

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JAMES NICE

C.A. No. 30173

Appellant

v.

CITY OF AKRON, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CA-2020-07-1921

Appellees

DECISION AND JOURNAL ENTRY

Dated: June 30, 2023

SUTTON, Presiding Judge.

{¶1} Plaintiff-Appellant, James Nice, appeals from the judgment of the Summit County Court of Common Pleas, awarding summary judgment to Defendants-Appellees, Daniel Horrigan, Mayor of the City of Akron, Kenneth Ball, a former Chief of the Akron Police Department, and the City of Akron. This Court affirms.

I.

Relevant Background

{¶2} This appeal arises from a series of events that occurred after J. Nice, Mr. Nice’s nephew, made allegations to City officials regarding Mr. Nice’s use of racist language to describe his direct supervisor, title fraud, and sexual misconduct toward M.S., a female subordinate. At the time J. Nice made these allegations, Mr. Nice was employed as the Chief of the Akron Police Department. After learning of the allegations, Mayor Horrigan instructed Mr. Nice to come to his office, the next day, or resign. Mr. Nice chose the latter and resigned on his own accord. Mayor

Horrigan accepted Mr. Nice's resignation, appointed Mr. Ball as interim Chief of Police, and held a press conference regarding the same. At the press conference, Mayor Horrigan stated:

I requested [Mr. Nice] resign, citing evidence of conduct unbecoming of an officer, including making derogatory statements about fellow officers, inappropriate contact with a City employee, and allegations of potential criminal misconduct relating to an ongoing criminal case involving his nephew [J. Nice].

Subsequent to Mayor Horrigan's press conference, City of Akron officials confirmed to the Akron Beacon Journal the specific word Mr. Nice used to describe his direct supervisor.

{¶3} The Summit County Prosecutor's Office appointed Matthew Meyer, an Assistant Cuyahoga County Prosecutor, to investigate and prosecute any possible criminal offenses committed by Mr. Nice. As part of the investigation, Prosecutor Meyer requested Mr. Ball create a summary, or synopsis, regarding allegations of sexual assault because Mr. Ball had previously spoken with Mr. Nice's alleged victim. Mr. Ball complied with this directive and provided the synopsis to Prosecutor Meyer.

{¶4} Mr. Nice filed a civil complaint against: (1) Mayor Horrigan; (2) Mr. Ball; and (3) the City of Akron. In his complaint, Mr. Nice alleged claims for defamation and defamation per se, false light-invasion of privacy, abuse of process, and civil liability for criminal acts. Mayor Horrigan, Mr. Ball, and the City of Akron filed motions for summary judgment and Mr. Nice filed briefs in opposition. Based upon arguments in Mr. Nice's brief in opposition pertaining to Mr. Ball, Mr. Ball also filed a supplemental motion for summary judgment. Mr. Nice filed a response in opposition. At the oral argument on the motions, Mr. Nice dismissed his claim for civil liability for criminal acts against all defendants.

{¶5} The trial court awarded summary judgment to Mayor Horrigan, Mr. Ball, and the City of Akron on all remaining claims. In its order, the trial court stated:

It was [] stipulated that at all times relevant the plaintiff, James Nice, prior to his resignation, was [P]olice [C]hief of the City of Akron. The defendant, Daniel Horrigan, was Mayor of the City of Akron and the defendant, Kenneth Ball, was Deputy Chief of the Akron Police Department, and became Interim Police Chief upon Mr. Nice's resignation.

It was further stipulated that in those capacities, [Mr.] Nice, [Mayor] Horrigan and [Mr.] Ball were public officials.

It was further stipulated that the sovereign immunity statute applied to the claimed actions of the defendants. Accordingly, the exceptions to sovereign immunity became the focus: Was the conduct of the defendant or defendant[s] or both done with malicious purpose, in bad faith, or in a wonton or reckless manner?

Also because the defendants, [Mayor] Horrigan and [Mr.] Ball were public officials, at the time when statements were attributed to them, were said statements protected by a privilege and was that privilege absolute and/or qualified.

Kenneth Ball

Mr. Ball was asked by Matthew Meyer, special prosecutor assigned to investigate Mr. Nice, to submit a synopsis of potential criminal conduct. The synopsis included allegations of inappropriate sexual conduct with a subordinate female officer.

* * *

What was sent to the special prosecutor was necessary for a full and proper investigation. The synopsis was protected by absolute privilege.

* * *

As it pertains to Mr. Ball, the cause of action for false light is tied to the defamation claim and fails for the reasons stated herein.

* * *

Mayor Horrigan

First, the abuse of process claim. [Mr. Nice] argues that an ulterior motive was demonstrated, at least to create a material issue, when Mr. Nice made a complaint about Mayor Horrigan to City Council, and that numerous agencies had investigated [Mr.] Nice without charges. A review of the file does not give rise to material issues of fact in controversy regarding the investigation. The actions taken were appropriate and the referral to the special prosecutor essential.

As to the defamation and false light claims, the Mayor is protected by sovereign immunity and none of the exceptions apply. Disagreement between parties or even

dislike, does not rise to the level of malice or reckless or wanton behavior. * * *
Accordingly, the [c]ourt rules in favor of the defendants on all claims.

* * *

{¶6} Mr. Nice now appeals raising five assignments of error for our review. Initially, we note Mr. Nice has not challenged the trial court's award of summary judgment to the City of Akron. Mr. Nice's arguments only concern the award of summary judgment to Mayor Horrigan and Mr. Ball. As such, this Court will limit our review of the trial court's award of summary judgment to these parties. *See* App.R. 16(A)(7). We group and take certain assignments of error out of order to better facilitate our review and discussion.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN HOLDING THAT [] [MR.] BALL'S SYNOPSIS WAS ENTITLED TO ABSOLUTE PRIVILEGE.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ACTED AS A FINDER OF FACT AND ERRED WHEN GRANTING SUMMARY JUDGMENT TO [MR.] BALL AND DETERMINING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO [MR.] NICE'S DEFAMATION CLAIM AGAINST [MR.] BALL.

{¶7} In his first and second assignments of error, Mr. Nice argues the trial court erred in determining Mr. Ball's synopsis was entitled to absolute privilege and no genuine issue of material fact existed as to Mr. Nice's defamation claim. Specifically, Mr. Nice challenges two statements in Mr. Ball's synopsis, asserting they are not related to Prosecutor Meyer's investigation into allegations against Mr. Nice. These statements are:

* * *

M.S. also claimed that, during that encounter [in San Diego] and unknown to her, [Mr.] Nice took compromising photographs of her. [M.S.] said that [Mr. Nice] used these pictures to leverage future physical interactions.

* * *

M.S. said that she was horrified that the events would be characterized as an affair when every instance had resulted from fear of bullying – not a willful participation.

* * *

{¶8} Appellate review of an award of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is appropriate under Civ.R. 56 when: (1) no genuine issue as to any 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 nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977), citing Civ.R. 56(C). A court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992). A trial court does not have the liberty to choose among reasonable inferences in the context of summary judgment, and all competing inferences and questions of credibility must be resolved in the nonmoving party's favor. *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218 (1988).

{¶9} The Supreme Court of Ohio has set forth the nature of this burden-shifting paradigm as follows:

[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears 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 the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which

affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then 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 nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

Dresher v. Burt, 75 Ohio St.3d 280, 293 (1996).

{¶10} “In Ohio, 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.’” *Sturdevant v. Likley*, 9th Dist. Medina No. 12CA0024-M, 2013-Ohio-987, ¶ 7, quoting *Jackson v. City of Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). However, “[p]rivilege in the law of defamation recognizes certain communications as not being within the rules imposing liability for defamation. A privileged communication is one which, except for the occasion on which or the circumstances under which it is made, would be defamatory, and actionable.” *Costanzo v. Gaul*, 62 Ohio St.2d 106, 108 (1980).

{¶11} “Privileged communications are divided into two general classes those which are absolutely privileged, and those which are qualifiedly or conditionally privileged.” *Id.* “The basic difference between the two as generally stated is that complete protection is afforded by absolute privilege, whereas a qualified or conditional privilege affords protection only in the absence of ill motive or malice in fact.” *Id.* at 108-109.

{¶12} Indeed, “[a]n affidavit, statement or other information provided to a prosecuting attorney, reporting the actual or possible commission of a crime, is part of a judicial proceeding.” *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497 (1994), syllabus. “The informant is entitled to

an absolute privilege against civil liability for statements made which bear some reasonable relation to the activity reported.” *Id.* The *Sweeney* Court further explained:

As a matter of public policy, extension of an absolute privilege under such circumstances will encourage the reporting of criminal activity by removing any threat of reprisal in the form of civil liability. This, in turn, will aid in the proper investigation of criminal activity and the prosecution of those responsible for the crime.

Id. at 505.

{¶13} Here, Prosecutor Meyer attested, in 2018, he served as a Special Assistant Summit County Prosecutor and, in that role, investigated and prosecuted criminal offenses committed by Mr. Nice. Further, Prosecutor Meyer attested “[o]ne of the matters [] [he] investigated was information that [Mr.] Nice sexually assaulted a female subordinate.” Prosecutor Meyer stated:

As part of my investigation of that matter, [Mr.] Ball informed me that he communicated and met with the female subordinate on Sunday, August 27, 2017. In the period of late 2017 or early 2018, I directed [Mr.] Ball to prepare, among other things, a summary of his communications, and the meeting with the female subordinate on Sunday, August 27, 2017.

In the synopsis regarding his August 27, 2017 meeting with M.S., Mr. Ball provided the requested information to Prosecutor Meyer for use in the investigation. Thus, in accordance with *Sweeney*, *supra*, Mr. Ball’s synopsis is absolutely privileged, as a matter of law, and cannot be used against him in a civil law suit. Therefore, the trial court did not err in granting summary judgment in favor of Mr. Ball on the defamation claim.

{¶14} Accordingly, Mr. Nice’s first and second assignments of error are overruled.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON [MR.] NICE’S CLAIMS FOR INVASION OF PRIVACY-FALSE LIGHT.

{¶15} In his fifth assignment of error, Mr. Nice argues the trial court erred in granting summary judgment in favor of Mayor Horrigan and Mr. Ball on his claims for invasion of privacy and false light. Importantly, instead of making an independent argument in his fifth assignment of error regarding invasion of privacy and false light, Mr. Nice “incorporate[d] the arguments made above” regarding his claims for defamation against Mayor Horrigan and Mr. Ball.

{¶16} Pursuant to App.R. 12(A)(2) and App.R. 16(A)(7), an appellant is required to set forth a separate argument in support of each assigned error. *State v. Calhoun*, 9th Dist. Summit No. 29604, 2021-Ohio-1713, ¶ 24. As such, an appellant “cannot ‘incorporate the arguments contained in the other assignments of error to support a different assignment of error.’” *Id.*, quoting *State ex rel. Midview Local School Dist. Bd. of Edn. v. Ohio School Facilities Comm.*, 9th Dist. Lorain No. 16CA010991, 2017-Ohio-6928, ¶ 29. In so doing, Mr. Nice “improperly asks this Court to extrapolate and apply [his] argument in a prior assignment of error.” *State v. Gales*, 9th Dist. Summit No. 29316, 2022-Ohio-776, ¶ 35, quoting *State ex rel. Midview Local School Dist. Bd. of Edn.* at ¶ 29. This Court declines to do so.

{¶17} Accordingly, Mr. Nice’s fifth assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED WHEN DETERMINING THAT [MAYOR] HARRIGAN WAS PROTECTED BY SOVEREIGN IMMUNITY WHEN PUBLISHING ALLEGATIONS THAT [MR.] NICE HAD USED RACIST LANGUAGE.

{¶18} In his third assignment of error, Mr. Nice argues the trial court erred in determining Mayor Horrigan was protected by sovereign immunity when publishing allegations regarding Mr. Nice’s alleged use of racist language. Specifically, Mr. Nice argues given Mayor Horrigan’s

“admission that he ‘questioned the credibility’ of the allegations against [Mr.] Nice, his complete failure to investigate creates a genuine issue of material fact as to his recklessness.” Mr. Nice makes this argument regarding Mayor Horrigan’s alleged *reckless* failure to adequately investigate the allegations for the first time on appeal.

{¶19} As a preliminary matter, “[a]rguments that were not raised in the trial court cannot be raised for the first time on appeal.” *JPMorgan Chase Bank, N.A. v. Burden*, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶ 12. Accordingly, this Court will not consider Mr. Nice’s argument that Mayor Horrigan *recklessly* failed to adequately investigate J. Nice’s allegations.

{¶20} However, Mr. Nice also argues Mayor Horrigan acted with actual malice in failing to further investigate the allegations, because there was reason to doubt the credibility of J. Nice’s statements regarding Mr. Nice’s use of racist language. Further, Mr. Nice argues Mayor Horrigan’s published statements amount to defamation per se. We will now address these two arguments. In his brief in opposition to summary judgment and his merit brief on appeal, Mr. Nice characterizes Mayor Horrigan as an “employee” of the City of Akron. As such, our analysis below, regarding immunities to employees of political subdivisions, reflects Mr. Nice’s arguments and the City’s responsive arguments on this issue.

{¶21} Mr. Nice’s third assignment of error also challenges an award of summary judgment. Thus, we examine the record to determine whether: (1) Mayor Horrigan met his *Dresher* burden by demonstrating there were no genuine issues of material fact for trial; (2) Mr. Nice met his reciprocal *Dresher* burden; and (3) the evidence supported that reasonable minds could only come to one conclusion in Mayor Horrigan’s favor. *Temple*, 50 Ohio St.2d at 327.

Actual Malice

{¶22} Ohio’s Political Subdivision Tort Liability Act, which governs political subdivision liability and immunity, is codified in R.C. 2744.01 et seq. *McNamara v. City of Rittman*, 125 Ohio App.3d 33, 43 (9th Dist.1998). The general rule is that political subdivisions are immune from tort liability. *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 46 (9th Dist.2002). Further, R.C. 2744.03(A)(6) prescribes immunities that an employee of a political subdivision may assert to establish nonliability in a civil action for damages allegedly caused by an act or omission in connection with a governmental or proprietary function. *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, ¶ 7. Relevant to this case is R.C. 2744.03(A)(6)(b), which provides that an employee is immune from liability unless his “acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner * * *.”

{¶23} “One acts with a malicious purpose if one willfully and intentionally acts with a purpose to cause harm.” *Moss v. Lorain Cty. Bd. of Mental Retardation*, 185 Ohio App.3d 395, 2009-Ohio-6931, ¶ 19 (9th Dist.). “The term ‘bad faith’ embraces more than bad judgment or negligence; it is conduct that involves a ‘dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.’” *Thomas v. Bauschlinger*, 9th Dist. Summit No. 26485, 2013-Ohio-1164, ¶ 22, quoting *Garvey v. Vermillion*, 9th Dist. Lorain No. 10CA009873, 2012-Ohio-1258, ¶ 23. “Wanton misconduct is the failure to exercise any care toward those whom a duty of care is owed in circumstances in which there is great probability that harm will result.” *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, paragraph three of the syllabus. Finally, “[r]eckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.” *Id.* at paragraph four of the syllabus. To be reckless, the actor must be conscious that his conduct will in

all probability result in injury, i.e., there must be a perverse disregard of a known risk. *Chunyo v. Gauntner*, 9th Dist. Summit No. 28346, 2017-Ohio-5555, ¶ 9; *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, paragraph three of the syllabus.

{¶24} Here, Mr. Nice bases his entire actual malice argument on the assertion that Mayor Horrigan questioned the credibility of J. Nice's allegations regarding Mr. Nice using racist language, but failed to further investigate due to ill-motive or will. The record, however, does not support Mr. Nice's claim. During his deposition, Mayor Horrigan was asked the following questions and responded accordingly:

Q. When you discussed with Ken Ball on August 26th the allegation that Jim Nice admitted to using the N-word, [] did Ken Ball indicate to you that this information originally came from [J.] Nice?

A. I don't recall [] where he indicated he had heard that from, except to say [] or reaffirm the fact that in a subsequent conversation with [Mr. Nice] that [Mr. Nice] admitted using [racist language].

Q. And at that time you were not aware that J. Nice had anything to do with that supposed admission?

A. No.

Q. Did you subsequently learn that?

A. Yes.

Q. When?

A. I don't recall exactly. Probably over the next couple of days, like, Saturday, Sunday.

Q. When you learned this information, did it give you cause to question the credibility of the information that was conveyed originally by [J.] Nice?

* * *

A. Yeah. I questioned the credibility of anything that comes-especially something like that that's made against the senior member of the Akron Police Department. Which is why I [stated] to [Mr. Nice] [] report to my office or turn in your

resignation. I mean, this is serious allegations. And * * * since the fact that [Mr. Nice] had reported, hey, I may have used that, or I used it and there may be a tape, yeah, it gave me a lot of concern[.] [I]t led to [Mr. Nice] resigning. I mean, [Mr. Nice] chose to resign as opposed to report to my office and refute the allegations.

* * *

{¶25} In spite of Mr. Nice’s contention, Mayor Horrigan did not specifically state he questioned the credibility of J. Nice’s allegations due to J. Nice’s character or criminal history. Instead, Mayor Horrigan indicated he would question any allegation of this nature being made against the “senior member of the Akron Police Department[,]” and that is why he asked Mr. Nice to report to his office or resign. Moreover, Mayor Horrigan did not specifically know the time-frame in which he learned J. Nice reported these allegations. Additionally, Mr. Ball reported to Mayor Horrigan that Mr. Nice admitted, during a telephone conversation, to using the racist language. Mr. Nice then chose to resign instead of meeting with Mayor Horrigan to discuss and/or refute the allegations. These facts support the trial court’s conclusion that Mayor Horrigan’s actions, with respect to any publication referencing Mr. Nice’s use of racist language, did not fall within an exception to overcome statutory immunity.

{¶26} Further, Mr. Nice has not met his reciprocal *Dresher* burden to set forth specific facts showing there is a genuine issue for trial regarding whether Mayor Horrigan acted with malicious purpose, in bad faith, or in a wanton or reckless manner with regard to an investigation into Mr. Nice’s use of racist language. *See* R.C. 2744.03(A)(6)(b). At the press conference, Mayor Horrigan only referenced derogatory remarks, and did not use the words racial, racist, or state the exact word used by Mr. Nice. Although City officials later confirmed the exact word used by Mr. Nice, Mayor Horrigan received information, through Mr. Ball, that Mr. Nice admitted to using the word. “While issues regarding malice, bad faith, recklessness, and wanton conduct are generally questions left to the jury to resolve, summary judgment is appropriate when a plaintiff fails to

present sufficient facts to rebut the presumption of immunity.” *Szefcyk v. Kucirek*, 9th Dist. Lorain No. 15CA010742, 2016-Ohio-171, ¶ 16, citing *Shadoan v. Summit Cty. Children Servs. Bd.*, 9th Dist. Summit No. 21486, 2003-Ohio-5775, ¶ 14-15 (affirming summary judgment and holding that the appellant failed to set forth sufficient facts to rebut the presumption of immunity under Section 2744.03(A)(6)). “There should be no doubt that resting on mere allegations against a motion for summary judgment and eschewing the mandate of Civ.R. 56(E) is insufficient.” *King v. K.R. Wilson Co.*, 8 Ohio St.3d 9, 11 (1983).

{¶27} Thus, the trial court did not err in determining Mayor Horrigan is entitled to immunity on this claim.

Defamation per se

{¶28} Lastly, Mr. Nice also contends the publication of false allegations regarding his use of racist language amounts to defamation per se. Mr. Nice, however, failed to develop this argument with any legal analysis or citation to the record. “Where an appellant fails to develop an argument in support of his assignment of error, this Court will not create one for him.” *State v. Franks*, 9th Dist. Summit No. 28533, 2017-Ohio-7045, ¶ 16. *See State v. Harmon*, 9th Dist. Summit No. 26426, 2013-Ohio-2319, ¶ 6, citing App.R. 16(A)(7) and *Cardone*, 1998 WL 224934, at *8. As previously stated, “[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt’s duty to root it out.” *Cardone* at *8.

{¶29} Accordingly, Mr. Nice’s third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

**THE TRIAL COURT ERRED WHEN, IN ANALYZING [MR.] NICE’S
ABUSE OF PROCESS CLAIM, IT DETERMINED THAT NO GENUINE**

ISSUE OF MATERIAL FACT EXISTED PRECLUDING THE GRANT OF SUMMARY JUDGMENT.

{¶30} In his fourth assignment of error, Mr. Nice challenges the trial court’s granting of summary judgment in favor of Mayor Horrigan on his abuse of process claim. Thus, we examine the record to determine whether: (1) Mayor Horrigan met his *Dresher* burden by demonstrating there were no genuine issues of material fact for trial; (2) Mr. Nice met his reciprocal *Dresher* burden; and (3) the evidence supported that reasonable minds could only come to one conclusion in Mayor Horrigan’s favor. *Temple*, 50 Ohio St.2d at 327.

{¶31} “The three elements of the tort of abuse of process are: (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 (1994), paragraph one of the syllabus. In *Kremer v. Cox*, 114 Ohio App.3d 41, 51-52 (9th Dist.1996), this Court explained the differences between the torts of abuse of process and malicious prosecution, stating:

The tort of abuse of process arises when one maliciously misuses legal process to accomplish some purpose not warranted by law. The key to the tort is the purpose for which process is used once it is issued. Abuse of process does not lie for the wrongful bringing of an action, but for the improper use, or ‘abuse,’ of process. *
* * *Thus, if one uses process properly, but with a malicious motive, there is no abuse of process, though a claim for malicious prosecution may lie[.]* * * * The tortious character of the defendant’s conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner[.]

(Emphasis added.) (Citations omitted.) “Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court itself is powerless to order.” *Kremer* at 52, quoting *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 271 (1996).

{¶32} Here, Mr. Nice claims Mayor Horrigan is liable for abuse of process because Mayor Horrigan referred the investigation for allegations made against Mr. Nice to a special prosecutor for an “ulterior purpose[.]” In *Kremer* at 52, this Court stated:

Kremer contends that, by including Kremer in his lawsuit, Cox committed a tort. Kremer’s claim was premised solely on the filing of Cox’s complaint itself, which Kremer claims was done without probable cause and for nefarious purposes. Such a rationale may support a claim for malicious prosecution, but cannot provide a sufficient foundation for an abuse of process action.

Similar to the facts in *Kremer, supra*, Mr. Nice’s claim for abuse of process fails as a matter of law. Mayor Horrigan did not file a legal proceeding wherein he named Mr. Nice as a defendant, but, rather, referred a matter for further investigation to a special prosecutor. The record reveals Mayor Horrigan did so on the advice of counsel. Further, the record reveals Mayor Horrigan did not involve himself in the investigation, but left it solely to the discretion of the special prosecutor. Thus, as a matter of law, Mr. Nice is not entitled to relief for the mere referral of a possible criminal matter to a special prosecutor for investigatory purposes, even for an alleged “ulterior purpose.”

{¶33} Accordingly, Mr. Nice’s fourth assignment of error is overruled.

III.

{¶34} Mr. Nice’s five assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETTY SUTTON
FOR THE COURT

HENSAL, J.
CONCURS.

CARR, J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

SCOTT T. PERLMUTER, Attorney at Law, for Appellant.

EVE V. BELFANCE, Director of Law, and MICHAEL J. DEFIBAUGH, Assistant Director of Law, for Appellee.

JOHN CHRISTOPHER REECE, Deputy Director of Law, and KIRSTEN L. SMITH, Assistant Director of Law, for Appellee.