

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jimmy C. Cantrell,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-357 (C.P.C. No. 11CVH-05-5702)
Paul J. Deitz,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 28, 2013

Tyack, Blackmore & Liston Co., L.P.A., and Thomas M. Tyack, for appellant.

Maguire & Schneider, LLP, Karl H. Schneider, and Mark R. Meterko, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, Jimmy C. Cantrell ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Paul J. Deitz ("Deitz"), on appellant's claims alleging abuse of process and intentional infliction of emotional distress. Because appellant failed to demonstrate he established the elements required for an abuse of process cause of action, and because appellant failed to set forth any argument regarding his claim for intentional infliction of emotional distress, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} Appellant is the father of Julie Deitz ("Julie") and the grandfather of Julie's minor son with Deitz. In January 2010, Deitz filed for divorce from Julie. Appellant is now the former father-in-law of Deitz.

{¶ 3} On or about January 6, 2011, Deitz and Julie met in the parking lot of the Hilliard police station to exchange physical custody of their minor child, pursuant to Deitz's visitation order as set forth in their divorce. Appellant was also present during the exchange.

{¶ 4} Deitz claimed appellant threatened him during the exchange. After consulting with Mark M. Feinstein ("Attorney Feinstein"), the attorney handling his divorce, Deitz filed a pro se petition on January 7, 2011 in the Union County Court of Common Pleas, Division of Domestic Relations, seeking a civil protection order ("CPO") against appellant. Deitz alleged appellant threatened him by stating, "I would like to put a bullet in your head." Within the petition, Deitz specifically requested that appellant be prevented from possessing, using, carrying, or obtaining any deadly weapon. Notably, appellant owns and operates a gun store and sells firearms.

{¶ 5} An ex parte hearing was held before a magistrate, who subsequently denied the ex parte order but scheduled the matter for a full hearing on February 1, 2011. On that date, appellant and his counsel appeared, but Deitz did not appear. The Union County Court of Common Pleas, Division of Domestic Relations, granted appellant's motion to dismiss for want of prosecution.

{¶ 6} Appellant subsequently initiated the instant action asserting claims for abuse of process and intentional infliction of emotional distress. Appellant has denied having any conversation with Deitz in the parking lot and specifically denies ever making the statement, "I would like to put a bullet in your head." Appellant contends Deitz filed the petition for a CPO without probable cause and by asserting false allegations against him. Appellant claims the proceedings initiated by Deitz were perverted in an attempt "to accomplish a wrongful and improper purpose for which it was not designed." (Complaint, ¶ 11.) Appellant further asserts that as a direct and proximate result of the wrongful use of this process, he sustained direct damage in defending himself in the petition action.

Additionally, appellant alleges the false allegations asserted in the unsubstantiated petition were intended to cause serious emotional distress.

{¶ 7} On February 10, 2012, Deitz filed a motion for summary judgment, claiming he was entitled to judgment as a matter of law. Appellant filed a memorandum contra. Deitz filed a reply. On March 30, 2012, the trial court granted Deitz's motion for summary judgment. Specifically, the trial court found appellant failed to establish a cause of action for abuse of process because: (1) he failed to demonstrate an ulterior motive, (2) he failed to establish damages, and (3) the petition was dismissed for want of prosecution. As to the claim for intentional infliction of emotional distress, the trial court held appellant failed to present evidence establishing he suffered serious emotional distress or that Deitz's conduct was "extreme" or "outrageous."

II. ASSIGNMENT OF ERROR

{¶ 8} In his timely appeal from that judgment entry, appellant asserts a single assignment of error for our review:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THE WITHIN CAUSE IN THAT THERE WERE DISPUTED ISSUES OF MATERIAL FACT AND THE APPLICABLE LAW ESTABLISHED A RIGHT OF THE PLAINTIFF FOR RECOVERY.

III. STANDARD OF REVIEW

{¶ 9} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 10} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion

for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 11} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

IV. ANALYSIS

A. Appellant's Argument

{¶ 12} Under his sole assignment of error, appellant argues the trial court erred in granting summary judgment as to the abuse of process cause of action, claiming there exists a genuine issue of material fact. Specifically, appellant seems to assert there is a genuine issue of material fact as to whether or not Deitz had probable cause to file the petition for a CPO and whether or not Deitz's allegations against appellant were false. In support of his position, appellant cites to the affidavit of his daughter, as well as his own affidavit, in which they both aver that appellant never threatened Deitz and that the only inappropriate behavior demonstrated that day was when Deitz extended his middle finger in the air toward Julie.

{¶ 13} In addition, appellant argues the trial court's analysis is flawed because it failed to recognize that abuse of process can be demonstrated in a situation where the initial filing is not based upon probable cause but, rather, on the action having been initiated without probable cause. Appellant cites to *Border City S. & L. Assoc. v. Moan*,

15 Ohio St.3d 65 (1984), in support of this proposition. Specifically, appellant cites to the following language in *Border City* at 66:

An action for malicious prosecution *or abuse of process* "may be maintained where a proceeding is carried on maliciously and without probable cause." *Diehl v. Friester* (1882), 37 Ohio St. 473, 475; *Brinkman v. Drolesbaugh* (1918), 97 Ohio St. 171, 181 * * *. As it was stated in *Pope v. Pollock* (1889), 46 Ohio St. 367, 370 * * *:

It is a wrong to disturb one's property or peace; and to prosecute one maliciously, and without probable cause, is to do that person a wrong. * * * The burden of establishing both malice and want of probable cause will prove a sufficient check to reckless suits of this character. When the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of defendant's damage.

(Emphasis added.)

{¶ 14} Appellant seems to be arguing that a cause of action for abuse of process lies even where the initial filing is not based upon probable cause. We decline to accept this proposition of law. Subsequent to *Border City*, numerous courts have clearly enumerated the elements for abuse of process and have found otherwise.

B. Abuse of Process

{¶ 15} There are three elements to be satisfied in establishing a claim of abuse of process. Those three elements are: (1) a legal proceeding has been set in motion *in proper form and with probable cause*, (2) the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed, and (3) direct damage has resulted from the wrongful use of process. *Hershey v. Edelman*, 187 Ohio App.3d 400, 2010-Ohio-1992 (10th Dist.); *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264 (1996); *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298 (1994); *Sports Facilities Dev. II, Ltd. v. Lane, Alton & Horst*, 10th Dist. No. 10AP-591, 2011-Ohio-3650, ¶ 8.

{¶ 16} In the instant case, appellant appears to be mixing the elements of the tort of malicious prosecution with his cause of action for abuse of process.

{¶ 17} To state a cause of action for malicious civil prosecution, there are four essential elements which must be alleged: (1) malicious institution of prior proceedings

by the defendant against the plaintiff, (2) *a lack of probable cause to file the prior lawsuit*, (3) termination of the prior proceedings in favor of the plaintiff, and (4) seizure of the plaintiff's person or property during the prior proceedings. *Robb* at syllabus.

{¶ 18} The Supreme Court of Ohio has recognized "the tort of abuse of process as a distinct tort in its own right, distinguishable from the tort of malicious civil prosecution." *Yaklevich* at 298. The tort of malicious prosecution provides a remedy for when a proceeding is initiated without probable cause, but it does not provide a remedy for a related, but different situation. *Id.* at 297. The tort of "abuse of process" has developed for "'cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed.'" *Id.*, quoting Keeton, Doobs, Keeton & Owen, *Prosser & Keeton on the Law of Torts*, Section 121, 897 (5th Ed.1984). However, "'there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.'" *Id.* at 298, quoting *Prosser & Keeton* at 898.

{¶ 19} "Even though the tort of malicious prosecution and the tort of abuse of process have different elements, in some situations the same facts which may constitute an abuse of process may also support an action for malicious prosecution. In that case, a complaint could allege both causes of action, in separate counts. In such a situation, a *consideration of whether probable cause was present to bring the underlying litigation would be the key to determining under which tort theory the action should proceed.*" (Emphasis added.) *Id.*

{¶ 20} "'[A]buse of process' differs from 'malicious prosecution' in that the former connotes the use of process properly initiated for improper purposes, while the latter relates to the malicious initiation of a lawsuit which one has no reasonable chance of winning." *Clermont Environmental Reclamation Co. v. Hancock*, 16 Ohio App.3d 9, 11 (12th Dist.1984).

{¶ 21} "The tort of abuse of process is distinguishable from the tort of malicious civil prosecution." *Hershey* at ¶ 40, citing *Yaklevich* at 298. The key consideration in a malicious prosecution action is whether probable cause was initially present to bring the previous suit. *Id.*, citing *Yaklevich* at 300. In an abuse of process action, on the other

hand, the key consideration is whether an improper purpose was sought to be achieved via the use of a lawfully brought previous action. *Id.*, citing *Yaklevich* at 300. "The presence or absence of probable cause is the determining factor that divides the operation of the two torts." *Id.*

{¶ 22} We find the trial court properly granted summary judgment in favor of Deitz as to appellant's claim asserting abuse of process because appellant failed to meet all three elements required for demonstrating an abuse of process.

1. Probable Cause Element

{¶ 23} Appellant focuses on the first element in an abuse of process cause of action: whether the proceedings for the CPO were set in motion in proper form and with probable cause. Appellant claims there remains a genuine issue of material fact as to whether Deitz's allegations regarding the threats made by appellant were false and whether Deitz had probable cause to file the petition. Interestingly, however, appellant alleges the petition was filed *without* probable cause, even though the filing of an action *without* probable cause is not an element of an abuse of process claim. Rather, this tort requires the proceeding to have been filed *with* probable cause, not *without* probable cause. On the other hand, the tort for malicious prosecution of a civil action does require a lack of probable cause to file the prior lawsuit. It is noteworthy that appellant has repeatedly referred to his first cause of action as *malicious* abuse of process, which appellant seems to mistakenly assert as a hybrid of the two torts. We find the absence of probable cause is a basis upon which to grant summary judgment in favor of Deitz on appellant's claim for abuse of process. Furthermore, this flaw means that the determination of whether or not appellant actually threatened Deitz is no longer a genuine material issue of fact because it is no longer relevant in the absence of probable cause.

2. Ulterior Purpose Element

{¶ 24} With respect to the second required element in an abuse of process cause of action, appellant must show that the CPO order petition proceeding was perverted to accomplish an ulterior purpose for which it was not designed. Appellant has failed to do this.

{¶ 25} Deitz's petition for a CPO was filed pursuant to R.C. 2903.214. Under this provision, a person may seek relief by filing a petition which contains an allegation that the respondent is at least 18 years of age or older and engaged in a violation of R.C. 2903.211 (menacing by stalking). The statute permits the court, following an ex parte or full hearing, to issue a protection order designed to ensure the safety and protection of the person seeking the order. Citing to appellant's desire to "put a bullet in [his] head," and the fact that appellant, as a gun store owner, had easy access to numerous firearms, Deitz asserts he initiated the petition process because he was in fear for his safety and, therefore, he contends he used the process for its intended purpose. As Deitz points out, there is no evidence to the contrary.

{¶ 26} Appellant speculates that his former son-in-law instituted the petition proceedings in order to obtain an order prohibiting appellant from carrying a firearm, which would in turn cause appellant to lose his livelihood, given that appellant owned and operated a gun store. As part of his "revenge" in the divorce/custody case against Julie, appellant submits Deitz wanted to force appellant to close down his gun store. However, there is absolutely no evidence or affidavit testimony to support any of this. It is simply pure speculation. Thus, we find appellant has failed to meet his Civ.R. 56(E) burden. A similar determination was reached in *Walsh v. Walsh*, 4th Dist. No. 08CA4, 2008-Ohio-5701.

{¶ 27} In *Walsh*, the ex-wife obtained a CPO against her ex-husband. Criminal charges were later filed against the ex-husband for reported violations of the CPO. The ex-husband was found not guilty of the violations and subsequently filed a complaint for abuse of process, claiming the ex-wife used the violation allegations and the judicial system to obtain a strategic advantage in the divorce proceedings. The ex-wife filed a motion for summary judgment and attached an affidavit averring she sought the CPO to insure her safety and that her interest in reporting the violations was also to insure her safety. The ex-husband filed a memorandum in opposition and claimed the allegations were part of his ex-wife's plan to annoy and harass him as stated in his deposition testimony, which he failed to file in the record. He further argued there was a genuine issue of material fact as to whether the ex-wife's actions were undertaken to obtain an unfair advantage.

{¶ 28} The trial court in *Walsh* entered summary judgment in favor of the ex-wife. The court of appeals affirmed, citing to the ex-wife's affidavit in which she swore she filed the CPO and sought to enforce it due to safety concerns. The court of appeals further found appellant failed to respond to those assertions with competent evidence demonstrating otherwise and, instead, relied upon conclusory allegations and unfiled deposition testimony. Because the ex-husband failed to present Civ.R. 56 evidence in opposing the ex-wife's properly supported motion, the court determined summary judgment was appropriate. We believe that same logic is applicable here.

{¶ 29} Deitz's sworn affidavit, dated January 31, 2012, states Deitz believed appellant would cause him physical harm after appellant threatened him, stating, "I would like to put a bullet in your head." Deitz's affidavit further states he consulted with Attorney Feinstein in order to seek advice regarding the threat and, after receiving said advice, filed a pro se petition seeking a CPO. In addition, Deitz also attached an affidavit from Attorney Feinstein in which Attorney Feinstein averred he consulted with Deitz about the threat and expressed his belief that Deitz had a reasonable basis to request protection if he believed appellant was capable of carrying out the threat.

{¶ 30} In responding to Deitz's motion for summary judgment, appellant did not refute these assertions as sworn to by Deitz and Attorney Feinstein. Furthermore, appellant did not produce evidence or sworn testimony demonstrating that Deitz perverted the civil protection proceedings to attempt to accomplish an ulterior purpose for which it was not designed. Therefore, we believe the trial court was correct in granting summary judgment in favor of Deitz, due to appellant's failure to meet his Civ.R. 56(E) burden.

3. Direct Damage Element

{¶ 31} With respect to the third element, appellant likely sustained legal costs in defending the action (although this has not actually been demonstrated by admissible evidence), which could constitute direct damage. *See generally Preston v. Kelsey*, 6th Dist. No. L-85-352 (May 9, 1986) (evidence that the plaintiff spent money on legal fees to defend himself against criminal charges was evidence of direct damages suffered due to an alleged malicious prosecution). Nevertheless, in this case, any costs incurred were not the result of any wrongful use of process, as established above. Therefore, because any

damage suffered did not result directly from the wrongful use of process, appellant has failed to meet the third element of an abuse of process cause of action. Consequently, the granting of summary judgment in favor of Deitz was proper.

C. Intentional Infliction of Emotional Distress

{¶ 32} Finally, appellant also appears to have appealed from the portion of the judgment entry addressing appellant's claim for intentional infliction of emotional distress, since appellant's assignment of error generally asserts that the trial court erred in granting summary judgment to Deitz. However, appellant has failed to set forth any argument whatsoever as to this claim. Appellant's entire analysis focuses upon the abuse of process claim and ignores the claim for intentional infliction of emotional distress, which was also resolved on summary judgment.

{¶ 33} "The burden of affirmatively demonstrating error on appeal rests with the party asserting error." *Lundeen v. State Med. Bd. of Ohio*, 10th Dist. No. 12AP-629, 2013-Ohio-112, ¶ 16, citing *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 392, 2006-Ohio-943 (10th Dist.), citing App.R. 9 and 16. "An appellant must demonstrate each assigned error through an argument supported by citations to legal authority and facts in the record." *Ford Motor Credit Co. v. Ryan*, 189 Ohio App.3d 560, 2010-Ohio-4601, ¶ 23 (10th Dist.), citing App.R. 16(A)(7). Here, the portion of appellant's assignment of error which would presumably address the issue of intentional infliction of emotional distress has not been developed and supported by a detailed argument as required under App.R. 16(A)(7). In fact, appellant has not raised any argument at all with respect to his claim for intentional infliction of emotional distress. "If an appellant neglects to advance such an argument, a court of appeals may disregard the assignment of error." *Id.*, citing App.R. 12(A)(2); *Home S. & L. Co. v. Avery Place, LLC*, 10th Dist. No. 11AP-1152, 2012-Ohio-6255. " 'Errors not treated in the brief will be regarded as having been abandoned by the party who gave them birth.' " *Hawley v. Ritley*, 35 Ohio St.3d 157, 159 (1988), quoting *Uncapher v. Baltimore & Ohio RR. Co.*, 127 Ohio St. 351, 356 (1933).

{¶ 34} Consequently, to the extent that appellant's general assignment of error challenging the trial court's granting of summary judgment could be applied to his claim for intentional infliction of emotional distress, we shall consider any error on this issue to be waived, given appellant's failure to address it.

{¶ 35} Based upon our analysis as set forth above, we overrule appellant's sole assignment of error.

V. CONCLUSION

{¶ 36} In conclusion, we overrule appellant's single assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.
