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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



DIVISION ONE  
FILED: 06-10-2010  
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**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

SANDRA K. HIGGINS and DENNIS D. ) 1 CA-CV 09-0458  
HIGGINS, )  
) DEPARTMENT C  
Plaintiffs/Appellants, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules  
TIFFANY & BOSCO, P.A.; ROBERT A. ) of Civil Appellate  
ROYAL; CHAD HESTER; JAMES WARNE, ) Procedure)  
III; WARNE INVESTMENTS, LTD., an )  
Arizona corporation, )  
)  
Defendants/Appellees. )

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Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-052211

The Honorable Brian R. Hauser, Judge

**AFFIRMED**

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Dennis Higgins  
Sandra Higgins  
Plaintiffs/Appellants In Propria Persona

Scottsdale

Mariscal, Weeks, McIntyre, & Friedlander, P.A.  
by Timothy J. Thomason  
Anne L. Tiffen  
Attorneys for Defendants/Appellees

Phoenix

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**I R V I N E**, Presiding Judge

¶1 Plaintiffs/Appellants Sandra and Dennis Higgins appeal the trial court's grant of summary judgment in favor of Defendants/Appellees Tiffany & Bosco, P.A., Robert Royal, Chad Hester, James Warne, III, and Warne Investments, Ltd. For the following reasons, we affirm.

#### I. FACTS AND PROCEDURAL HISTORY

¶2 This case involves an earlier successor liability action brought by Defendant/Appellee Warne Investments, Ltd. ("Warne Investments") against Plaintiffs/Appellants Sandra and Dennis Higgins ("the Higgins"). Defendants/Appellees Tiffany & Bosco, Robert Royal, and Chad Hester represented Warne Investments in the action. Warne Investments obtained a judgment of \$155,000 plus interest against the Higgins. The court dismissed the claims against Dennis but stated that the judgment against Sandra would be enforceable against the Higgins' community property. Higgins appealed.

¶3 On November 6, 2006, Appellees sought and obtained a Writ of General Execution to conduct a Sheriff's sale of the Higgins' primary residence, which the Higgins hold in joint tenancy. A copy of the primary residence deed was attached to the writ. A sale of the residence was scheduled for January 2007. Prior to the sale, the Higgins asked the Sheriff not to conduct the sale.

¶4 Appellees also filed a request to enjoin the sale, stating that they potentially reached an agreement with Wells Fargo whereby Wells Fargo agreed to buy out Warne's judgment on the Higgins' property. The attorneys were uncertain whether they could collect on Dennis' one-half interest in the residence and decided not to proceed. Although no sale was pending, the Higgins successfully moved to enjoin the sale. On April 15, 2008, this court affirmed the judgment regarding Sandra Higgins' personal liability under the trust fund doctrine but reversed her personal liability for fraudulent transfer and successor liability.

¶5 In June 2008, the Higgins filed a complaint against Appellees for abuse of process, claiming that Appellees intentionally misused court processes for improper purposes, thus causing them harm. Appellees filed a motion for summary judgment in November 2008. The trial court granted Appellees' summary judgment motion, ruling that their motives in executing the judgment were immaterial and that there was no genuine issue of material fact.

¶6 While the motion for summary judgment was pending, the Higgins filed a Motion to Compel Disclosure. Appellees responded that they complied with Rule 26.1 by providing the Higgins with all non-privileged documents subject to disclosure. The Higgins also moved to amend the complaint to add: Count II, alleged

violations of the Rules of Professional Conduct; Count III, an alleged violation of Rule 11 of the Arizona Rules of Civil Procedure; Count IV, alleged intentional and negligent infliction of emotional distress and Count V, a malicious prosecution claim including James Warne III, owner of Warne Investments, who was not a named party in the Higgins' original complaint. The trial court denied the motion, permitting only the addition of the malicious prosecution claim against James Warne III. The court later dismissed the claim, finding that James Warne III was not a party to the underlying litigation. The trial court subsequently granted Appellees' Motion for Summary Judgment. The Higgins timely appealed.

## II. DISCUSSION

¶7 Summary judgment may be granted when "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Ariz.R.Civ.P. 56(c). A motion for summary judgment should be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim. . . ." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In reviewing a grant of summary judgment, "we view the facts in the light most favorable to the party against whom judgment was entered." *Great*

*Am. Mortgage, Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 124, 938 P.2d 1124, 1125 (App. 1997). We determine de novo whether any genuine issues of material fact exist and whether the superior court erred in applying the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). On appeal, we will uphold the trial court's decision if it is correct for any reason, even if the reason was not considered by the trial court. See *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986).

#### A. Abuse of Process

¶18 The basis for the Higgins' abuse of process claim was that Appellees impermissibly sought to sell Dennis Higgins' one-half interest in the residence when the judgment was only against Sandra Higgins' one-half interest in the residence as well as the Higgins' community property interest. The Higgins argue that the trial court erred in ruling that Appellees' "utilization of standard process even if [Appellees] used the process as leverage against [the Higgins] rather than it's legal intended purpose, that such consideration was at most incidental to the proper purpose of execution[.]" Therefore, the Higgins claim that the Writ of Execution was an abuse of process as a matter of law.

¶19 "The essential elements of the tort of abuse of process are an ulterior purpose and a wilful act in the use of

judicial process not proper in the regular conduct of the proceeding." *Bird v. Rothman*, 128 Ariz. 599, 602, 627 P.2d 1097, 1100 (App. 1981). "[T]here is no liability when the defendant has done nothing more than legitimately utilize the process for its authorized purposes, even though with bad intentions." *Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d 876, 881 (App. 1982). In other words, the Higgins must show that an improper purpose was Appellees' primary motive for issuing the Writ of Execution and that they did not intend to collect the judgment.

¶10 It is undisputed that Appellees sought to collect the judgment, which they were entitled to do. The Higgins admitted as much in the following excerpts from their statements in the record: "[Appellees'] use and manipulation of the legal process to collect on that judgment, by whatever means [they] determined appropriate;" Appellees sought an injunction to "prevent Warne from wrongfully attempting to enforce his judgment." Even in their opening brief, the Higgins argue that Appellees used "whatever it took to collect the judgment . . . ." Also in their opening brief, the Higgins concede that "[w]e did not dispute that Warne had a judgment and the right to collect on the judgment using all legal means allowed to secure collection."

¶11 Even if Appellees had bad intentions in issuing the writ, which they argue they did not, there is "no liability when the defendant has done nothing more than legitimately utilize

the process for its authorized purposes." *Nienstedt*, 133 Ariz. at 353, 651 Ariz. 881. Therefore, summary judgment was appropriate.

#### B. Discovery & Denial of Motion to Compel Disclosure

¶12 The Higgins argue that the trial court erred by granting Appellees' Motion for Summary Judgment before discovery was conducted. They claim that it limited the availability of discovery to which they were entitled and that they were entitled to oral argument before the trial court ruled on the motion. The Higgins also argue that the trial court erred by not granting their motion to extend time to respond to Appellees' summary judgment motion.

¶13 The Higgins claim that discovery was needed "at the very least" to determine whether Robert Royal's Declaration in Appellees' Motion for Summary Judgment that "[w]e never intended to accomplish some purpose other than attempting to collect on the judgment for the benefit of our client" was truthful. They "wish to obtain [Appellees'] files to examine the nature and timing of their legal research on the matter of the judgment; and their communications within the firm and with their client with respect to their proceedings against [the Higgins'] joint tenancy property." The Higgins argue that "it was harmful to abbreviate discovery where motive and intent, playing an important role, was in the hands of the defendants."

¶14 A trial court's ruling on discovery issues is reviewed for abuse of discretion. *Brown v. Superior Court*, 137 Ariz. 327, 331, 670 P.2d 725, 729 (App. 1983). A trial court's denial of a motion to extend time to respond to a summary judgment motion is also reviewed for abuse of discretion. See *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993). We note that the trial court was not required to allow oral argument prior to ruling on the summary judgment motion.

¶15 In this case, the trial court did not abuse its discretion by denying the Higgins' request for additional time to respond to Appellees' summary judgment motion. The Higgins did not comply with Rule 56(f) of the Arizona Rules of Civil Procedure, which requires the requesting party to file an affidavit describing a number of details, including what the evidence will reveal, the location of the evidence, and how the evidence will be obtained. Ariz.R.Civ.P. 56. This court has previously held that denying Rule 56(f) relief because the requesting party failed to file an affidavit is within the discretion of the trial court. See *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 281-82, 812 P.2d 1096, 1099-1100 (App. 1991).

¶16 Moreover, the trial court did not abuse its discretion by granting Appellees' summary judgment motion. The Higgins sought evidence based on speculation. The "communications"



sought in the Higgins' Motion to Compel included documents protected by attorney-client privilege. They failed to specify what, if any, evidence would be found to support the tort claim of abuse of process. They conceded that Appellees sought to collect the judgment by issuing the Writ of Execution. Therefore, the trial court did not err by granting Appellees' Motion for Summary Judgment.

### C. Disputed Facts

¶17 The Higgins claim that the trial court erred by granting Appellees' Motion for Summary Judgment because disputed facts existed regarding Appellees' motives for enforcing the judgment against the Higgins. Moreover, the Higgins argue that the trial court erred by not addressing all of the their evidence and by assuming the jury's role as the finder of fact. A jury trial was unnecessary since the court properly determined there were no disputed issues of material fact.

¶18 The Higgins assert that the record reflects several disputed facts including that: (1) Warne Investment considered executing on the judgment against Higgins' residence; (2) Appellees' "statement that they were advised by the Higgins counsel that the Higgins residence was held in joint tenancy is disingenuous and does not release them from their legal duty" because the deed to the property "is clearly worded and simple to read;" (3) Appellee Tiffany & Bosco's claim that they

researched whether or not they could execute the writ on the residence after the judgment is self-serving and deceptive because if they conducted research they would know about three statutory requirements that Appellees were required to comply with prior to issuing the writ; and (4) Appellees' statement that "[n]one of the steps that Tiffany & Bosco took were taken for any purpose other than the legitimate purpose of collection on the judgment." The Higgins claim they were entitled to discover if Appellees were "trying to coerce us into settlement before the appeal process [was] completed, conspiring to get around the homestead laws, or causing us financial or emotional duress."

¶19 We agree with the trial court that these allegations are no more than speculative. Whether Appellees no more than "considered" issuing and enforcing the Writ is irrelevant and undisputed because they did more than "consider" it. They issued and enforced it. Whether Tiffany & Bosco researched and understood the nature of the joint tenancy is immaterial to the abuse of process claim. Appellees' actions do not rise to the level that they "could not logically be explained without reference to the [Appellees'] improper motives." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 259, ¶ 19, 92 P.3d 882, 889 (App. 2004). Finally, the Higgins' claim that Appellees were trying to "coerce" them to settle is immaterial to an abuse of

process claim. See *Bird*, 128 Ariz. at 602, 627 P.2d at 1100 (“An ulterior purpose alone cannot constitute abuse of process. There was no proof of an improper use of judicial process here, as the purpose of settlement is includable in the goals of proper process.”). Therefore, summary judgment was proper.

#### D. Amended Complaint

¶20 The Higgins argue that the trial court erred by limiting their Motion for Leave to Amend Complaint. They also claim that the court erred by granting Appellees’ Motion to Strike Counts II, III, IV, and V of their First Amended Complaint, the Response, and the Reply. The Higgins argue that the court erred in finding that James Warne III, an officer of Warne Investment Ltd., could not have personally committed the tort of malicious prosecution because he was not personally a party to the underlying litigation.

¶21 The Higgins moved to add these claims while Appellees’ motion for summary judgment was pending. The trial court did not abuse its discretion in denying that the addition of all counts except the malicious prosecution claim be denied. The comments to Rule 11 of the Arizona Rules of Civil Procedure and Rule 4 of the Arizona Rules of Professional Conduct state that violations do not give rise to private causes of action.

¶22 Moreover, the Higgins claim that Appellees intentionally and negligently inflicted emotional distress by

issuing and attempting to execute the Writ that was properly denied. Parties to litigation are granted an absolute privilege from tort liability with the exception of abuse of process and malicious prosecution claims. See *Green Acres v. London*, 141 Ariz. 609, 613, 688 P.2d 617, 621 (1984) (holding that an absolute privilege against suit for tort liability exists for judicial participants).

¶23 Finally, the trial court did not err by granting Appellees' motion to strike the malicious prosecution claim against James Warne III. He was not a party to the underlying action, a required element of a malicious prosecution claim. See *Carroll v. Kalar*, 112 Ariz. 595, 596, 545 P.2d 411, 412 (Ariz. 1976).

### III. CONCLUSION

¶24 For the foregoing reasons, we affirm.

/s/

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PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

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MICHAEL J. BROWN, Judge

/s/

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DONN KESSLER, Judge