2017 IL App (1st) 161492-U

THIRD DIVISION
September 6, 2017

No. 1-16-1492

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL COLEMAN, Plaintiff-Appellant, v. THE VILLAGE OF EVERGREEN PARK, ILLINOIS; KIARI MORGAN; JARED CAMER; and ANTHONY SIGNORELLI, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2015 L 9189 The Honorable John H. Ehrlich, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: Trial court properly granted defendants' motion to dismiss plaintiff's case for malicious prosecution where plaintiff failed to meet three essential elements of that cause of action, including favorable termination, lack of probable cause and malice.

¶ 1 Following reversal of his conviction and remand for a new trial, which was then *nolle prossed*, plaintiff-appellant Michael Coleman (plaintiff) brought suit against defendants-appellees The Village of Evergreen Park, Illinois; Kiari Morgan; Jared Camer and Anthony

Signorelli (defendants, or as named) for malicious prosecution. Defendants moved to dismiss plaintiff's cause, and the trial court granted their motion. Plaintiff appeals, contending that the trial court erred in determining his criminal charges were not dismissed in his favor, in determining there was probable cause to charge him in the underlying criminal matter, and in dismissing his cause with prejudice. He asks that we reverse and remand for further proceedings. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 As noted, plaintiff appeared in our court challenging one of his underlying convictions involved in the instant cause. See *People v. Coleman*, 2013 IL App (1st) 122266-U. The facts surrounding that crime are presented in detail in that decision, and we briefly restate them here.

¶ 4 On the night of February 6, 2011, the Village's police dispatcher radioed a bulletin regarding a report of a hit-and-run vehicular collision near 3700 West 95th Street in Evergreen Park. The bulletin included a description of the offending vehicle and its partial license plate. Officer Kiari Morgan heard the bulletin, was in the area, and soon spotted a car matching the description; plaintiff was driving. When officer Morgan saw plaintiff's car change lanes without signaling, he curbed it. Officer Jared Camer was also in the area and arrived to assist officer Morgan with the stop. Officer Morgan approached plaintiff and asked him if he had been involved in an accident, to which plaintiff replied that he had been sideswiped by another car. While officer Morgan was standing at the driver's door, plaintiff began to drive away, dragging officer Morgan with him. Officer Morgan leaned in and tried to reach for the keys, but could not grab them, so he drew his weapon and ordered plaintiff to stop the car. Plaintiff eventually did

so, after having dragged officer Morgan for about 20 feet. When plaintiff refused to exit the vehicle upon officer Morgan's order, officers Morgan and Camer forcibly removed him from the car and took him into custody. By this time, Detective Anthony Signorelli arrived on scene. Just prior to his arrival, Detective Signorelli had located the other car involved in the hit-and-run and its driver/the victim, Mary Parker. Detective Signorelli testified that he had a conversation with Parker wherein Parker told him that her car had just been sideswiped, she described the offending car, and she explained that she followed that car continuously since the point in time when she called police to report the hit-and-run. Detective Signorelli, who noted the damage to Parker's car, further testified that when he arrived to where the other officers were with plaintiff, plaintiff's car, which matched the dispatched description and the one given by Parker, was damaged, to wit, his passenger side mirror was hanging off his vehicle and this damage looked fresh. Further testimony indicated that plaintiff needed assistance in balancing and walking to the police vehicle for transport to the station, as well as in balancing and walking from the police vehicle into the station; plaintiff was using profanity and had bloodshot eyes, slurred speech and a strong odor of alcohol on his breath.

¶ 5 Plaintiff was charged with leaving the scene of an accident, fleeing and eluding a peace officer, driving while under the influence of alcohol (DUI), and resisting arrest. Following a bench trial, at which Parker did not testify, the trial court found plaintiff guilty of the first two charges and not guilty of the latter two charges. It sentenced him to one year's supervision and imposed a $100 fine for each of the two convictions, plus costs.

¶ 6 Plaintiff appealed his conviction for leaving the scene of an accident to our court, but not

his conviction for fleeing and eluding a peace officer. He argued that the State's evidence was insufficient pursuant to the *corpus delicti* rule to establish his guilt beyond a reasonable doubt for that offense. We disagreed, concluding that his statement to officer Morgan that his vehicle had been sideswiped, along with independent evidence tending to prove that the crime occurred (namely, physical evidence consisting of plaintiff's damaged mirror which was dangling from his car when stopped, Detective Signorelli's testimony of "fresh damage," and circumstantial evidence of plaintiff's location, the fact that he was driving near the scene of the accident, his failure to produce his license and insurance, his failure to explain why he did not stop to report the accident, and his flight from officer Morgan), was sufficient to prove the *corpus delicti* of the crime, establishing that plaintiff was guilty beyond a reasonable doubt of leaving the scene of an accident. See *Coleman*, 2013 IL App (1st) 122266-U, ¶ 15.

¶ 7 At the same time, however, we reversed and remanded plaintiff's cause for a new trial. This was because we noted that Detective Signorelli had been permitted to testify as to the substance of his conversation with Parker, who had not appeared or testified at trial, amounting to inadmissible hearsay. See *Coleman*, 2013 IL App (1st) 122266-U, ¶ 18. Accordingly, although we held that the trial court erred by improperly relying on this hearsay evidence to convict plaintiff, we concluded that, because the remaining evidence was sufficient to convict, double jeopardy did not bar his retrial. See *Coleman*, 2013 IL App (1st) 122266-U, ¶ 18.

¶ 8 Upon remand, plaintiff's cause was assigned to Assistant State's Attorney (ASA) Nicolas Castiglione, who eventually moved to *nolle prosequi* the matter. In an affidavit attached to his motion, ASA Castiglione explained that, while he was not the original ASA on the cause, he had

reviewed the matter after remand and the decision not to pursue it was due to victim Parker's continued "reluctance to testify." With this motion, the charge against plaintiff for leaving the scene of an accident was dismissed.[1]

¶ 9 Thereafter, plaintiff filed the instant cause against defendants for malicious prosecution, *respondeat superior* and indemnification. Essentially, plaintiff claimed that as a result of his "wrongful" conviction for leaving the scene of an accident, he was disqualified from holding a commercial driver's license, was terminated from his job, could no longer find work as a truck driver until his license was reinstated, and that he suffered financially, resulting in eviction from his home, ruined credit and the sending of his child support payments into arrears. Defendants filed a section 2-619 motion to dismiss (735 ILCS 5/2-619(a)(9) (West 2014)).

¶ 10 The trial court granted defendants' motion. In a lengthy and detailed Memorandum Opinion and Order, the court outlined the elements of a malicious prosecution claim and concluded that plaintiff could not meet three of them. First, the court noted that plaintiff was required to show that the underlying proceeding against him was terminated in his favor. In situations when, as here, the underlying proceeding is eventually withdrawn, the focus turns on the circumstances of the withdrawal and whether these are indicative of innocence. Upon examination of the reason for withdrawal here, namely, Parker's continual failure to cooperate with the prosecution against plaintiff, the trial court found this to be "an entirely neutral factor

[1]We make clear for the record, again, that plaintiff never appealed his conviction for fleeing and eluding a peace officer. The decision to *nolle prosequi* the charge of leaving the scene of an accident and its eventual dismissal did not affect that conviction, which otherwise stands.

and does not indicate a favorable termination for" plaintiff. While this disposed of the cause, the trial court continued to analyze the remaining two elements at issue. Additionally, it found that plaintiff could not prove that defendants lacked probable cause since the record demonstrated that the facts defendants knew at the time they swore out the charges against plaintiff (*i.e.*, the information Detective Signorelli gathered from Parker, who reported the accident, had damage to her car, and followed plaintiff from the scene of the accident to the scene of his arrest; plaintiff's admission that he was in an accident; and the fresh damage to plaintiff's car) were clearly sufficient to bring the charge of leaving the scene of an accident against him. And, the court further found that, with respect to the element of malice, not only was there no such allegation in his complaint, but plaintiff also "chose not to allege a single fact *** to support even an inference of malice" on the part of defendants. Accordingly, having concluded that plaintiff could not meet the elements of malicious prosecution and, thus, that his dependent claims for *respondeat superior* and indemnification would also therefore fail, the trial court dismissed his cause, with prejudice.

¶ 11 ANALYSIS

¶ 12 On appeal, plaintiff challenges the trial court's findings that he cannot meet his burden with respect to establishing the three cited elements of his cause of action against defendants for malicious prosecution. He asserts that, in granting defendants' section 2-619(a)(9) motion to dismiss, the court erred in determining his criminal charges were not dismissed in his favor, in finding there was probable cause to charge him in the underlying criminal matter, and in dismissing his instant cause with prejudice without allowing him a chance to reallege the malice

requirement. Upon our thorough review of the record here, we disagree.

¶ 13 While a motion to dismiss pursuant to section 2-619(a)(9) admits the legal sufficiency of the complaint, it raises affirmative matters either internal or external from the complaint that would defeat the cause of action. See 735 ILCS 5/2-619(a)(9) (West 2014). An "affirmative matter" is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999). The affirmative matter must either appear on the face of the complaint or be supported by affidavits or other evidentiary materials of record. See *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 377 (2003). Once a defendant meets this burden, the plaintiff's right to recover is barred. See *Van Meter*, 207 Ill. 2d at 370. We review appeals from dismissals pursuant to section 2-619(a)(9) on a *de novo* basis. See *Van Meter*, 207 Ill. 2d at 368; *Griffith v. Wilmette Harbor Ass'n, Inc.*, 378 Ill. App. 3d 173, 180 (2007).

¶ 14 It is true that a section 2-619(a)(9) motion to dismiss should not be used where the affirmative matter is merely evidence upon which the defendant expects to contest an ultimate issue of fact, nor should such a motion be allowed if it cannot be determined with reasonable certainty that the alleged defense exists. See *Consumer Electric Co. v. Cobelcomex, Inc.*, 149 Ill. App. 3d 699, 703 (1986). However, a section 2-619(a)(9) motion provides a means to dispose not only of issues of law but also issues of easily proved fact, and a trial court may in its discretion properly decide questions of undisputed fact upon hearing such a motion. See *Consumer Electric Co.*, 149 Ill. App. 3d 703-04; see also *Czarobski v. Lata*, 227 Ill. 2d 364, 369

(2008) ("[t]he purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation"); *Villanueva v. Toyota Motor Sales, U.S.A., Inc.*, 373 Ill. App. 3d 800, 802 (2007) (complaint is properly dismissed under this section if barred by affirmative matter and this matter defeats claim and avoids its legal effect); *Martinez v. Gutmann Leather, LLC*, 372 Ill. App. 3d 99, 101 (2007) (section 2-619(a)(9) allows for dismissal on basis of easily proven facts).

¶ 15 Under the circumstances of the instant cause, we find that the issue of whether defendants could be liable to plaintiff under a theory of malicious prosecution as he alleged in his complaint comprises an easily proven factual and legal issue proper for resolution by a section 2-619(a)(9) motion without further hearing.

¶ 16 The elements for malicious prosecution are well established. To recover, a plaintiff must show (1) the defendants commenced or continued a criminal prosecution against him, (2) the proceeding terminated in the plaintiff's favor, (3) the defendants lacked probable cause to proceed against him, (4) the defendants proceeded with malice, and (5) the plaintiff suffered damages. See *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 71 (2007). Illinois law does not favor suits for malicious prosecution. See *Boyd*, 378 Ill. App. 3d at 71, citing *Ross v. Mauro Chevrolet*, 369 Ill. App. 3d 794, 801 (2006). Again, the burden to prove all the cited elements rests solely with the plaintiff in the cause, and his failure to establish even one of them bars his claim completely. See *Boyd*, 378 Ill. App. 3d at 71.

¶ 17 In the instant cause, defendants have conceded that the first and fifth elements have been met. They admit that they commenced a criminal prosecution against plaintiff here when they

brought charges against him for the underlying incident involving his hit-and-run with Parker and his encounter with officer Morgan. Defendants also have not argued that plaintiff suffered the damages he claimed. This leaves only the elements of favorable termination, probable cause and malice at issue. Upon our review of the record, we find that plaintiff fails to satisfy any of these.

¶ 18 First, with respect to the favorable termination element, plaintiff argues that the fact that his charge for leaving the scene of an accident was *nolle prossed* following this Court's reversal and remand clearly indicates the cause was terminated in his favor and automatically proves his innocence. This is incorrect. Our supreme court directly dealt with this issue in *Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996), wherein it held that the State's decision to *nolle pros* a criminal charge against a plaintiff in an underlying criminal case does not necessarily constitute a favorable termination allowing that plaintiff to, in turn, establish a claim for malicious prosecution. Rather, our supreme court noted that it may constitute as much, but at the same time, it may not; instead, it depends upon the circumstances under which the proceedings are withdrawn. See *Swick*, 169 Ill. 2d at 513. That court held that "the majority rule is that a criminal proceeding has been terminated in favor of the accused when a prosecutor formally abandons the proceeding via a *nolle prosequi*, unless the abandonment is for reasons not indicative of the innocence of the accused." *Swick*, 169 Ill. 2d at 513. Thus, only when a plaintiff establishes that the *nolle prosequi* of his criminal charges was entered for reasons indicative of his innocence does he meet the element of favorable termination necessary for a malicious prosecution claim. See *Swick*, 169 Ill. 2d at 513 (circumstances surrounding

abandonment of criminal proceedings must "compel inference that there existed lack of reasonable grounds to pursue criminal prosecution"). If, on the other hand, the underlying criminal proceedings were terminated in a manner not indicative of his innocence, he cannot assert a malicious prosecution action. See *Swick*, 169 Ill. 2d at 513. Reasons not indicative of innocence include, as our supreme court specified in *Swick*, an agreement or compromise with the accused, misconduct on the part of the accused to prevent trial, mercy requested or accepted by the accused, the institution of new criminal proceedings, or the impracticability of bringing the accused to trial. See *Swick*, 169 Ill. 2d at 513. Whatever the reason, again, it remains the plaintiff's burden to show that the termination was in his favor. See *Swick*, 169 Ill. 2d at 513 (bare claim that *nolle prosequi* order was entered, without statement of reason why, is not enough, as *nolle prosequi* is not a final disposition but, rather, only indicates that matter reverts to same condition which existed before prosecution was commenced).

¶ 19 In the instant cause, plaintiff is correct that the State's decision to *nolle pros* the charge against him for leaving the scene of an accident, which it did of its own accord, was not due to a plea deal, an agreement for leniency or any misconduct or delay on his part. Nor were any new criminal proceedings instituted against him. However, and contrary to his assertions, the record is indeed clear as to the State's reason for its choice here. In his affidavit attached to his *nolle pros* motion, ASA Castiglione averred that he was not the original ASA who prosecuted the matter and had only been assigned to plaintiff's cause following our reversal and remand. Moreover, he stated that Parker, the victim and only independent eyewitness to the accident–and to the leaving-the-scene charge against plaintiff–still did not want to testify. Parker had failed to

cooperate in the State's initial prosecution of plaintiff and now did not want to participate in his retrial. Based on these factors, ASA Castiglione determined, upon his review, that it was best to dismiss the charge.

¶ 20 From this, it is clear that the State's decision to *nolle pros* the cause against plaintiff for leaving the scene was directly due to the impracticability of bringing him to trial. Not only was ASA Castiglione not the original prosecutor but, without Parker's eyewitness account due to her reluctance to testify, and without Detective Signorelli's testimony about what Parker told him at the scene which our Court had determined to be improper hearsay, the State would have been left struggling at retrial with a charge for which it could provide no real evidence, due to circumstances beyond its own control. This reason for the State's decision to *nolle pros* the charge at issue is far from indicative of plaintiff's innocence. Instead, it is one of the exceptions explicitly enumerated by our supreme court as the very opposite. See *Swick*, 169 Ill. 2d at 513 (impracticability of reprosecution is not a reason indicative of innocence). Accordingly, having provided nothing more in an effort to dispute this, plaintiff fails to prove the element of favorable termination and, thus, cannot maintain an action for malicious prosecution.

¶ 21 Even were our analysis somehow incorrect with respect to this element, plaintiff does not meet his burden with respect to probable cause, either. Turning to this next element of malicious prosecution, plaintiff is required to establish that defendants lacked any probable cause in proceeding against him in the underlying criminal case. Probable cause in this context "is defined as 'a state of facts that would lead a person of ordinary care and prudence to believe or to entertain an honest and sound suspicion that the accused committed the offense charged.' " *Sang*

Ken Kim v. City of Chicago, 368 Ill. App. 3d 648, 654, (2006), quoting *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 642 (2002); see *Howard v. Firmand*, 378 Ill. App. 3d 147, 150 (2007) (the party initiating that complaint must have an honest belief that the other is probably guilty of the offense). The focus is not on the actual facts of the cause or the accused's guilt or innocence; it is on what the defendants knew when they commenced their prosecution against him. See *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶ 115 (a court is to look at this "in assessing probable cause in a malicious-prosecution case"); see also *Howard*, 378 Ill. App. 3d 147, 150 (2007) (probable cause for malicious prosecution case "is determined at the time of subscribing a criminal complaint" and not on facts of case); *Fabiano*, 336 Ill. App. 3d at 646 ("when addressing probable cause [in malicious prosecution context], the defendants' state of mind is at issue, not the actual facts of the case"). And, when there is an honest belief by the prosecuting party that the accused is probably guilty, a mistake or reasonable error "will not affect the question of probable cause." *Kim*, 368 Ill. App. 3d at 654-55; accord *Gauger*, 2011 IL App (2d) 100316, ¶ 112.

¶ 22 In the instant cause, the record shows that, at the time defendants decided to charge plaintiff, there was much evidence to support an honest belief in their decision to prosecute him. Detective Signorelli had spoken to Parker only minutes after the accident; she had followed plaintiff after they collided and affirmatively identified his vehicle to Detective Signorelli at the scene as the car that hit her and drove away. Clearly, this amounted to probable cause to prosecute plaintiff for leaving the scene. Now, we acknowledge that we reversed and remanded plaintiff's conviction based on the admission of this portion of Detective Signorelli's testimony,

noting that it was hearsay. See *Coleman*, 2013 IL App (1st) 122266-U, ¶ 18. However, in that situation, we were called to evaluate the basis of the trial court's conviction of plaintiff for leaving the scene. See *Coleman*, 2013 IL App (1st) 122266-U, ¶ 18. Here, the context is now different, as we are not examining the propriety of his conviction but, instead, the propriety of the trial court's dismissal of plaintiff's malicious prosecution claim against defendants. As we just explained, in the context of a malicious prosecution claim, we are to focus on what defendants knew at the time they brought charges–not on what a court eventually ruled with respect to the admissibility of the proof they presented to succeed in that prosecution. See *Kim*, 368 Ill. App. 3d at 654; *Fabiano*, 336 Ill. App. 3d at 642. In this respect, a reasonable ground for the honest belief in the accused's guilt can be based on the defendants' personal knowledge, as well as on information from others. See *Kim*, 368 Ill. App. 3d at 655. The defendants are "not required to verify the correctness of each item of information obtained; it is sufficient to act with reasonable prudence and caution." *Kim*, 368 Ill. App. 3d at 655, citing *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 72 (2003). Critically, and directly on par with what occurred herein, " '[w]here the victim of the crime supplies the police with the information forming probable cause, there is a presumption that this information is inherently reliable.' " *Kim*, 368 Ill. App. 3d at 655, quoting *People v. Turner*, 240 Ill. App. 3d 340, 357-58 (1992).

¶ 23 Regardless, and even apart from Detective Signorelli's testimony regarding Parker's statements to him, probable cause was still evident at the time defendants charged plaintiff based on additional evidence presented here. That is, officer Morgan was in the area of the accident when he received a bulletin from dispatch and immediately spotted plaintiff in the car matching

the description provided, including the license plate. He stopped plaintiff and asked him if he had been involved in an accident, to which plaintiff replied affirmatively. In fact, plaintiff has never disputed that he and Parker collided. And, upon his arrival at the scene, Detective Signorelli clearly noted that plaintiff's vehicle had been damaged and that this damage looked fresh. From this, we find that defendants' belief in bringing charges against plaintiff for leaving the scene was an honest one based on probable cause and, therefore, plaintiff fails to meet his burden in relation to his malicious prosecution claim. See *Burghardt v. Remiyac*, 207 Ill. App. 3d 402, 406 (1991) ("[t]he existence of probable cause is a complete defense to a malicious prosecution cause of action").

¶ 24 The third, and final, element at issue in plaintiff's claim here is malice. As the accused, he must show that those prosecuting him did so with improper motives. See *Fabiano*, 336 Ill. App. 3d at 647. Significantly, "malice may not be inferred where probable cause exists." *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 937 (1980) (to establish claim for malicious prosecution, there must be both malice and lack of probable cause). In the instant cause, not only have we just concluded that defendants had probable cause for charging plaintiff with leaving the scene, but we would also note that plaintiff never alleged in his complaint for malicious prosecution any facts related to malice on defendants' part or from which an inference of malice could even be made. Simply put, plaintiff cannot meet his burden as to this element.

¶ 25 Plaintiff insists that the trial court erred in refusing to allow him to amend his pleading, particularly to "re-plead facts further establishing or clarifying malice." We find no abuse of discretion on the part of the trial court in denying any request of plaintiff's to amend his

pleadings. See *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273-74 (1992) (whether to allow such amendment is for trial court, who has broad discretion in this determination, and factors to consider are whether amendment would cure defect in pleading, opposing party would be surprised, amendment is timely, and prior opportunities to amend). First, plaintiff never sought to amend his complaint before the trial court nor did he ever present a proposed amended complaint at that time for the record, or now on appeal, for that matter. This argument, therefore, is waived at this point in time. See *Perez v. Chicago Park District*, 2016 IL App (1st) 153101, ¶ 33, citing *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 521 (1987). Moreover, there is no indication that plaintiff could amend his complaint in any way to substantiate a cause for malicious prosecution. We have already discussed at length that he fails to meet each of the burdens of favorable termination, lack of probable cause and malice, any one of which defeats a malicious prosecution claim. See *Boyd*, 378 Ill. App. 3d at 71. Thus, allowing him to amend to replead the malice element, in light of the fact that his cause was not terminated in his favor and the clear existence of probable cause in pursuing the charges against him, would be, at best, futile, and at worst, a waste of legal resources.

¶ 26 Having determined that plaintiff fails to meet any of the three cited elements of malicious prosecution at issue, namely, favorable termination, lack of probable cause and malice, we find that the trial court properly granted defendants' motion to dismiss plaintiff's cause of action without any further hearing.[2]

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[2]We note for the record that defendants present two additional arguments at the end of their brief on appeal in support of our affirmance here, asking us to find (1) that dismissal of plaintiff's cause was proper on the further ground of collateral estoppel, a theory they argued

¶ 27 CONCLUSION

¶ 28 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 29 Affirmed.

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below in relation to the probable cause element, and (2) that officer Camer, who only responded to the accident but never swore charges or a complaint against plaintiff and did not testify at his trial, deserves separate and independent dismissal from this cause since he did not "commence or continue" the criminal prosecution against plaintiff. Defendants presented these same arguments in their motion to dismiss, but the trial court, in granting their motion, chose not to address them. Having similarly concluded that dismissal of plaintiff's complaint was proper as to all defendants on the primary ground of plaintiff's inability to properly sustain a cause of action for malicious prosecution, and thus having disposed of all open and relevant matters in this cause, we, likewise, find no need to address these additional matters defendants restate on appeal.