

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Horizons Computer Training and
Employability Center, LLC, et al.

Court of Appeals No. L-08-1400

Trial Court No. CI 08-1063

Appellants

v.

Esther R. Glover-Grant

DECISION AND JUDGMENT

Appellee

Decided: October 16, 2009

* * * * *

Thomas A. Sobecki, for appellants.

Julia R. Bates, Lucas County Prosecuting Attorney, John A. Borell
and Maureen O. Atkins, Assistant Prosecuting Attorneys, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court granted summary judgment to appellee, Esther R. Glover-Grant, and dismissed a complaint for damages due to defamation, interference with

business contracts and intentional infliction of emotional distress filed by appellants, Horizon Computer Training and Employability Center, LLC ("Horizons"), and Patricia Parker. On appeal, appellants set forth the following two assignments of error:

{¶ 2} "The trial court erred when it denied plaintiff's [sic] motion to continue [the] summary judgment process.

{¶ 3} "The trial court erred when it granted appellee's motion for summary judgment and dismissed appellants' complaint."

{¶ 4} At all times relevant to this appeal, appellee was an employee of Lucas County Job and Family Services ("LCJFS"). Appellant, Horizons, was a company which contracted to provide job training and placement services for LCJFS clients, most of which were single mothers. Appellant Parker was Horizon's owner and chief executive officer.

{¶ 5} On January 4, 2008, Parker and Horizons filed a complaint against appellee in the Lucas County Court of Common Pleas, in which they alleged that appellee published, verbally and in writing, false comments that portrayed Parker and Horizons in a less than flattering manner. Specifically, the complaint alleged that appellee falsely stated that Horizon's clients were harassed and treated discourteously, and often received less than an "optimal education experience." The complaint also alleged that appellee incorrectly represented to her supervisors at LCJFS that Parker falsified clients' attendance and employment records so Horizons could receive additional reimbursement from LCJFS and, on one occasion, told a superior that Parker used "her greed and

malevolent personality with a sugary sweet disarming façade to win over others and get what she wants." Accordingly, the complaint set forth a claim of business interference and sought damages due to loss of Horizon's business in the amount of \$1,441,300, along with Parker's individual claims for damages due to defamation and intentional infliction of emotional distress.

{¶ 6} Appellee filed a motion for judgment on the pleadings on March 5, 2008, in which she alleged that the complaint was barred by operation of the statute of limitations, because it was not filed within two years after appellee's alleged misconduct occurred. That same day, appellee filed an answer. On March 21, 2008, appellants filed a motion to amend the complaint to incorporate by reference a nearly identical complaint against Glover-Grant which was filed on November 11, 2005, and dismissed without prejudice on January 5, 2007. The motion to amend was granted by the trial court on March 26, 2008.

{¶ 7} An answer to the amended complaint was filed on April 3, 2008. That same day, appellee filed a motion for summary judgment and memorandum in support thereof. In her motion, appellee argued that, as a government employee who did not act maliciously or in bad faith, she is immune from liability for all claims raised in the complaint. Alternatively, appellee argued that she is entitled to summary judgment because: (1) the claim of defamation is barred by privilege, since appellee was acting within the scope of her employment and was fulfilling a public duty to report misconduct; (2) the claim of tortious interference with a business relationship does not apply in this

case, since appellee did not induce a third party to end a business relationship with appellants; and (3) appellants failed to submit any evidence in support of their claim for intentional infliction of emotional distress. Attached to appellee's motion were appellee's affidavit and a copy of her job description.

{¶ 8} In her affidavit, appellee stated that, as a Contract Specialist for LCJFS, she was responsible to monitor compliance on the part of the agency's contractors, including Horizon. Appellee further stated that, in 2005, she received verbal and written reports that Horizon was not performing according to the terms of its contracts. Specifically, appellee stated she received reports that, among other things, Horizon falsified student records, harassed students and treated them discourteously, and employed unqualified staff. Appellee further stated that she discussed these reports with her supervisors, who directed her to bring the issues to the attention of LCJFS officials and the Lucas County Prosecutor's Office.

{¶ 9} Pursuant to appellee's job description, appellee is to spend 20 percent of her time monitoring and periodically evaluating the agency's contractual agreements, which includes consulting with the agency's attorney on legal issues, reviewing contracts for compliance, and conducting reviews of provider case records. She is also directed to complete reports for the agency that "[reflect] results of evaluation and recommendations for the provider, and/or taking financial or procedural audit findings when necessary." An additional ten percent of appellee's duties included training provider staff and keeping providers current with administrative rules and regulations. The contract also states that

appellee is responsible to interpret rules for providers, to train providers on program eligibility, and to "[investigate] provider's issues involving billing, referrals, eligibility, and other service delivery concerns."

{¶ 10} On April 21, 2008, appellants filed a motion for a continuance of summary judgment, pursuant to Civ.R. 56(F). In their motion, appellants asked the trial court for a nine-month continuance to conduct discovery. In support of the motion, appellants stated in Parker's attached affidavit that more time was needed to take appellee's deposition concerning "things she has in her affidavit which is attached to her motion for summary judgment." Appellants also wanted more time to depose "the people who [appellee] claims made complaints" against Parker and Horizon. Parker acknowledged in her affidavit that depositions had not yet been sought in this action, and no written discovery had been initiated.

{¶ 11} On May 20, 2008, appellee filed a memorandum in opposition to the motion to continue. In support, appellee stated that, after filing the original complaint in 2005, appellants did not ask to take depositions or submit any affidavits. Appellee further stated that, after refiling the complaint in 2008, appellants again did not ask to take depositions until after the summary judgment motion was filed. Accordingly, appellee argued that appellants failed to provide the trial court with sufficient facts to justify the need for a continuance, as required by Civ.R. 56(F).

{¶ 12} On May 30, 2008, appellants filed a reply, in which they stated that discovery was not completed in the original case because appellee was tardy in

responding to appellants' written interrogatories, and appellants "did not wish to take depositions until the written discovery was first completed * * *." Appellants also stated that the first complaint was dismissed after the trial court denied their motion to compel discovery.

{¶ 13} On June 12, 2008, the trial court denied appellants' motion to continue discovery. On June 27, 2008, appellants filed a reply in opposition to summary judgment and a memorandum in support, in which they argued that they were "severely handicapped" by the trial court's denial of their request for a continuance. Specifically, appellants argued that they were in possession of copies of emails and other documents that support their claims against appellee; however, without additional time to take depositions, they were unable to properly authenticate those documents for summary judgment purposes. Attached to appellants' reply was Parker's second affidavit, the affidavits of Horizon students, Elizabeth Maciag and Michelle Shively, who each stated they had not observed Parker engaging in unprofessional conduct or encouraging students to misappropriate school resources, and copies of the unauthenticated documents and emails which appellants proffered to the trial court in an attempt to support their claims against appellee.

{¶ 14} On October 20, 2008, the trial court issued an opinion and judgment entry, in which it found that appellants had not submitted any relevant, admissible evidence to support the claims raised in their complaint. Accordingly, the trial court granted

summary judgment to appellee and dismissed appellants' complaint. A timely notice of appeal was filed in this court on November 12, 2008.

{¶ 15} In their first assignment of error, appellants assert that the trial court erred by not granting their request to continue the summary judgment process so they could conduct discovery. In support, appellants argue that they did not have ample opportunity to conduct discovery because of "the procedural path of the case." Appellants argue that, if they had been granted additional time to depose appellee, they would have been able to authenticate the documents which allegedly provide support for their claims against appellee.

{¶ 16} Civ.R. 56(F) states, in pertinent part, that:

{¶ 17} "Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

{¶ 18} The trial court's decision to grant or deny a continuance pursuant to Civ.R. 56(G) will not be overturned on appeal absent a finding of abuse of discretion. *Brown v. Balnius*, 5th Dist. No. 08 CA 47, 2009-Ohio-2671, ¶ 35. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 19} In support of a Civ.R. 56(F) motion, "[t]he party seeking additional time [to respond to summary judgment] must do more than merely assert generally the need for additional discovery. * * * There must be a factual basis stated and reasons given why the party cannot present facts essential to its opposition to the motion." *Penix v. Avon Laundry & Dry Cleaners*, 8th Dist. No. 91355, 2009-Ohio-1362, ¶ 31, citing *Wombold v. Barna* (Dec. 11, 1998), 2d Dist. No. 17035. In order for a court to grant a continuance pursuant to Civ.R. 56(F), it must be convinced that there is a likelihood of discovering some fact that supports the need for a such action. *Drake Constr. Co. v. Kemper House Mentor, Inc.*, 170 Ohio App.3d 19, 2007-Ohio-120, ¶ 29. "Lack of diligence in pursuing discovery by the party moving under Civ. 56(F) militates against a grant of delay." *Id.*, citing *Doriott v. MVHE, Inc.*, 2d Dist. No. 20040, 2004-Ohio-867, ¶ 41.

{¶ 20} It is undisputed that, after filing the original complaint in 2005, appellants did not request any depositions or file any affidavits.¹ Similarly, in support of their motion for a continuance, appellants recited the procedural aspects of this case, from the filing of the complaint to their request for a nine-month extension of time. However, appellants offered no explanation as to why they did not attempt to depose witnesses earlier in the proceedings so they could authenticate the documents and emails already in their possession, which allegedly support their claims against appellee, instead of waiting

¹Apparently, appellants did engage in some written discovery; however, the trial court ruled that disclosure of some of the documents sought by appellants would violate Ohio law. In any event, nothing pertaining to written discovery obtained in the first lawsuit was refiled in this case.

until the last minute to ask for additional time. Finally, the statements made in Maciag's and Shively's affidavits, even if true, are irrelevant to the issues raised in the complaint.

{¶ 21} On consideration of the foregoing, we cannot say that the trial court abused its discretion by refusing to grant appellants a continuance in order to begin conducting discovery. Appellants' first assignment of error is not well-taken.

{¶ 22} In their second assignment of error, appellants assert that the trial court erred by granting summary judgment to appellee and dismissing their complaint. In support, appellants argue that appellee is not protected by the privilege enjoyed by public employees because evidence either was, or would have been, presented to show that appellee acted in bad faith, or in a wanton or reckless manner, by reporting that appellants were not fulfilling their duties under the contracts with LCJFS. Similarly, appellants argue that appellee's "personal remarks" about Parker's demeanor suggest that she was acting "outside her capacity as an employee" and, therefore, is liable for tortious interference with the business relationship between Horizons and LCJFS. They further argue that those same remarks demonstrate that appellee "was acting with the express purpose of harming appellants and, therefore, a jury could find her liable for intentional infliction of emotional distress." Finally, appellants argue that the allegations made in the complaint, construed in a light most favorable to appellants, demonstrate that appellee's actions are not protected by the employer-employee privilege.

{¶ 23} We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court.

Lorain Natl. Bank v. Saratoga Apts. (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 24} Initially, the party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The motion may be filed "with or without supporting affidavits[.]" Civ.R. 56(A). Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). "If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party." *Snyder v. Ford Motor Co.*, 3d Dist. No. 1-05-41, 2005-Ohio-6415, ¶ 11; Civ.R. 56(E).

{¶ 25} This court has stated that "[t]he elements of a cause of action for defamation are '(1) an unprivileged publication, (2) false and defamatory language about another, and (3) requisite malice.'" *Rinehart v. Maiorano* (1991), 76 Ohio App.3d 413, 419-420, quoting *Tohline v. Central Trust Co., N.A.* (1988), 48 Ohio App.3d 280, 284. In a case where a plaintiff is injured in his trade, profession or business, "malice is presumed and the defamatory words are actionable per se. *Id.* However, where a qualified

privilege is established, the plaintiff must prove express malice, i.e., ill will, hatred, revenge, or wanton and reckless disregard for the truth, by the defendant to establish his case." *Id.*

{¶ 26} The Supreme Court of Ohio has defined a "qualified privilege" as "one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest." *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244. As set forth above, the record shows that the comments made by appellee about appellants' business practices were made to her employer, LCJFS. The record contains no admissible evidence to show that those comments were made with malice, ill will, hatred, revenge, or wanton and reckless disregard for the truth. In fact, the record demonstrates that appellee discussed the allegations with her supervisors, before bringing them to the attention of LCJFS and the Lucas County Prosecutor's Office. Accordingly, appellants have failed to establish a prima facie case of defamation.

{¶ 27} In order to establish the tort of interference with a business relationship there must be proof that "one who, without a privilege to do so, induce[d] or otherwise purposely cause[d] a third party not to enter into, or continue, a business relationship with another * * *." *Brahim v. Ohio College of Pediatric Medicine* (1994), 99 Ohio App.3d 479, 489, quoting *Juhasz v. Quik Shops, Inc.* (1977), 55 Ohio App.2d 51, 57. However,

"[i]t is axiomatic that the wrongdoer must be a non-party to the contract." *Castle Hill Holdings, LLC v. Al-Hut, Inc.*, 8th Dist. No. 86442, 2006-Ohio-1353, ¶ 47. Where two parties are engaged in a business relationship the parties' employees are not regarded as "outsiders," or "third parties" while acting within the scope of their employment duties. See *Fitzgerald v. Roadway Express, Inc.* (N.D. Ohio 2003), 262 F.Supp.2d 849, 859. See, also, *Anderson v. Minter* (1972), 32 Ohio St.2d 207. ("Where * * * the act complained of is within the scope of a defendant's duties, a cause of action in tort or monetary damages does not lie." *Id.*, at 213.)

{¶ 28} It is undisputed that appellee was an employee of LCJFS. In addition, her job description expressly included monitoring contracts, including appellants' two contracts with LCJFS, for compliance purposes. Finally, as set forth above, no evidence was presented to show that appellee acted with malice or was otherwise acting outside the scope of her duties as a Contract Specialist for LCJFS. Accordingly, appellants have failed to establish a prima facie case of interference with a business relationship.

{¶ 29} The tort of intentional infliction of emotional distress is established by showing 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." *Outlaw v. Werner*, 8th Dist. No. 92297, 2009-Ohio-2362, ¶ 20, citing *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 1994-Ohio-389. "Extreme and outrageous conduct is conduct that goes beyond all possible bounds of decency and is so atrocious that it is 'utterly intolerable in a

civilized community." Id., citing *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375, reversed on other grounds by *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451. "Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities' are insufficient to sustain a claim for relief." Id.

{¶ 30} Although appellants allege that Horizons suffered financial losses due to appellee's actions, the record is devoid of admissible evidence to show that Parker suffered emotional distress.² Moreover, although appellee's comment that Parker hid her true nature with a "sugary sweet" personality could be characterized as a personal insult, as a matter of law, it does not come close to the type of "extreme and outrageous conduct" that is intolerable in a civilized community. *Outlaw v. Werner*, supra. Accordingly, appellants have failed to establish a prima facie case of intentional infliction of emotional distress.

{¶ 31} This court has reviewed the entire record that was before the trial court and, upon consideration thereof, finds that appellants have presented no admissible evidence to support a cause of action for defamation, interference with a business relationship, or intentional infliction of emotional distress. We find further that, even after considering the evidence presented in a light most favorable to appellants, the trial court did not err

²Appellants argue in their reply brief that the issue of whether Parker suffered actual emotional distress was waived because it was not raised by appellee on summary judgment. However, the presence of a debilitating emotional or physical injury is a key element of the tort of intentional infliction of emotional distress that must be proved in order to maintain the cause of action. See *Giglio v. Doherty* (1988), 55 Ohio App.3d 59.

by granting summary judgment to appellee as a matter of law and dismissing appellants' complaint. Appellants' second assignment of error is, therefore, not well-taken.

{¶ 32} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.