

[Cite as *Coleman v. Beachwood*, 2009-Ohio-5560.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92399

KATHY W. COLEMAN

PLAINTIFF-APPELLANT

vs.

**CITY OF BEACHWOOD,
OHIO, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-653392

BEFORE: Stewart, J., McMonagle, P.J., and Blackmon, J.

RELEASED: October 22, 2009

JOURNALIZED:

FOR APPELLANT

Kathy W. Coleman, Pro Se
3901 Silsby Road
University Heights, OH 44118

**ATTORNEY FOR APPELLEES CITY OF BEACHWOOD, BEACHWOOD LAW
DIRECTOR MARGARET ANNE CANNON, BEACHWOOD PROSECUTOR
THOMAS GREVE, AND BEACHWOOD DETECTIVE ALLAN BAUMGARTNER**

Nick C. Tomino
Tomino & Latchney, L.L.C., L.P.A.
803 East Washington Street, Suite 200
Medina, OH 44256

**ATTORNEYS FOR APPELLEES CITY OF SHAKER HEIGHTS AND
MARGARET ANNE CANNON**

Matthew T. Fitzsimmons, III
R. Christopher Yingling
L. James Juliano, Jr.
Nicola, Gudbranson & Cooper, LLC
Landmark Office Towers
Republic Building, Suite 1400
25 West Prospect Avenue
Cleveland, OH 44115

ATTORNEYS FOR APPELLEE MYRNA R. GILL

John J. Reagan
Brian D. Sullivan
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment

and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} In this appeal, plaintiff-appellant Kathy W. Coleman appeals pro se from the judgment of the Cuyahoga County Court of Common Pleas that granted 1) the motion for summary judgment of defendants-appellees the city of Beachwood, Beachwood Law Director Margaret Anne Cannon, Beachwood Prosecutor Thomas Greve, and Beachwood Detective Allan Baumgartner (hereinafter Beachwood), 2) the motion for a more definite statement of defendants-appellees the city of Shaker Heights and Shaker Heights Law Director Margaret Anne Cannon (hereinafter Shaker Heights), and 3) the motion for judgment on the pleadings of defendant-appellee Myrna Gill. For the reasons stated below, we affirm in part and reverse in part.

{¶ 2} In October 2006, Coleman filed an action for monetary damages against Shaker Heights, Beachwood, and Myrna Gill on numerous claims including malicious prosecution, abuse of process, and intentional infliction of emotional distress. The claims arose out of the city of Beachwood's prosecution of appellant in the Shaker Heights Municipal Court on charges of telephone harassment following a criminal complaint filed by Gill.

{¶ 3} Appellant voluntarily dismissed her complaint without prejudice, pursuant to Civ.R. 41(A), and on March 10, 2008, refiled the action against the same defendants. On August 11, 2008, appellant filed a Civ.R. 41(A) notice of voluntary dismissal of all claims against Shaker Heights.

{¶ 4} Gill filed a motion for judgment on the pleadings on August 26, 2008. Appellant requested and was granted an extension of time until September 25, 2008 to respond to the motion. On August 29, 2008, Beachwood filed a motion for summary judgment on all claims. On September 25, 2008, appellant filed a request for an extension of time to respond to both motions. The trial court denied this request. Appellant failed to respond to either motion. On October 9, 2009, the trial court granted both motions and entered judgment in favor of Gill and Beachwood on all of appellant's claims thereby terminating the action. Appellant timely filed this appeal raising four assignments of error for our review.¹

{¶ 5} In her first and second assignments of error, appellant contends that the trial court erred in not granting her additional time to respond to Gill's motion for judgment on the pleadings and Beachwood's motion for summary judgment. Appellant argues that her request for an extension of time was based upon "just cause" and therefore, the trial court's refusal was unreasonable.

¹Appellant originally raised six errors for review. Assignments of error five and six relate to Shaker Heights and appellant subsequently dismissed her appeal as to Shaker Heights only.

{¶ 6} Pursuant to Civ.R. 6(B)(1), the trial court is granted discretion to expand the time a party has to respond to motions. Accordingly, we will not reverse the trial court's decision absent an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶ 7} The record reflects that Gill filed her motion for judgment on the pleadings on August 26, 2008. Appellant had seven days to respond. Appellant requested and was granted additional time, until September 25, 2008, to file her response to that motion. Beachwood filed their motion for summary judgment on August 29, 2008. Appellant's response to that motion was due within 30 days. As a result, when appellant filed her second request for additional time to respond on September 25, 2008, she was facing deadlines on both motions.

{¶ 8} Appellant argues that her second request for an extension of time to respond to Gill's motion was for "just cause." However, the record reflects that the trial court granted the first extension of time upon appellant's claim that she needed the additional time because she was facing an August 30, 2008 deadline on a newspaper article she was writing. Appellant's second request is premised largely upon the same newspaper article and on other personal issues relating to events that occurred many weeks earlier in a criminal case against her in the Lyndhurst Municipal Court. Appellant points to nothing in the record that demonstrates that the trial court acted in an arbitrary, unreasonable, or

unconscionable manner in denying her second request for additional time to respond to Gill's motion.

{¶ 9} Included in appellant's September 25, 2008 motion for a second extension of time is a brief request for an unspecified extension of time to respond to Beachwood's summary judgment motion. In addition to the previously stated reasons for needing more time, appellant stated a need to secure counsel and a claim that defendants had ignored her timely requests for discovery.

{¶ 10} However, the record reflects that appellant used this same argument four months earlier to secure additional time to respond to a Shaker Heights motion. Appellant offers no reason why she was unable to secure counsel during that time and gives no estimate of how much time she needed to secure counsel.

{¶ 11} "One of the overriding goals of Civ.R. 56 is fundamental fairness to all litigants, given the high stakes involved when summary judgment is sought. Because summary judgment terminates litigation without benefit of a trial on the merits, compliance with both the letter and spirit of the rule is of paramount importance. Civ.R. 56's procedural fairness requirements place significant responsibilities on all parties and judges to ensure summary judgment should be granted only after all parties have had a fair opportunity to be heard." *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, at ¶34 (citation deleted).

{¶ 12} "Civ.R. 56(F) permits a party opposing summary judgment to seek a continuance to pursue further discovery in order to develop its opposition to the motion. Under this provision, the opposing party must submit an affidavit stating

the reasons justifying an extension. * * * When no affidavit is presented in support of a motion for extension under Civ.R. 56(F), a court *may not* grant an extension pursuant thereto.” *Cook v. Toledo Hosp.*, 169 Ohio App.3d 180, 2006-Ohio-5278, ¶42 (emphasis added). The record reflects that appellant did not submit an affidavit in support of her motion. Additionally, appellant did not file a motion to compel discovery and there is nothing in the record to support her claim that discovery requests went unanswered.

{¶ 13} Under the circumstances presented in this case, we find that appellant has failed to establish that the trial court abused its discretion by denying her requests for extensions of time. Appellant’s first and second assignments of error are overruled.

{¶ 14} For her third assignment of error, appellant asserts that the trial court erred in granting Gill’s motion for judgment on the pleadings.

{¶ 15} Appellate review of the grant of a Civ.R. 12(C) motion for judgment on the pleadings is de novo. *Chromik v. Kaiser Permanente*, Cuyahoga App. No. 89088, 2007-Ohio-5856. Accordingly, we must independently review all legal issues without deference to the determination of the trial court. *Fontbank, Inc. v. CompuServe, Inc.* (2000), 138 Ohio App.3d 801.

{¶ 16} Unlike a motion for summary judgment where the parties are permitted to submit certain evidentiary materials for the court’s review, the determination of a motion for judgment on the pleadings is restricted solely to the

allegations in the pleadings and any writings attached to the complaint. See *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161.

{¶ 17} Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. *Burnside v. Leimbach* (1991), 71 Ohio App.3d 399, 403. “Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570. Thus, the granting of a judgment on the pleadings is only appropriate where the plaintiff has failed to allege a set of facts which, if true, would establish the defendant’s liability. *Chromik*, supra, citing *Walters v. First Natl. Bank of Newark* (1982), 69 Ohio St.2d 677.

{¶ 18} The trial court granted Gill judgment on the pleadings on appellant’s claims of malicious prosecution, abuse of process, and intentional infliction of emotional distress.

{¶ 19} “The tort of malicious criminal prosecution is the right to recover damages for the harm caused to a defendant in a criminal case by the misuse of criminal actions.” *Criss v. Springfield Twp.* (1990), 56 Ohio St.3d 82, 84. In order to sustain a claim for malicious prosecution, the plaintiff must set forth the following elements: (1) malice in instituting or continuing the prosecution, (2) lack of

probable cause, and (3) termination of the prosecution in favor of the accused. Id.

For purposes of malicious prosecution, malice means an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice. Id. at 85.

{¶ 20} Appellant's pro se complaint states the following allegations with respect to the claim of malicious prosecution against Gill:

{¶ 21} "14. In August and December 2004 Defendant Gill filed criminal complaints with Defendant Beachwood City Police Department, * * * wherein she alleged that Plaintiff Coleman harassed her by telephone since she stop [sic] seeing her in October 2003, although she later admitted in court that she lied and had seen Plaintiff numerous times up to March 2004. * * *

{¶ 22} "15. In February 2005 a complaint of telephone harassment was filed by Gill with the Beachwood police wherein Defendant Gill claims Plaintiff Coleman called her on four occasions when she allegedly told her not to. A warrant was issued for Plaintiff Coleman's arrest * * *.

{¶ 23} "* * *

{¶ 24} "20. Plaintiff Coleman was acquitted * * * on the misdemeanor charge of telecommunications harassment on October 28, 2005.

{¶ 25} "* * *

{¶ 26} "22. [T]he special prosecutor found that Gill lied as to the criminal complaint and during the criminal trial."

{¶ 27} In her answer, Gill asserted that she and her staff were subjected to “a pattern of repeated, harassing telephone calls” from appellant necessitating the filing of criminal charges. She denied all allegations that she lied as to the criminal complaint. Viewing the material allegations in the complaint as true, with all reasonable inferences to be drawn therefrom in favor of appellant, we find that material factual issues exist regarding the elements of appellant’s claim for malicious prosecution.

{¶ 28} To assert a claim for intentional infliction of emotional distress, a plaintiff is required to show that “(1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; (2) defendant’s conduct was extreme and outrageous; (3) defendant’s action proximately caused plaintiff’s psychic injury; and (4) the mental anguish plaintiff suffered was serious.” *Sultaana v. Giant Eagle*, Cuyahoga App. No. 90924, 2008-Ohio-3658, ¶25, citing *Mitnaul v. Fairmount Presbyterian Church*, 149 Ohio App.3d 769, 2002-Ohio-5833.

{¶ 29} In her complaint, appellant alleges that Gill’s actions caused her to suffer irreparable harm and undue injury. She states that Gill had counseled her in the past. She alleges that Gill intentionally lied to the police about her, filed a false criminal complaint of telephone harassment, and threatened that appellant’s clinical records would be made public in the criminal prosecution. She claims serious emotional injury as well as injury to her reputation and opportunity for job advancement. These allegations, accepted as true for this analysis, are sufficient

to demonstrate the existence of genuine issues of material fact relating to appellant's claim for intentional infliction of emotional distress.

{¶ 30} In order to assert a claim of abuse of process, a plaintiff must allege: “(1) that a legal proceeding has been set in motion in proper form and with probable 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.” *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503.

{¶ 31} A review of the pleadings finds that appellant's abuse of process claim must fail as a matter of law. Appellant's entire action is premised upon there being a lack of probable cause for the criminal prosecution against her. All of her factual allegations claim that Gill intentionally lied in her complaint, that Beachwood knew she was lying and, therefore, no probable cause existed to prosecute her for telecommunications harassment under the claim that she called Gill when told not to. Accordingly, the trial court did not err in granting Gill judgment on this claim.

{¶ 32} Appellant's third assignment of error is sustained as to the malicious prosecution and intentional infliction of emotional distress claims, and overruled as to the abuse of process claim.

{¶ 33} Appellant's fourth assignment of error asserts that the trial court erred in granting summary judgment in Beachwood's favor. We review the granting of summary judgment under a de novo standard. No deference is afforded to the

trial court's decision and we independently review the record to determine whether summary judgment is appropriate.

{¶ 34} Summary judgment is appropriate when, looking at the evidence as a whole: (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) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 686-687, 1995-Ohio-286. The only evidence to be considered in deciding summary judgment is that found in the “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.” Civ.R. 56(C).

{¶ 35} The party moving for summary judgment carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. “When a motion for summary judgment is made and supported as provided in Civ.R. 56, the nonmoving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing that there is a genuine triable issue.” *State ex rel. Mayes v. Holman* (1996), 76 Ohio St.3d 147,148. If the opposing party does not so respond, “summary judgment, if appropriate, shall be entered against the party.” Civ.R. 56(E).

{¶ 36} Because appellant did not respond to the motion for summary judgment, she failed to provide any Civ.R. 56 evidence to demonstrate the existence of genuine issues of fact for trial. However, we must still review the trial court's decision to determine whether the grant of summary judgment was appropriate.

{¶ 37} Beachwood moved for summary judgment on appellant's claims of malicious prosecution, abuse of process, and intentional infliction of emotional distress. They asserted in their motion that there was probable cause to institute the criminal prosecution, that they acted at all times in their official capacity and without malice or bad faith and, that they are each immune from liability pursuant to R.C. Chapter 2744. They supported their motions with affidavits from Detective Baumgartner, Prosecutor Greve, and Law Director Cannon.

{¶ 38} The criminal prosecution against appellant was brought under Ohio's telecommunications harassment statute that provides in pertinent part that "no person shall knowingly make or cause to be made a telecommunication, * * *, to another, if the caller * * * knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises." R.C. 2917.21(A)(5).

{¶ 39} In his affidavit, Detective Baumgartner states that on November 3, 2004, Gill reported to the Beachwood Police Department that she was receiving harassing phone calls from appellant at her office. Gill said that she had instructed appellant not to call her office anymore, but appellant continued to do so. He told Gill to contact the phone company to have a “trap” placed on her phones. Phone company records showed that appellant called Gill’s office once on November 10, 2004 and three times on November 29, 2004. Gill confirmed the calls were from appellant and she said she wanted to file criminal charges against appellant.

{¶ 40} The affidavit further states that Baumgartner did not file criminal charges against appellant; that he believed in good faith that probable cause existed for Gill’s complaint; that there was no malicious purpose or bad faith behind his actions; and, that he did not act in a wanton or reckless manner. He states he forwarded Gill’s information to Prosecutor Greve who authorized and approved the filing of criminal charges. On February 18, 2005, Gill signed a sworn complaint and affidavit in the Shaker Heights Municipal Court. A copy of the complaint was attached to the affidavit.

{¶ 41} In Greve’s affidavit, he states: that he acted at all times in his official capacity as prosecutor; he reviewed the information regarding Gill’s complaint and determined that there was probable cause to file telecommunications harassment charges against appellant; and, he authorized and approved the filing of a sworn complaint by Gill.

{¶ 42} In Cannon's affidavit, she states that: she was not involved in the filing of criminal charges against appellant; she did not institute any judicial process against appellant; and she did not act with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 43} As previously stated, the elements of the tort of malicious criminal prosecution are (1) malice in instituting or continuing the prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused.

{¶ 44} "In actions for malicious prosecution, while malice is an essential element, the want of probable cause is the real gist of the action." *Melanowski v. Judy* (1921), 102 Ohio St.153, 156. Probable cause has been defined as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *Id.* "The person instituting the criminal proceeding is not bound to have evidence sufficient to insure a conviction but is required only to have evidence sufficient to justify an honest belief of the guilt of the accused." *Brown v. Crestmont Cadillac*, Cuyahoga App. No. 87460, 2006-Ohio-5734, citing, *Epling v. Pacific Intermountain Exp. Co.* (1977), 55 Ohio App.2d 59, 62.

{¶ 45} Defendants moved for summary judgment on the grounds that there was probable cause to prosecute appellant on a charge of telephone harassment.

They supported their motion with evidence of Gill's statements to police, telephone records showing calls from appellant's phone to Gill's office, and Gill's

sworn complaint and affidavit. This evidence is sufficient for defendants to establish probable cause.

{¶ 46} Appellant failed to rebut this evidence with specific facts showing the existence of a genuine issue of material fact. Appellant's assertion that defendants are "lying" is insufficient to meet her burden of showing that there was a genuine issue for trial. Civ.R. 56(E); *Dresher*, supra. Accordingly, the trial court did not err in granting summary judgment on the claim of malicious prosecution.

{¶ 47} As to the abuse of process claim, we find that appellant's claim fails as a matter of law with regard to Beachwood for the same reason it fails as to Gill.

Appellant simply alleges no facts in her complaint that the criminal charges were filed in proper form and with probable cause, which are essential elements of this claim.

{¶ 48} A claim for intentional infliction of emotional distress requires a showing of serious emotional distress. *Sultaana*, supra, at _25. Serious emotional distress has been defined as "emotional injury which is both severe and debilitating." *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, at paragraph 3a of the syllabus. A plaintiff claiming severe and debilitating emotional injury must present some evidence in support of his or her claim, such as expert evidence or lay witness testimony, to prevent summary judgment in favor of the defendant. *Sultanna* at _26, citing *Motley v. Flowers & Versagi Court Reporters, Inc.* (Dec. 11, 1997), Cuyahoga App. No.72069.

{¶ 49} The record is devoid of evidence to support appellant's allegation of "undue emotional distress" as stated in her complaint. As a result, defendants were entitled to judgment as a matter of law on appellant's intentional infliction of emotional distress claim.

{¶ 50} In addition to arguing that there is no evidence to support appellant's claims, the city of Beachwood, Baumgartner, Greve, and Cannon argue that they are immune from liability. We agree.

{¶ 51} Under R.C. 2744.02, political subdivisions are immune from intentional torts. *Walsh v. Village of Mayfield*, Cuyahoga App. No 92309, 2009-Ohio-2377, citing *Wilson v. Stark Cty. Dept. of Human Services*, 70 Ohio St.3d 450, 1994-Ohio-394. Since the city of Beachwood is a political subdivision under R.C. 2744.01(F), it is immune from appellant's claims of malicious prosecution, abuse of process, and intentional infliction of emotional distress because they are intentional torts.

{¶ 52} Only if an exception applies will a political subdivision be stripped of its immunity. *Walsh* at ¶12. The exceptions are enumerated in R.C. 2744.02(B)(1-5). None of these exceptions apply in this case. Appellant's claims do not involve a motor vehicle, the negligent performance of a proprietary function, the condition of streets or highways or, an injury due to a physical defect on the grounds of a public building. There also is no express imposition of liability by statute. Therefore, the city of Beachwood is immune from liability on appellant's claims.

{¶ 53} Baumgartner, Greve, and Cannon are employees of a political subdivision and were involved in the performance of governmental functions. Therefore, unless one of the exceptions to immunity applies, they also are immune from liability.

{¶ 54} Appellant argues that R.C. 2744.03(A)(6) applies. That section states that an employee is immune from liability unless, “(a) The employee’s acts or omissions were manifestly outside the scope of the employee’s employment or official responsibilities; (b) The employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; [or] (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code.” None of these exceptions apply in this case. Baumgartner, Greve, and Cannon provided evidence demonstrating that they were acting within the scope of their employment, and appellant failed to provide any evidence in support of her claims that defendants acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Even viewing the evidence in a light most favorable to appellant, based on the evidence in the record, reasonable minds could only conclude that defendants were entitled to judgment as a matter of law. Accordingly, appellant’s fourth assignment of error is overruled.

{¶ 55} Judgment affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR