STATE OF MICHIGAN

COURT OF APPEALS

GEORGE CHABIAA, Plaintiff-Appellee,	UNPUBLISHED February 21, 2012
v	No. 300390 Macomb Circuit Court
KAROULIN ALJORIS, Defendant-Appellant.	LC No. 2007-004748-NO

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

In this tort action for assault and abuse of process, defendant Karoulin Aljoris appeals the trial court's order of judgment awarding plaintiff George Chabiaa $17,300.24 on his assault and abuse of process claims and dismissing the remaining counts of plaintiff's complaint with prejudice. We affirm in part and reverse in part.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On March 12, 2006, plaintiff and defendant were married and living together with plaintiff's mother. From 3:00 p.m. to 11:00 p.m., plaintiff and defendant had several arguments. By 11:00 p.m., plaintiff told defendant that he wanted to sleep by himself on the "Lazy Boy." Defendant said "no" and that they would "sleep together like usual." Defendant then jumped on plaintiff and hit him. Plaintiff told defendant to let him go and to leave him alone. Plaintiff and defendant went to their bedroom and tried to sleep. But, defendant began arguing again. Plaintiff said, "[E]nough, I just want to go." Plaintiff stood up, and defendant pushed him. Plaintiff left the room and went into the living room. Defendant followed and continued to argue. Defendant hit plaintiff. Plaintiff went back to the bedroom. Defendant then hit plaintiff on his stomach. Plaintiff went back to the living room and then into the bedroom where his mother was sleeping. Plaintiff's mother went into the living room.

Later that night, when plaintiff was laying down, defendant came into the bedroom and sat on plaintiff's chest. Defendant told plaintiff that he could not leave her and that she would have him killed. Defendant scratched plaintiff on the left side of his face and hit him in the head two or three times. Plaintiff got away from defendant and went to the bathroom. Plaintiff was bleeding. Plaintiff then dialed "the number" for the police, but defendant took the telephone from plaintiff. Plaintiff took the telephone back and dialed 911. Defendant took the telephone from plaintiff again and threw it onto the kitchen table. A "few minutes" later, the police arrived

at plaintiff and defendant's home. The police took photographs of plaintiff's face.[1] The scratches were on plaintiff's face for two months.

After the March 12, 2006, incident, plaintiff filed for divorce. However, plaintiff and defendant continued to live together.

On the morning of June 29, 2006, plaintiff was at home, sitting on the "Lazy Boy." Defendant and plaintiff's mother were also there. Plaintiff was on the telephone with a friend discussing the divorce. While plaintiff was on the telephone, defendant said, "[W]hat are you doing talking about divorce?" Defendant then "came after" plaintiff, tried to take the telephone from him, and scratched plaintiff's finger. Defendant went into the kitchen and called the police, shouting that "my husband try [sic] to kill me." Plaintiff took his mother into a bedroom and called the "county domestic violence victim." The police arrived at the home within "a few minutes." According to Officer Steven Kret of the Macomb County Sheriff's Department, no one was arrested, and he did not observe any injuries, wounds, or blood on defendant.

On June 30, 2006, defendant filed a personal protection order (PPO) against plaintiff. Plaintiff and defendant separated on July 4, 2006. Plaintiff paid an attorney $2,500 to contest the PPO. After a hearing, the PPO was dismissed.

On April 3, 2007, plaintiff and defendant entered into a domestic relations arbitration agreement. Under the agreement, an arbitrator, "Referee Elias," was to decide the following issues: "division of real and personal property, including ancillary issues"; spousal support; and costs, expenses, and attorney fees. After arbitration, the circuit court entered a judgment of divorce on June 25, 2007, pursuant to the arbitration award. The judgment of divorce provided that it resolved all pending claims and closed the case.

On November 2, 2007, plaintiff, in propria persona, filed the instant action against defendant. Plaintiff's complaint contained six counts: (I) assault; (II) abuse of process; (III) intentional infliction of emotional distress; (IV) false imprisonment; (V) fraud; and (VI) defamation. Defendant moved for summary disposition under both MCR 2.116(C)(7) and MCR 2.116(C)(10), arguing that the judgment of divorce barred plaintiff's tort action. After a bench trial, the trial court issued an opinion and order, denying defendant's motion for summary disposition and finding in favor of plaintiff on the assault and abuse of process claims but in favor of defendant on plaintiff's remaining claims. The trial court later entered an order of judgment, awarding plaintiff $17,300.24[2] and dismissing counts III, IV, V, and VI of plaintiff's complaint with prejudice.

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[1] During the bench trial, the trial court admitted into evidence photographs of plaintiff taken by the police.

[2] The trial court calculated the $17,300.24 award as follows: (1) $2,500 for compensatory damages incurred for defending the personal protection order; (2) $7,500 for damages sustained for the assault and battery; (3) $864.24 in interest; and (4) $6,436.00 in mediation sanctions, costs, and attorney fees.

II. PROPRIETY OF TORT CLAIMS AFTER DIVORCE PROCEEDINGS

Defendant first argues that the trial court erred when it denied her motion for summary disposition because plaintiff's assault and abuse of process claims could not be brought in the trial court as a matter of law after the divorce proceedings. We disagree.

We review de novo motions for summary disposition under MCR 2.116(C)(7) and (C)(10). *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011); *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 244; 760 NW2d 828 (2008). As this Court has recognized, the standards under (C)(7) and (C)(10) "are essentially the same." *Hanley v Mazda Motor Corp*, 239 Mich App 596, 599 n 3; 609 NW2d 203 (2000). We accept all well-pleaded allegations as true and construe them in favor of the nonmoving party. *Id.* at 600; see also *Tellin*, 291 Mich App at 698. Furthermore, this Court must consider the "affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists." *Hanley*, 239 Mich App at 600; see also MCR 2.116(G)(5). Summary disposition should be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010).

"[I]t is well established in Michigan that one spouse may maintain an action against the other for certain torts committed during their marriage." *Gubin v Lodisev*, 197 Mich App 84, 88; 494 NW2d 782 (1992). For example, in *Goldman v Wexler*, 122 Mich App 744, 746, 749; 333 NW2d 121 (1983), this Court determined that a woman could bring a tort action against her former spouse for a battery that occurred during the marriage. During the parties' marriage in *Goldman*, the defendant battered the plaintiff. *Goldman*, 122 Mich App at 746. The marriage was later terminated by a judgment of divorce. *Id.* The plaintiff pursued a claim of battery against the defendant, but the trial court concluded that the claim was barred by the prior divorce judgment. *Id.* This Court disagreed. *Id.* We concluded that the plaintiff's tort claim was neither barred by nor merged into the divorce judgment, explaining that "[a]lthough . . . fault continues to be a consideration in property division disputes in a divorce action, we cannot agree . . . that both claims constituted but a single cause of action." *Id.* at 748 (internal citation omitted). This Court also concluded that, to the extent it was determined in the prior divorce proceeding that the defendant battered the plaintiff, the defendant was bound by the earlier determination under the doctrine of collateral estoppel. *Id.* This Court noted that "[i]f [the] defendant intended that all claims which grew out of the marriage be thereafter foreclosed by the divorce judgment, a release providing for the same should have been incorporated into that judgment." *Id.* at 749. Finally, we addressed concerns that the plaintiff was receiving a double recovery:

> The above is not meant to suggest that plaintiff is entitled to double recovery. If the consideration which was given plaintiff as part of the property settlement constituted payment, at least in part, for the injuries she suffered as a result of the alleged battery, defendant may raise that issue by way of affirmative defense and attempt to obtain a set-off against any judgment plaintiff obtains in this action. [*Id.*]

Similarly, in *McCoy v Cooke*, 165 Mich App 662, 664; 419 NW2d 44 (1988), this Court addressed whether a woman could pursue claims for assault and intentional infliction of

emotional distress against her former spouse for conduct that occurred during their marriage. We determined that res judicata did not apply because the divorce and tort actions were separate causes of action. *McCoy*, 165 Mich App at 667. With respect to collateral estoppel, this Court stated that it prevented relitigation of whether a battery occurred, as opposed to precluding the plaintiff's tort claims. *Id.* And, as in *Goldman*, this Court noted that the "defendant may raise as an affirmative defense the issue whether and to what extent the divorce judgment compensated [the] plaintiff for any injuries she suffered as a result of the batteries." *Id.* at 667-668.

In contrast to the assault, battery, and intentional infliction of emotional distress claims in *Goldman* and *McCoy*, this Court has concluded that a claim for fraud associated with the very existence of the marriage could not be maintained independently from a divorce action. See *Gubin*, 197 Mich App at 87-89. In addition to a judgment of divorce, the plaintiff in *Gubin* obtained a separate judgment for fraud against the defendant, her former husband. *Id.* at 85. This Court found that the evidence sufficiently showed that the defendant fraudulently induced the plaintiff to marry him "for no other reason than to obtain the means of lawful entry into the United States." *Id.* at 87. However, we concluded that the judgment of divorce precluded the plaintiff's fraud claim. *Id.* at 87-89. We opined: "In this case, we are presented with a typical case of a fraudulently induced marriage, not with a separate case for fraud. The fraud was so intimately involved with the marriage contract that it cannot be separated." *Id.* at 87. This Court stated that a separate tort action for fraud was "unnecessary" and resulted in an insufficient allocation of judicial resources because "the allegations of fraud relate[d] to the very existence of the marital relationship" and the trial court in the divorce proceeding could account for the plaintiff's damages by fashioning an award of alimony or property. *Id.* at 88-89. We distinguished the case from *McCoy* and *Goldman*, emphasizing that those were cases of battery and intentional infliction of emotional distress—"torts . . . not bound so intimately with the breakdown of the marriage itself." *Id.* at 88.

Defendant argues that, under *Gubin*, plaintiff's claims for assault and abuse of process are precluded by the parties' judgment of divorce as a matter of law because the claims relate to the very existence of their marital relationship. We disagree. Our holding in *Gubin* was limited to independent tort claims for fraud—fraud that induced a plaintiff to marry a defendant so that "[t]he fraud was so intimately involved with the marriage contract that it cannot be separated." *Id.* at 87. In the present case, it cannot be said that the alleged assaults and abuse of process are "so intimately involved with the marriage contract" that they "cannot be separated" from the marriage contract. See *id.* The *Gubin* Court emphasized that the case before it was not "a separate case for fraud" but, rather, a "typical case of a fraudulently induced marriage." *Id.* In contrast, the *McCoy* Court emphasized that the plaintiff's claims of assault and intentional infliction of emotional distress were "separate" from the divorce action. *McCoy*, 165 Mich App at 667. Like *McCoy*, the same is true of plaintiff's claims for assault and abuse of process in this case. Defendant's concern that plaintiff could obtain a double recovery by maintaining the instant case does not require dismissal of plaintiff's claims; under *Goldman*, defendant was free to raise an affirmative defense and attempt to obtain a setoff on the basis that plaintiff received

consideration in the judgment of divorce for the assaults and abuse of process.[3] See *Goldman*, 122 Mich App at 749.

Accordingly, the trial court did not err when it denied defendant's motion for summary disposition under MCR 2.116(C)(7) and (C)(10); defendant was not entitled to judgment as a matter of law on the basis that plaintiff's assault and abuse of process claims related to the very existence of their marital relationship and, thus, were not properly before the trial court.

III. MCR 3.602

Defendant next argues that the trial court did not have the authority to find defendant liable for assault and abuse of process. According to defendant, the arbitration agreement's provision that authorized the arbitrator to decide the issue of "Division of real and personal property, including ancillary issues," empowered the arbitrator to decide whether plaintiff incurred damages as a result of an assault or an abuse of process committed by defendant. Thus, defendant argues that, under MCR 3.602, the trial court improperly reviewed the arbitrator's decision in the divorce proceeding because there was not a finding that the arbitrator's award was the result of fraud, duress, or misuse of the arbitrator's authority. We disagree.

We review this unpreserved issue for plain error. See *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 31; 772 NW2d 801 (2009); see also MRE 103(d). Under MCR 3.602, the parties to an arbitration are bound by the decision of the arbitrator unless the award was procured by fraud or duress, the arbitrator or another is guilty of corruption or misconduct that prejudiced a party's rights, the arbitrator exceeded his powers, the arbitrator refused to hear material evidence or postpone the hearing on a showing of sufficient cause, or the arbitrator conducted the hearing in a way that substantially prejudiced a party's rights. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999); see also MCR 3.602(J).

We conclude that defendant's argument fails for two reasons. First, the scope of the arbitration agreement did not include the resolution of tort claims the parties may have had against each other. "To ascertain the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000). The defendant contends that the reference to "ancillary issues" in the arbitration agreement covered tort claims between the parties. The reference to "ancillary issues," however, was not a catch-all phrase for all matters between the parties. Rather, it was included specifically in reference to the division of real and personal property. Ancillary issues associated with the division of property might include whether real property must be sold, who will be permitted to live in the family home pending sale, who will be held responsible for the mortgage, the timing of personal property removal from the home, and other matters. One cannot deduce from the agreement's language that the viability and resolution of liability for tort claims against one another would be

[3] It is noteworthy that the judgment of divorce does not indicate that plaintiff received consideration on account of tortious conduct by defendant during the marriage.

decided and included in such property division. Notably, the judgment of divorce does not indicate that plaintiff received consideration on account of tortious conduct by defendant during the marriage.

Second, plaintiff is not seeking to vacate the arbitrator's decision on any of the grounds listed in MCR 3.602(J). Indeed, plaintiff does not claim that the arbitrator's decision was erroneous in any respect. As previously discussed, plaintiff's assault and abuse of process claims are separate from the divorce action. The trial court's findings and conclusions in the present case simply are not a judicial review of the arbitrator's findings. Thus, defendant's contention that this case was not properly before the trial court is meritless as this case does not involve a review of the arbitrator's decision.

Accordingly, there is no plain error.

IV. ABUSE OF PROCESS

Defendant also argues that the trial court erred when it found defendant liable for abuse of process. We agree.

When reviewing a trial court's decision after a bench trial, we review the trial court's findings of fact for clear error and its conclusions of law de novo. *Butler v Wayne Co*, 289 Mich App 664, 671; 798 NW2d 37 (2010). A factual finding is clearly erroneous where there is no factual support for it or where there is factual support but this Court is left with a definite and firm conviction that the trial court made a mistake. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

"To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981). This Court has described a meritorious claim of abuse of process as "a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). "[T]here must be some corroborating act that *demonstrates the ulterior purpose*." *Id.* (emphasis added). An "action for the abuse of process lies for the improper use of process *after it has been issued, not for maliciously causing it to issue*." *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911) (emphasis added). "A bad motive alone will not establish an abuse of process." *Bonner*, 194 Mich App at 472.

Defendant argues that the trial court incorrectly found that a hearing was held on September 6, 2006, to address defendant's petition for a PPO against plaintiff and that the trial court presiding over the divorce action found at the hearing that defendant had an ulterior motive for requesting the PPO. We agree. In its November 5, 2009, opinion and order, the trial court opined:

> The proofs amply reveal that Defendant initiated a proceeding to obtain a personal protection order, for which a hearing was conducted on September 6, 2006. In view of the trial court's assessment of Defendant's ulterior motive for initiating same (i.e., to better her position in the pending divorce action), the Court finds

> Defendant attempted to utilize what is an otherwise proper legal procedure for a purpose other than that which it was designed to accomplish.

Nothing in the record demonstrates that a hearing was held on September 6, 2006, and that the trial court concluded—at any hearing—that defendant had an ulterior motive for requesting the PPO. Therefore, the trial court's finding is clearly erroneous. See *Hill*, 276 Mich App at 308.

Moreover, the trial court's legal conclusion that defendant committed abuse of process is erroneous. There was no evidence at trial that defendant used the PPO process after the PPO was issued to better her position in the pending divorce action, as plaintiff contends. See *Spear*, 164 Mich at 623. While the evidence at trial did show that defendant arrived at the parties' home with the police to remove plaintiff from the home after she secured the PPO, this use of the PPO process does not demonstrate an ulterior purpose of bettering defendant's position in the divorce litigation. See *id.*

Accordingly, the trial court erred when it found defendant liable for abuse of process and awarded plaintiff $2,500 in damages on that basis.

V. DAMAGES

Defendant's final argument is that the trial court should have only awarded plaintiff nominal damages for the assault. According to defendant, plaintiff did not present any evidence at trial that the assault and battery caused him damages. We disagree.

"This Court reviews the trial court's determination of damages following a bench trial for clear error." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). "Nominal damages are those damages recoverable where [a] plaintiff's rights have been violated by . . . tortious injury, but no actual damages have been sustained or none can be proved." *4041-49 W Maple Condo Ass'n v Countrywide Home Loans, Inc*, 282 Mich App 452, 460; 768 NW2d 88 (2009).

In this case, plaintiff testified at trial that defendant jumped on him, sat on his chest, pushed him, and hit him multiple times, including on his stomach, head, and face. Plaintiff testified—and photographic evidence admitted at trial confirmed—that plaintiff sustained scratches to the left side of his face. Plaintiff testified that the scratches caused him to bleed, were "very, very painful," and scarred his face for two months. Given this evidence, plaintiff established that he suffered actual damages as a result of the assault; thus, an award of only nominal damages was inappropriate in this case. See *id.* As this is a personal injury case where there was no absolute standard for the trial court to measure compensatory damages for plaintiff's physical injury and pain and suffering, the award was in the sound discretion of the trial court. See *Peterson v Dep't of Transp*, 154 Mich App 790, 799; 399 NW2d 414 (1987). We are not left with a definite and firm conviction that the trial court mistakenly awarded plaintiff $7,500 in compensatory damages for the assault.

Affirmed in part and reversed in part.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering