[Cite as *Allen v. Pirozzoli*, 2016-Ohio-2645.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103632

JAMES ALLEN

PLAINTIFF-APPELLANT

vs.

FRED PIROZZOLI

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-829798

BEFORE: E.A. Gallagher, P.J., Keough, J., and Blackmon, J.

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EILEEN A. GALLAGHER, P.J.:

{¶1} Plaintiff-appellant, James Allen, appeals the decision of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of defendant-appellee Fred Pirozzoli. For the following reasons, we affirm in part, and reverse in part and remand.

Facts and Procedural Background

{¶2} Allen's complaint against Pirozzoli alleges assault, battery, civil recovery for theft, three counts of intentional infliction of emotional distress, defamation and falsification. The counts cover two specific instances of conduct and a broader alleged period of general harassment. The complaint alleges that Pirozzoli intentionally inflicted emotional distress upon Allen in the form of bullying, harassment and annoyance from January 1, 2006 until the date the complaint was filed on July 15, 2014, that Pirozzoli committed defamation and falsification by providing false statements and evidence to police on August 14, 2012 resulting in Allen being charged with criminal damaging in violation of Parma Municipal Ordinance 642.10, a claim of intentional infliction of emotional distress due to having to defend against that charge and claims of assault, battery, and civil recovery for theft arising out of a July 22, 2013 incident in which Pirozzoli allegedly struck Allen in the face and stole a camera from him. Allen also asserts that Pirozzoli's actions on that date constituted intentional infliction of emotional distress.

{¶3} Pirozzoli moved for summary judgment and attached Allen's deposition testimony regarding the relevant events. Allen filed a motion to strike Pirozzoli's motion for summary judgment that the trial court construed as a brief in opposition. On September 17, 2015 the trial court granted Pirozzoli's motion for summary judgment finding that no genuine issues of material fact existed and that Pirozzoli was entitled to judgment as a matter of law.

Law and Analysis

{¶4} In his sole assignment of error, Allen argues that the trial court erred in granting summary judgment in favor of Pirozzoli as to each count in the complaint.

{¶5} Our review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus; *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

I. Intentional Infliction of Emotional Distress

{¶6} To establish a claim for intentional infliction of emotional distress, a plaintiff must show that: (1) the defendant intended to cause the plaintiff serious emotional distress; (2) the defendant's conduct was extreme and outrageous; and (3) the defendant's conduct was the proximate cause of plaintiff's serious emotional distress. *Phung v. Waste Mgt. Inc.*, 71 Ohio St.3d 408, 410, 1994-Ohio-389, 644 N.E.2d 286.

{¶7} We begin by noting that generally the applicable statute of limitations for a claim of intentional infliction of emotional distress is four years. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983). However, when the acts underlying the claim would support another tort, the statute of limitations for that other tort governs the claim for intentional infliction of emotional distress. *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 1994-Ohio-531, 629 N.E.2d 402. In order to determine the applicable statute of limitations for a particular claim, courts must look to the actual nature or subject matter of the acts giving rise to the complaint rather than the form in which the action is pleaded. *Id.*; *Love v. Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988). A party cannot transform one cause of action into another through clever pleading or an alternate theory of law in order to avail itself of a more satisfactory statute of limitations. *Callaway v. Nu-Cor Automotive Corp.*, 166 Ohio App.3d 56, 2006-Ohio-1343, 849 N.E.2d.

{¶8} With regard to Allen's broader claim of ongoing intentional infliction of emotional distress dating back to January 2006, we find that any allegations predating

July 15, 2010, four years prior to the date of the filing of his complaint, are barred by the statute of limitations.

{¶9} Allen's deposition testimony reveals that the factual basis of his general claim of ongoing harassment includes: (1) Pirozzoli asking him in 2006 to sign a waiver for the construction of a fence on the property line dividing the parties' backyards; (2) Pirozzoli standing at the fence line while Allen would cut his grass; (3) Pirozzoli setting off "hundreds" of fireworks in his own yard although Allen conceded he never personally observed this activity; (4) an encounter with Pirozzoli at Allen's doctor's office that Allen attributed to stalking; (5) the presence of Pirozzoli in Pirozzoli's own driveway at times when Allen would drive past Pirozzoli's home that Allen attributed to stalking; (6) allegations that Pirozzoli or one of his "associates" would follow him in public stemming from Allen hearing car horns honking in parking lots and assuming this to be Pirozzoli despite never actually observing Pirozzoli;[1] (7) Pirozzoli making noises and banging on his fence and windows; (8) Pirozzoli revving his motorcycle in front of his house and (9) Pirozzoli's children riding their bicycles in front of Allen's house.

{¶10} Aside from the fact that none of the conduct described by Allen was attributed to the time period of July 15, 2010 until July 15, 2014, we cannot conclude that the alleged conduct, some of which Allen conceded he did not actually observe, was

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[1]The following illustrative excerpt is taken from Allen's deposition: QUESTION: "You hear horns honking when you're going in and out of businesses and you're making the assumption that it has something to do with Mr. Pirozzoli, is that right?" ANSWER: "Yes."

extreme or outrageous or that it was intended to cause Allen emotional distress. As such, Allen's claim fails as a matter of law.

{¶11} Even if we were to find that Allen's allegations created a genuine issue of material fact regarding Pirozzoli's conduct, we note that a claim for intentional infliction of emotional distress also requires proof "that the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it." *Burks v. Torbert*, 8th Dist. Cuyahoga No. 91059, 2009-Ohio-486, ¶ 19. A plaintiff may prove severe and debilitating emotional injury through the testimony of an expert or lay witnesses acquainted with the plaintiff who have observed significant changes in the emotional or habitual makeup of the plaintiff. *Id.* at ¶ 20. A self-serving affidavit, however, is insufficient to overcome summary judgment as to this element of intentional infliction of emotional distress. *Id.* at ¶ 20, citing *Jacob v. Fadel*, 8th Dist. Cuyahoga No. 86920, 2006-Ohio-5003, ¶ 13. The record reveals that all three of Allen's intentional infliction of emotional distress claims fail due to this deficiency.

{¶12} We find no error in the trial court's decision to grant summary judgment on Allen's intentional infliction of emotional distress claims.

II. Defamation and Falsification

{¶13} Defamation occurs when a publication contains a false statement "made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession." *Jackson v. Columbus*, 117 Ohio

St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 9, quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 1995-Ohio-66, 651 N.E.2d 1283. If a claimant establishes a prima facie case of defamation, a defendant may then invoke a conditional or qualified privilege. *Id.*, citing *Hahn v. Kotten*, 43 Ohio St. 2d 237, 243, 331 N.E.2d 713 (1975).

{¶14} "Any communications made by private citizens to law enforcement personnel for the prevention or detection of crime are qualifiedly privileged and may not serve as the basis for a defamation action unless it is shown that the speaker was motivated by actual malice." *Lewandowski v. Penske Auto Group*, 8th Dist. Cuyahoga No. 94377, 2010-Ohio-6160, ¶ 26, quoting *Oswald v. Action Auto Body & Frame, Inc.*, 8th Dist. Cuyahoga No. 71089, 1997 Ohio App. LEXIS 1642 (Apr. 24, 1997).

{¶15} A qualified privilege may be defeated only if a claimant proves with convincing clarity that the speaker acted with actual malice. *Jacobs v. Frank*, 60 Ohio St.3d 111, 573 N.E.2d 609 (1991), paragraph two of the syllabus. "In a qualified privilege case, 'actual malice' is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Id*. The phrase "reckless disregard" applies when a publisher of defamatory statements acts with a high degree of awareness of their probable falsity or in fact entertained serious doubts as to the truth of his publication. *Id*. at ¶ 10, citing *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Actual malice may not be inferred from evidence of personal spite,

ill-will or intention to injure on the part of the writer. *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 119, 413 N.E.2d 1187 (1980), citing *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967). Rather, the focus of inquiry is on defendant's attitude toward the truth or falsity of the publication. *Id.*, citing *Herbert v. Lando*, 441 U.S. 153, 160, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Furthermore, the subjective belief of the speaker must be considered in determining whether a statement was made with actual malice. *Georgalis v. Ohio Turnpike Comm.*, 8th Dist. Cuyahoga No. 94478, 2010-Ohio-4898, ¶ 27, citing *Lakota Local School Dist. Bd. of Edn. v. Brickner*, 108 Ohio App.3d 637, 649, 671 N.E.2d 578 (6th Dist.1996).

{¶16} A one-year statute of limitations applies to defamation claims. *T.S. v. Plain Dealer*, 194 Ohio App.3d 30, 2011-Ohio-2935, 954 N.E.2d 213, ¶ 6-8 (8th Dist.), citing R.C. 2305.11(A). The date a defamation cause of action accrues is the date of publication. *Id.*; *Foster v. Wells Fargo Fin. Ohio, Inc.*, 195 Ohio App.3d 497, 2011-Ohio-4632, 960 N.E.2d 1022, ¶ 15 (8th Dist.).

{¶17} Allen does not dispute the fact that his complaint was filed outside the one-year statute of limitations but argues that the time period should be extended beyond one year and through the date at which his citation for criminal damaging was dismissed in Parma Municipal Court, to wit: January 9, 2013. This court has previously rejected such tolling of the statute of limitations for defamation claims. *Tourlakis v. Beverage Distribs.*, 8th Dist. Cuyahoga No. 81222, 2002-Ohio-7252, ¶ 44. Therefore, we conclude that Allen's defamation claim is barred by the statute of limitations.

{¶18} Based on the same alleged conduct, Allen's complaint raises a claim of falsification under R.C. 2921.13(G). However, R.C. 2921.13(G) does not provide a private, original, civil cause of action absent the initiation of criminal charges or criminal proceedings pursuant to R.C. 2921.13. *Hershey v. Edelman*, 187 Ohio App.3d 400, 2010-Ohio-1992, 932 N.E.2d 386, ¶ 29, 33 (10th Dist.).

{¶19} Even if Allen's claims for defamation and falsification were not otherwise barred, we note that the sole evidence Allen offered in the record in support of his claims on summary judgment actually refutes the allegations of his complaint. Allen cites to the dismissal of his criminal damaging charge in Parma Municipal Court as evidence of Pirozzoli's false statements to police that Allen had damaged his fence. To this end, Allen provided a transcript of the trial proceedings. The transcript reveals that the trial court dismissed the case after the prosecutor conceded that there was no evidence that directly linked Allen to the damage sustained by Pirozzoli's fence. In fact, the prosecutor indicated that the case against Allen was purely circumstantial: Allen and Pirozzoli were feuding neighbors, Allen opposed Pirozzoli's fence, according to Pirozzoli the fence was previously undamaged and then on, August 14, 2012, he discovered the fence had been damaged. Thus, the transcript offered by Allen does not support his claim that Pirozzoli falsely claimed to have personally observed Allen damaging the fence or represented to police that he possessed photographic evidence depicting Allen causing damage to the fence in this instance. Allen has failed to offer any evidence that Pirozzoli made a statement to police with actual malice.

{¶20} We find no error in the trial court's decision to grant summary judgment on Allen's claims of defamation and falsification.

III. Assault, Battery and Theft

{¶21} Allen's remaining claims of assault, battery and theft pertain to a July 22, 2013 incident in which Allen alleges that Pirozzoli followed him by car from his home in Parma onto I-71 North. Allen called 911 and was advised to proceed to the nearest police station. Instead, Allen exited his vehicle when the vehicles stopped at a red light on an exit ramp and attempted to take a photograph of Pirozzoli in his car that was behind Allen. Allen alleges that Pirozzoli exited his vehicle, struck him in the face and absconded with his camera. The 911 recording documents the initial call, Allen exiting his vehicle, a muffled series of incoherent shouts and Allen returning to the vehicle to report to the 911 dispatcher that Pirozzoli had stolen his camera. At his deposition Allen reported that he subsequently experienced pain in his neck for which he sought treatment from his doctor. Pirozzoli denies this incident occurred.

{¶22} In summary judgment proceedings a court may not weigh the evidence or judge the credibility of sworn statements, properly filed in support or in opposition to a summary judgment motion, and must construe the evidence in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[W]hen reviewing a motion for summary judgment, a court must be careful not to weigh the evidence or judge the credibility of witnesses. * * * Instead, it must consider all of the evidence and reasonable inferences that can be drawn from the

evidentiary materials in favor of the nonmoving party." *Wheeler v. Johnson*, 2d Dist. Montgomery No. 22178, 2008-Ohio-2599, ¶ 28. When trial courts choose between competing affidavits and testimony, they improperly determine credibility and weigh evidence contrary to summary judgment standards. *Finn v. Nationwide Agribusiness Ins. Co.*, 3d Dist. Allen No. 1-02-80, 2003-Ohio-4233, ¶ 39.

{¶23} Under the facts in the record, we find that Pirozzoli has failed to meet his burden regarding the assault, battery and theft counts as these claims present a question of credibility that should not be resolved on summary judgment.

{¶24} We find that the trial court erred in granting summary judgment as to the assault, battery and theft counts and Allen's assignment of error is sustained as to those counts.

IV. Punitive Damages

{¶25} Finally, Pirozzoli moved for summary judgment on Allen's claims in the complaint for punitive damages and attorney fees. Allen argues that summary judgment on the issue of punitive damages was inappropriate. Considering the detailed recounting of the alleged assault, battery and theft incident provided by Allen in his deposition we find no evidence of actual malice that would support a punitive damages claim. The Ohio Supreme Court in *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), defined "actual malice" in pertinent part as "a conscious disregard for the right and safety of other persons that has a great probability of causing substantial harm." In his deposition, Allen described Pirozzoli striking him as follows: "[Pirozzoli] comes down

with his right hand right across my face and takes my camera." We cannot say that this description of the incident supports a cognizable claim of actual malice as defined above.

{¶26} Allen's sole assignment of error is sustained in part, and overruled in part.

{¶27} The judgment of the trial court is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court 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.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
PATRICIA A. BLACKMON, J., CONCUR