[Cite as *Clellan v. Wildermuth*, 2011-Ohio-6390.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joan Kathleen Clellan et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 11AP-452 (C.P.C. No. 10CVH-04-5526)
Joyce Eileen Wildermuth et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 13, 2011

Joan K. Clellan, for appellants.

Curry, Roby & Mulvey Co., LLC, and *Bruce A. Curry*, for appellee Joyce E. Wildermuth.

Bradigan & Orlandini, Inc., Brian J. Bradigan and *David W. Orlandini*, for appellee Renee Wildermuth.

Lane, Alton & Horst LLC., and *Gregory D. Rankin*, for James Thieman.

Ron O'Brien, Prosecuting Attorney, and *Patrick Piccininni*, for Eric Horvath, Neva Jacobs, Melanie Cooley, Andrew Capehart, Sheriff [Zach Scott], Franklin County Commissioners, and Franklin County.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Plaintiffs-appellants, Joan and John Clellan (the "Clellans"), appeal the decision of the Franklin County Court of Common Pleas granting summary judgment to all defendants. For the following reasons, we affirm the trial court's decision.

{¶2} The Clellans bring the following assignments of error:

> [I.] The trial court erred by dismissing certain Defendants from this case and by denying Plaintiffs' Motions for Reconsideration without comment or rationale.
>
> [II.] The trial court erred when it determined there was no genuine issue of material fact and that Defendants were entitled to judgment as a matter of law as to Appellants' Section 1983 claim.
>
> [III.] The trial court erred when it decided there was no genuine issue of material fact and that Defendants were entitled to judgment as a matter of law as to Appellants' Abuse of Process claim.
>
> [IV.] The trial court erred when it determined there was no genuine issue of material fact and that Defendants were entitled to judgment as a matter of law as to Appellants' claims for defamation, trespass and intentional infliction of emotional distress.

Case Facts and History

{¶3} Defendants-appellees are Joyce Wildermuth, Renee Wildermuth, Attorney James Thieman, Franklin County Deputy Probate Clerk Neva Jacobs, various other Franklin County Employees, the Franklin County Board of Commissioners (the "Board"), and Franklin County (collectively "appellees"). Joyce Wildermuth is the daughter of Dorothy Swartz, sister of appellant, Joan Clellan, and mother of appellee, Renee Wildermuth. James Thieman is Joyce Wildermuth's attorney.

{¶4} This case is among a number of legal actions arising from a family dispute over a proposed guardianship for Dorothy M. Swartz. Mrs. Swartz was in her 90's and the mother of appellant Joan Clellan and appellee Joyce Wildermuth. When Mrs. Swartz was widowed, she apparently inherited hundreds of thousands of dollars. Mrs. Swartz's capacity to deal with such an amount of money and with her own personal affairs was reasonably questioned.

{¶5} Mrs. Swartz essentially lived most of her life in Auglaize County, Ohio. Mrs. Swartz also reportedly lived at 6574 Darby Blvd., in Franklin County from December 2007 until March 2009 with the Clellans. The Clellans maintain that on March 17, 2009, Mrs. Swartz left 6574 Darby Blvd., in a car with someone named "Terry Swartz" and an unidentified Hispanic man. It was indicated that Terry was a relative although Joan Clellan did not know her. The Clellans reportedly did not communicate with Mrs. Swartz until one year later, at the end of February 2010, when Mrs. Swartz was living in Florida with Dora Kovac, Joan Clellan's long-time client and friend.

{¶6} On March 24, 2009, attorney Thieman began a proceeding in the Franklin County Probate Court seeking a guardianship over Mrs. Swartz on behalf of Joyce Wildermuth. That action was based upon the perception that Mrs. Swartz lacked the ability to manage a large distribution of money from her late husband's estate.

{¶7} Joyce Wildermuth ultimately dismissed the application submitted to the Franklin County Probate Court in August 2009, because of continuing procedural problems with service and potential issues regarding jurisdiction. Essentially, the difficulty

arose because it could not be verified whether Mrs. Swartz was residing in Franklin County.

{¶8} During this time, while Mrs. Swartz's whereabouts were unknown, Neva Jacobs, a deputy clerk for the Franklin County Probate Court, sent attorney Thieman a letter dated March 19, 2009. The letter returned the court cost deposit and the guardianship application for Mrs. Swartz. The letter concluded with "If you are seeking an independent guardian we suggest you contact Adult Protective Services at (614) 462-4348." This recommendation is Joan Clellans' entire basis for naming Neva Jacobs as a defendant.

{¶9} On April 9, 2009, an "Entry and Temporary Restraining Order" issued by the Franklin County Probate Court stated that there was reasonable cause to believe "Dorothy M. Swartz , a 92 year old adult, born on February 15, 1917, and residing at 6574 Darby Blvd., Grove City, Franklin Count[y], Ohio 43123, is being or has been abused, neglected, or exploited and that [Franklin County Office on Aging]'s access to her residence has been denied or obstructed." The order also found that Clellans "have repeatedly denied or obstructed access to [the Franklin County Office on Aging]".

{¶10} On or about April 10, 2009, as part of his normal duties as a probate court investigator, Eric Horvath attempted to serve process upon Mrs. Swartz at the Clellans' properties, both 6562 and 6574 Darby Blvd., but was unable to do so. Horvath was accompanied by two sheriff deputies and a representative from Franklin County Adult Protective Services who was also trying to serve process on a matter separate from the guardianship action. John Clellan described the conduct of these four individuals as

"professional," and he did not lodge any complaint about their conduct with their superiors. Service was attempted at both of Clellans' adjoining properties. The agents were at the properties for a total of ten minutes. When asked to unlock the adjoining house, John Clellan voluntarily let the sheriff deputies into 6562 Darby Blvd.

{¶11} Thereafter, on May 3, 2010, the Clellans filed an amended complaint which set forth claims including violations of 42 U.S.C. 1983, abuse of process, defamation, trespass, and intentional infliction of emotional distress.

{¶12} On February 18, 2011, appellees filed motions for summary judgment. On April 8, 2011, the trial court entered a decision granting appellees summary judgment as to all of the Clellans' claims. The Clellans timely appealed.

Standard of Review

{¶13} As to the Clellan's contention that summary judgment was improperly granted, Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> * * * [T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * *

{¶14} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64,

65-66. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. Id. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶15} De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102,105, 1996-Ohio-336. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court, are found to support it, even if the trial court failed to consider those grounds. See *Dresher*; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶16} Despite appealing the trial court's decision granting summary judgment, the Clellans did not oppose any motion for summary judgment. A party's failure to respond to a motion for summary judgment does not, by itself, warrant that the motion be granted. *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St.3d 45, 47. In such cases, the trial court's analysis could focus upon whether the movant has satisfied its initial burden of showing that reasonable minds could only conclude that the case should be decided against the nonmoving party. Only then should the court address whether the nonmovant has met its

reciprocal burden of establishing that a genuine issue remains for trial. *Transcontinental Ins. Co. v. Exxcel Project Mgt., Inc.*, 10th Dist. No. 04AP-1243, 2005-Ohio-5081, ¶8. The Clellans' failure to file a motion in opposition to summary judgment left the trial court and this court to rely on the naked allegations of the complaint and the evidence already presented to find that a genuine issue remains for trial.

First Assignment of Error: Dismissal of Defendants

{¶17} The Clellans' first assignment of error claims the trial court erred by dismissing certain defendants from the case and by denying the Clellans' motion for reconsideration without comment or rationale.

{¶18} The Clellans filed a motion for reconsideration in response to the trial court's November 30, 2010 journal entry dismissing county employees Melanie Cooley, Andre Capehart, Eric Horvath, Franklin County Sheriff James Karnes [now Zach Scott], Franklin County Commissioners, and the County of Franklin, Ohio, as defendants. The only county employee that remained as a defendant was Franklin County Probate Court Deputy Clerk Neva Jacobs. This motion for reconsideration was denied in the trial court's April 8, 2011 decision as moot. The trial court had found summary judgment for all remaining defendants.

{¶19} The Clellans attempted to hold the Board and "The County of Franklin Ohio" liable as respondeat superior. The Board is a creature of statute and possesses only those powers and duties imposed on it by statute. *Applegate v. Duncanside Park* (1986), 28 Ohio App.3d 88, 90. The Board is not charged with polices pertaining to deputy sheriffs, absent this control over the sheriff's office, the Board cannot be held

vicariously liable. *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 53. In general, counties can neither sue nor be sued. *Picciuto v. Lucas Cty. Bd. of Commrs.* (1990), 69 Ohio App.3d 789. By lacking the capacity to be sued, the county, likewise, cannot be held liable.

{¶20} The county employees were alleged to generally have participated in a conspiracy against the Clellans. The Clellans never offered any explanation or evidence of such a conspiracy that would result in an allegedly warrantless search of the Clellans' home. "It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch* (C.A.6, 1987), 826 F.2d 1534, 1538. It was proper for the trial court to dismiss all county employees except Neva Jacobs.

{¶21} Additionally, it was proper for the trial court to deny the motion for reconsideration as to all of the county employees except for Neva Jacobs.

{¶22} The Clellans' first assignment of error is overruled.

Second Assignment of Error: Section 1983 Claim

{¶23} The Clellans' second assignment of error asserts that the trial court erred when it determined there was no genuine issue of material fact and that appellees were entitled to judgment as a matter of law as to the Clellans' section 1983 claim.

{¶24} In order to establish a section 1983 claim, plaintiffs must establish two elements: "(1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or

immunities secured by the Constitution or laws of the United States." *George v. State*, 10th Dist. No. 10AP-4, 2010-Ohio-5262, at ¶29, citing *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34. To satisfy the "under the color of state law" requirement, it must be shown that the conduct complained of was taken pursuant to power possessed by virtue of state law, and made possible only because the wrongdoer was clothed with the authority of state law. *Roe v. Franklin Cty.* (1996), 109 Ohio App.3d 772. A private party will be deemed a state actor if there is a "sufficiently close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself," *Campbell v. PMI Food Equipment Group, Inc.* (C.A.6, 2007), 509 F.3d 776, 784, or a nominally private entity will be treated as a state actor when it is controlled by an agency of the state, or when it had been delegated a public function by the state, or when it is entwined with governmental policies, or when government is entwined in its management or control. *Brentwood Academy v. Tenn. Secondary School Athletic Assoc*., 531 U.S. 288, 296, 121 S.Ct. 924 (private party treated as a state actor).

{¶25} The trial court determined that Neva Jacobs was the only remaining state actor subject to a section 1983 claim. The trial court found that no evidence exists reasonably suggesting that the form letter she sent which contained the sentence "If you are seeking an independent guardian we suggest you contact Adult Protective Services at (614) 462-4348" deprived plaintiffs of any rights under the constitution or federal law.

{¶26} The trial court is correct, there is no evidence to support the Clellans' allegations that Neva Jacobs gave unwarranted advice to contact and engage Adult Protective Services for reasons other than suspected abuse, neglect or exploitation of

Mrs. Swartz. The Clellans' failure to respond to defendants' motions to dismiss leaves the only reasonable conclusion that Neva Jacobs was merely suggesting a legal means of addressing a situation where an elderly citizen was suspected of being abused and neglected. There is no evidence to suggest that Neva Jacobs was acting with any ulterior motives.

{¶27} The second assignment of error is overruled.

Third Assignment of Error: Abuse of Process Claim

{¶28} The Clellans' third assignment of error asserts the trial court erred when it decided there was no genuine issue of material fact and that appellees were entitled to judgment as a matter of law as to the Clellans' abuse of process claim.

{¶29} To establish a claim for abuse of process, a party must prove: (1) that a legal proceeding has been set in motion in proper form and with proper cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 1996-Ohio-189. "Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order." Id. at 270.

{¶30} The trial court found that there was no evidence that reasonably suggested that any of the appellees' actions in Franklin County Probate Court was undertaken for any ulterior motive, or fell outside basic court procedure.

{¶31} Neva Jacobs' suggestion that attorney Thieman contact Adult Protective Services was not improper. The Clellans presented no evidence that there existed an

ulterior motive for such a suggestion. The trial court properly granted summary judgment to Neva Jacobs.

{¶32} The Clellans also claimed abuse of process against attorney Thieman, Joyce Wildermuth's attorney. When an abuse of process claim is "raised against an attorney, he may only be held liable if he acts maliciously and has an ulterior purpose which is completely separate from his client's interest." *Wolfe v. Little* (Apr. 27, 2001), 2d Dist. No. 18718. The evidence does not show any ulterior motive on the part of attorney Thieman, nor does the evidence show that attorney Thieman acted with malice completely separate from his client. There is no evidence to support the Clellans' allegations that attorney Thieman lied about facts he knew or should have known. The trial court properly granted summary judgment to attorney Thieman.

{¶33} The claims of an abuse of process against Joyce and Renee Wildermuth are based on the allegation that Joyce and Renee attempted to use Adult Protective Services to obtain service over Mrs. Swartz so Joyce Wildermuth would be appointed guardian. The evidence shows that there was no improper attempt to render service on Mrs. Swartz. Eric Horvath, as a probate court investigator, is the person who attempted to obtain service on Mrs. Swartz on April 11, 2009 as a result of the Temporary Restraining Order. There is no evidence that service of the guardianship action was attempted by Adult Protective Services, nor is there any evidence that Joyce or Renee Wildermuth attempted to have Adult Protective Services render service on Mrs. Swartz in the guardianship action. The trial court properly granted summary judgment to Joyce and Renee Wildermuth.

{¶34} The third assignment of error is overruled.

Fourth Assignment of Error: Defamation, Trespass, Intentional Infliction of Emotional Distress

{¶35} The Clellans' fourth assignment of error asserts that the trial court erred when it determined there was no genuine issue of material fact and that appellees were entitled to judgment as a matter of law as to the Clellans' claims for defamation, trespass, and intentional infliction of emotional distress.

{¶36} It is established law that "[a] statement made in a judicial proceeding enjoys an absolute privilege against a defamation action as long as the allegedly defamatory statement is reasonably related to the proceeding in which it appears." *Hecht v. Levin*, 66 Ohio St.3d 458, 460, 1993-Ohio-110. "To fall under the absolute privilege relating to statements in connection with litigation, the statements must be: (1) made in the regular course of preparing for and conducting a proceeding that is contemplated in good faith and under serious consideration; (2) pertinent to the release sought; and (3) published only to those directly interested in the proceeding." *Am. Chem. Soc. v. Leadscope*, 10th Dist. No. 08AP-1026, 2010-Ohio-2725, ¶53 (internal citation omitted). For a defamation claim to succeed five things must be proven: falsity, defamation, publication, injury, and fault. *State ex rel. Sellers v. Gerken*, 72 Ohio St.3d 115, 117, 1995-Ohio-247.

{¶37} The publication of defamatory matter is an essential element to liability for defamation. Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed. *Hecht* at 460.

{¶38} In regard to defamation claims against attorney Thieman, the Clellans claim that attorney Thieman made defamatory statements to the Clellans' neighbor. There is no evidence that attorney Thieman made any statements about the Clellans outside those made in court or in court filings, which the Clellans admitted to in their depositions. (Joan Clellan's deposition, at 103-04; John Clellan's deposition, at 32-33.) Summary judgment in favor of attorney Thieman on defamation charges is therefore proper.

{¶39} Any alleged defamatory statements made by Joyce Wildermuth as part of probate court proceedings were privileged. The Clellans claim that Joyce defamed them by saying that they were holding Mrs. Swartz against her will, stole money from her, and physically abused her. Joan Clellan, however, has admitted in her deposition that she is unaware of anything other than testimony provided in court proceedings that would support a claim for defamation. (Joan Clellan's deposition, at 45-47.) John Clellan admits that other than court proceedings, the Clellans' only claim of defamation against Joyce arises from a telephone conversation between himself and Joyce, however, there where no third parties to that telephone conversation. (John Clellan's deposition, at 53-56.) The trial court properly granted summary judgment for Joyce Wildermuth on claims of defamation.

{¶40} In the trial court, the Clellans brought a claim against Renee Wildermuth for allegedly leaving a voice mail message on Joan Clellan's cell phone stating that the Clellans where holding Mrs. Swartz hostage. There was no evidence presented that Renee Wildermuth published this statement by intentionally or negligently communicating this statement to a third party. The lack of any evidence that Renee Wildermuth

published her alleged defamatory statement shows that the granting of summary judgment was proper.

{¶41} In regards to trespass, the Clellans claim that attorney Thieman and Joyce Wildermuth were spotted on their property going through trash and taking pictures. This claim is based on a hearsay statement by a neighbor who allegedly said that he saw a man and a women trespass; this neighbor was not deposed and has offered no evidence for consideration. Attorney Thieman and Joyce Wildermuth deny having trespassed on the Clellans' property. Once the hearsay is disregarded, there remains no evidence to support a claim of trespass. Therefore, it was proper for the trial court to grant summary judgment.

> In order to defeat a motion for summary judgment on a claim for intentional infliction of emotional distress, a plaintiff must present evidence creating a genuine issue of material fact as to the following elements: (1) the defendant intended to cause emotional distress or knew or should have known that actions taken would result in severe emotional distress; (2) the defendant's conduct was so extreme and outrageous that it went beyond all bounds of decency, and was such as to be considered utterly intolerable in a civilized community; (3) the defendant's actions proximately caused plaintiff's psychic suffering; and (4) the plaintiff suffered serious mental anguish of a nature that no reasonable man could be expected to endure.

Aycox v. Columbus Bd. of Edn., 10th Dist. No. 03AP-1285, 2005-Ohio-69, ¶27.

{¶42} With respect to the requirement that the conduct alleged be "extreme and outrageous," the Ohio Supreme Court finds comment d to Section 46 of the Restatement (Second) of Torts (1965) 71, at 73, to be instructive in describing this standard. "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty

oppressions, or other trivialities." *Yeager v. Local Union 20, Teamsters* (1983), 6 Ohio St.3d 369, 375 (overruled on other grounds).

{¶43} Nothing the Clellans allege that the appellees have committed rise to levels of extreme or outrageous conduct that went beyond the bounds of decency. As such, it was proper for the trial court to grant summary judgment on the claim of intentional infliction of emotional distress in favor of appellees.

{¶44} Having found summary judgment was proper in regards to defamation, trespass, and intentional infliction of emotional distress, we overrule the fourth assignment of error.

{¶45} Having overruled all of the Clellans' assignments of error, we affirm the decision of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.

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