IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MICHAEL P. THIEME, *Plaintiff/Appellant*,

v.

J. JEFFREY COUGHLIN, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0191
FILED 7-10-2018

Appeal from the Superior Court in Yavapai County
No. P1300CV201500179
The Honorable Patricia A. Trebesch, Judge

AFFIRMED

COUNSEL

Michael P. Thieme, Prescott
Plaintiff/Appellant

Hinshaw & Culbertson LLP, Phoenix
By Stephen W. Tully, Bradley L. Dunn
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer M. Perkins joined.

C A T T A N I, Judge:

¶1 Michael P. Thieme challenges the superior court's grant of summary judgment dismissing his claims against Jeffrey Coughlin and Coughlin's wife Heidi. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Thieme sued his neighbors, Daniel and Linda Szewczyk and Delbert and Sharon Hopkins, over a maintenance agreement for a shared well (the "Shared Well Litigation"). Coughlin represented the Szewczyks in that matter.

¶3 While that lawsuit was pending, Thieme filed a separate lawsuit against the Coughlins, the Szewczyks, the Hopkinses, and others, alleging claims of defamation, invasion of privacy (false light, intrusion upon seclusion, and disclosure of private facts), aiding and abetting, civil conspiracy, intentional infliction of emotional distress, and negligence. The claims against the Coughlin defendants asserted that Coughlin defamed Thieme in "correspondence, Court filings, and discovery papers," and made "improper accusations" against him during the Shared Well Litigation. Thieme identified several documents he claimed evidenced that Coughlin had defamed him, aided and abetted the Szewczyks in defaming him, and assisted the Szewczyks in inflicting emotional distress on him.

¶4 Thieme further alleged that Coughlin's allegations and statements, together with photographs that were taken of Thieme's property, established a factual basis for claims of intrusion upon seclusion, disclosure of private facts, and false light. He also alleged that Coughlin was negligent by asserting counterclaims in the Shared Well Litigation without first obtaining "a signed copy of the [homeowners' association] bylaws," causing Thieme to "expend time and effort to draft and file . . . a motion for partial summary judgment."

¶5 Coughlin moved for summary judgment, arguing that the statements Thieme identified were not published and were within the absolute privilege afforded to parties and counsel in litigation. Coughlin also argued that Thieme's negligence claim simply repeated his unsuccessful request for sanctions made under Arizona Rule of Civil Procedure 11 in the Shared Well Litigation.

¶6 The superior court granted Coughlin's motion for summary judgment, and Thieme timely appealed.[1] We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).

DISCUSSION

¶7 We review a grant of summary judgment de novo, viewing the evidence and all reasonable inferences in the non-moving party's favor. *Russell Piccoli P.L.C. v. O'Donnell*, 237 Ariz. 43, 46–47, ¶ 10 (App. 2015). Summary judgment is proper if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Accordingly, the court may enter summary judgment "if the facts produced in support of [a] 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 (1990). We address each of Thieme's claims in turn.

I. Defamation.

¶8 Thieme argues that there are genuine issues of material fact as to whether Coughlin published the allegedly defamatory statements. *See Dube v. Likins*, 216 Ariz. 406, 417, ¶ 36 (App. 2007) (noting that defamation claims require that the allegedly defamatory statements be communicated to a third party). Here, Coughlin made the statements at issue in response to interrogatories, in a disclosure statement, and in letters to Thieme and Thieme's counsel. Thieme's only support for his assertion that these statements were published is his conclusory testimony that the statements "were published by Coughlin to third parties." Without more, this testimony is insufficient to defeat a motion for summary judgment. *See Florez v. Sargeant*, 185 Ariz. 521, 526–27 (1996). And, to the extent communication of these statements to the court may be considered publication, it was Thieme who published the statements by entering them into the record.

II. Invasion of Privacy Claims.

¶9 Thieme next argues that the superior court erred by granting summary judgement on his invasion of privacy claims based on intrusion upon seclusion, public disclosure of private facts, and false light. Thieme's false light and public disclosure of private facts claims were premised on

[1] Thieme's claims against the Szewczyks and the Hopkinses were otherwise resolved and are not at issue in this appeal.

the disclosure and publication of Coughlin's alleged defamatory statements. *See Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 280 (App. 1997) (stating that a false light claim requires the defendant to have "give[n] publicity to a matter concerning another that places the other before the public in a false light"); Restatement (Second) of Torts ("Restatement") § 652D (1977) (defining the tort of publicity given to private life as requiring that the matter be publicized). But, as described above, there is no evidence that Coughlin disclosed or published the statements at issue. Accordingly, the superior court appropriately granted summary judgment on those claims.

¶10 Thieme's intrusion upon seclusion claim relied not only on publication of the allegedly defamatory statements, but also on an assertion that a tortious intrusion occurred when Coughlin photographed Thieme's property. A claim for intrusion upon seclusion requires proof that the defendant "intentionally intrude[d], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . if the intrusion would be highly offensive to a reasonable person." Restatement § 652B; *see also Hart*, 190 Ariz. at 279–80. But the first amended complaint alleged only that "[d]efendants took up-close photographs of the Thieme property, including, upon information and belief, photographs of the Thiemes themselves on their property." Thieme did not allege that anyone improperly entered the property or took the photographs in an unreasonable manner. And, as noted by the superior court, there was no indication of non-compliance with the rules of discovery "to the extent information was elicited [or] . . . exchanged." Accordingly, the superior court correctly granted Coughlin's motion for summary judgment on the intrusion upon seclusion claim.

III. Aiding and Abetting a Tort.

¶11 Aiding and abetting a tort requires evidence that, among other things, the "primary tortfeasor has committed a tort causing injury to the plaintiff." *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 491, ¶ 44 (App. 2008). Thieme's aiding and abetting claim was premised generally on allegedly "improper accusations" by the defendants in the Shared Well Litigation, and specifically on Thieme's assertion that Coughlin elicited certain precluded testimony from Mrs. Szewczyk in that litigation. But Mrs. Szewczyk's testimony was protected by an absolute privilege; she therefore committed no tort that Coughlin could have aided or abetted. *See Yeung v. Maric*, 224 Ariz. 499, 501, ¶ 10 (App. 2010) ("[W]itnesses in judicial proceedings are protected by an absolute privilege, and they are immune from civil suits arising from allegedly defamatory testimony during

depositions and at trials."). Accordingly, summary judgment on Thieme's aiding and abetting claim was proper.

IV. Abuse of Process.

¶12 Abuse of process requires a willful act in the use of judicial process for an improper ulterior purpose. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257, ¶ 11 (App. 2004). A plaintiff alleging such a claim must show that the defendant abused "one or more specific judicially sanctioned processes" and that an "improper purpose was the primary motivation for [his] actions, not merely an incidental motivation." *Id.* at 257–59, ¶¶ 14, 18–19.

¶13 Thieme accuses Coughlin of "abus[ing] judicial process" but does not identify any specific court process Coughlin abused. *See Fappani v. Bratton*, 243 Ariz. 306, 310, ¶ 11 (App. 2017) (requiring a showing that the defendant "engaged in [a] specific court process or procedure, or [] otherwise acted with 'authority of the court'"). Citing to more than five hundred pages of documents from the Shared Well Litigation, Thieme asserts that Coughlin "us[ed] motion and discovery practice to harass [him]" and to cause him "to file multiple motions for various protective orders" and a motion to compel. But none of these documents suggest that Coughlin used any court process in a manner inconsistent with legitimate litigation objectives. *See Crackel*, 208 Ariz. at 259, ¶ 19.

¶14 Thieme also cites a settlement letter that Coughlin sent to Thieme's "supervising attorney" that he contends revealed an effort to get him fired. But Thieme was represented—at least for a time—by the law firm where he worked, and correspondence from Coughlin was appropriately directed to the attorneys who were working on the case. And nothing in the letter can reasonably be interpreted to be for something other than settlement purposes (as opposed to the alleged improper purpose of "threatening to get Thieme fired"). Accordingly, summary judgment on Thieme's abuse of process claim was proper.

V. Intentional Infliction of Emotional Distress.

¶15 "A plaintiff suing for intentional infliction of emotional distress must prove the defendant caused severe emotional distress by extreme and outrageous conduct committed with the intent to cause emotional distress or with reckless disregard of the near-certainty that such distress would result." *Watkins v. Arpaio*, 239 Ariz. 168, 170–71, ¶ 8 (App. 2016). Thieme did not cite any extreme or outrageous conduct in support of this claim; thus, the court properly granted summary judgment in

Coughlin's favor. For that reason, we decline to address Thieme's argument regarding Coughlin's intent and Thieme's request for punitive damages based on this claim.

VI. Negligence.

¶16 Thieme contends the superior court erred by finding that Coughlin owed him no duty of care. Whether a duty of care arises is a question of law for the court; absent a duty of care, there can be no negligence claim. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007). Notwithstanding Thieme's argument to the contrary, attorneys owe no duty of care to opponents in litigation. *See Wetherill v. Basham*, 197 Ariz. 198, 208, ¶ 39 (App. 2000).

¶17 Thieme cites *Aranki v. RKP Investments, Inc.*, 194 Ariz. 206 (App. 1999), for the proposition that Coughlin was obligated to treat him fairly in the Shared Well Litigation. But *Aranki* addressed a Real Estate Department regulation that obligates real estate professionals to "deal fairly with all other parties to a transaction." *Id*. at 208, ¶ 8 (quoting Ariz. Admin. Code R4-28-1101(A)). Thieme cites no comparable regulation imposing a similar duty on attorneys in litigation. Although Thieme opines that Coughlin violated several Rules of Professional Conduct promulgated by our supreme court, those rules do not establish a duty of care as a matter of law. *Stanley v. McCarver*, 208 Ariz. 219, 224 n.6, ¶ 17 (2004).

¶18 Citing *Hays v. Sony Corp. of America*, 847 F.2d 412 (7th Cir. 1988), and *Boone v. Superior Court*, 145 Ariz. 235, 242 n.2 (1985), Thieme further argues that there is a duty of care based on Arizona Rule of Civil Procedure 11, which prohibits court filings for an improper purpose. But nothing in *Hays* suggests a party may sue opposing counsel for negligence based on an alleged Rule 11 violation in an earlier lawsuit. 847 F.2d at 418. And although the *Boone* court acknowledged that "[i]t may be [] that violation of Rule 11 may provide a basis for bar discipline or civil liability for malpractice, abuse of process, or malicious prosecution," 145 Ariz. at 242 n.2, the court did not identify negligence toward an opposing party as a potential claim. Accordingly, summary judgment on Thieme's negligence claim was proper.

VII. Attorney's Fees and Costs on Appeal.

¶19 Coughlin requests his attorney's fees incurred here and in the superior court pursuant to A.R.S. § 12-349(A)(1), which authorizes a fee award against a party who "[b]rings or defends a claim without substantial justification." A claim is without substantial justification if it is "groundless

and is not made in good faith." A.R.S. § 12-349(F). Although we have determined that Thieme's claims are groundless, Coughlin has not established that Thieme pursued the case in bad faith. We therefore decline to award fees. Nevertheless, as the successful party on appeal, Coughlin is entitled to his costs upon compliance with ARCAP 21.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA