial grounds is a termination in favor of the accused on the merits. This is an issue of first impression as there is no existing Ohio case law on this issue and this important issue is therefore ripe for a decision by this court. As this issue deals with an individual's constitutional right to a speedy trial, it is a matter of great public and/or general interest. Otherwise, if this court were to determine that a dismissal of criminal charges against a defendant based on speedy trial grounds prohibits the bringing of a malicious prosecution claim, the court would be creating a loophole through which prosecutors could avoid liability in malicious prosecution actions. If a prosecutor were to be in a situation where he felt a successful malicious prosecution claim might be brought against him, all he needed to do is seek continuances until he had violated the defendant's right to a speedy trial. Under the trial court's logic, the prosecutor would then be immune from civil liability for malicious prosecution. This would be the case no matter how frivolous or trumped up the criminal charges had been. Further, this issue also deals with an individual's constitutional right to equal protection under the law. The lower court's holding that a dismissal based on speedy trial grounds is not a termination in favor of the accused would unfairly differentiate and deny a person whose case was dismissed on speedy trial grounds from bringing a malicious prosecution case, while

permitting others whose cases were dismissed for other reasons to bring such claims.

The other issue discussed in detail below is whether no presumption of probable cause exists for an arrest warrant issued by a mayor's court clerk because a mayor's court clerk has no such authority to issue arrest warrants under Ohio law. According to the Fourth Amendment, no arrest warrants shall be issued without probable cause. This case raises the substantial constitutional question of whether an individual's constitutional right to be free from warrantless arrests under the U.S. and the Ohio constitution is violated when the signing authority on the warrant is the clerk from an Ohio's mayor's court. Further, the protection of this basic and essential constitutional right to be free from arrest without probable cause is of great public and/or general interest. Therefore, for this reason as well the Court should accept jurisdiction of this case.

STATEMENT OF THE CASE AND FACTS

This action arises from the aftermath of an incident that occurred on August 15, 2002, at Sky Bank in Springboro, Ohio. On August 15, 2002, Doug Wiedeman was a customer of Sky Bank, who required assistance due to a discrepancy after making a deposit at the drive-thru window. See Doug Wiedeman Deposition ("Wiedeman Depo.") at 34-35. Specifically, Wiedeman noticed that the deposit ticket that he received from Kevin Carsey, a Sky Bank employee, at the drive-thru window reflected a balance in an amount lower than what he had deposited. *Id.* at 33-34. Wiedeman entered the branch and approached Carsey to discuss the discrepancy. *Id.* at 37-38. Carsey informed Wiedeman that a check had bounced. *Id.* at 39. Wiedeman inquired about when the check bounced and the notification procedures. *Id.* at 39-41. When Wiedeman questioned the inconsistent information Carsey had provided, Carsey indicated that he did not have to take this anymore and told Wiedeman that he would have him arrested. *Id.* at 42. Carsey's voice grew louder, and Wiedeman

turned to leave the branch. Id. As Wiedeman was leaving, Carsey again threatened to have Wiedeman arrested. Id. at 43. In response to Carsey again threatening to have him arrested and saying he was calling the cops, Wiedeman turned on his way out the door and replied with an expletive. Id. at 43-44. Wiedeman was opening the door to leave as he made this comment. Id. at 44. The interaction between Carsey and Mr. Wiedeman lasted approximately a minute and a half and it was recorded on a bank security camera. Id. at 42. Wiedeman got in his car and drove home. Id. at 45.

At approximately 3:00 pm, Wiedeman received a phone call from Eric Smith, Branch Manager of the Sky Bank branch, advising that the relationship between Sky Bank and Mr. Wiedeman would be severed. Id. at 46. Mr. Wiedeman concurred. Id. at 46. The conversation was of a short duration, and Smith did most of the talking. Id. at 46-47.

A week later, at about 9:00 pm, Mr. Wiedeman was arrested at his home when he was returning from the pool with his wife and children, who were four, five, and six-years-old at the time. Id. at 48. Mr. Wiedeman was charged with disorderly conduct and aggravated menacing.

On May 28, 2003, the charges against Mr. Wiedeman were dismissed on constitutional and statutory speedy trial violations to one charge and a defective complaint on another charge in the Mayor's Court. On this date Defendants, Prosecutor John Sharts, Lt. Thomas Barton and Sgt. Jonathan Wheeler engaged in tortious conduct and participated in the continuation of the malicious prosecution of this matter as was memorialized in the highly unusual Magistrate's order of dismissal. See order attached to Defendant's Sky Bank, Inc's, Kevin R. Carsey, and Eric Smith's Motion for Summary Judgment. The order reads in pertinent part:

"...Because of the delay in bringing him to trial, the court granted his attorney's motion to

dismiss. It was a classic case of a case being dismissed because of a technicality. It was hardly the type of ruling that allowed the defendant to walk out of court feeling vindication for his alleged wrongdoing. But, of course, that's what the defendant did. He immediately walked out of the courtroom and chastised the officers who had arrested him, saying that there was nothing to the case which was evidenced by the dismissal of the charges. This act accomplished little more than irritating a police department that has grown tired of his tirades and infuriating this Magistrate who took great pains in the courtroom to make his feelings crystal clear * * *

This "Order" is **not** based on anything the Magistrate observed or heard in testimony during the trial from the three supporting witnesses and the responding police officer. Rather, Prosecutor Sharts "shoptalked" with Magistrate Kirby, in the aftermath of the dismissal and together they "marveled" that evidently Mr. Wiedeman had not learned from his experience based on the "outbreak" with the officers outside the building. Deposition of John Sharts ("Sharts Depo.") at 68. Prosecutor Sharts then made the decision to appeal the dismissal to Warren County Court in June of 2003, and he continued to prosecute the case. Sharts Depo. at 63, 69.

The Mayor's Court Magistrate also declined to even view the videotape of the incident during the trial thus excluding substantial probative and exculpatory evidence from the official record. He spoke with Mr. Carsey in open court without swearing him in to discover why this case was not brought to trial sooner. Mr. Carsey's responses as to the reason for all of the continuances (he had important bank training to attend instead) demanded the speedy trial action. Since that time each court has referenced the entry of the Magistrate that speaks of events of which he neither witnessed nor heard testimony. Doug Wiedeman initially waived his right to a speedy trial and endured six months of pretrial hearings and three continuances of trial dates before he revoked his waiver and

demand this matter be set for trial. The pretrials consisted of three months of asking Sky Bank to turn over the surveillance tape, they did this in late November, 2003. Continuances were asked for and received by the prosecutor to "accommodate important" bank training by the complaining witness.

The appeal to the Warren County Court was ultimately dismissed based upon Constitutional and statutory violations of speedy trial guarantees approximately a year later on June 17, 2004, after Wiedeman's demand for a speedy trial.

During the time the matter was appealed to the Warren County Court, Wiedeman brought a civil action in the Greene County Common Pleas Court on August 15, 2003. In February, 2003 and monthly thereafter during the attempted criminal prosecutions, Wiedeman's criminal defense attorney, Ronald Ruppert, was approached by Sharts, the Springboro City Prosecutor. Affidavit of Ronald Ruppert, attached as Exhibit "1" to Appellant's Motion for Summary Judgment at 2,3. The Prosecutor offered to dismiss the criminal charges against Wiedeman if he would agree to release the City of Springboro, Sky Bank, and their respective employees from any potential civil liability arising out of the charges against him and his arrest. Id. at 3. Mr Wiedeman declined the offer but would agree to release the City of Springboro and its employees from any potential civil liability, but not Sky Bank or its employees. Mr. Sharts declined deciding to tie the City of Springboro and its employees to the fate of Sky Bank.

In this civil action, Wiedeman filed his First Amended Complaint ("Complaint") against Sky Bank, Inc., against Kevin Carsey, Eric Smith, John Sharts, Lt. Thomas Barton, Sgt. Jonathan Wheeler, and the City of Springboro. In the amended complaint, he asserted claims of deprivation of his constitutional rights pursuant to 42 USC 1983, abuse of process, and malicious prosecution

against the Defendants. The City of Springboro, Sharts, Barton, Wheeler, Sky Bank, Carsey, and Smith all subsequently moved for summary judgment on these claims to which Wiedeman responded. On February 2, 2007, the trial court entered judgment (see attached Exhibit A and B) in favor of all of the Defendants based on the alleged failure of Wiedeman to establish a claim for malicious prosecution which, according to the trial court, also rendered all of Wiedeman's other claims moot.

Subsequently, Wiedeman appealed the trial court's decision to the Second District Court of Appeals, which affirmed the trial court's decision on October 5, 2007 (see attached Exhibit C). Wiedeman is now filing a notice of appeal and this memorandum in support of jurisdiction with this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. Appellant Wiedeman's Proposition of Law No. I: A dismissal of a criminal case based on statutory speedy trial grounds is a dismissal on the merits in favor of the accused.

In order to bring a claim for malicious prosecution, a plaintiff must show (1) malice in instituting or continuing the prosecution; (2) a lack of probable cause, and (3) the prosecution was terminated in favor of the accused. *Trussell v. General Motors Corp.* (1990), 53 Ohio St.3d 142. In the case at bar, the Trial Court held, and the Second District Court of Appeals ("Appeals Court") affirmed, that Wiedeman failed to establish his malicious prosecution claim against the Defendants in part because the criminal proceedings against Wiedeman were not terminated in his favor. However, based on Ohio law this is incorrect.

In *Ash v. Ash* (1995), 72 Ohio St.3d 520, 522, the Ohio Supreme Court stated that an unconditional, unilateral dismissal of criminal charges or an abandonment of a prosecution by the

prosecutor or the complaining witness that results in the discharge of the accused generally constitutes a termination in favor of the accused. In their summary judgment motions, Defendants cited to *Broadnax v. Greene Credit Servs.* (1997), 118 Ohio App.3d 881 and *Buchanon v. Reeve*, (S.D. Ohio Apr. 8, 2005) 2005 WL 1652188, in support of their argument that Wiedeman cannot bring a claim for malicious prosecution. However, in both of those cases, the criminal matter was not terminated, but rather the prosecution continued to have an opportunity to bring an action against the plaintiff. This case is more similar to the situations addressed in the Eighth District's opinions in *Brand v. Geissbuhler* (Feb. 27, 1997) Eighth Dist. No. 70565 and *Rios v. The Grand Slam Grille* (Nov. 18, 1999), Eighth Dist. No. 75150 and the Second District's opinion in *Hamilton v. Best Buy* (Feb. 15, 2002) Second Dist. No. 19001. In *Geissbuhler*, *Rios* and *Hamilton*, the criminal action was terminated on procedural grounds. The Appellate Courts found that a dismissal on procedural grounds that ended the criminal matter was a termination in the criminal defendant's favor. *Id.*

Similarly, Wiedeman's criminal matter was terminated in his favor when the Warren County Court dismissed the criminal charges against him on June 17, 2004. This unilateral dismissal of the charges on constitutional and statutory speedy trial grounds ended the prosecution's ability to bring the criminal charges against Wiedeman. Pursuant to *Geissbuhler*, *Rios*, and *Hamilton* the criminal charges against Wiedeman were terminated in his favor. Therefore, his claim for malicious prosecution is not barred because it was dismissed on procedural grounds and the trial court's holding in favor of the Defendants on the malicious prosecution claim based on this reasoning was incorrect and must be reversed.

Additionally, if this court were to determine that a dismissal of criminal charges against a defendant based on speedy trial grounds prohibits the bringing of a malicious prosecution claim, the

court would be creating a loophole through which prosecutors could avoid liability in malicious prosecution actions. If a prosecutor were to be in a situation where he felt a successful malicious prosecution claim might be brought against him, all he needed to do is seek continuances until he had violated the defendant's right to a speedy trial. Under the trial court's logic, the prosecutor would then be immune from civil liability for malicious prosecution. This would be the case no matter how frivolous or trumped up the criminal charges had been. The action would almost always be dismissed on the speedy trial grounds and the matter would not proceed to a jury trial and verdict. Such a ruling gives carte blanche to prosecutors to harass and prosecute whomever they choose without fear of being liable for malicious prosecution. This reasoning was persuasive to the New York Court of Appeals in *Smith-Hunter v. Harvey* (2000), 734 N.E.2d 750, which held that a dismissal on speedy trial grounds could support a cause of action for malicious prosecution. A dismissal for a violation of a criminal defendant's speedy trial rights should be found to be a termination in favor of the criminal defendant and **not** a bar to a malicious prosecution claim.

The Appellate Court's decision also makes reference in the probable cause argument that it was Doug Wiedeman's burden to contradict Carsey's assertions. The reason for this is that Appellant Wiedeman was never presented that opportunity by the police, Sharts or the Courts. No one ever spoke to Wiedeman about this event until after they had arrested Wiedeman. This is a direct result of no investigation of these assertions by Carsey being investigated by anyone that denied Wiedman's due process of law.

II. Appellant Wiedeman's Proposition of Law No. II: There can be no presumption of probable cause for an arrest which is based on an arrest warrant issued by a mayor's court clerk because no such authority is granted to a mayor's court clerk under Ohio law.

In this case, the Trial Court also held, and the Court of Appeals affirmed, that Wiedeman's malicious prosecution claim must fail because Wiedeman has failed to demonstrate a lack of probable cause as required in order to establish a malicious prosecution claim. Both Court's relied upon a presumption of probable cause based upon the fact that an arrest warrant had been issued in the criminal action. However, this is was incorrect because there can be no presumption of probable cause under Ohio law for an arrest warrant issued by a mayor's court clerk, when mayor's court clerks are not authorized to issue arrest warrants.

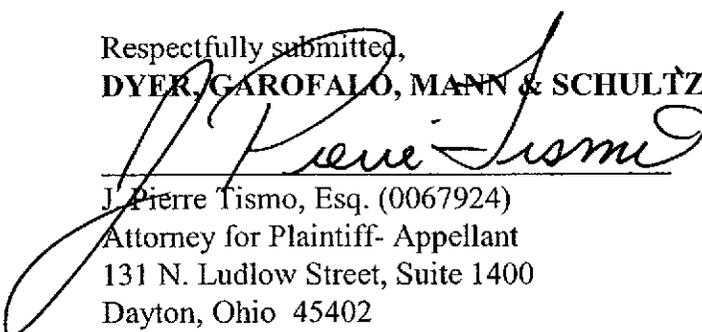
Arrest warrants may be issued by municipal court clerks without violating the U.S. or Ohio Constitutions when authorized to do so by state statute. *Shadwick v. City of Tampa* (1972), 407 U.S. 345; *State v. Stuber* (1990), 71 Ohio App.3d 86. According to Ohio law, a municipal court clerk has the power to issue an arrest warrant pursuant to statute. O.R.C. § 1901.31; *Stuber*, supra. In contrast, no such similar power to issue arrest warrants is specifically granted to a *mayor's* court clerk in Sections 1905.01, et seq. of the Ohio Revised Code. Because a mayor's court is not a court of record, it only has the statutory authority granted to it pursuant to O.R.C. § 1905.01, et seq. *State ex rel. Montgomery County Public Defender* (2006), 108 Ohio St.3d 334. R.C. 1905.20 permits mayors and mayor's court magistrates to issues writs and warrants, but it does not confer such power on the clerks of the mayor's courts. Therefore, a mayor's court clerk has no authority under Ohio law to issue arrest warrants and any attempt by a mayor's court clerk to issue an arrest warrant would lack probable cause. It follows that any such issuance of an arrest warrant by a mayor's court clerk would violate the arrestee's U.S. Constitutional rights under the Fourth Amendment that "no warrants shall issue, but upon probable cause" and the arrestee's rights pursuant to Article I, Section 14 of the Ohio Constitution. The arrest warrant issued by the mayor's court clerk in this case

therefore lacked probable cause and this element of Wiedeman's malicious prosecution case is satisfied contrary to the Trial Court's and Appeal's Court's holdings.

CONCLUSION

For the above states reasons, this case raises substantive constitutional questions and involves matters of public or great general interest. This Court should accept this discretionary appeal and accept jurisdiction.

Respectfully submitted,
DYER, GAROFALO, MANN & SCHULTZ



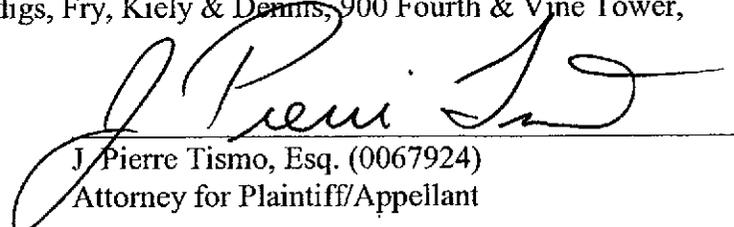
J. Pierre Tismo, Esq. (0067924)
Attorney for Plaintiff- Appellant
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937)223-8888
Fax # (937) 824-8630
ptismo@dgmsslaw.com

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was sent to the following this 19th day of November, 2007 via U.S. Ordinary Mail:

Stephen C. Findley, Esq., Freund, Freeze & Arnold, Capitol Square Office Building, 65 E. State Street, Suite 800, Columbus, OH 43215-7300;

Wilson G. Weisenfelder, Jr., Esq., Rendigs, Fry, Kiely & Dennis, 900 Fourth & Vine Tower, Cincinnati, OH 45202.



J. Pierre Tismo, Esq. (0067924)
Attorney for Plaintiff/Appellant

APPENDIX

Opinion of the Greene County Court of Appeals (October 5, 2007) **EXHIBIT A**

Judgment entry of the Greene County Court of Appeals
(October 5, 2007) **EXHIBIT B**

Opinion of the Greene County Common Please Court (Feb 2, 2007) **EXHIBIT C**

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

DOUG WIEDEMANN :

Plaintiff-Appellant : C.A. CASE NO. 2007CA0017

vs. : T.C. CASE NO. 2005CV0489

SKY BANK, INC., et al : (Civil Appeal From
Common Pleas Court)

Defendant-Appellee :

O P I N I O N

Rendered on the 5th day of October, 2007.

J. Pierre Tismo, 131 N, Ludlow Street, Suite 1400, Dayton, OH 45402, Atty. Reg. No.0067924

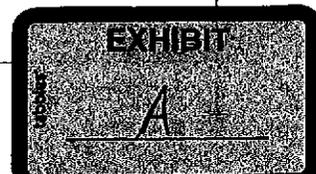
Robert S. Kaiser, 8281 Tidewater Court, Cincinnati, OH 45255
Attorneys for Plaintiff-Appellant Wiedemann

Stephen C. Findley, Atty. Reg. No.0010715, 65 East State Street, Suite, 800, Columbus, OH 43215
Attorney for Defendant-Appellees Sky Bank; Carsey and Smith

Wilson G. Weisenfelder, Jr., Atty. Reg. No. 0030179, One West Fourth Street, Suite 900, Cincinnati, OH 45202-3688
Attorney for Defendant-Appellees, City of Springboro, OH
John E. Sharts, Thomas James Barton, and
Jonathan Wheeler

GRADY, J.:

This is an appeal from a summary judgment for all



Defendants on Plaintiff's claims for relief alleging malicious prosecution, abuse of process, and violations of his civil rights.

On August 15, 2002, Plaintiff, Doug Wiedemann, made a deposit to his checking account with Sky Bank at its branch in Springboro, Ohio. The deposit was made at the drive-through window. The bank teller who accepted the deposit was Kevin Carsey.

After Wiedemann pulled forward from the drive-through window he examined his deposit slip and discovered that his account balance was less than the amount he had deposited. Wiedemann parked his vehicle and went inside the bank to inquire about the discrepancy.

Carsey explained to Wiedemann that the balance in his account reflected a charge for a check that was returned for insufficient funds several days before. Carsey further informed Wiedemann that another of his checks was returned for that same reason earlier that day.

Believing that the bank had promised to employ different procedures, Wiedemann challenged Carsey's explanation. Their exchange became heated, and Carsey threatened to call the police. Wiedemann turned and left the bank, and as he did exclaimed "F- you!" in a loud tone of voice. Carsey claims

that Wiedemann also said, "I ought to kill you."

Carsey telephoned the Springboro police to complain about Wiedemann after Wiedemann left the bank. Carsey was shaking and had difficulty speaking. Carsey went to the Springboro Prosecutor's office the following day to press his complaint about Wiedemann's conduct. However, when asked if he wished to have Wiedemann arrested, Carsey replied: "absolutely not."

The surveillance camera at the Sky Bank branch recorded a non-audio, still frame tape of the exchange between Wiedemann and Carsey. The following day the branch manager, Eric Smith, gave the tape to the Springboro Prosecutor's office.

Approximately one week later, on August 22, 2002, at about 9:00 p.m., Springboro Police arrested Wiedemann at his home, in the presence of his wife and four young children. The docket of the Springboro Mayor's Court shows that Wiedemann was charged with two violations of local ordinances.

Wiedemann was charged in case number 02TRB1182 with "Disorderly Conduct/Fail to Desist," a violation of Springboro ordinance #648.04. Wiedemann was charged in case number 02TRB1181 with "Menacing," a violation of Springboro ordinance #636.05. Both offenses are fourth degree misdemeanors. The docket reflects that the charges were filed on the complaint

of Kevin Carsey and that Wiedemann entered pleas of not guilty and was released on the date he was arrested.

A trial date of August 28, 2002, one week after Wiedemann's arrest, was ordered in the Mayor's Court. However, the trial was continued from that date and was reset several times for various reasons. On the last date set for trial, May 28, 2003, Wiedemann moved for a discharge pursuant to R.C. 2945.73(B) for a violation of his statutory speedy trial right. R.C. 2945.71(B)(1).

The magistrate presiding in the two criminal cases granted Wiedemann's motion and ordered his discharge on the two offenses alleged. In his written decision, the magistrate stated:

"Because of the delay in bringing him to trial, the court granted his attorney's motion to dismiss. It was a classic case of a case being dismissed because of a technicality. It was hardly the type of ruling that allowed the defendant to walk out of court feeling vindication for his alleged wrongdoing. But, of course, that's what the defendant did. He immediately walked out of the courtroom and chastised the officers who had arrested him, saying that there was nothing to the case which was evidenced by the dismissal of the charges. This act accomplished little more than irritating a

police department that has grown tired of his tirades and infuriating this Magistrate who took great pains in the courtroom to make his feelings crystal clear . . ."

The Springboro City prosecutor assigned to Wiedemann's cases, John Sharts, filed objections to the magistrate's order of discharge in the Warren County Court, to which the two cases were transferred on June 13, 2003. That court subsequently overruled the objections and dismissed the charges on speedy trial grounds on June 17, 2004.

While Wiedemann's criminal cases were pending in the Warren County Court, Wiedemann commenced the civil action underlying this appeal in the court of Common Pleas of Greene County on August 15, 2003. The complaint that Wiedemann filed named as Defendants Sky Bank, Inc. ("Sky Bank"), Kevin Carsey, the bank teller and complainant in the criminal charges against Wiedemann, Eric Smith, the bank manager, the City of Springboro, John Sharts, the City's prosecutor, and Springboro Police Officers Thomas Barton and Jonathan Wheeler. The complaint alleged that Wiedemann was injured by the "wrongful actions" of Carsey, Smith, and Sky Bank. It also alleged a claim for relief against Sharts, Barton, Wheeler, and the City of Springboro for violations of Wiedemann's federal civil rights under the Fourth and Fourteenth Amendments. The

complaint further alleged a conspiracy between the Defendants, or some of them, to violate Wiedemann's federal constitutional rights, which were not specified.

The Defendants filed responsive pleadings. Subsequently, a motion for summary judgment was filed by Sky Bank, Kevin Carsey, and Eric Smith. (Dkt. 19). A motion for summary judgment was also filed by the City of Springboro, John Sharts, Thomas Barton, and Jonathan Wheeler. (Dkt. 29). Following additional submissions on the motions by all parties, the trial court granted the Defendants' motions on February 5, 2007. (Dkt. 48). Wiedemann filed a timely notice of appeal.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS/APPELLEES."

Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. All evidence submitted in connection with a motion for summary judgment must be

construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25. In reviewing a trial court's grant of summary judgment, an appellate court must view the facts in a light most favorable to the party who opposed the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326.

When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 119-120, 1992-Ohio-106. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

The claim for relief pleaded in Wiedemann's complaint against Sky Bank, Carsey, and Smith did not allege any particular common law tort that their allegedly "wrongful actions" constitute. In granting the motions for summary judgment the Defendants filed, the trial court concluded that

the claim for relief Wiedemann alleged against those Defendants was for the tort of malicious prosecution. On appeal, Wiedemann adopts that view, though he argues that the trial court erred in granting summary judgment for the Defendants on his claim for relief.

The trial court granted summary judgment on Wiedemann's malicious prosecution claim on findings that the criminal proceedings against Wiedemann were not terminated in his favor and also were not lacking in probable cause. The trial court cited and relied on the decision of the Supreme Court in *Ash v. Ash* (1995), 72 Ohio St.3d 520, in which the court wrote:

"This court previously has held that '[t]he elements of the tort of malicious criminal prosecution are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused.' *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142, 559 N.E.2d 732, syllabus. A private person who initiates or procures the institution of criminal proceedings against another is not subject to liability unless the person against whom the criminal proceedings were initiated proves all three of the above-listed elements. See 3 Restatement of the Law 2d, Torts (1977) 406, Section 653. This case concerns only the third element: whether the

criminal proceedings that gave rise to these malicious prosecution actions were terminated in favor of the plaintiffs.

"A proceeding is 'terminated in favor of the accused' only when its final disposition indicates that the accused is innocent. See 3 Restatement of the Law 2d, Torts (1977) 420, Section 660, Comment a. Thus, an unconditional, unilateral dismissal of criminal charges or an abandonment of a prosecution by the prosecutor or the complaining witness that results in the discharge of the accused generally constitutes a termination in favor of the accused. See *Douglas v. Allen* (1897), 56 Ohio St. 156, 46 N.E. 707; see, also, Prosser & Keeton, Law of Torts (5 Ed.1984) 874, Section 119 ('Prosser'); 3 Restatement of the Law 2d, Torts (1977) 419, Section 659(c), Comment e." *Id.*, at 522.

In *Ash*, a civil action was terminated upon a settlement by voluntary agreement of the parties. In the present case, the trial court held that the criminal charges against Wiedemann were not terminated in his favor because the discharge ordered pursuant to R.C. 2945.73 for a violation of his speedy trial rights was procedural in nature and not a final disposition indicating that Wiedemann is innocent of the criminal charges. Wiedemann argues that the trial court

erred. He cites decisions that were rendered in three cases for that proposition. They are: *Hamilton v. Best Buy* (Feb. 15, 2002), Montgomery App. No. 19001; *Brand v. Geissbuhler* (Feb. 27, 1997), Cuyahoga App. No. 70565; and *Rios v. The Grand Slam Grille* (Nov. 18, 1999), Cuyahoga App. No. 75150. In his Reply Brief, Wiedemann cites a fourth holding: *Longworth v. Schob* (1957), 106 Ohio App. 476.

We have reviewed the decisions Wiedemann cites. None involved a speedy trial discharge. A speedy trial discharge has been held to constitute a termination in favor of the accused, if the facts support a finding that the discharge resulted from an abandonment of the prosecution by the prosecutor. *Murphy v. Lynn* (1997), 118 F.3d. 938.

Prosecutorial abandonment is an alternative to a judicial determination of innocence that *Ash* held may demonstrate a termination in favor of the accused. However, *Ash*, also held that the finding is a question of law, while *Murphy v. Lynn* holds that the issue may present a question of fact for the jury. *Id.*, 118 F.3d., at 950.

Ash further held that if any one of the three-prong test for malicious prosecution is not satisfied, the claim necessarily fails. For the reasons discussed below, we find that the second prong of that test, lack of probable cause for

the prior criminal proceeding, cannot be satisfied. Therefore, we need not decide whether the trial court erred with respect to its finding relative to the speedy trial discharge, because resolution of that issue is not essential to a determination of the error assigned: whether the trial court erred when it granted Defendants' motion for summary judgment on Wiedemann's malicious prosecution claim.

The trial court also granted summary judgment against Wiedemann on his claim for malicious prosecution on a further finding under the rule of Ash that Wiedemann could not show a lack of probable cause for the criminal complaints that Sky Bank, Smith, and Carsey filed which resulted in Wiedemann's criminal prosecution. The court held that, absent a defect in the warrant for his arrest, which was not shown, the warrant demonstrates that those Defendants did not lack probable cause.

Probable cause to arrest exists when a reasonably prudent person would believe that the individual to be arrested has committed a crime. *State v. Timson* (1974), 38 Ohio St.2d 122. Because the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause," a determination by a judicial officer who issues a warrant that probable cause exists insulates a defendant on whose complaint the warrant issued

from liability on a claim of malicious prosecution, "unless the probable cause hearing was tainted by fraud, deception, or false or materially incomplete testimony by the complainant . . ." *Frank v. Whitehouse* (Aug. 31, 1992), Stark App. No. CA-8958, quoting from *Moore v. Barber* (June 11, 1990), Stark App. No. CA-7960.

A copy of a record maintained by the Springboro Police Department showing that a warrant for Wiedemann's arrest issued was attached to a Supplemental Memorandum in support of their motion for summary judgment filed by Sky Bank, Smith, and Carsey. (Dkt. 30, Exhibit D). The document is certified as true and accurate by the Records Clerk of the Springboro Police Department. Concerning the charge on which Wiedemann was arrested, the report states: "Bench Warrant."

Wiedemann argues that the alleged warrant cannot demonstrate probable cause because it was issued by a clerk pursuant to Crim.R. 4(A), and clerks are incompetent to make probable cause determinations. However, the relevant question is instead whether a clerk that issued the warrant failed to function as a neutral and detached magistrate. See *Shadwick v. City of Tampa* (1972), 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783.

Upon proof that a warrant for his arrest had issued,

which was offered to demonstrate that the criminal proceedings did not lack probable cause, it became Wiedemann's burden under the rule of *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-170, to offer evidence showing that proof of the warrant was insufficient for that purpose. He could do that by offering evidence showing that the warrant was fraudulently procured or issued on incomplete testimony. *Frank v. Whitehouse*. Alternatively, Wiedemann could satisfy his burden by offering evidence showing that a clerk who issued the warrant failed to function as a neutral and detached magistrate. *Shadwick v. City of Tampa*. Wiedemann did neither. Therefore, on evidence that a warrant for Wiedemann's arrest on the criminal charges had issued, the trial court correctly found that the record failed to demonstrate that the criminal proceedings against Wiedemann lacked probable cause, and on that finding, the court was required to grant summary judgment for the Defendants on Wiedemann's malicious prosecution claim. Civ.R. 56(C).

Even absent proof of the arrest warrant, on this record a lack of probable cause is not shown. Kevin Carsey, the bank teller, testified that Wiedemann had said to him, "I ought to kill you." Carsey also testified that he reported the threat to the officer who responded to his call, and the officer who

responded testified likewise. Therefore, there was a showing of probable cause for the prosecution for disorderly conduct and menacing against Wiedemann that was initiated on Carsey's complaint. It became Wiedemann's burden under *Dresher v. Burt* to contradict that evidence in order to preserve a genuine issue of material fact on the probable cause issue. He failed to do that, by denying either the alleged threat or that Carsey had in fact reported the alleged threat to the officers who obtained the warrant based on what Carsey told them. Therefore, the court could only find on the record before it that there was probable cause with respect to the criminal charges underlying Wiedemann's malicious prosecution claims against the Defendants.

The trial court further found Wiedemann could not prove his abuse of process claim against Sky Bank, Smith, and Carsey because there was no proof of any process they abused. We agree. However, from the pleadings in his complaint and his brief on appeal, it appears that Wiedemann's abuse of process claim pertains instead to the conduct of Prosecutor Sharts and Officers Barton and Wheeler, and the City of Springboro, following Wiedemann's discharge by the magistrate, as grounds for his 42 U.S.C. § 1983 civil rights and conspiracy claims.

"While the gist of the action for malicious prosecution

is that the prosecution has been carried on maliciously and without probable cause, the essence of an action for abuse of process is the use of process in any manner not proper in the regular conduct of the proceeding, with an ulterior motive .

. . ." 45 Ohio Jurisprudence 3d, False Imprisonment and Malicious Prosecution, § 67. When committed by persons acting under color of law, an abuse of process may constitute a deprivation of an accused's right to due process of law guaranteed by the Fourteenth Amendment, on which an action may be brought pursuant to 42 U.S.C. § 1983.

Wiedemann points to the magistrate's admonitions concerning his conduct in relation to Officers Barton and Wheeler after he was ordered discharged, to argue that the Crim.R. 19(D) (3) (b) objections to the magistrate's decision that Sharts filed was an abuse of process, inferring that Sharts' ulterior motive was to punish Wiedemann for the behavior the magistrate described. Wiedemann also points to the fact that, subsequently, Sharts offered to dismiss the criminal charges against Wiedemann if Wiedemann dismissed his civil action. The alleged offer was described in an affidavit of Wiedemann's attorney in the civil proceeding.

Prosecutor Sharts may have had an ulterior motive in objecting to the magistrate's decision, but there is no basis

to find that his filing of objections to the magistrate's discharge order pursuant to Civ.R. 19(D)(3)(b) was not proper in the regular course of the proceeding on the criminal charges against Wiedemann. Therefore, Sharts' conduct in that respect cannot support an abuse of process claim.

With respect to his alleged offer to dismiss the criminal proceedings, the trial court found that Sharts "was acting as a prosecutor at all times in this case," and that while Sharts' "attempt, if true, to resolve the case through dismissal of both the criminal and civil cases may not have been prudent, . . . his acts still fell within the scope of the so-called advocacy function. Therefore he, as well as the City of Springboro would probably be entitled to immunity on the malicious prosecution claims." (Citing R.C. 2744.02).

The Supreme Court has held that a prosecutor may appropriately negotiate an agreement whereby criminal charges are dropped in exchange for a release of 42 U.S.C. § 1983 claims against a city and municipal officials. *Newton v. Rumery* (1987), 480 U.S. 386, 107 S. Ct. 1187, 94 L.Ed.2d 405. As the Court noted, "[i]n many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of

prevailing in a civil action." 480 U.S., at 394. As to the prosecutor's motivation, the Court refused to assume that a prosecutor would bring frivolous charges or dismiss meritorious charges. 480 U.S. at 396.

The United States District Court for the District of Massachusetts, relying on the Supreme Court's rationale in *Newton*, has held that a 42 U.S.C. § 1983 claim could not be based on a mere offer to drop a criminal complaint in exchange for a civil release, stating:

"Since the Supreme Court has found that such release-dismissal agreements are not *per se* improper, much less unconstitutional, the offer of such an agreement cannot possibly be construed as unconstitutional. Therefore, [the plaintiff] cannot base his § 1983 claim on the alleged offer to drop the criminal complaint in exchange for a civil release." *Grant v. John Hancock Mutual Life Insurance Co.* (D. Mass. 2002), 183 F. Supp. 2d 344, 360.

A criminal defendant may have a better chance of success in a subsequent 42 U.S.C. § 1983 claim brought on an abuse of process claim if he can show that he was actually coerced into accepting an offer to release a civil claim in return for the dismissal of the criminal charges, because "in some cases these agreements may infringe important interests of the

criminal defendant and of society as a whole". *Newton*, 480 U.S., at 392. However, a mere offer by the prosecution that was declined by the defendant is not sufficient to make out a 42 U.S.C. § 1983 claim.

Also, if the plaintiff in the malicious prosecution action can show that there is a practice of using these release-dismissal agreements, there is a greater likelihood of success in a 42 U.S.C. § 1983 claim. *Salkil v. Mount Sterling Township Police Department* (6th Cir. 2006), 458 F.3d 520, 530 (in dicta, noting that the language of the First Amendment precluding the deprivation of the right to petition the government arguably conflicts with a municipality's attempt to avoid liability for a constitutional wrong though the blanket use of release-dismissal agreements).

The offer that Sharts allegedly made was not accepted by Wiedemann, and he has not shown any attempt to coerce him into dismissing his civil case or a pattern of similar conduct. On the authority of *Newton v. Rumery*, we agree with the trial court that evidence of the offer Sharts made, standing alone, is insufficient to demonstrate abuse of process as a basis for a 42 U.S.C. § 1983 claim.

The trial court also granted summary judgment for all the Defendants on Wiedemann's 42 U.S.C. § 1983 claims that they

violated his civil rights and conspired to violate his civil rights. The summary judgments that were properly granted on the underlying allegations of malicious prosecution and abuse of process remove any grounds for the civil rights violations alleged.

Conclusion

The trial court did not err when it granted the motions for summary judgment filed by the Defendants on Plaintiff Wiedemann's claims for relief. The assignment of error is overruled. The judgment of the trial court will be affirmed.

WOLFF, P.J. And FAIN, J., concur.

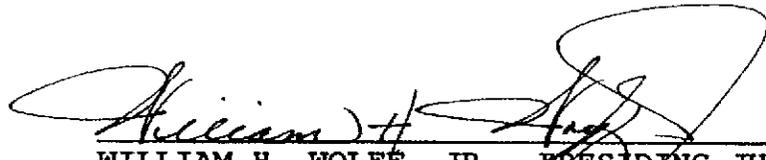
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Wilson G. Weisenfelder, Jr., Esq.
Hon. J. Timothy Campbell

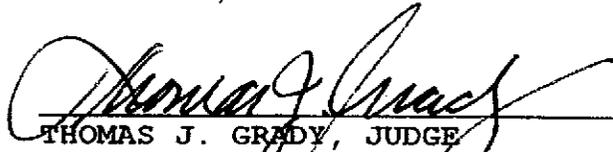
IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

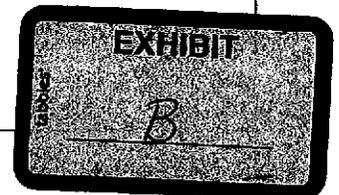
DOUG WIEDEMANN :
Plaintiff-Appellant : C.A. CASE NO. 2007CA0017
vs. : T.C. CASE NO. 2005CV0489
SKY BANK, INC., et al : FINAL ENTRY
Defendant-Appellee :

Pursuant to the opinion of this court rendered on the
5th day of October, 2007, the judgment of the trial
court is Affirmed. Costs are to be paid by Plaintiff-
Appellant.


WILLIAM H. WOLFF, JR., PRESIDING JUDGE


MIKE FAIN, JUDGE


THOMAS J. GRADY, JUDGE



Copies mailed to:

J. Pierre Tismo, Esq.
131 N, Ludlow Street
Suite 1400
Dayton, OH 45402

Robert S. Kaiser, Esq.
8281 Tidewater Court
Cincinnati, OH 45255

Stephen C. Findley, Esq.
65 East State Street
Suite, 800
Columbus, OH 43215

Wilson G. Weisenfelder, Jr., Esq.
One West Fourth Street, Suite 900
Cincinnati, OH 45202-3688

Hon. J. Timothy Campbell
45 N. Detroit Street
Xenia, OH 45385-2998

GREENE COUNTY, OHIO
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COMMON PLEAS COURT
GREENE COUNTY, OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO
CIVIL DIVISION

DOUGLAS J. WIEDEMAN,

CASE NO. 2005CV0487

Plaintiff,

Judge J. Timothy Campbell

-vs-

**FINAL APPEALABLE
ORDER
JUDGMENT ENTRY**

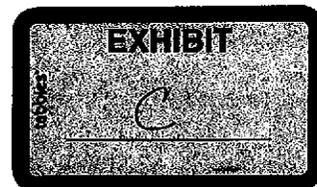
SKY BANK, INC. et al.,

Defendants.

This matter is before the Court on Defendants' Sky Bank, Kevin Carsey, Eric Smith, City of Springboro, John Sharts, Thomas Barton, and Jonathan Wheeler's Motion for Summary Judgment. Plaintiff has filed a Response Memorandum.

The standard for summary judgment is clear.¹ A request for summary judgment will only be granted where there is no genuine issue as to

¹See *Harless v. Willis Day Warehousing* (1978), 54 Ohio St.2d 64



any material fact and the moving party is entitled to judgment as a matter of law.² In addition, summary judgment shall not be rendered unless it appears***that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in his favor.

The moving party may make his motion for summary judgment in his favor with, or without supporting evidence.³ However, a party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party meaningful opportunity to respond.⁴ Summary judgment should be granted with caution, with a court construing all evidence and deciding any doubt in favor of the nonmovant.⁵ Once the moving party demonstrates that he is entitled to summary judgment, the burden then shifts to the nonmoving party to show why summary judgment in favor of the moving party should

²See Ohio Civil Rule 56(C).

³See Ohio Civil Rule 56(B).

⁴See *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

⁵See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356

not be had.⁶

Plaintiff's claims against Defendants appear to be twofold. First, a claim of malicious prosecution. Second, what appears to be a claim for violation of federal constitutional right of due process and to be free from unreasonable seizure.

In order to state a claim for malicious prosecution there are essential elements that must be alleged by Plaintiff: (1) malicious institution of prior proceedings against the Plaintiff by Defendants, (2) lack of probable cause for the filing of the prior lawsuit, (3) termination of the prior proceedings in Plaintiff's favor.⁷

In this case, Plaintiff's claim fails for several reasons. First, and foremost, Plaintiff's criminal case, dismissed on procedural grounds, was not terminated on the merits and in his favor.⁸ In fact, when the judge dismissed the case because it was not brought to trial within the time provided for in R.C. 2945.71, he stated *he did it with reluctance, and indicated the actions of Plaintiff clearly merit the intervention of the judicial system. The fact that he will not be held accountable for his be-*

⁶See Ohio Civil Rule 56(E)

⁷See *Crawford v. Euclid Nat'l Bank* (1985), 19 Ohio St. 3d 135.

⁸See Defendants' Exhibit D Entry of Decision, Judge Heath

*havior may seem to be an injustice.*⁹

Plaintiff relies on the fact that the prior proceedings were dismissed. Although beneficial to Plaintiff, it falls well short of the standard articulated by the courts for favorable termination.¹⁰ In determining the issue of favorable determination courts look to whether the outcome of the prior case was on the merits and in Plaintiff's favor. Further, the Ohio Supreme Court has held, *A proceeding is terminated in favor of the accused only when its final disposition indicates that the accused is innocent.*¹¹

In this case, the prior proceeding was dismissed on a technicality by the court. Plaintiff was not discharged because he was innocent. In fact, the Court reluctantly dismissed the case, having mused how Plaintiff's behavior was inappropriate and criminal. There is no indicia of evidence indicating the accused was innocent. Therefore, a claim for malicious prosecution cannot stand.

In addressing the issue of probable cause discussed in Defendants' Motion it appears a warrant was issued in the criminal case suggesting the presence of probable cause. Absent a defect in the warrant, probable cause

⁹Id

¹⁰See *Broadness v. Greene Credit Service* (1997), 118 Ohio App. 3d 881.

¹¹See *Ash v. Ash* (1995), 72 Ohio St. 3d 520.

exists for purposes of the criminal charge. Also, there is no evidence to support Plaintiff's claim of abuse of process against these Defendants. [They] were witnesses, the prosecutor manages and controls the prosecution.¹² Plaintiff has not offered any evidence to show Defendants were involved in a conspiracy to pervert the criminal proceedings.

Finally, the Court turns to Defendants' Motion for Summary Judgment relating to Plaintiff's 42 U.S. C. section 1983 claim. Plaintiff maintains that the Defendants conspired with the prosecutor in the proceeding case to continue the prosecution unless Plaintiff agreed to hold the Defendants in this case harmless from civil liability in exchange for dismissal of the criminal matter.¹³ Further, Defendants' acts deprived Plaintiff of his federal constitutional rights to due process and to be free from unreasonable seizure. Although somewhat confusing, it appears the 1983 action is based upon malicious prosecution.

In order to maintain a 1983 action Plaintiff must show he has been deprived of a right secured by the Constitution and that Defendants acted under color of state law. However, he must first plead and prove the tort elements of malicious prosecution. The Court notes it has already found

¹²See Deposition of Prosecutor Shart.

¹³See Plaintiff's Exhibit No. 1, Affidavit of Ronald Ruppert.

Plaintiff's claim of malicious prosecution to be without merit. Also, There is no evidence to support a conspiracy in this case. The Court also finds that Plaintiff has only offered to this Court conclusory allegations and no facts that would support this claim.

Also, several Defendants maintain they have immunity from the acts described in Plaintiff's complaint. The Court has found that a claim for malicious prosecution will not stand either as a state claim or a federal 42 U.S.C. section 1983 claim. Therefore, the issue of immunity is moot. However, the Court does note Defendant Sharts was acting as a prosecutor at all times in this case.¹⁴ His attempt, if true, to resolve the case through dismissal of both the criminal and civil cases may not have been prudent, but his acts still fell within the scope of the so-called advocacy function. Therefore he, as well as the City of Springboro would probably be entitled to immunity on the malicious prosecution claims.¹⁵

Finally, the Court notes Defendants' have raised several other reasons as to why summary judgment should be granted. However, those issues are rendered moot based on the Court's decision in this case.

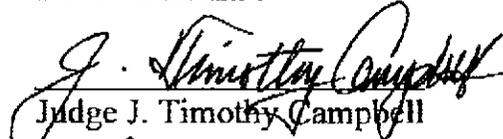
Accordingly, Defendants' Motion for Summary Judgment is well-

¹⁴See *Willitzer v. McCloud* (1983), 6 Ohio St. 3d 447.

¹⁵See R.C. 2744.02

taken and therefore GRANTED.

SO ORDERED:


Judge J. Timothy Campbell
2-2-07

SERVICE OF COPY: A copy hereof was served upon:

Stephen A. Findley, Esq., Capitol Square Office Building, 65 E. Street, Suite
800, Columbus, Ohio 43215

Robert Kaiser, Esq., 7343 Jager Ct., Cincinnati, Ohio 45230

J. Pierre Tismo, Esq., 131 N. Ludlow St., Suite 1400, Dayton, Ohio 45402

Wilson G. Weisenfelder, Esq., One west Fourth St., Suite 900, Cincinnati,
Ohio 45202

on the date of filing herein.


Assignment Commissioner
R. Aileen Crawford