IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

KENNETH J. MYNATT, Plaintiff-Appellant, v. NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 39, et al., Defendants-Appellees.	)	No. M2020-01285-COA-R3-CV Rutherford County Circuit Court Case No. 75CC1-2020-CV-77158

BRIEF OF APPELLEES NATIONAL TREASURY EMPLOYEES UNION; NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 39; JOHN VAN ATTA; ANTHONY REARDON; AND COLLEEN KELLEY

Leon Dayan (PHV86460)
Elisabeth Oppenheimer (PHV86461)
BREDHOFF & KAISER, PLLC
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
Tel: (202) 842-2600
ldayan @bredhoff.com
eoppenheimer@bredhoff.com

Anthony A. Orlandi
BRANSTETTER, STRANCH & JENNINGS, PLLC
223 Rosa L. Parks Avenue
Suite 200
Nashville, TN 37203
(615) 254-8801
aorlandi@bsjfirm.com

Counsel for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the trial court correctly dismissed Plaintiff Kenneth Mynatt's malicious prosecution claim because the retirement and dismissal of the charges against Mynatt in the underlying criminal proceeding "d[id] not relate to the merits" of the criminal case, as required under *Himmelfarb v. Allain*, 380 S.W.3d 35, 41 (Tenn. 2012) and *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005).

2. Whether Mynatt's malicious prosecution claim also fails for the independent reason that his counsel conceded at oral argument before the trial court that a retirement and dismissal of a criminal charge is a compromise disposition as a matter of law, and that in fact Mynatt agreed to compromise with the prosecutor by waiving his speedy trial rights in order to obtain the retirement and dismissal of the underlying criminal proceeding here.

3. Whether Mynatt's malicious prosecution claim also fails for the independent reason that he has failed to allege that the Defendants procured a prosecution without probable cause.

4. Whether, even if Mynatt had validly alleged a malicious prosecution claim, his conspiracy claim would fail because he has not alleged that the Defendants had a common design to accomplish an unlawful purpose.

STATEMENT OF THE CASE

This appeal arises from one of several lawsuits by Plaintiff Mynatt based on an alleged conspiracy against him driven by his employer, his former union, and a potpourri of federal agents. Mynatt's 26-page Complaint in this case alleges only two substantive counts: first, that the

Defendants (all of whom are associated with his former union) maliciously prosecuted him and, second, that they engaged in a conspiracy to do so.

As set forth in more detail below, the Complaint alleges that Tennessee state prosecutors brought charges against Mynatt based in part on allegedly false information supplied by one Defendant, and that a grand jury indicted him on two felonies that are never specified in the Complaint. Eventually, the state prosecutor filed a motion to retire the felony charges for one year and then dismissed the charges when that one-year period had run. That criminal prosecution is the basis for Mynatt's current malicious prosecution claim.

Before the trial court, Defendants filed a motion to dismiss, arguing among other things that a retirement of charges followed by a dismissal is a compromise resolution that "does not relate to the merits" and does not "reflect[] on . . . innocence" as required to support a malicious prosecution action under *Himmelfarb v. Allain*, 380 S.W.3d 35, 38 (Tenn. 2012) and *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005). The trial court agreed, finding that because there is no consideration of the facts or evidence giving rise to a charge when the charge is retired and dismissed, a retirement and dismissal "cannot be a determination on the merits." R. at 86.[1] Hence, the trial court found that Mynatt could not allege the elements of a malicious prosecution claim as a matter of law,

[1] Citations to the Technical Record are abbreviated as "R. at [page number]." Citations to August 7, 2020 Transcript of Proceedings are abbreviated as "Tr. [page number] [line number]."

and dismissed both that claim and the conspiracy claim that depended on it. This appeal followed.

STATEMENT OF FACTS

A. Factual Background

Mynatt's rambling Complaint can be distilled to a few relevant allegations. According to the Complaint, Mynatt has been a full-time employee at the Internal Revenue Service ("IRS") since 1991. R. at 3, ¶ 10. The employees of the IRS are represented by a national union, defendant National Treasury Employees Union ("NTEU"), and by the local affiliate of NTEU with responsibility for their particular location. *Id.*, ¶¶ 10-12. Mynatt was represented by defendant Chapter 39 of the NTEU ("Chapter 39"), and, in September of 2009, he was elected executive vice president of Chapter 39. At that time, the Complaint alleges, defendant John Van Atta was the President of Chapter 39; defendant Colleen Kelley was the President of NTEU; and defendant Anthony Reardon was Kelley's chief of staff. R. at 9-10, ¶¶ 5-6, 11.

According to the Complaint, Mynatt's relationships with the other union officers and with IRS management soured over the years. R. at 5-12, ¶¶ 23-55. In 2011, two IRS managers allegedly pushed the Treasury Inspector General for Tax Administration ("TIGTA") to launch an investigation of whether Mynatt had misused the IRS email system by using it to send union emails. R. at 13, ¶¶ 58-59. In addition, Van Atta allegedly contacted the Department of Labor's Office of Labor Management Standards ("OLMS") and asked the Department to investigate whether Mynatt had stolen money from Chapter 39. R. at 15, ¶ 65.

The Complaint alleges that TIGTA and OLMS agents enthusiastically pursued these complaints, and unsuccessfully attempted to obtain a federal indictment of Mynatt on unspecified charges. R. at 20-21, ¶ 88. It further alleges that Kelley then suggested that the OLMS and TIGTA agents see if Mynatt could be indicted under state law. *Id.* ¶ 89. TIGTA agent Patrick Mayes then allegedly set up a meeting for himself, OLMS agent Scott Kemp, an unnamed Assistant District Attorney ("ADA"), and Van Atta, although the complaint does not make any allegations as to whether Van Atta in fact attended the meeting.[2]

At the meeting, an unnamed person allegedly gave the ADA unspecified "false testimony and forged documents generated by Defendant Van Atta." R. at 21, ¶ 90. The Complaint makes no allegations about the contents of the alleged false testimony and forged documents. *See id.* Mayes and Kemp then promptly "admitted to the ADA that they were being pressured by their respective management structures to have [Mynatt] indicted regardless of the facts [and] admitted to the ADA that the charges were political in nature and not based on provable facts." *Id.* The ADA initially did not pursue charges,

[2] The ADA is unnamed in the Complaint in this case, but is named as Rob Mitchell in one of Mynatt's federal lawsuits. *See* Am. Compl. ¶¶ 139-42 (M.D. Tenn. Case No. 3:17-cv-01454) (Dkt. 62). The complaint in that federal suit deviates from the Complaint here in several notable ways. Most importantly, the complaint in the federal suit makes no mention of *any* of the Defendants here having any involvement whatsoever in the state-court prosecution. *Id.*

but he eventually permitted Kemp to testify before a state grand jury, which indicted Mynatt on unspecified felony charges. *Id.* ¶¶ 90-91.

According to the Complaint, Mynatt's attorney then contacted the ADA's supervisor, Jim Milam, and explained "the prior unsuccessful efforts of agents Kemp and Mayes to dupe the U.S. Attorney's Office into indicting the Plaintiff for false charges based on manufactured evidence." R. at 23, ¶ 98. When he learned this information, Milam "personally took over the prosecution of the Plaintiff's case." *Id.* Rather than dropping the charges based on the new information, however, Milam pursued the case for several months, during which Plaintiff "refus[ed] all 'deals.'" *Id.* ¶ 100. After Mynatt "refus[ed to] plead guilty or resign," Milam filed a motion to "retire" the charges for one year, after which the charges were dismissed. R. at 23-24, ¶¶ 99-102.

Based on these events, Mynatt initially filed a complaint in federal court against the defendants in this case, various OLMS and TIGTA agents, and numerous others. R. at 24, ¶ 104; *see also* Case No. 3:17-cv-01454 (M.D. Tenn. filed Nov. 15, 2017). Judge Eli Richardson dismissed all of Mynatt's federal claims and declined to exercise supplemental jurisdiction over Mynatt's state-law claims. R. at 24, ¶¶ 105-06; *see also Mynatt v. Nat'l Treasury Emps. Union Chapter 39*, No. 3:17-cv-01454, 2019 WL 7454711, at *6 (M.D. Tenn. June 10, 2019). Those state-law claims for malicious prosecution and conspiracy are the subject of this action. Mynatt is also pursuing a second lawsuit against OLMS and TIGTA in federal court (M.D. Tenn. Case No. 3:20-cv-151).

B. Proceedings Below

In the trial court, Defendants moved to dismiss the Complaint pursuant to Rule 12.02(6), arguing that a retirement and dismissal is a compromise between the defendant and the prosecutor, rather than a merits-based disposition, and thus does not reflect innocence as required by *Himmelfarb v. Allain*, 380 S.W.3d 35, 38 (Tenn. 2012) and *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005). On August 7, 2020, the trial court held oral argument on the motion. At the oral argument, Mynatt's counsel conceded that a "defendant has to . . . waive his rights to a speedy trial" in order for the prosecutor to have the discretion to retire a case. Tr. 10:1-3. He further conceded that Mynatt had in fact "waive[d] his right to a speedy trial" to secure the retirement and dismissal here. Tr. 12:12-14. Nonetheless, Mynatt's counsel contended that the retirement was terminated on the merits because Mynatt "maintained his innocence" throughout the entire proceeding. Tr. 9:7-11.

The court concluded that a retirement is a termination that "does not go to guilt or innocence" because there is no consideration "of any of the facts or evidence giving rise to the charge" in a retirement and dismissal. R. at 85-86. Accordingly, the court found that Mynatt could not meet the termination "on the merits" element of the malicious prosecution claim, and the court dismissed both the malicious prosecution claim and the conspiracy claim based on it. *Id.* at 86.

ARGUMENT

I. Legal Standard

In considering a motion to dismiss, courts "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31 (Tenn. 2007) (citation omitted). "While a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, it . . . must contain 'direct allegations on every material point necessary to sustain a recovery,'" *Donaldson v. Donaldson*, 557 S.W.2d 60, 61 (Tenn. 1977) (citation omitted), and a court is not required to credit legal conclusions couched as facts. *Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997). Thus, asserting a "mere legal conclusion . . . will not be sufficient to withstand a motion to dismiss, unless factual allegations support that conclusion directly or by necessary inference." *Givens v. Mullikin*, 75 S.W.3d 383, 406 (Tenn. 2002). In sum, "[t]he facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (citation omitted).

II. The Malicious Prosecution Claim Must Be Dismissed Because Mynatt Has Not Alleged That the Prior Action Terminated in His Favor on the Merits or that Defendants Procured a Prosecution Without Probable Cause

A. A Retirement Is Not a Termination on the Merits

1. The Trial Court Correctly Found That a Retirement Does Not Reflect Innocence

In order to make out a claim for malicious prosecution, a plaintiff must show that the defendant (1) instituted a proceeding against him "without probable cause," (2) the defendant did so "with malice," and (3) the proceeding was "terminated in [his] favor." *Lane v. Becker*, 334 S.W.3d 756, 761-62 (Tenn. Ct. App. 2010) (citation omitted).

The third element—"favorable termination"—requires that the allegedly malicious underlying action terminated in the plaintiff's favor *on the merits*. *Himmelfarb v. Allain*, 380 S.W.3d 35, 38 (Tenn. 2012). A procedural dismissal or a settlement will not do. *Id.* This requirement reflects the fact that "[m]alicious prosecution actions have the potential to create a chilling effect on the right to access the courts," and so the criteria for bringing a malicious prosecution action should be strict. *Id.* at 41; *cf.* Dobbs, The Law of Torts § 590 (2d ed. 2011) ("the requirement of termination serves to minimize a threat of civil liability that might chill testimony in the criminal action"). Critically, if the termination of the underlying action "does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense that it would support a subsequent action for malicious prosecution." *Himmelfarb*, 380 S.W.3d

at 41 (citation omitted). Although the underlying action in *Himmelfarb* was civil, the standard is the same when the underlying action is criminal: "For the purposes of a malicious prosecution action, a favorable termination must be one indicating that the accused is innocent." *Sewell v. Par Cable, Inc.*, No. 87-266-II, 1988 WL 112915, at *3 (Tenn. Ct. App. Oct. 26, 1988).

As the trial court correctly found, Mynatt's claim fails because he has not alleged that the disposition of his case reflects his innocence. Rather, his allegation that the disposition was a dismissal after retirement of the charges forecloses characterizing the disposition as reflective of, or indicative of, innocence. A retirement of charges is a procedural device normally "used in plea negotiations" and denotes a temporary suspension of charges for some period, during which the prosecution can revive the charge at any time. R. at 68-70 (Tenn. Crim. Prac. & Proc. § 22:18, at 196-98). Typically, the prosecutor and the criminal defendant will agree to some condition (often that the criminal defendant will commit no further infractions for a specified period), and the charges will be retired until the condition has been met; once that occurs, the charge can be dismissed. *Id.* As the trial court observed, there can be a variety of reasons that the "defendant and the State agree to retire" the case prior to dismissal, but the end result is that the case is resolved without any consideration of the merits of the underlying charges. Tr. 13:18-14:4. Hence, as the trial court held, a retirement "does not go to guilt or innocence" and does not satisfy the requirement of a favorable termination *on the merits*. R. at 85.

In *Anderson v. Wal-Mart Stores, Inc.*, the only other case we are aware of that squarely addresses this issue, the court held that a retirement did *not* satisfy the "favorable determination on the merits" element of malicious prosecution under Tennessee law, and accordingly, like the trial court here, it held the plaintiff's malicious prosecution claim to be deficient as a matter of law. No. 1:07-00024, 2008 WL 1994822, at *5-6 (M.D. Tenn. May 2, 2008).[3] In *Anderson*, as in this case, the prosecutor retired the charges against the criminal defendant for one year before dismissing them. *Id.* at *1.

The *Anderson* court began by observing that "if the reason for dismissal is 'not inconsistent' with a defendant's wrongdoing, it will not be considered a favorable termination." *Id.* at *5 (quoting *Parrish v. Marquis*, 172 S.W.3d 526, 530 (Tenn. 2005) (internal quotation marks and citation omitted)). The court then examined Tennessee law to determine whether a retirement and dismissal, which the court observed was similar to successful pretrial diversion, was "inconsistent" with the defendant being guilty. The *Anderson* court found that Tennessee courts have consistently held that "successfully diverted charges may be introduced at trial to impeach witnesses," because "diversion, even when followed by an expungement of the charges, 'does not alter the fact that the witness may be guilty of a prior bad act.'" 2008 WL 1994822, at *6 (quoting *State v. Dishman,* 915 S.W.2d 458, 464 (Tenn. Crim. App. 1995))

[3] Although the *Anderson* court at some points refers to a diversion instead of a retirement, the court's holding does not turn on any distinction between a retirement and a diversion; the court held that neither disposition was inconsistent with guilt.

(brackets omitted). Hence, the *Anderson* court found that a retirement or diversion of charges "was not inconsistent with the defendant's having actually committed the charged offense, and it did not reflect on the merits of the underlying action." 2008 WL 1994822, at *6. The plaintiff's malicious prosecution suit therefore failed. *Id.*

Similarly, in *Sewell*, the court of appeals found that the defendant's malicious prosecution suit failed where the defendant and the prosecutor agreed to retire the charges for six months and dismiss them assuming the defendant committed no further infractions, because that disposition did not indicate innocence. 1988 WL 112915, at *6.

The disposition alleged here, like the dispositions in *Anderson* and in *Sewell*, is a termination of proceedings that does not reflect Mynatt's innocence, and so it cannot be the predicate for a malicious prosecution action. Indeed, the Complaint fails to allege that either the prosecutor or the court concluded that Mynatt was not guilty. Rather, it alleges that the case was resolved through a disposition that "does not alter the fact that [Mynatt] may be guilty of [the] bad act." *Dishman,* 915 S.W.2d at 464. In other words, even read generously, the Complaint alleges nothing more than the sort of "indecisive termination" that is insufficient to support a malicious prosecution case. *Sewell*, 1988 WL 112915, at *3, 6. And while malicious prosecution cases are often decided at the summary judgment stage, *Himmelfarb* makes clear that they may also be decided on a motion to dismiss where, as here, a plaintiff cannot allege that the disposition of the underlying case reflected his innocence.

Mynatt cites *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005) for the proposition that "[i]n determining whether a specific result was a

favorable termination, a court must examine the circumstances of the underlying proceeding." Mynatt Br. at 27. *Parrish* relied on a comment in the Restatement (Second) of Torts for that proposition. 172. S.W.3d at 531. But *Himmelfarb*, while preserving *Parrish's* central holding that a termination is "favorable" only if it relates to the merits and reflects on the defendant's innocence, overruled *Parrish* on *precisely* the proposition for which Mynatt cites it. *See Himmelfarb*, 380 S.W.3d at 41 ("We acknowledge that *Parrish* also instructs courts to 'examine the circumstances of the underlying proceeding' to determine whether the result in the prior case was favorable . . . . To the extent that *Parrish* can be read as adopting the Restatement (Second) approach, it is overruled."). Mynatt's statement that *Himmelfarb* overruled *Parrish* on "other grounds," Mynatt Br. at 27, is therefore false.

Mynatt's assertion as to what *Himmelfarb* overruled is not only false, it is revealing. For it lays bare the principal flaw in Mynatt's entire submission to this Court, which is that it does not come to grips with the holding of the Tennessee Supreme Court's most recent and definitive ruling on the question of what constitutes a "favorable termination on the merits" for purposes of the malicious-prosecution tort. The inescapable truth is that *Himmelfarb* held that when a generic type of disposition normally does not reflect on the merits, all cases of that type fail as a matter of law to support a malicious prosecution—even if a fact-specific inquiry into some cases of that type might indicate that a particular disposition did reflect on the merits. *Himmelfarb*, 380 S.W.3d at 39-41 (voluntary nonsuit in civil case did not support malicious prosecution action as a matter of law, even though the circumstances of a particular

voluntary nonsuit might indicate the defendant's innocence); *see also Meeks v. Gasaway*, No. M2012-02083-COA-R3-CV, 2013 WL 6908942, at *6 (Tenn. Ct. App. Dec. 30, 2013) (settlement of a civil case could not support malicious prosecution claim as a matter of law, notwithstanding plaintiff's allegation that particular settlement terms showed he had prevailed on the merits in underlying suit, because *Himmelfarb* foreclosed inquiry into the circumstances of settlement).

Thus, because it is plaintiff's burden to show that the action was favorably terminated, and because Mynatt's Complaint does not "contain direct allegations on every material point necessary to" meet that burden, *Donaldson*, 557 S.W.2d at 61 (citation omitted), the trial court was correct to find that under a straightforward analysis, Mynatt's claim fails.

2. Mynatt's Attempt to Avoid the Rule That the Underlying Action Must Have Favorably Terminated on the Merits Is Unavailing

Implicitly acknowledging that his claim fails under current Tennessee law as expounded by this State's highest court, Mynatt argues that this Court should "clarify" the law and "join[] the 'clear majority of American courts' that have held that 'a formal end to a prosecution in a manner **not inconsistent with** a plaintiff's innocence is a favorable termination.'" Mynatt Br. at 47-48 (emphasis in original; citation omitted). Indeed, much of Mynatt's brief proceeds as if that *is* the standard in Tennessee. But it is not, and there is no justification for the wholesale overruling of past caselaw—not the mere "clarif[ication]"—that Mynatt proposes. Mynatt Br. at 47.

First, whatever "several of Tennessee's neighboring or near-neighboring states" hold with respect to what constitutes a favorable termination is irrelevant. Mynatt Br. at 48 (citing caselaw from other states). The Tennessee Supreme Court has addressed the topic of what constitutes a "favorable termination" within the last ten years and expressly reaffirmed that if a "'termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense that it would support a subsequent action for malicious prosecution.'" *Himmelfarb*, 380 S.W.3d at 41 (reaffirming *Parrish,* 172 S.W.3d at 531, on this point). Thus, the court held that a voluntary nonsuit in a civil case—although obviously a termination that is "not inconsistent" with innocence—could not be the basis for a subsequent malicious prosecution action. In so holding, the Tennessee Supreme Court considered *and specifically rejected* the approach of "the majority of jurisdictions" on how to evaluate whether a termination is favorable. *Himmelfarb*, 380 S.W.3d at 38. The Court explained that a key basis for its rejection of other jurisdictions' approaches was its recognition that malicious prosecution actions have the potential to create a chilling effect on the rights to petition and access the courts. *Id.* at 41.

Contrary to Mynatt's suggestion that the standard here is different because the underlying case was criminal, the standard for a favorable termination is the same regardless of the nature of the underlying action. *See, e.g.*, *Collins v. Carter*, No. E2018-01365-COA-R3-CV, 2020 WL 1814905, at *5 (Tenn. Ct. App. Apr. 9, 2020) (citing *Parrish* standard in a case in which the underlying action was criminal); Restatement

(Second) of Torts § 674 (Am. Law Inst. 1977) ("In determining the effect of withdrawal [of a civil case] the same considerations are decisive as when criminal charges are withdrawn"). Indeed, the *Parrish* and *Himmelfarb* holdings requiring a termination on the merits reflecting innocence is perfectly consistent with the court of appeals' holding in *Sewell*, where the underlying action was criminal, that "a favorable termination must be one indicating that the accused is innocent." 1988 WL 112915, at *3. Moreover, the Tennessee Supreme Court's concern that the threat of a malicious prosecution action may deter the public from petitioning and accessing courts applies equally in the criminal arena, where malicious prosecution actions can have a chilling effect on witnesses' willingness to bring information to a prosecutor. *See* Dobbs, The Law of Torts § 590 (2d ed. 2011). In short, the rule in Tennessee requiring that a termination reflect innocence on the merits, regardless of whether the underlying case is civil or criminal, is clear—and, as the trial court found, it is fatal to Mynatt's claims.

Mynatt argues that this rule is unworkable in malicious-prosecution cases where the underlying action is criminal by starting with the premise that an acquittal in a criminal case—in implicit contrast with a finding for a defendant in a civil case—"actually is not an indication of innocence at all," just an indication of the prosecution's failure to meet its burden of proof. Mynatt Br. at 47. Mynatt proceeds from there to conclude that even an acquitted defendant in a criminal case does not meet the standard required by current Tennessee law. *Id.* at 47. Mynatt is wrong in both his implicit premise and the conclusion he draws from it. As to his implicit premise, a finding for the defendant

in a civil case also reflects failure to meet a burden of proof and not some ultimate truth about moral responsibility for the wrong alleged. As to his conclusion, while of course neither a verdict for the defense in a civil case nor an acquittal in a criminal case constitutes *definitive proof* of innocence—which no Tennessee case has ever suggested is required to support a subsequent malicious prosecution action—both a defense verdict in a civil case and an acquittal surely "indicate" innocence, which is all that is required. Both show that a factfinder has considered the merits of the case, as required by *Himmelfarb*, and consequently determined that no liability should be imposed. Indeed, except in unusual circumstances (*e.g.*, certain post-conviction proceedings), an acquittal is the most significant demonstration of innocence possible in Tennessee's criminal system—and this is why Tennessee courts have had no difficulty determining that "obviously" an acquittal supports a malicious prosecution action. *Sewell*, 1988 WL 112915, at *2-3.

As Mynatt notes, Tennessee courts have found that "dispositions short of an acquittal" will also support a malicious prosecution case, *id.* at *2, but examination of the relevant cases reveals that (with one exception discussed below) they are all merits-based determinations that are the functional equivalent of an acquittal given the stage of the case. *See Williams v. Norwood*, 10 Tenn. (2 Yer.) 329, 336 (1829) (magistrate's dismissal of a warrant); *Tennessee Valley Iron & R.R. v. Greeson*, 1 Tenn. Civ. App. 369, 388-89 (1910) (grand jury's failure to indict); *Townsell v. Louisville & N. R.R.*, 4 Tenn. Civ. App. 211, 214 (1912) (return of a search warrant stating that no stolen property was found). Thus, acquittals and

other dispositions that actually reflect innocence can be the basis for a later malicious prosecution suit.

In addition to these merits-based determinations that support a malicious prosecution action, the Tennessee Supreme Court held in 1914 that a *nolle prosequi* dismissal—there, a *nolle prosequi* dismissal over the criminal defendant's vociferous objection that he wanted to litigate the case—will support a malicious prosecution action. *Scheibler v. Steinburg*, 167 S.W. 866, 866-67 (Tenn. 1914). Given that a *nolle prosequi* is the criminal equivalent of a civil voluntary nonsuit, which *Himmelfarb* found would not support a malicious prosecution action as a matter of law, it doubtful that the Tennessee Supreme Court would analyze *Scheibler* in the same way after *Himmelfarb*. In any event, the only issue that the *Scheibler* Court specifically considered—and the only issue that appears to have divided the parties—was whether a *nolle prosequi* dismissal counts as a "final determination," not whether, if it does, it also qualifies as a "favorable" determination. *See* 167 S.W. at 866. It was the latter issue, of course, that was the sole focus of *Himmelfarb* and that the *Himmelfarb* Court found to implicate the right to petition and access the courts. *See id.* at 866-67. Thus, whether or not *Scheibler* would be binding in a case involving a *nolle prosequi* dismissal, it certainly cannot supply the rule of decision on the issue of what constitutes a "favorable" determination in any other context, because *Himmelfarb* sets out the principles and contains the reasoning that governs that issue, whereas *Scheibler* merely announces a *result* as to that issue and contains reasoning only as to the final determination issue. *Cf. Penley v. Honda Motor Co.*, 31 S.W.3d 181,

188 (Tenn. 2000) (where subsequent case undermines an earlier case, "precedential weight" of earlier case should be limited "to its explicit holding"); *Davis v. Garrett*, 91 Tenn. 147, 18 S.W. 113, 113 (1892) (prior case that "goes to the verge of the law . . . should be limited to its facts").

Since Mynatt does not (and cannot) allege that a *nolle prosequi* was entered here, *Scheibler* does not apply. Mynatt's claim thus fails as a matter of law because he has not alleged that the termination of his case reflected his innocence on the merits under the rule set out in the thoroughly reasoned *Himmelfarb* decision.

3. The Retirement Here Was A Critical Piece of the Dismissal, Not an Irrelevant Intermediate Step

Mynatt also argues that because retirement is only an "intermediate" step on the way to dismissal, whether a case has been retired is irrelevant to whether it will support a malicious prosecution claim; in his view, only the fact that the case was finally dismissed matters. Mynatt Br. at 34-39. Like Mynatt's argument that an acquittal does not indicate innocence, this argument asks this Court to set aside common sense. Mynatt's Complaint makes clear that the dismissal in this case was not a separate act from the retirement, but rather that the retirement and dismissal were part and parcel of a single package deal: the charges would be retired for one year and would be dismissed when the end of that one-year period arrived. R. at 23-24, ¶¶ 101-02.[4] Notably,

[4] The trial court did not make any ruling about any retirement that is not alleged to be part of a package deal with a dismissal—for instance, the trial court's opinion does not address the situation where a case is temporarily retired, revived, and litigated to a verdict. Thus, Mynatt's

the Tennessee court of appeals has held that a dismissal of precisely the type at issue here (a deferral of prosecution for some months to be followed by a dismissal when the end of that period arrived) will not support a malicious prosecution action, *see Sewell*, 1988 WL 112915, at *6. Thus, it is not only the ultimate dismissal that matters, but rather the precise type of dismissal—and here, Mynatt has alleged that the precise type of dismissal at issue is a retirement (and not a *nolle prosequi*).

To support his argument, Mynatt cites *Joyner v. Clower*, No. 03A01-9203CV118, 1992 WL 204468 (Tenn. Ct. App. Aug. 25, 1992), in which he claims that the Tennessee court of appeals held "that a retired criminal charge supported a malicious prosecution claim." Mynatt Br. at 35. Thus, he argues, this Court would "have to overrule" *Joyner* to affirm the trial court's ruling in this case that the retirement and dismissal was not a favorable termination that would support a malicious prosecution claim. *Id.* That is a complete misstatement of *Joyner.* The court in *Joyner* was considering when the statute of limitations on the malicious prosecution claim began to run, and in that connection, it noted the plaintiff's contention that "the first warrant was 'reinstated' after the *nolle prosequi* dismissal, and later retired." 1992 WL 204468 at *1. The court found no record evidence that this so-called reinstatement had occurred (which means there would have been no subsequent retirement), so the court concluded that the statute of limitations began

---

abstract arguments about retirements that truly are an intermediate step on the way to a merits-based dismissal are irrelevant here.

to run upon the *nolle prosequi* dismissal. *Id.* In short, in *Joyner* there was no retirement and the court never considered the element of favorable termination, so it is entirely inapposite here—and certainly does not support the claim that a retirement is only an intermediate disposition that is irrelevant to the favorable-termination analysis.

Ultimately, this issue comes back to the simple point that the district court considered the allegations of the Complaint regarding the retirement and dismissal and concluded that Mynatt could allege no set of facts that would meet the "favorable termination on the merits" requirement. Mynatt can identify no reason why the trial court should have ignored the evident relationship between the retirement and the dismissal as alleged in the Complaint, and no justification for doing so is found in the caselaw.

B. The Retirement of Mynatt's Case Was Not a Favorable Termination on the Merits Because His Counsel Conceded As a Matter of Law That Retirements Are Compromise Resolutions and As a Matter of Fact That Mynatt Compromised with the Prosecutor

The foregoing is sufficient to affirm the trial court's correct decision that Mynatt cannot bring a favorable termination claim where he does not (and cannot) allege that the disposition of the criminal case reflects his innocence. However, there is also a second, independent reason that the trial court's decision must be affirmed. *White v. Johnson*, 522 S.W.3d 417, 425 (Tenn. Ct. App. 2016) (appeals court may affirm on a ground other than that relied on by the trial court). Specifically, and contrary to the repeated representations in Mynatt's brief that the resolution of his criminal case was "*not* due to a settled resolution or any deal," Br. at 23

(internal quotation marks omitted), Mynatt's counsel conceded at oral argument before the trial court that (1) as a matter of law, a "defendant has to . . . waive his rights to a speedy trial" to give the prosecutor discretion to retire a case, and (2) as a matter of fact, Mynatt actually "waive[d] his right to a speedy trial" to secure the retirement and dismissal here. Tr. 10:1-3, 12:12-14.[5]

It is clear that "dismissal of criminal charges as part of a settlement agreement is not a favorable termination for purposes of a malicious prosecution action," so an agreed-upon retirement is not a favorable termination on the merits. *Collins*, 2020 WL 1814905, at *5. It is also clear that a prosecutor cannot simply decide to retire charges with no consideration of a defendant's speedy trial rights. *State ex rel. Lewis v. State*, 447 S.W.2d 42, 43 (Tenn. Crim. App. 1969) (noting that a retirement may result in a violation of the defendant's speedy trial right unless the defendant waives that right). Thus, as Mynatt's counsel

[5] Mynatt has likewise conceded this point in his filings in his federal lawsuits. *See* Compl. ¶ 14 (M.D. Tenn. Case No. 3:20-cv-151) (Dkt. 1) (alleging that Mynatt "waive[d] his right to a speedy trial" to obtain retirement and dismissal); Pl.'s Resp. Mot. to Dismiss Am. Compl. at 8 (M.D. Tenn. Case No. 3:17-cv-01454) (Dkt. 73) (Mynatt "entered into an agreed 'retirement'" with state prosecutor). These acknowledgments that Mynatt made a deal with the state prosecutor are in no way inconsistent with the *factual* allegations of the Complaint, which—contrary to the misleading statements in Mynatt's brief—do not say that Mynatt refused all deals throughout the process. Rather, the Complaint says that he repeatedly "refused all 'deals'" *before* the option of retirement was presented. Once the option of retirement was on the table, the Complaint alleges only that he "refus[ed] to plead guilty or resign" from his job. R. at 22-23, ¶¶ 99-102.

conceded as a matter of law, the prosecutor has discretion to retire the case if "the defendant . . . waive[s] his rights to a speedy trial." Tr. 9:25-10:3. This means that a retirement by its nature is a compromise resolution, and as such it cannot be the basis for a malicious prosecution claim as a matter of law. That alone is sufficient to require dismissal of Mynatt's claim, but Mynatt's counsel also conceded as a matter of fact that Mynatt waived his right to a speedy trial in order to obtain a retirement and dismissal of charges, Tr. 12:11-13, and this factual concession constitutes an additional, independent ground on which to dismiss his claim.

It is of course black-letter law that a Rule 12.02(6) motion is based on the allegations of the complaint, but it is equally undisputed that "[c]ourts resolving a motion to dismiss may consider items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case . . . without converting the motion into one for summary judgment." *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016) (internal quotation marks and citation omitted). A party's own legal and factual concessions are items within the record of this case that a court may consider in resolving a motion to dismiss. *See id.* (finding that trial judge could "consider the position taken by Bayer CropScience in its original answer and earlier motions regarding its status as an employer" in resolving motion to dismiss); *Byington v. Reaves*, No. E2020-01211-COA-R3-CV, 2021 WL 1537033, at *2 (Tenn. Ct. App. Apr. 20, 2021) (considering counsel's concession at oral argument in resolving motion to dismiss). Likewise, "developments in a prior trial or prior proceedings," like Mynatt's concessions in his filings

in other cases, *see supra* n.5, "all have been subject to judicial notice." *State v. Brooks*, No. W2015-00833-CCA-R3-CD, 2017 WL 758519, at *11 (Tenn. Crim. App. Feb. 27, 2017); *Haynes v. Bass*, No. W2015–01192–COA–R3–CV, 2016 WL 3351365, at *4-5 (Tenn. Ct. App. June 9, 2016) (taking judicial notice of filings in separate lawsuit).[6]

Mynatt, in his 55-page brief, completely ignores both the factual and legal concessions he made below, instead arguing for the first time that factual discovery is necessary to determine whether he compromised his claim. But "[t]he trial court will not be put in error for matters not called to his attention," *Sears-Roebuck & Co. v. Finney*, 89 S.W.2d 749, 751 (Tenn. 1936), as this argument was not. Notably, Mynatt does not make any effort to retract the concessions in the court below. As the Tennessee Supreme Court previously observed in a case in which a party

[6] Courts in other jurisdictions employing the same motion-to-dismiss standard as Tennessee courts are in accord on these points. *See Pegram v. Herdrich*, 530 U.S. 211, 230 (2000) (court could consider statements in plaintiff's brief to clarify ambiguous allegations in complaint in ruling on motion to dismiss); *Arturet-Velez v. R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 13 n.2 (1st Cir. 2005) (court can consider plaintiff's concessions in briefs in ruling on motion to dismiss); *Chongris v. Bd. of Appeals*, 811 F.2d 36, 37 (1st Cir.1987) (noting that on a motion to dismiss, a court need not credit those allegations "which have since been conclusively contradicted by plaintiffs' concessions"); *see also McCorkle v. Bank of Am. Corp.*, 688 F.3d 164, 170, 172 (4th Cir. 2012) (affirming the district court's dismissal of a claim based on a "concession made at oral argument [before the district court] by counsel for Plaintiffs"). Of course, a court cannot take account of factual representations *made by defense counsel about plaintiff's actions* at oral argument on a motion to dismiss without converting the motion to a summary judgment motion. *Meeks v. Gasaway*, 2013 WL 6908942, at *3.

tried to avoid its counsel's concessions, "[i]f these statements were inadvertently made under a misapprehension of the facts, of course they might be retracted and the real facts presented to the Court, but until counsel undertake to show that in reality the facts were different, and the admission inadvertently made, we will take the admission as true[.]" *Gates v. Brinkley*, 72 Tenn. 710, 716 (1880).

In essence, Mynatt is asking this court to blind itself to the law and facts admitted in open court simply because his Complaint makes the conclusory allegation that "[t]he criminal prosecution terminated in the favor of the Plaintiff." R. at 25, ¶ 110. But as this Court noted in an analogous context, "a plaintiff should not be entitled to avoid a motion to dismiss in reliance upon Rule 10.03 exhibits by simply shirking its duty to properly attach" the exhibits required by Rule 10.03. *Belton v. City of Memphis*, No. W2015-01785-COA-R3-CV, 2016 WL 2754407, at *4 (Tenn. Ct. App. May 10, 2016). Similarly here, Mynatt should not be able to avoid a motion to dismiss by pointing to Rule 12.02(6), while at the same time asking this Court to ignore his own repeated unequivocal statements of fact and law, both before the trial court and other courts, on this dispositive issue. In the face of the positions Mynatt took below, to allow this case to go back to the trial court—where Mynatt would presumably seek to take expensive and time-consuming discovery on the vast conspiracy he alleges in his Complaint—would essentially be to allow Mynatt to abuse the judicial process. This Court should reject the attempt.

C. Mynatt's Malicious Prosecution Claim Also Fails Because He Has Not Alleged That the Defendants Procured a Prosecution Without Probable Cause

Finally, Mynatt's Complaint must also be dismissed for a third independent reason: he has not shown that any of the Defendants in this case instituted or procured the criminal prosecution against him without probable cause. Although the trial court did not decide the case on the basis of this issue, it constitutes another ground on which this Court may affirm the trial court's decision. *White*, 522 S.W.3d at 425.

A private citizen cannot bring a criminal prosecution in Tennessee state courts; thus, the general rule is that a private citizen has not instituted a criminal proceeding, for purposes of a later malicious prosecution suit, merely because he has given information to a prosecutor, who "'in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information.'" *Gordon v. Tractor Supply Co.*, No. M2015–01049–COA–R3–CV, 2016 WL 3349024, at *6 (Tenn. Ct. App. June 8, 2016) (quoting Restatement (First) of Torts § 653 cmt. g (Am. Law Inst. 1939)); *see also Cohen v. Ferguson*, 336 S.W.2d 949, 954 (1959). There is an exception to this rule, however, when the private citizen knowingly gives *false* information to the prosecutor, because in that situation "'an intelligent exercise of the officer's discretion becomes impossible.'" *Gordon*, 2016 WL 3349024, at *6 (quoting Restatement (First) of Torts § 653 cmt. g (Am. Law Inst. 1939)) (emphasis removed).

A review of the Complaint makes immediately clear that Mynatt's actual quarrel is with TIGTA agent Mayes and OLMS agent Kemp—the

only individuals who are alleged to have communicated with the state prosecutors—not the Defendants here. The sole allegation of the Complaint regarding Kelley and Reardon is that Kelley suggested, during a meeting between Kelley, Reardon, and Van Atta, that a local prosecution of Mynatt might be possible. R. at 21, ¶ 89. But "mere advice or encouragement" that a third party contact a prosecutor "is not enough" to constitute procuring a malicious prosecution, Dobbs, The Law of Torts § 587 n.7 (2d ed. 2011). As to defendant Van Atta, the Complaint alleges that "false testimony and forged documents generated by Defendant Van Atta were given to the ADA" during a January 2014 meeting, but the complaint conspicuously does not say *who* gave those materials to the ADA or even that Van Atta attended the meeting. R. at 21, ¶ 90. Thus, while the Complaint refers to false information *"generated by"* by Van Atta, an examination of the Complaint makes clear that there are no direct allegations on the material issue of whether Van Atta (rather than Mayes and Kemp) took any part in supplying that information to the prosecutor. Finally, because Mynatt did not properly allege that any of the individual Defendants instituted the underlying criminal proceeding, NTEU and NTEU Chapter 39 cannot be held to have done so on a respondeat superior theory. *See White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000).[7]

[7] The statement in Mynatt's brief that the Complaint alleges that "the Defendants arranged for a meeting with the District Attorney General for the 20th Judicial District of Tennessee [] in early January 2014" is false. Mynatt Br. at 20. The Complaint alleges that the TIGTA agent, who is not a defendant here, set up that meeting. R. at 21, ¶ 89.

Not only has Mynatt failed to properly allege that any defendant supplied any prosecutor with false information, he has pleaded certain facts that affirmatively defeat his claims. "[A] plaintiff can say too much and 'plead himself out of court by pleading facts that show that he has no legal claim.'" *Mhoon v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 3:16-01751, 2017 WL 468421, at *3 (M.D. Tenn. 2017) (quoting *Epstein v. Epstein*, 843 F.3d 1147, 1150 (7th Cir. 2016)). In particular, after alleging that false information and testimony were given to the ADA, the Complaint then makes the additional allegation that Kemp and Mayes made clear to the ADA that the charges they sought were political and "not based on provable facts." R. at 21, ¶ 90. That additional allegation – that the prosecutor here was given unreliable information and then was *told* it was unreliable – makes it impossible for Mynatt to prevail here. The rationale for allowing private parties, who lack the power to initiate criminal prosecutions, to be sued for procuring such prosecutions when they deceive the prosecutor is that "an intelligent exercise of the officer's discretion becomes impossible" in that circumstance. *Gordon*, 2016 WL 3349024, at *6 (internal quotation marks and citation omitted). But this rationale does not (and could not) apply in the unusual circumstance where it has been disclosed to the prosecutor that the information being presented to him or her is false or unreliable, because in that circumstance—present here but not in any case uncovered in our research—the prosecutor, having not been deceived, *can* engage in an intelligent exercise of discretion about whether to proceed. Hence, even if the Court were to find that any defendant had any role in supplying bad information to the unnamed ADA, no malicious prosecution action

should lie here because the prosecutor was still able to make "an intelligent exercise of [his] discretion." *Id.*

II. Mynatt's Conspiracy Claim Must Be Dismissed Because Mynatt's Allegations Do Not Establish Either the Underlying Tort or the Elements of a Conspiracy

The trial court correctly concluded that Mynatt's civil conspiracy claim failed because the underlying tort of malicious prosecution failed, *see Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007), and Mynatt does not appear to challenge that finding. For completeness, however, we note that Mynatt has also failed to allege the elements of a civil conspiracy.

Even when commission of an underlying predicate tort has adequately been alleged, to establish a civil conspiracy, a plaintiff must show "(1) a common design between two or more persons, (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means, (3) an overt act in furtherance of the conspiracy, and (4) resulting injury." *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 38 (Tenn. Ct. App. 2006). Despite the liberal pleading standard at the motion-to-dismiss stage, "[c]onspiracy claims must be pled with some degree of specificity" in order to survive a motion to dismiss; "[c]onclusory allegations . . . unsupported by material facts will not be sufficient to state such a claim." *Id.* Here, Mynatt has not pled the requisite specific, material facts to show that each of the Defendants had "a common design . . . to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means." *Id.*

Although the Complaint alleges in conclusory terms that the Defendants conspired to bring about a false prosecution of Mynatt, *see* R. at 13-14, ¶¶ 61-62, actual specifics are notably lacking. Indeed, the only pled *facts* supporting the allegation that the Defendants joined a conspiracy to procure the prosecution at issue here are as follows: (1) Kelley suggested that Kemp and Mayes should see whether Mynatt could be prosecuted at the state level, (2) Reardon and Van Atta heard Kelley's suggestion, and (3) false material "generated by" Van Atta was given to the prosecution by an unnamed person.

Even accepting as true the allegation that Kelley suggested that federal investigators see if a state court prosecution was possible, there are no factual allegations in the Complaint supporting the idea that Kelley thought, hoped or expected that a state-court prosecution would be *based on false evidence*, nor are there any allegations that she had a hand in creating or passing along any false evidence. The closest the Complaint comes is the bald assertion in paragraphs 61 and 62 that Kelley, Reardon and Van Atta conspired to secure a prosecution of Mynatt based on false evidence, but this is exactly the sort of conclusory allegation of conspiracy that is insufficient to make out a claim. *See O'Dell v. O'Dell*, 303 S.W.3d 694, 697 (Tenn. Ct. App. 2008). Without any facts supporting the allegation that Kelley intended that the prosecution be procured by fraud, Mynatt cannot make out a claim that she was part of a "a common design . . . to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means." *Kincaid*, 221 S.W.3d at 38. The same problem infects the conspiracy claim against Reardon. Moreover, Reardon is only alleged to have heard and not to have made

the suggestion about seeking a local prosecution, and hearing a suggestion is clearly insufficient to join a conspiracy: "'[m]ere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy.'" *State v. Lane*, No. E2009-02225-CCA-R3-CD, 2011 WL 2120120, at *7 (Tenn. Crim. App. May 24, 2011) (quoting *Solomon v. State*, 76 S.W.2d 331, 334 (Tenn. 1934)).

Finally, there are no allegations stating what the allegedly false documents Van Atta created were about or when he created them, or alleging that he either gave these documents to the ADA or agreed that someone else could do so. Rather, the story actually told by the Complaint is that Van Atta worked with OLMS agents in investigating Mynatt's possible financial malfeasance in the 2011 time frame. This is a far cry from alleging that Van Atta made an affirmative agreement to join a conspiracy to seek a state-court investigation by fraud in 2014. *See Keele v. Davis*, No. 4:05-cv-105, 2006 WL 8442673, at *7 (E.D. Tenn. Sept. 22, 2006) (dismissing claim that individuals who had worked together on investigation had formed a conspiracy to bring a malicious prosecution). Because the Complaint lacks any direct allegations on *that* point, which is the dispositive one here, the conspiracy claim must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the judgment of the trial court be affirmed and that Defendants be awarded fees and costs under Tenn. Code. Ann. § 20-12-119(c).

Respectfully submitted,

/s/ Elisabeth Oppenheimer
Leon Dayan (PHV86460)
Elisabeth Oppenheimer
(PHV86461)
Bredhoff & Kaiser, PLLC
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
Tel: (202) 842-2600
ldayan@bredhoff.com
eoppenheimer@bredhoff.com

Anthony A. Orlandi
BPR No. 03398
Branstetter, Stranch &
Jennings, PLLC
223 Rosa L. Parks Avenue
Suite 200
Nashville, TN 37203
Tel: (615) 254-8801
aorlandi@bsjfirm.com

Counsel for Defendants-Appellees

Dated: May 20, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in 14-point Century font, that it contains a total 8,319 words, as calculated by my word processing software, and that it complies with the requirements set forth in Tenn. Sup. Ct. R. 46, § 3.02.

/s/ Elisabeth Oppenheimer
Elisabeth Oppenheimer

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2021 a copy of the forgoing document was served via the Court's electronic filing system upon:

Daniel A. Horwitz
Lindsay B. Smith
4016 Westlawn Drive
Nashville, TN 37209
daniel@horwitz.law
lindsay@horwitz.law

/s/ Elisabeth Oppenheimer
Elisabeth Oppenheimer