APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5548

ALI AL-MAQABLH,

Plaintiff-Appellant,

v.

CRYSTAL L. HEINZ, Individually,
and in her official capacity as the County Attorney
of Trimble County, Kentucky, *et al.*,

Defendants-Appellees.

NOT RECOMMENDED FOR PUBLICATION

On appeal from the United States District Court
for the Western District of Kentucky
Filed January 4, 2022
Deborah S. Hunt, Clerk
Document 68-2

O R D E R

Before: SUTTON, Chief Judge; ROGERS and GRIFFIN, Circuit Judges.

Ali Al-Maqablh, a Kentucky resident represented by counsel, appeals the district court's dismissal of his civil action against various state and county

prosecutors and police officers as well as the mother of his minor child. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Maqablh's suit concerned what he believes to be trumped-up criminal charges filed against him for harassment and falsely reporting an incident after he called the police three times to request welfare checks on the child he has with Lindsey Jo Alley. He asserted a host of claims, including that the defendants: retaliated against him and violated his free-speech rights by filing false criminal charges against him; engaged in abuse of process and malicious prosecution; violated 42 U.S.C. § 1985 by conspiring to deter him from challenging the actions of the state and county defendants and by conspiring to decline to investigate his administrative complaints; violated several federal criminal laws—18 U.S.C. §§ 1341, 1342, and 1349—by impersonating him and intercepting his mail; violated Kentucky Revised Statutes § 600.020 by charging him with falsely reporting an incident of child abuse; conspired to subject him to three malicious prosecutions; unlawfully used a federal administrative subpoena to harass his alma mater, the University of Louisville, in an attempt to obtain his academic records; and improperly enforced Kentucky Revised Statues §§ 519.040 and 525.080, governing the reporting of child injuries, because the statutes are void for vagueness. He sought an order directing the state bar to investigate and suspend the prosecutor's law license and another order directing various law-enforcement agencies to investigate and prosecute the defendants. Maqablh also sought declaratory judgments that his

rights were violated and that the above Kentucky statutes are unconstitutionally vague. He asked for injunctions against the various defendants. And he sought damages, costs, and fees.

The district court screened the complaint because Maqablh had filed suit in forma pauperis, *see* 28 U.S.C. § 1915(e), and the court dismissed several claims: his claims under the federal criminal statutes, because they do not provide a private right of action; his § 1985 claims as untimely and because his allegations were too conclusory; his § 1983 claims against the prosecutors, because they are protected by prosecutorial immunity, and against Alley, because she is not a state actor; his claim alleging the unlawful use of a subpoena against the University of Louisville, because he lacked standing to raise a claim for the school; his claim under Kentucky Revised Statutes § 600.020, because that statute only contains definitions for the State's juvenile code; some of his malicious-prosecution claims, because they are time-barred; his abuse-of-process claims, because they are untimely and because he did not allege that the defendants obtained warrants to gain a collateral advantage outside the criminal proceeding, as required by state law; and his fraud claims, because he did not allege an injury. In all, the district court determined that Maqablh could proceed with his malicious-prosecution claims against Kentucky State Trooper James Phelps and against Alley and his claims that Kentucky Revised Statues §§ 519.040 and 525.080 are void for vagueness. *Maqablh v. Heinz*, No. 3:16-CV-289-JHM, 2016 WL 7192124, at *8 (W.D. Ky. Dec. 12, 2016). On motions by the defendants, the district court then dismissed Maqablh's vagueness

claims, *Al Maqablh v. Heinz*, No. 3:16-CV-00289-JHM, 2017 WL 1788666, at *5 (W.D. Ky. May 4, 2017), as well as claims that he presented in his amended complaint, including for racial discrimination and for conspiracy under 42 U.S.C. §§ 1985 and 1986, *Al Maqablh v. Heinz*, No. 3:16-CV-289-JHM, 2018 WL 4390744, at *4 (W.D. Ky. Sept. 14, 2018). Following discovery, Alley and Phelps moved for summary judgment on Maqablh's remaining claims for malicious prosecution, and the district court granted their motion. *Al Maqablh v. Heinz*, No. 3:16-CV-289-JHM, 2019 WL 1607534, at *3 (W.D. Ky. Apr. 15, 2019).

On appeal, Maqablh argues that the district court erred in granting summary judgment on his federal and state claims for malicious prosecution, in rejecting his claims that the Kentucky criminal laws he was charged with violating are unconstitutionally vague and overbroad, and in dismissing his federal-civil-rights claims under 42 U.S.C. §§ 1983 and 1985 and his state-law claims for malicious prosecution, abuse of due process, and fraud. By failing to raise other arguments on appeal, Maqablh has forfeited their review. *See Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 317 (6th Cir. 2021).

We review de novo a district court's dismissal of a claim on screening, *see Small v. Brock*, 963 F.3d 539, 540 (6th Cir. 2020), on a motion to dismiss, *see Daunt v. Benson*, 999 F.3d 299, 307 (6th Cir. 2021), and on summary judgment, *see Johnson v. Ford Motor Co.*, 13 F.4th 493, 502 (6th Cir. 2021). To avoid dismissal at screening or on a motion under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain

sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In resolving a summary-judgment motion, we view the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Maqablh first argues that the district court erroneously granted summary judgment on his federal and state malicious-prosecution claims against Kentucky State Trooper James Phelps and Alley. The district court held that Maqablh's claims failed because he did not satisfy the requirement, under both federal and state law, that the criminal proceedings were resolved in his favor. *See Hartman v. Thompson*, 931 F.3d 471, 485 (6th Cir. 2019); *Martin v. O'Daniel*, 507 S.W.3d 1, 11 (Ky. 2016). The court cited *Ohnemus v. Thompson*, 594 F. App'x 864, 867 (6th Cir. 2014), for the proposition that, "[i]n order for a termination of proceedings to be favorable to the accused, the dismissal must be one-sided and not the result of any settlement or compromise." The district court also cited an analogous rule from a Kentucky case. *See Broaddus v. Campbell*, 911 S.W.2d 281, 284 (Ky. Ct. App. 1995) (holding that the plaintiff had not met the favorable-termination element because "[t]he dismissal was not the unilateral act of the prosecutor; [he] gave up something to secure the dismissal of the charges"). Quoting Maqablh's deposition, the district

court noted that he and the prosecutor entered "an informal agreement" under which, if he did "not assault Lindsey Alley for three months . . . the charges will be dismissed." *Al Maqablh*, 2019 WL 1607534, at *2. Because the prosecutor "made a deal with [Maqablh] that she would drop the charges against him if he would not assault Alley for the next three months," the district court held that "[t]his was a two-sided compromise," and therefore that Maqablh could not prove a malicious-prosecution claim. *Id.* at *3.

On appeal, Maqablh argues that the district court's reliance on *Ohnemus* was misplaced because there, unlike in his case, the plaintiff had agreed to pay restitution in exchange for dismissal of the charges. That is a difference, but it is not a material one: Maqablh's criminal prosecution still terminated after he had fulfilled his obligations under an agreement with the prosecutor; he did not "demonstrate that his 'dismissal indicates that [he] may be innocent of the charges,' or that a conviction has become 'improbable.'" *Jones v. Clark County*, 959 F.3d 748, 765 (6th Cir. 2020) (quoting *Ohnemus*, 594 F. App'x at 867; Restatement (Second) of Torts § 660). Maqablh contends that he did not enter a compromise with or make any concession to the prosecution in exchange for dismissing the charges, but his own deposition, as quoted above, belies that contention. Maqablh also cites *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), in which the Supreme Court held that to recover damages under § 1983 for an unconstitutional conviction or imprisonment, a plaintiff "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal

authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Maqablh noted that the charges against him were expunged within six months of being filed. But as the district court pointed out, *Heck* involved a plaintiff convicted of a crime, not one, like Maqablh, who was merely charged. Maqablh still had to satisfy the favorable-termination requirement. The fact that the charges were dismissed pursuant to an agreement with the prosecutor confirms that he did not.

Maqablh next argues that the district court erred in dismissing his claims that the two Kentucky criminal laws he was charged with violating are unconstitutionally vague and overbroad: Kentucky Revised Statute § 519.040, which criminalizes falsely reporting an incident; and section 525.080, which criminalizes making harassing communications. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Under the "First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008).

On Maqablh's vagueness argument, the district court held that both Kentucky statutes provided "reasonable notice of what conduct is prohibited"

because they contain a scienter requirement: a person is guilty of harassing communications only if he has the "intent to intimidate, harass, annoy, or alarm another person"; while "[a] person is guilty of falsely reporting an incident when he . . . [k]nowingly gives false information to any law enforcement officer with intent to implicate another." *Al Maqablh*, 2017 WL 1788666, at *2-3; Ky. Rev. Stat. §§ 525.080(1), 519.040(1)(d). The Supreme "Court has made clear that scienter requirements alleviate vagueness concerns." *Gonzales*, 550 U.S. at 149. The district court also noted that the statutes use common terms, thus further undermining Maqablh's vagueness arguments.

As for Maqablh's overbreadth claim, the district court determined that the statutes did not criminalize protected speech. The district court held that the harassing-communications law regulates not speech but unprotected conduct—"the manner used to convey the communication," *Al Maqablh*, 2017 WL 1788666, at *3 (quoting *Yates v. Commonwealth*, 753 S.W.2d 874, 876 (Ky. Ct. App. 1988))—and noted that the Kentucky Court of Appeals has long held the harassing-communications statute to be constitutional. *See Yates*, 753 S.W.2d at 876. The district court also held that the Kentucky statute criminalizing knowingly false reporting to law enforcement plainly does not prohibit constitutionally protected speech. *Al Maqablh*, 2017 WL 1788666, at *5.

Maqablh raises several arguments about the district court's ruling on these issues, but none is persuasive. He first claims that section 525.080 is

unconstitutional because it criminalizes anonymous speech, citing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342-43 (1995). But that case involved political speech and did not protect anonymity for its own sake. In any event, the harassing-communications statute does not single out anonymity, and Maqablh's argument misses the point that the law criminalizes not constitutional speech but only communications made with the "intent to intimidate, harass, annoy, or alarm another . . . with no purpose of legitimate communication." Ky. Rev. Stat. § 525.080(1).

Maqablh next argues that section 525.080 criminalizes protected conduct and compares the statute to other states' laws that "define harassment with the clarity needed to defeat or at least reduce vagueness and overbreadth concerns." Yet Kentucky defines harassment similarly, *see* Ky. Rev. Stat. § 525.070, and its harassing-communications law also requires that the communication "serves no purpose of legitimate communication," Ky. Rev. Stat. § 525.080; *see also United States v. Dukes*, 779 F. App'x 332, 335 (6th Cir. 2019).

Maqablh also claims that the statute improperly focuses on the perception of the recipient of the communication. He cites several cases from other courts striking down statutes involving similar subject matter. But none of those statutes includes the same requirement as Kentucky's that the offending communication must serve no legitimate purpose. Indeed, in one of the cases that Maqablh cites, *State v. Vaughn*, 366 S.W.3d 513, 521 (Mo. 2012), the Missouri Supreme Court struck down the state's harassment

statute as overbroad because it criminalized when a person "[k]nowingly makes repeated unwanted communication to another person," *id.* at 519 (quoting Mo. Ann. Stat. § 565.090.1(5)), but the court upheld a related section that criminalized engaging in certain harassment "without good cause," with the court noting that the section was necessarily limited to unprotected matters "because the exercise of constitutionally protected acts clearly constitutes 'good cause.'" *Id.* at 521 (quoting Mo. Ann. Stat. § 565.090.1(6)).

Similarly, Maqablh argues that the Kentucky harassing-communications law unconstitutionally prohibits speech directed at public officials. Yet, as above, because the law is limited to communications that serve no legitimate purpose, it does not apply to protected speech.

Maqablh next claims that the harassing-communications statute's scienter requirement does not by itself save it from vagueness and overbreadth concerns. But the district court did not hold that the scienter element alone made the statute constitutional. As described above, the district court explained several reasons that the law was not vague or overbroad. Maqablh also argues that the district court's reliance on *Yates* and its emphasis on "the right to be left alone," 753 S.W.2d at 876, contradicts Supreme Court precedent about the privacy interests implicated by the First Amendment. Yet his argument still does not show that Kentucky's harassing-communications statute criminalizes protected speech or conduct.

Next, Maqablh maintains that the district court did not subject the statute to strict scrutiny, as required by *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). But that standard applies only to government regulation of content-based speech. *Id.* at 163-64. Given that section 525.080 does not "draw[] distinctions based on the message a speaker conveys," *id.* at 163, the standard was inapplicable.

Maqablh further argues that the district court ignored his as-applied challenge to section 525.080. He cites paragraph 44 of his original complaint, in which he claimed that he was falsely arrested for violating that statute and released on bail as long as he did not contact the child or her mother. He does not develop this supposed as-applied challenge, however, either in his district-court pleadings or on appeal, and so the district court did not err in failing to discern that he was raising such a claim.

Maqablh likewise claims that the district court failed to address his as-applied challenges to section 519.040, Kentucky's false-reporting statute. He maintains that his "Complaint gives a full account of the claims under that statute that can be easily understood as an as-applied set of challenges." He recounts these putative claims in his appellate brief, but none relates to an as-applied challenge to the statute; instead, Maqablh alleged that various defendants concocted false charges against him "knowing that he had not been a part of any alleged incidents." He maintains that he was "arbitrarily charged with a crime under KRS 519.040," but his pleadings do not assert that the statute criminalized his constitutionally protected speech in this instance;

rather, Maqablh's claim is that the defendants chose to charge him under that statute because they could not charge him under another. Again, Maqablh's pleadings do "not contain any factual allegation sufficient to plausibly suggest" that he was raising an as-applied challenge to the false-reporting statute. *Iqbal*, 556 U.S. at 683.

Maqablh also argues that section 519.040 is unconstitutionally vague because it can be used arbitrarily, citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). But, as explained above, the statute includes a scienter requirement—unlike the law in *Morales*, *see id.* at 55—which alleviates vagueness problems, and Maqablh has not alleged how the statute, which proscribes making knowingly false reports to law enforcement, "encompass[es] harmless conduct," *id.* at 63, or "affords too much discretion to the police and too little notice to citizens," *id.* at 64.

The rest of Maqablh's appellate brief concerns matters that the district court dismissed at the screening stage. He argues that the court erred in dismissing his claims under 42 U.S.C. § 1985, the federal-civil-rights statute concerning conspiracies, because he failed to sufficiently allege that the defendants discriminated against him because of his membership in a protected class. *See Maqablh*, 2016 WL 7192124, at *4. He notes that the district court correctly understood him to be raising a claim under subsection (2) of the statute, which provides a private right of action against people who, among other things, "conspire for the purpose of impeding, hindering, obstructing, or defeating . . . the due course of justice . . . with intent to deny to any citizen the

equal protection of the laws." Maqablh maintains that the district court misconstrued the statute to apply to only class- or race-based discrimination. But that is this court's interpretation too, *see Alexander v. Rosen*, 804 F.3d 1203, 1207-08 (6th Cir. 2015), and therefore the district court had to abide by it, as do we, see *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019). Maqablh also argues that the district court erred in holding that his allegations of a conspiracy were conclusory, but his failure to allege class- or race-based discrimination is enough to support the dismissal of his § 1985 claims.

Maqablh next argues that the district court erroneously dismissed his § 1983 claims based on prosecutorial immunity. He claimed that the defendants—Trimble County Attorneys Crystal L. Heinz and Kim Vittitow—were engaged in non-prosecutorial tasks and thus are not shielded by that immunity. Yet the only other task he cites is that they also "administer[] the enforcement of child support." It is unclear how those responsibilities relate to his claims, and, in any event, he does not argue such claims on appeal. Maqablh also maintains that prosecutorial immunity does not apply because he sued the defendants in their individual capacities. But he is mistaken: prosecutorial immunity applies only to individual-capacity claims, while a claim for damages against the defendants in their official capacities would be barred by Eleventh Amendment immunity. *See Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009). Maqablh further argues that the defendants had the burden of showing that they were immune and that the district court improperly shifted that burden by dismissing the claims at screening. But the statute

authorizing plaintiffs to proceed in forma pauperis required the district court to "dismiss the case at any time if the court determines that . . . the action . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(iii).

Maqablh makes the same individual-capacity argument above about the dismissal of his state malicious-prosecution claim against Heinz. But, as before, Maqablh misunderstands the issue: under Kentucky law, "so long as a prosecutor acts within the scope of the duties imposed by law," prosecutorial immunity applies. *McCollum v. Garrett*, 880 S.W.2d 530, 534 (Ky. 1994).

Maqablh next argues that the district court incorrectly dismissed his state-law abuse-of-process claim because he failed to allege that the defendants used "the process to secure a collateral advantage outside the criminal proceeding." *Maqablh*, 2016 WL 7192124, at *8 (quoting *Sprint Commc'ns Co., L.P. v. Leggett*, 307 S.W.3d 109, 114 (Ky. 2010)). Maqablh maintains that his pleadings alleged that the defendants made "a threat of using due process to hinder action in the court of law," and that they "threatened to use the legal process against Maqablh to accomplish a purpose for which that process is not designated, [which] satisfies the element of alleging an act of accomplishing a 'collateral advantage.'" But Maqablh offers no authority to support that latter argument, nor does he show that the former argument meets the collateral-advantage requirement. As the district court put it, despite his reference to "'ulterior motives,' in reality, [Maqablh] is complaining that

Defendants 'obtained a criminal summons without a probable cause and is [sic] an abuse of due process,'" *id.*, and "obtaining an indictment alone, even with an ulterior purpose, is not abuse of process," *id.* (quoting *Leggett*, 307 S.W.3d at 114).

Finally, Maqablh argues that the district court erred by dismissing his state-law fraud claim, which alleged that Vittitow and Heinz changed his address and phone number in order to intercept his communications with the government. The district court held that he did not allege an injury, such as a missed deadline or adverse decision. *Id.* Maqablh asserts that he alleged that their actions rendered "moot" his "report to the Kentucky cabinet of health and human services." But that bald statement is insufficient; Maqablh does not explain, either in his pleadings or on appeal, how the defendants' alleged actions "moot[ed]" the proceeding and how he suffered damages from it.

Accordingly, we AFFIRM the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 3:16-CV-289-JHM

ALI AL MAQABLH,

Plaintiff,

v.

CRYSTAL L. HEINZ, *et al.*,

Defendants.

Filed August 14, 2019
Document 145

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants James Phelps and Lindsey Alley's Bill of Costs [DN 125], Motion for Attorney Fees [DN 126], and Plaintiff's Motion to Withdraw Document [DN 133]. Fully briefed, these matters are ripe for decision. For the following reasons, the Plaintiff's Objections to the Bill of Costs are OVERRULED in part and SUSTAINED in part, Defendants' Motion for Attorney Fees is DENIED, and Plaintiff's Motion to Withdraw Document is GRANTED.

I. BACKGROUND

Plaintiff Ali Al Maqablh filed this lawsuit alleging multiple claims against Jefferson County, Trimble County, and various Kentucky state employees regarding the criminal proceedings commenced against him and related to the contact that he had with the mother of his child, Defendant Lindsay Jo Alley. The majority of the claims in Plaintiff's Original Complaint and his Amended Complaint were dismissed after initial screening and motions to dismiss. The two remaining claims—a federal claim of malicious prosecution under 42 U.S.C. § 1983 against Defendant Trooper James Phelps and a state claim of malicious prosecution against Alley—were dismissed after the parties filed cross motions for summary judgment and the Court entered a Judgment [DN 124] in favor of Defendants and against Plaintiff.

Within fifteen days from the entry of Judgment, Defendants filed a Bill of Costs [DN 125] and a Motion for Attorney Fees [DN 126]. Plaintiff offered a Response to Defendants' Motion for Attorney Fees [DN 128] that also included Objections to the Bill of Costs. Then, one week later, Plaintiff filed a Motion to Withdraw his Response [DN 133], stating that an incorrect draft of the Memorandum of Support was filed and offering the corrected Memorandum of Support [DN 133-2] as an attachment. Defendants do not object to Plaintiff's Motion to Withdraw and therefore, the Court will use the corrected Memorandum of Support to make its determination on attorney fees and costs.

II. TROOPER PHELPS

Trooper James Phelps asks the Court to award him attorney fees. Plaintiff brought a claim against Phelps under 42 U.S.C. § 1983. Congress enacted § 1983 to encourage the private enforcement of civil rights. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). For this reason, Congress also provided for attorney fees for § 1983 actions, providing that, "the court, in its discretion, may allow the prevailing party . . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Typically, this statute is used to award attorney fees to successful plaintiffs. However, there are circumstances in which attorney fees may be awarded to a defendant as the prevailing party.

> [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.

Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). The Sixth Circuit has observed, "An award of attorney's fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986).

In this case, Defendants have not claimed that Plaintiff brought or continued this lawsuit in bad faith. Furthermore, although some of Plaintiff's claim were dismissed early in the lawsuit, the Court cannot say that his lawsuit was frivolous, unreasonable, or groundless. Ultimately, the Defendants' success came down to an issue with a single element of Plaintiff's malicious prosecution claims. For this reason, the Court will not resort to the extreme sanction of attorney fees.

III. LINDSEY ALLEY

Defendant Lindsey Alley also asks for attorney fees. Because the claims against her were under Kentucky common law, Kentucky rules of attorney fees apply. In Kentucky, attorney fees are not awarded to a prevailing party unless allowed by statute or provided for by contract. However, Alley cites to *Smith v. Bear, Inc.*, 419 S.W.3d 49, 59 (Ky. App. 2013) for the proposition that Kentucky courts may use equity to allow attorney fee awards despite Kentucky's adherence to the American Rule regarding attorney's fees. The Kentucky Supreme Court, in *Bell v. Commonwealth*, 423 S.W.3d 742 (Ky. 2014), has made clear that "[i]f courts truly had equitable or inherent powers as broad as those assumed by the trial court, the American Rule regarding attorney's fees as costs would be obliterated." *Id.* at 750. The Court went on to state, "trial courts may not award attorney's fees just because they think it is the right thing to do in a given case. That is not what the law of Kentucky allows." *Id.*

The Kentucky Supreme Court stated that, in the absence of a contractual or statutory basis on which to award attorney fees, "the only appropriate award of

attorney's fees" may be as a sanction under the rules. *Id.* at 749. Awarding attorney's fees as a sanction is appropriate only in those instances where the very integrity of the court is at issue. Such is not the case here, therefore, attorney fees under Kentucky law are not appropriate.

IV. COSTS

Lastly, Defendants submitted a Bill of Costs and Plaintiff offered his Objections. Fed. R. Civ. P. 54(d)(1) provides, "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." This rule "creates a presumption in favor of awarding costs, but allows denial of costs at the discretion of the trial court." *Singleton v. Smith*, 241 F.3d 534, 539 (6th Cir. 2001). Plaintiff does not disagree that Defendants are the prevailing party but offers objections to specific items in the Defendant's Bill of Costs and argues that his indigence should preclude taxing costs against him.

In their Reply, Defendants concede that they included one cost in their Bill of Costs by mistake. Defendants were charged $15 on December 14 for postage and delivery of Plaintiff's deposition transcript. They admit that this cost should not be assessed to Plaintiff. As for the other two certified copies of Defendants' transcripts, those documents were e-delivered at no cost to the Defendants. The Court will remove the $15 for postage and delivery from consideration in the Bill of Costs.

Next, Plaintiff objects to the cost of his deposition. According to Plaintiff, he should not have to pay for

his deposition because Defendants failed to use interrogatories, requests for admission, or other less-expensive discovery methods. Defendants respond, calling the Plaintiff's argument hypocritical because Plaintiff took depositions of both Alley and Phelps without utilizing cheaper means of discovery. The Sixth Circuit has stated, "Ordinarily, the costs of taking and transcribing depositions reasonably necessary for the litigation are allowed to the prevailing party." *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). In this case, summary judgment was granted to Defendants based on testimony from Plaintiff's deposition. For that reason, Plaintiff's deposition was necessary to the litigation and Plaintiff should be taxed for the cost of $714.

Plaintiff also argues that he should not have to pay for Defendants' certified copies of Alley's deposition because that document was available in the record. A court may tax as costs "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." 28 U.S.C. § 1920. Specifically, other courts in this district have held that "copies of deposition transcripts may be taxed." *Cunningham v. Target Corp*, No. 3:06-CV-160, 2010 WL 1032772, at * 2 (W. D. Ky. March 17, 2010). For the costs of certified copies of Alley's deposition and Trooper Phelps', Plaintiff should be taxed $431.55.

The next cost that Plaintiff refutes is the $50 late cancellation payment for Plaintiff's deposition. Issues with the timing of Plaintiff's deposition arose when Defendants' counsel incorrectly communicated the date of the deposition on the notice to Plaintiff.

Although the parties' counsels agreed that Plaintiff would be deposed on December 6, the notice stated Plaintiff's deposition would be on December 4. Not realizing the mistake until the day before, Defendants' counsel clarified with the court reporter and Plaintiff's counsel, but Plaintiff still showed up on December 4 for his deposition. However, the $50 cancellation fee at issue was not charged for the mistake on December 4. On December 5, after Plaintiff had showed up for his rescheduled deposition, counsel for the parties confirmed that the deposition was meant to be on December 6. Plaintiff's counsel confirmed on December 5, "We are still on for tomorrow." (Exhibit 5 – Emails Confirmation Dec 6 [DN 138-6]). Regardless, Plaintiff did not show up on December 6 and offered no explanation for his absence, so the Court will assess the $50 cancellation fee against Plaintiff for failing to show up at his deposition on December 6.

Lastly, Plaintiff argues that his indigence should preclude costs being assessed against him. The Sixth Circuit has clearly stated that a "plaintiff's indigency does not prevent the taxation of costs against him." *Sales*, 873 F.2d at 120. Despite the fact that Plaintiff was permitted to proceed in forma pauperis, the law still mandates that Plaintiff pay "costs at the conclusion of the suit or action as in other proceedings." 28 U.S.C. § 1915(e). However, the Sixth Circuit has directed courts to determine an indigent party's capacity to pay the costs assessed. "[D]istrict judges are encouraged to consider the question of indigency fully for the record." *Banks v. Bosch Rexroth Corp.*, 611 Fed. App'x 858, 860 (6th Cir. 2015) (quoting *In re Ruben*, 825 F.2d 977, 987 (6th Cir. 1987)).

In this case, the record is devoid of any evidence as to Plaintiff's financial situation, other than his Motion for Leave to Proceed in forma pauperis [DN 3] that Plaintiff filed back in 2016. Since then, Plaintiff has offered nothing other than his unsubstantiated statements in his Objections concerning his inability to pay. This is not enough to overcome the presumption that costs should be assessed against Plaintiff as the losing party.

V. CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED Plaintiff's Objections to the Bill of Costs are OVERRULED in part and SUSTAINED in part, Defendants' Motion for Attorney Fees is DENIED, and Plaintiff's Motion to Withdraw Document is GRANTED. Costs are taxed in the amount of one thousand one hundred and ninety-five dollars and fifty-five cents ($1,195.55).

Joseph H. McKinley Jr., Senior Judge
United States District Court

August 14, 2019

cc: counsel of record

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 3:16-CV-289-JHM

ALI AL MAQABLH,

Plaintiff,

v.

CRYSTAL L. HEINZ, *et al.*,

Defendants.

Filed April 15, 2019
Document 123

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiff's Motion for Summary Judgment [DN 112] and Defendants' Motion for Summary Judgment [DN 113]. Fully briefed, these matters are ripe for decision. For the following reasons, the Court holds that Plaintiff's Motion for Summary Judgment is DENIED and Defendants' Motion for Summary Judgment is GRANTED.

I. BACKGROUND

Plaintiff Ali Al Maqablh filed his Original Complaint in this Court alleging multiple claims against various Defendants regarding criminal

proceedings commenced against him related to contact that he had with the mother of his child, Defendant Lindsay Jo Alley. Following initial screening and a series of motions to dismiss, only two Defendants remain—Lindsay Jo Alley and State Trooper James Phelps. Both Plaintiff and Defendants now ask the Court for summary judgment in their favor.

Plaintiff alleges that both Defendants are liable for malicious prosecution in relation to charges that were filed against him on April 7, 2015. In 2015, Plaintiff and Defendant Alley were engaged in litigation over Plaintiff's visitation rights for their son. During that time, Plaintiff called the police on three separate instances to request welfare checks on his child. It is Defendants' contention that Plaintiff utilized these welfare checks as a means to harass Alley. For this reason, Trooper Phelps assisted Alley in filing a criminal complaint against Plaintiff charging him with one count of harassment under KRS 525.070 and one count of falsely reporting an incident under KRS 519.040. On September 29, 2015, the relevant charges against Plaintiff were dismissed and later expunged.

II. STANDARD OF REVIEW

Before the Court may grant a motion for summary judgment, it must find that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of specifying the basis for its motion and identifying that portion of the record that demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving

party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party must do more than merely show that there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the Federal Rules of Civil Procedure require the non-moving party to present specific facts showing that a genuine factual issue exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute[.]" Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252.

III. DISCUSSION

Although both Alley and Phelps are accused of malicious prosecution, the claims against them are slightly varied. Phelps faces malicious prosecution liability under 42 U.S.C. § 1983 as an official acting under color of law. Alley, as a private citizen, is not subject to 1983 liability but might be liable for state violations of malicious prosecution. However, some elements of each defendant's malicious prosecution claims are the same. For example, both state and federal claims of malicious prosecution require the plaintiff to prove that the criminal proceedings were

resolved in his or her favor. *Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir. 2010) (articulating the elements of a federal malicious prosecution claim under § 1983); *Ohnemus v. Thompson*, 594 Fed. App'x 864, 866 (6th Cir. 2014) (listing the six elements of malicious prosecution under Kentucky law).

The parties strongly disagree about whether the proceedings against Plaintiff were resolved in his favor. In Kentucky, "the determination of whether a termination is sufficiently favorable ultimately rests with the trial court as a matter of law, absent a factual dispute relative to the circumstances of the dismissal." *Davidson v. Castner-Knott Dry Goods Co.*, 202 S.W.3d 597, 606 (Ky. Ct. App. 2006). In this case, there is no factual dispute. Both parties acknowledge that the charges against Plaintiff were dropped pursuant to an informal agreement between Plaintiff and prosecutor, Crystal Heinz. Plaintiff described the agreement in his deposition as such:

> It was an informal agreement where my attorney, Robert Riley, told—explained it to me that you do not assault Lindsey Alley for three months and we'll pass this to September 25, I believe or some—a day around—some—some day in—I think September 29. We'll pass this over to that date and if you have not assaulted Lindsey Alley within these three months, the charges will be dismissed. And I told him that I never, ever laid a finger of Lindsey Alley, so I'm—I'll be happy to do that.

(Pl. Dep. [DN 113-2] at 58).

Plaintiff argues that under the Supreme Court precedent of *Heck v. Humphrey*, 512 U.S. 477 (1994), his expungement alone is indicative that the proceedings were terminated in his favor. Plaintiff states, "Under *Heck*, expungement defines favorable termination." (Pl.'s Mot. for Summ. J. [DN 112] at 28). Defendants disagree, pointing out that *Heck* concerns "challenges to criminal convictions and the availability of habeas corpus relief." (Defs.' Resp. [DN 118] at 18). Since Plaintiff was not actually convicted of either of the crimes filed against him in 2015, Defendants argue that *Heck* is not applicable. The Court agrees. In *Heck*, the Supreme Court set standards for what constitutes favorable termination in the case of prisoners who have the opportunity to seek redress for violations of their rights through both § 1983 and habeas corpus. In seeking to protect against inconsistent judgments, the Supreme Court created a specific standard applicable for those seeking to recover damages "for allegedly unconstitutional conviction or imprisonment." *Heck*, 512 U.S. at 486. In this case, that standard is inapplicable to Plaintiff who was neither convicted of nor imprisoned for the relevant charges.

Next, Plaintiff argues that "the timeline in this case is a proof [sic] that the charges were dismissed in Plaintiff's favor." (Pl.'s Mot. for Summ. J. at 18).

> In addition, the Defendants can't prove otherwise, simply, because Plaintiff had not entered into any plea agreement or any other alternative means as the time with which these charges were initiated, dismissed, and expunged lies outside of the prescribed

> statutory requirements that govern such agreements, clearly indicating that the charges were dismissed in Plaintiff's favor.

(*Id.*). The Court disagrees. Whether there was a formal plea agreement is not determinative. The question is whether the proceedings were terminated in favor of the plaintiff. The Sixth Circuit has spoken directly on situations that are considered to be termination in favor of the plaintiff. "In order for a termination of proceedings to be favorable to the accused, the dismissal must be one-sided and not the result of any settlement or compromise." *Ohnemus*, 594 Fed. App'x at 867.

Also, in *Broaddus v. Campbell*, the Kentucky Court of Appeals dismissed a plaintiff's malicious prosecution claim because the court concluded that the plaintiff "gave up something to secure the dismissal of the charges" and the dismissal did not indicate that the plaintiff was actually innocent. 911 S.W.2d 281, 285 (Ky. Ct. App. 1995).

Plaintiff's explanation of the informal agreement that led to dismissal of the charges against him reveals that it was a compromise. Heinz made a deal with Plaintiff that she would drop the charges against him if he would not assault Alley for the next three months. Plaintiff argues that because he never assaulted Alley in the first place, he was not giving up anything of value to him. Whether or not he had ever assaulted Alley before is not the point. The point is he promised not to assault her in the future in exchange for dismissal of the charges. This was a two-sided compromise. The facts of the dismissal did not give any indication that Plaintiff may have been innocent

of the charges against him. Therefore, the Court finds that Plaintiff cannot establish a necessary element of a malicious prosecution claim and Defendants are entitled to judgment as a matter of law.

IV. CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is DENIED and the Defendants' Motion for Summary Judgment is GRANTED.

Joseph H. McKinley Jr., District Judge
United States District Court

April 15, 2019

cc: counsel of record

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 3:16-CV-289-JHM

ALI AL MAQABLH,

Plaintiff,

v.

CRYSTAL L. HEINZ, *et al.*,

Defendants.

Filed April 15, 2019
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JUDGMENT

This matter has come before the Court on a number of dispositive motions. The Court dismissed portions of Plaintiff's Complaint by memorandum opinion and orders dated December 12, 2016, [DN 10], May 4, 2017 [DN 45], and September 14, 2018 [DN 106]. As for the remaining claims, summary judgment was granted in favor of Defendants on April 5, 2019. Therefore,

IT IS HEREBY ORDERED that judgment be entered in favor of Defendants consistent with the

Court's memorandum opinion and orders and the Plaintiffs' complaint be dismissed with prejudice.

Joseph H. McKinley Jr., District Judge
United States District Court

April 15, 2019

cc: counsel of record

Appendix E

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, § 1, in relevant part

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.