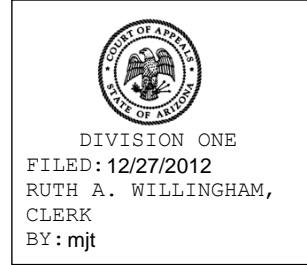


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DANNY MEYER and MELISSA MEYER,) No. 1 CA-CV 12-0109
husband and wife,)
) DEPARTMENT D
Plaintiffs/Counterdefendants/)
Appellees,) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
ROBERT GUTIERREZ and MARILYN) Rule 28, Arizona Rules of
MILLER-GUTIERREZ, husband and) Civil Appellate Procedure)
wife,)
)
Defendants/Counterclaimants/)
Appellants.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-040193

The Honorable John Rea, Judge

AFFIRMED

Allen Law Group, PLC Phoenix
By Lynn M. Allen
Attorneys for Plaintiffs/Counterdefendants/Appellees

Daniel R. Raynak Phoenix
Attorney for Defendants/Counterclaimants/Appellants

K E S S L E R, Judge

¶1 Defendants/Appellants Robert Gutierrez and Marilyn
Miller-Gutierrez ("Appellants") appeal from the trial court's

order granting Danny and Melissa Meyer's post-verdict renewed motion for judgment of law on Appellants' counterclaim for abuse of process. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellants moved into the house next door to the Meyers in 2000. On December 31, 2009, the Meyers filed suit against Appellants alleging various claims for relief arising out of Appellants' alleged harassment and defamation of the Meyers in the context of their relationship as neighbors. Appellants filed a counterclaim against the Meyers for abuse of process. The matter proceeded to a jury trial.

¶3 At the close of evidence, the Meyers moved for a judgment as a matter of law on the counterclaim pursuant to Arizona Rule of Civil Procedure 50(a). The court denied the motion. The jury found for Appellants on both the Meyers' claims and on Appellants' counterclaim. As damages on the counterclaim, the jury awarded "Legal fees & court costs."

¶4 Appellants lodged a form of judgment, to which the Meyers objected because "it includes an amount of attorneys' fees not specified in the jury's verdict, such verdict leaving the damage amount to others and not based upon the evidence adduced at trial." The Meyers also renewed their motion for a judgment as a matter of law under Rule 50(b), arguing Appellants failed to present evidence to satisfy the elements of the abuse

of process counterclaim. After oral argument, the court granted the Rule 50(b) motion, dismissed the counterclaim and reversed the jury's assessment of fees and costs against the Meyers. The court found that the jury verdict on the counterclaim "was unresponsive and inconsistent with the jury instructions and therefore, as a matter of law, no judgment for the Defendants/Counterclaimants can be entered on the Counterclaim." The court further found "that the evidence produced by the Defendants/Counterclaimants was insufficient to sustain their Counterclaim." Appellants timely appealed, see ARCAP 9(b)(1), and we have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(A)(2) (Supp. 2012).¹

¹ We cite to the most recent version of the statute when no revisions material to this decision have since occurred.

DISCUSSION

¶5 Appellants contend the court erred in granting the Rule 50(b) motion.² We disagree.

¶6 We review for an abuse of discretion. A trial court has “substantial latitude in deciding whether to upset the verdict . . . [because] “[t]he judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.” *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998) (quoting *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978)). While a Rule 50(b) motion should be granted only if there is no substantial evidence upon which the jury could render its verdict, *In re Frick’s Estate*, 13 Ariz. App. 247, 251, 475 P.2d 732, 736 (1970), the purpose of a Rule 50(b) motion is “to permit the trial court, after more mature

² Appellants’ brief also asserts the court erred in failing to grant a new trial on the abuse of process claim after granting the Rule 50(b) motion. However, Appellants provide no substantive argument on this issue. See ARCAP 13(a)(6) (a litigant must present significant arguments, set forth his or her position on the issues raised, and include citations to relevant authorities, statutes, and portions of the record). The failure to present an argument in this manner usually constitutes abandonment and a waiver of that issue. *State v. Moody*, 208 Ariz. 424, 452 n.9, 94 P.3d 1119, 1147 n.9 (2004) (citation omitted); see also *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (holding appellate courts “will not consider argument posited without authority.”). Consequently, we do not address the propriety of the court’s refusal to order a new trial.

deliberation to revise its ruling in denying the motion for a directed verdict." *Id.* In conducting our review of the trial court's grant of a Rule 50(b) motion, we review the evidence in a light most favorable to upholding the jury verdict. *Hutcherson*, 192 Ariz. at 53, ¶ 13, 961 P.2d at 451.

¶7 To succeed on an abuse of process claim, a claimant must prove the other party committed "(1) a willful act in the use of judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings." *Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d 876, 881 (App. 1982). Examples of judicial process that may support an abuse of process claim are noticing a deposition, filing an entry of default, and general motion practice "such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances." *Id.* at 352-53, 651 P.2d at 880-81. However, with respect to the cited act, "a claimant must present evidence that the defendant committed a specific 'wilful act . . . not proper in the regular conduct of the proceedings' to support a claim for abuse of process," and "evidence of the defendant's mere persistence in litigation, even if based on an improper motive, does not sustain the tort." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 258, ¶ 15, 92 P.3d 882, 888 (App. 2004) (quoting *Morn v. City of Phoenix*, 152 Ariz. 164, 166, 168, 730 P.2d 873, 875, 877 (App. 1986)). That is, as

long as the judicial process at issue is used for a proper purpose, "an incidental motive of spite or an ulterior purpose of benefit to the defendant" is insufficient to establish liability for abuse of process. *Nienstedt*, 133 Ariz. at 353, 651 P.2d at 881 (quoting Restatement (Second) of Torts § 682 cmt. b (1977)).

¶8 Here, Appellants contend "the Meyers abused [judicial] process by making claims in the complaint that they knew were either privileged, untrue, or had no good faith basis to believe they were true, as well as making false claims during the discovery process." For example, Appellants refer to the Meyers' statement in an interrogatory that they suffered over \$900,000 in damages, which they later admitted was false. Appellants also reference the Meyers' allegation regarding Appellants' allegedly defamatory comments made at an injunction proceeding in this case in November 2011.

¶9 Regarding the "privileged" and "false statements" made by the Meyers during this litigation, and viewing such statements in the light most favorable to sustaining the jury's verdict on the counterclaim, we do not find evidence of abuse of process. Throughout trial, the court refused to admit purportedly defamatory statements made at the injunction hearing because they were privileged. It was not abuse of process to sue for defamation based on privileged statements. *See Morn*,

152 Ariz. at 167, 730 P.2d at 876 (holding that the commencement of an action without justification, without more, does not constitute abuse of process). Moreover, the Meyers also alleged in their amended complaint that Appellants made defamatory statements outside of judicial proceedings. Likewise, the alleged false statements the Meyers made during discovery do not by themselves show a primary improper purpose in utilizing a judicial process. Specifically, Melissa Meyer's statements regarding damages made during discovery, statements she later conceded were false, do not demonstrate a primary improper purpose. It is not uncommon for statements regarding damages in a notice pleading context before discovery is completed to be inaccurate until a correct assessment of damages can be made.³ The statements do not demonstrate that the primary purpose of the Meyers' use of a judicial process was improper.

¶10 Relying on *Nienstadt*, Appellants also argue the "excessive" funds the Meyers spent litigating this case illustrate the Meyers' abuse of process. But Appellants misapprehend the holding of *Nienstedt*, which stands for the proposition that an abuse of process claim may properly be based on evidence that a defendant's primary purpose is to subject the

³ Melissa Meyers clarified that the defamation claim focused on statements made about the Meyers personally, not about their business entity as she apparently initially stated at her deposition before correcting herself.

claimant to excessive litigation expenses. *Nienstedt*, 133 Ariz. at 354, 651 P.2d at 882. Thus, the Meyers' litigation expenses are irrelevant as to Appellants' abuse of process counterclaim.

¶11 Further, we reject Appellants' contention that the jury's verdict in their favor on the Meyers' claims proves an abuse of process by the Meyers because the claims were unbelievable. Any implied inference from the defense verdicts that the Meyers continued this litigation even though they knew it had no basis is, by itself, not sufficient evidence of abuse of process.⁴ See *Morn*, 152 Ariz. at 167, 730 P.2d at 876 ("An abuse of process claim will not lie . . . where process . . . continued without justification.").

¶12 In sum, Appellants do not point to evidence before the jury of a specific court process that the Meyers used primarily for an improper purpose. See *Crackel*, 208 Ariz. at 257-58, ¶ 14, 92 P.3d at 887-88 (noting abuse of process claimant must identify "specific judicially sanctioned processes" that have been abused; "possess[ing] an improper purpose in sustaining the overall litigation [is insufficient]"). Accordingly, on this

⁴ Moreover, we note that the trial court denied Appellants' motion for summary judgment, thereby finding that the Meyers' complaint raised issues of material fact and was therefore at least implicitly not groundless. See *Morn*, 152 Ariz. at 168, 730 P.2d at 877.

record, we cannot conclude that the court abused its discretion in granting the Meyers' Rule 50(b) motion.

CONCLUSION

¶13 The order granting the Meyers' renewed motion for judgment as a matter of law on the abuse of process counterclaim is affirmed.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

ANDREW W. GOULD, Acting Presiding Judge

/S/

DIANE M. JOHNSEN, Judge