

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TODD M. CELLEY,

Plaintiff-Appellant,

v

KATHLEEN STEVENS,

Defendant-Appellee,

and

CITY OF ANN ARBOR,

Defendant.

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UNPUBLISHED

January 27, 2004

No. 243114

Washtenaw Circuit Court

LC No. 01-000425-NO

Before: O’Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s decision to grant defendant’s motion for summary disposition. We affirm in part and reverse in part.

**I. Facts and Proceedings**

Plaintiff married defendant on May 6, 2000. Shortly thereafter, their relationship deteriorated. According to plaintiff, when he refused to leave the marital home, defendant created a “phony story” about domestic violence, which eventually formed the basis for plaintiff’s claims. On July 3, 2000, defendant sought treatment in the emergency room at Saline Community Hospital, alleging that she had been assaulted. She also called the Ann Arbor police department and informed the police that plaintiff had assaulted her. Plaintiff was subsequently prosecuted for domestic violence and acquitted following a jury trial in October 2000.

In 2001, plaintiff filed a complaint against defendant and the City of Ann Arbor<sup>1</sup> in which he alleged that on July 3, 2000, defendant Stevens wrongfully filed a domestic assault charge

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<sup>1</sup> The trial court eventually dismissed plaintiff’s claim against the city of Ann Arbor because  
(continued...)

against him for which he faced criminal charges. Plaintiff's complaint asserted claims of negligence, defamation, intentional infliction of emotional distress, and malicious prosecution against defendant. With permission of the trial court, plaintiff subsequently amended his complaint to allege intentional interference with a business relationship and abuse of process.<sup>2</sup>

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court granted defendant's motion, dismissing plaintiff's claims with prejudice. This appeal followed.

## II. Standard of Review

We review the grant of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

## III. Analysis

Plaintiff first claims that the trial court erred in dismissing his defamation claim on the basis that defendant's reports of domestic assault were absolutely privileged. In part, we agree.

Statements made by a witness as part of a judicial proceeding are absolutely privileged. *Couch v Schultz*, 193 Mich App 292, 295; 483 NW2d 684 (1992). This privilege extends to all stages of the proceeding, *id.*, including providing information to police officers regarding criminal activity. *Hall v Pizza Hut of America, Inc.*, 153 Mich App 609, 619; 396 NW2d 809 (1986), citing *Shinglemeyer v Wright*, 124 Mich 230, 239-240; 82 NW 887 (1900). Accordingly, defendant's allegations of domestic violence made to Ann Arbor police officers cannot form the basis of a defamation claim by plaintiff.

This privilege does not extend, however, to the reports of domestic assault defendant made to individuals outside of the judicial process, as alleged in plaintiff's amended complaint. Moreover, defendant did not request summary disposition on plaintiff's claims that defendant defamed him to individuals other than law enforcement personnel. Accordingly, the trial court erred by dismissing all of plaintiff's claims of defamation on the basis of defendant's immunity as a witness. When evaluating claims of defamation, each allegedly false publication amounts to a separate cause of action, *Grist v Upjohn Co.*, 1 Mich App 72, 82; 134 NW2d 358 (1965), and, therefore, must be evaluated individually. We remand this matter to the trial court for reinstatement of plaintiff's remaining defamation claims that defendant has not yet challenged.

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(...continued)

plaintiff failed to attend a scheduling conference. Plaintiff has not appealed this decision, and this opinion is limited to discussing the trial court's decision to grant defendant Stevens' motion for summary disposition. Throughout the remainder of this opinion, "defendant" refers to defendant Stevens.

<sup>2</sup> In his amended complaint, plaintiff also added claims that defendant defamed him to other individuals. It is not clear from the record before us whether plaintiff added these claims with leave of the trial court.

Plaintiff next contends that the trial court erred in granting summary disposition to defendant on plaintiff's negligence claim. We disagree. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), citing *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993).

Here, the trial court concluded that plaintiff had not established the existence of a duty owed to him by defendant. Plaintiff argues that a fiduciary duty, including the duty not to make a false domestic violence allegation, arises out of the relationship between a husband and wife, and that the existence of such a duty supports his cause of action for negligence. We disagree. A fiduciary relationship arises "only when there is a reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another." *In re Jennings' Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952). Plaintiff's claim against defendant does not arise out of his placement of reliance upon defendant's judgment and advice, and, therefore, cannot be premised on the duty imposed in a fiduciary relationship. See *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999) (stating that relief is granted for breach of fiduciary relationship when the "position of influence has been acquired and abused, or when confidence has been reposed and betrayed").

The duty necessary to sustain a claim of negligence, however, is defined as "an obligation to perform to a specific standard of care toward another as recognized under the law." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998) (citation omitted). Here, plaintiff alleges that defendant had a duty not to make a false report of domestic violence and breached that duty, causing foreseeable harm. Examined closely, these allegations do not support a claim of negligence but merely restate plaintiff's defamation claims. See *id.* at 258-259; *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988), citing *St Paul Fire & Marine Ins Co v Littky*, 60 Mich App 375, 378-379; 230 NW2d 440 (1975) (stating that "[t]his Court is not bound by a party's choice of labels for his or her action because this would put form over substance"); see also *Teadt, supra* at 576-577. Accordingly, the trial court did not err by dismissing plaintiff's negligence claim.

Plaintiff next contends that the trial court erred in granting summary disposition to defendant on his claim of intentional infliction of emotional distress. We disagree. To sustain a claim of intentional infliction of emotional distress, a plaintiff must establish the following: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996), citing *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985); *Johnson v Wayne Co*, 213 Mich App 143, 161; 540 NW2d 66 (1995). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush, supra* at 234.

Plaintiff based his claim of intentional infliction of emotional distress on defendant's reports of domestic violence to the police. In light of our conclusion that these reports were absolutely privileged, we likewise conclude that the trial court properly granted defendant's motion for summary disposition on plaintiff's claim of intentional infliction of emotional distress. Additionally, we conclude that defendant's conduct was not sufficiently "extreme and

outrageous,” as a matter of law, to permit recovery. See *Teadt, supra* at 582. The conduct plaintiff complained of would not cause a member of the community to respond “Outrageous!” and would not be regarded as atrocious. *Id.* at 582-583.

Plaintiff also contends that the trial court erred in granting summary disposition to defendant on plaintiff’s malicious prosecution claim. We disagree. To prevail on a claim of malicious prosecution,

the plaintiff has the burden of proving: (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Matthews v Blue Cross Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998), citing *Rivers v Ex-Cell-O Corp*, 100 Mich App 824, 832; 300 NW2d 420 (1980), citing *Weiden v Weiden*, 246 Mich 347, 352; 224 NW 345 (1929).]

Moreover, a claim asserted “against a private person requires proof that the private person instituted or maintained the prosecution and that the prosecutor acted on the basis of information submitted by the private person that did not constitute probable cause.” *Matthews, supra* at 379. “[T]he prosecutor’s exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious prosecution.” *Id.* at 384, citing *Christy v Rice*, 152 Mich 563, 565; 116 NW 200 (1908).

In the present case, plaintiff cannot demonstrate that defendant initiated the prosecution. As the Court stated in *Matthews*, institution of criminal charges lies within the prosecutor’s exclusive discretion. *Matthews, supra* at 383 n 24. Unless the prosecutor acts on the information provided by the private person, exclusive of conducting an independent investigation, the private person has not procured the prosecution. *Id.* at 385. Here, plaintiff testified that he did not know whether the prosecution instituted an independent investigation prior to prosecuting him. This is not sufficient to show that the prosecution acted without conducting an independent investigation before exercising its discretion to prosecute plaintiff. We therefore conclude that the trial court properly granted summary disposition to defendant on this claim as well.

Finally, plaintiff contends that the trial court erred in granting summary disposition to defendant on his abuse of process claim. We disagree. A successful claim of abuse of process requires proof of “(1) an ulterior purpose, and (2) an act in the use of the process that is improper in the regular prosecution of the proceeding.” *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992), citing *Friedman v Dozor*, 412 Mich 1, 30-31; 312 NW2d 585 (1981). A claim of abuse of process will not succeed unless the plaintiff shows “some irregular act in the use of the process.” *Friedman, supra*. Merely harboring bad motives without manifesting those motives does not amount to abuse of process. *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987) (citations omitted).

The trial court granted summary disposition on the basis that plaintiff had not produced evidence of a corroborating act or ulterior purpose. Plaintiff, however, contends that

corroborating evidence exists because defendant told him that if he did not leave the marital home on July 3, 2000, and participate in a quick, no-fault divorce, she would embarrass him and ruin him. In the trial court, however, defendant did not assert the existence of any substantively admissible evidence to support his claim of abuse of process. Accordingly, the trial court properly granted summary disposition, *Maiden, supra* at 120, and plaintiff's argument has not been properly preserved for our review, *Camden v Kaufman*, 240 Mich App 389, 400, n 2; 613 NW2d 335 (2000). Even if plaintiff had properly preserved this argument, we would nevertheless conclude that it lacks merit.

The gravamen of plaintiff's claim is that defendant maliciously caused the institution of criminal proceedings against him for her advantage in the divorce proceeding. However, an "action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue." *Friedman, supra* at 31, quoting *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911); see also *Friedman, supra* at 30 n 18. Although plaintiff argues that defendant informed him that she would ruin him if he did not participate in a quick divorce proceeding, he does not demonstrate through substantively admissible evidence that she actually used the criminal proceedings to accomplish that purpose. His claim for abuse of process consequently fails.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder