

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1570

September Term, 2014

THOMAS H. CLARK

v.

JEFFREY S. ALBAUGH

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: June 18, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case is the latest in a series of legal disputes arising from a stop-payment order on a \$344 personal check from Thomas Clark to Jeffrey Albaugh. This transaction gave rise to a civil lawsuit and one criminal proceeding against Clark, which in turn spawned two civil actions against Albaugh.

Most recently, Clark brought an unsuccessful libel action against Albaugh. Clark appeals from that adverse judgment, contending that the court erred when it denied a pre-trial motion to take judicial notice of certain documents related to the parties' prior proceedings. Finding no error in the court's ruling, we affirm the judgment.

BACKGROUND

A. Breach of Contract Action and Criminal Charges Against Clark

On April 5, 2012, Albaugh installed stereo equipment at Clark's residence in Baltimore City. In exchange, Clark issued Albaugh a check for \$344. A few days later, Clark stopped payment on the check. On April 30, 2012, Albaugh brought a breach of contract action against Clark in the District Court of Maryland for Baltimore County.¹

While he was seeking this civil remedy, Albaugh also pursued criminal charges against Clark in Baltimore County and in Baltimore City. On June 9, 2012, Albaugh made a Bad Check Crime Report to the Baltimore County State's Attorney. On June 28, 2012, he also submitted an Application for Statement of Charges in the District Court of Maryland for

¹ In the district court's docket entries, appellee's name is spelled "Albaugm."

Baltimore City. Upon that application, Clark was charged with obtaining property or services by bad check.² Those charges were nol prossed on August 7, 2012.

Nonetheless, Albaugh ultimately prevailed in the breach of contract action. On September 20, 2012, he was awarded a judgment in the amount of \$349.

B. Actions Against Albaugh for Malicious Prosecution and Libel Per Se

Within the next year after that judgment, Clark brought two civil actions in circuit court against Albaugh. Both actions sought recovery for damages allegedly caused by Albaugh's pursuit of criminal charges against Clark.

On November 8, 2012, Clark filed a malicious prosecution complaint in the Circuit Court for Baltimore City. Clark alleged that Albaugh had applied for criminal charges in Baltimore City without probable cause. Clark demanded a judgment of \$50,000 in compensatory damages and \$100,000 in punitive damages for "severe mental anguish and loss of reputation from the malicious prosecution by Albaugh giving Clark a criminal record."

While that case was pending, Clark also learned of the bad check report that Albaugh made in Baltimore County. Instead of amending his complaint, Clark decided to institute separate litigation based on the same series of events. On June 5, 2013, Clark filed a separate

² See Md. Code (2002, 2012 Repl. Vol.), § 8-103(b) of the Criminal Law Article ("A person may not obtain property or services by issuing a check if: (1) when issuing the check, the person knows that the person . . . intends, without the consent of the payee, to stop or countermand the payment of the check . . .; and (2) payment is refused by the drawee on presentment").

complaint, for libel per se, in the Circuit Court for Baltimore County. This action is the subject of the instant appeal.

The second complaint alleged that Albaugh “knowingly and deliberately published a false assertion of a corporal crime” when Albaugh made a bad check report in Baltimore County. Clark asserted that Albaugh’s “numerous acts of malice” caused Clark “great anxiety [sic], loss of reputation, public disgrace, dishonor[,] and ridicule.” Clark now demanded \$100,000 in compensatory damages, plus \$250,000 in punitive damages.

Albaugh moved to transfer the libel action to the Circuit Court for Baltimore City on the grounds of forum non conveniens. In support of his motion, he emphasized that the libel action arose “out of the same occurrence as a suit that is already scheduled to be heard in Baltimore City.” He argued: “To allow the Plaintiff’s choice of venue to stand would be to unnecessarily burden two court systems with claims that arise out of one occurrence.”³

The Baltimore County court granted the motion and transferred the case to Baltimore City on October 29, 2013.

³ As the basis for his opposition to the motion, Clark accused a Baltimore City judge of arbitrarily denying his motion for summary judgment in the malicious prosecution case. Clark wrote: “The decision of the City Circuit taints the integrity of that court. [The circuit judge] could not find probable cause, so he invented ‘GOOD CAUSE’ (personal opinion) in place of probable cause (facts) enabling attorney to draw additional fees and consume unnecessary court time on a case with no defense. This does not bode well for justice as justice goes[.] There is no fair or practicable benefit to anyone to send this case to such an environment.”

Nevertheless, for reasons that are not evident from our record, the two cases were never consolidated, and the Circuit Court for Baltimore City was burdened with two trials based on the same transaction. The malicious prosecution case was eventually tried in March 2014, and Clark prevailed. On April 2, 2014, judgment was entered against Albaugh and in favor of Clark, in the sum of \$345, four dollars less than Albaugh won in his civil suit against Clark.⁴

C. Clark's Request for Judicial Notice in Libel Action

The action for libel per se proceeded to trial on September 2, 2014. On the morning of the scheduled trial date, Clark submitted a one-page motion to the court, styled as “Plaintiff’s Request for Judicial Notice.” In full, the motion stated:

COMES NOW, Thomas H. Clark, Plaintiff, Pro Se in the above captioned case pursuant to Md. Rule 5-201 (d)(f)(g) [sic], requests Judicial Notice of adjudicated facts, and in support thereof states:

1. Application for Charges , Baltimore City District Court with two page narrative on June 28, 2012. Ex.1

⁴ In view of the jury verdict in Albaugh’s favor in the civil action to collect the amount of the check, it is not entirely clear whether the jury could properly have found that Albaugh lacked probable cause to bring criminal charges against Clark for stopping payment. *Cf. Quecedo v. DeVries*, 22 Md. App. 58, 70 (1974) (conviction of criminal charges is conclusive determination of probable cause even if conviction is later reversed on appeal). It is similarly unclear why the jury verdict on the malicious prosecution claim did not operate as res judicata to bar Clark from pursuing his libel claims in this separate action. *See, e.g., FWB v. Richman*, 354 Md. 472, 493 (1999) (“when a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar, . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose”). Those issues, however, are not before us in the present appeal.

2. Statement of Charges, June 28, 2012. Ex. 2
3. Nolle-Prosequi. Ex. 3
4. Malicious Prosecution Complaint. Ex. 4
5. Judgment in favor of ComplainantEx. 5 [sic]
6. Recorded Judgment against [sic] Albaugh. Ex. 6
Bad Check and Stop Payment have been adjudicated [sic] by a jury
against Jeffrey Albaugh for lack of probable cause with punitive
damages.

The submission included the six exhibits Clark had listed, but it included no argument in support of the motion.

The court noted that the motion was not timely, but permitted Clark to make an oral argument in support of his request. Clark proceeded to make a presentation that did nothing to clarify his request.⁵ As best as can be understood, Clark asked the court to take “judicial notice” of all of the events from the malicious prosecution case, from Albaugh’s application for criminal charges in Baltimore City to the eventual money judgment on Clark’s malicious prosecution claim. Clark’s argument included many factual assertions that were not even supported by any of the documents, including the details of Albaugh’s successful action for breach of contract. Clark’s main emphasis, if any, seemed to be that it was improper for Albaugh to pursue criminal charges for passing a bad check, while also pursuing the civil breach of contract action.

Albaugh, through counsel, first objected to the timeliness of the motion. Counsel then commented, “I’m not quite sure if I followed Mr. Clark.” Nonetheless, he argued that any

⁵ To facilitate a better understanding of the context for the court’s ruling, the entirety of Clark’s oral argument is reproduced in an appendix to this opinion.

documents that Clark wished to introduce as evidence should be introduced in the normal course, upon a proper foundation, rather than “[j]ust throwing a handful of documents at the jury and expecting them to understand some other case[.]”

The court denied Clark’s motion. The court recited the basic standard for judicial notice, which is that a court may not take judicial notice of a fact unless it is not subject to reasonable dispute. The court then explained:

THE COURT: So, I’m wrestling with trying to figure out what facts that you are asking this Court to consider, to take notice of, that would be an efficient way to proceed that would promote judicial economy. And what I hear is that you want me to take judicial notice of a complaint of a bad check, which is a criminal matter, and a stop payment complaint, which is a civil matter. Any indication of coupling those two are erroneous as it pertains to this civil matter.

I don’t follow the logic in that and I’m not following the logic by way that the Court [and] the Maryland Rules explains to me how to proceed on judicial notice. For that reason, your Motion for Judicial Notice to the articulation of what you have asked this Court to take judicial notice of is denied.

The case proceeded to a jury trial. A full trial transcript was not made part of the record submitted to this Court. Our record does indicate, however, that Clark later introduced into evidence the first three of the six exhibits from his pre-trial motion, as well as other documents related to the malicious prosecution action.

The jury reached its verdict later that day. The jury found that Clark did not prove defamation by a preponderance of the evidence and that he did not prove malice by clear and

convincing evidence. Judgment in favor of Albaugh was entered on September 10, 2014.

Clark then filed a timely notice of appeal.

DISCUSSION

The ‘questions presented’ section of Clark’s pro se appellate brief does not present actual questions.⁶ The substance of his brief focuses on the court’s denial of his pre-trial motion for judicial notice. In Clark’s summary: “The trial court’s decision to deny Judicial Notice of an adjudicated fact of no Bad Check based solely on ‘articulation’ of the parties with no deference to the Motion, support[,] or fact finding was not legally correct.”

Clark states that the trial court “raised and decided ‘articulation’ on its own for rejecting Judicial Notice[.]” He writes that the court was required to give “deference to the contents of the Motion for Judicial Notice or to fact finding,” but that the court gave “arbitrary deference to ‘articulation’ of the parties to deny the Motion.” Clark asserts that the court “created a new standard of ‘articulation’” and in doing so “applied reverse due

⁶ Clark’s brief includes this list of ten separately numbered phrases:

1. Jurisdiction to “articulate.”
2. Arbitrary decision outside Motion.
3. No discretion on adjudicated fact for Judicial Notice.
4. Preservation of appeal on issue raised by Court.
5. Denial of Motion for Judicial Notice legally[.]
6. Due Process reversed.
7. Unequal protection of Law to advance benefit of adjudication.
8. Jury discretion on adjudicated fact(s).
9. Is preservation of adjudicated fact denied required.
10. Preliminary Motion on Judicial Notice absent from Case History.

process” and deprived him of equal protection under the law. He concludes that the court denied the motion on “an incorrect, arbitrary[,] and personal basis.”

As best as we can determine from his brief, Clark believes that his motion was denied based on the trial judge’s personal dislike of Clark’s oral presentation. In reality, the court denied the motion because Clark, in both his written submissions and his oral arguments, failed to satisfy his burden as the movant. *See generally Epps v. State*, 193 Md. App. 687, 702 (2010) (“As a general rule, the moving party on any proposition, civil or criminal, has both the burden of production and the burden of persuasion. It is the moving party who attempts to persuade a judge to somehow alter the status quo”) (quoting *Herbert v. State*, 136 Md. App. 458, 481 (2001)).

The Maryland Rules apply equally to pro se litigants and to represented parties. *See Tretick v. Layman*, 95 Md. App. 62, 68 (1993). Rule 2-311 sets forth basic standards for any motion made to the circuit court. A written motion made before trial “shall set forth the relief or order sought[,]” Md. Rule 2-311(a), and “shall state with particularity the grounds and the authorities in support of each ground.” Md. Rule 2-311(c). Clark’s written submission met neither of these requirements.

The only asserted basis for the motion was Rule 5-201, which governs judicial notice of adjudicative facts. “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot

reasonably be questioned.” Md. Rule 5-201(b). The Rule provides that a trial court “shall take judicial notice if requested by a party and supplied with the necessary information.” Md. Rule 5-201(d). In civil matters tried by a jury, the court “shall instruct the jury to accept as conclusive any fact judicially noticed[.]” Md. Rule 5-201(g).

As the Rule makes plain, judicial notice allows a court to take notice of “facts,” not of evidence. The doctrine of judicial notice is not a tool for the unfettered introduction of documents that may have some official or authoritative nature. The Rule provides only that, under some circumstances, certain commonly known or readily ascertainable facts may be accepted as conclusive without formal proof.

Clark’s written motion was fundamentally defective, because it did not even apprise the court of the action that Clark desired the court to take. His motion failed to identify any facts that he wished to show as conclusive. The motion also failed to state with particularity any grounds for concluding that those facts were judicially noticeable. At the very least, a request for judicial notice must identify facts and establish that those facts are “not subject to reasonable dispute.” Otherwise, the court and the other party have no opportunity to address “the propriety of taking judicial notice and the tenor of the matter noticed.” *See* Md. Rule 5-201(e) (providing that other party is entitled to request opportunity to be heard on issue of judicial notice).

It was by no means obvious from the circumstances what Clark sought to demonstrate through his documentary submissions. He attached six different documents from different

sources, each of which contained various assertions. For instance, one attached exhibit was Clark's complaint against Albaugh for malicious prosecution. Even assuming that a court could take judicial notice of the existence of that pleading, it would not be proper for the court to take notice of the truth of the assertions within that document. *See Abrishamian v. Washington Med. Group, P.C.*, 216 Md. App. 386, 415-16 (2014). Because the documents would be inadmissible for many purposes, it was necessary for Clark to identify a permissible purpose for which the documents were offered. *See In re Adoption/Guardianship Nos. CAA 92-10852, 92-10853*, 103 Md. App. 1, 33 (1994) (explaining that, when evidence is admissible “only for a limited purpose or under some theory, the proponent must also explain to the court how the evidence is admissible and why it should be received,” and holding that appellant failed to preserve issue for appellate review by failing to make adequate proffer).

Clark's oral argument to the court was certainly more extensive than his written motion, but it did nothing to cure the deficiencies of his written submission. If anything, his presentation made matters worse. Clark offered a narrative description of the parties' history that focused on many factual assertions that were not even arguably established by any of the supporting documents. In particular, Clark emphasized details related to Albaugh's civil action for breach of contract action even though none of the attachments related to that action.⁷ Clark's argument as to the relevance of the documents rested on the purported

⁷ Clark stated that the contract action was somehow “incorporated” into his malicious prosecution complaint.

significance of Albaugh’s civil action against him. This proffer was not sufficient to demonstrate any relevant relationship between his submissions and the nature of the issues before the court. *See Grandison v. State*, 341 Md. 175, 208-10 (1995) (no error in excluding testimony relating to prior civil lawsuit where party “gave no indication to the trial judge of what he was attempting to demonstrate, and as a result, the proffer was insufficient to demonstrate a relevant relationship” between the prior civil suit and any issue for trial).

Similarly, Clark’s appellate brief fails to illuminate what facts he sought to notice. He refers variously to his motion as a request for “Judicial Notice of an adjudicated fact of no Bad Check,” “Judicial Notice for an instruction on the Bad Check adjudication against the Appellee,” and “Judicial Notice of a criminal charge adjudicated by a civil jury against the Appellee.” We are still unable to discern the fact or facts he desired to have judicially noticed. Thus, we cannot determine whether or not those facts were judicially noticeable under Rule 5-201, whether it would have been clear error for the court to decline to take notice,⁸ whether those facts would have been relevant to the proceeding, and whether Clark suffered any prejudice to his case. Under these circumstances, this Court has no basis to grant his present request for “a new trial with Judicial Notice of no Bad Check.” *See Rollins*

⁸ *See Abrishamian*, 216 Md. App. at 413 (stating that this Court reviews a trial court’s decision not to take judicial notice “under the ‘clearly erroneous’ standard, keeping in mind “[t]he principle that there is a legitimate range within which notice may be taken or declined””) (quoting *Smith v. Hearst Corp.*, 48 Md. App. 135, 141 (1981)).

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v. Capital Plaza Assocs., L.P., 181 Md. App. 188, 201 (2008) (explaining that appellate court cannot be expected to seek out factual and legal support to sustain appellant's position).

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

APPENDIX

PLAINTIFF'S ORAL ARGUMENT

MR. CLARK: Well, yes, Your Honor. I tried to explain it in my submission. But essentially what happened is, that there was a malicious prosecution against the Defendant and he went to trial. And the jury decided that there was no probable cause for filing a criminal report against Clark. And they decided that they would render compensatory and punitive damages.

That's the long and the short of it, Your Honor. If you want me to get into the details of the pleadings.

THE COURT: Well, no. You indicated that there was a malicious prosecution against the Defendant. And that a jury indicated there was no probable cause and they awarded compensatory damages?

MR. CLARK: And punitive damages.

THE COURT: When did that happen?

MR. CLARK: The date of the trial, Your Honor? Well, I believe that was – well, now, I have to look here. I think it was in March, sometime in March of this year, maybe the 26th of March. Something like that.

THE COURT: And what would you like me to take judicial notice of?.

MR. CLARK: What I'd like you to take judicial notice of, Your Honor, are two things. 1) In the criminal complaint, there was a statement of bad check, which is a corporal crime with fine and imprisonment. There was also [] stop payment. Which was a dispute between the contract with Albaugh and Clark. It was incorporated into the malicious prosecution request here that I provided you with a copy with the statement of charges against Mr. Clark by Albaugh where both, I just stated, they were both stop payment and bad check.

Now, the stop payment is a civil matter. The bad check is a criminal matter. But coupling the two is erroneous, because the stop payment, as admitted by Mr. Albaugh when you filed for a civil suit, he admitted it was a civil matter. Later on he indicated that the basis of his filing in Baltimore County of the bad check earlier on was a result of his filing for stop payment

in a civil court. And it just doesn't make any sense, you see. But at any rate, that trial of the malicious prosecution against Albaugh, the Court – the submissions by the Plaintiff, me, be included the statement of stop payment and bad check.

The jury had both of those before them. And they decided that – actually, they decided that there was no probable cause. But the instructions to them by the judge included fraud. But that's not what I charged here. I charged here – here I charged malicious prosecution. Here I charge libel per se, which is in writing in a corporal crime and blah, blah, blah. But there's a conflict here, one cancels out the other. And there's no defense available against the libel per se in lieu of the decision of the jury in the malicious prosecution case.

THE COURT: How would you get that evidence before the jury in the first place for me to even take judicial notice of it? . . . How would you get that, those records, what you have submitted to me?

MR. CLARK: Well, because I have them certified by the Court and they're admissible. In fact, I believe I attached something similar to that with my submission. I think it's on page – well, number – yes, the Statement of Charges as item two in my judicial notice request, June 28th. That's Exhibit 2. It would be that document, as you can see, coupled with the dismissal by the criminal judge, nolle pros.

THE COURT: Anything else, sir?

MR. CLARK: Well, I'm answering your questions. I hope I'm answering them accurately, because that's what I submitted to you and that's what I would submit to the jury.

THE COURT: Okay.

MR. CLARK: Thank you.

THE COURT: [Counsel for Albaugh.] I'll hear from you, Counsel.

DEFENDANT'S ORAL ARGUMENT

[COUNSEL FOR ALBAUGH]: Thank you, Your Honor.

THE COURT: And I do understand that these were not timely filed.

[COUNSEL FOR ALBAUGH]: Yes, that would be my first objection, because of that issue. But to the substance of it, I'm not quite sure if I followed Mr. Clark. And Mr. Clark, with all due respect, is an attorney. I don't think he's practicing any longer, but he certainly has been in court over his career working either on his own or the State of Maryland, as experience with jury trials. But I think it's important for the Court to be aware of that.

In terms of this issue of judicial notice, or at least his argument, I really wasn't following that argument. I think he certainly has the ability, if he wants to bring certain evidence in, he should establish a proper foundation, and he would have it entered in the normal course. Just throwing a handful of documents at the jury and expecting them to understand some other case that preceded on a number of issues, I think that would become prejudicial to my client. It would be very confusing to the jury. And I don't think it would serve justice today.

Just one follow-up thing. Obviously, if there was a other prior proceeding, and I would proffer to Your Honor, you may hear this in testimony. Mr. Clark has filed one case in the Circuit Court for Baltimore County and a case here in Baltimore City Circuit Court dealing with the same set of facts. You will hear testimony that Mr. Albaugh in fact did proceed in a civil matter on a bad check count that he prevailed, as well as he filed for a criminal action against Mr. Albaugh, which I believe is the heart of Mr. Clark's activities in Court for resolution.

And I will proffer that the criminal charges were entered nolle prosequi. And that the civil charges ended in a judgment in favor of Mr. Albaugh for Mr. Clark to pay the monies that were owed, the \$345. Certainly all of those documents could have been certified as true test copies and we could have brought them into evidence, and he could have laid the foundation as to why they're relevant, and why their value is more probative than prejudicial.

PLAINTIFF'S REBUTTAL ARGUMENT

MR. CLARK: Yes, Your Honor. The statement about Albaugh filing in the civil court. The filing in the civil court was stop payment, not bad check. The filing in the criminal court by Mr. Albaugh was stop payment and bad check. But that's where you have to separate the two. There is no

overplay of jurisdiction here between the stop payment claim as a breach of contract in the civil court. That stands on its own and it has no relationship to anything else, unless in defense the attorney says my reason in defense of the libel per se case to establish reasonable diligence relates to the stop payment in the Circuit civil court case. You can't do that, that's not enough. He has to show separately from the civil court stop payment case why there is due diligence in solving a bad check criminal corporal act against Mr. Clark in Baltimore County.

Which subsequently was removed at the request of the Defendant to Baltimore City. That's why this case is in Baltimore City. It originated in Baltimore County, it was transferred to the City, over my objection. And I won't speak to that, because it just makes things more complicated.