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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MICHAEL TARASKA, *Plaintiff/Appellant*,

v.

BRUCE BROWN, et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0714
FILED 11-26-2019

Appeal from the Superior Court in Maricopa County
No. CV2017-015198
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

Michael Taraska, Phoenix
Plaintiff/Appellant

Carpenter Hazlewood Delgado & Bolen LLP, Tempe
By Nicole Danielle Payne, Lydia Peirce Linsmeier
Counsel for Defendants/Appellees Brown, Brown Family Law Group, Sisk

Thomas A. Morton, Phoenix
Defendant/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Jennifer B. Campbell joined.

C A T T A N I, Judge:

¶1 Michael Taraska appeals from the superior court’s dismissal of his abuse of process and aiding and abetting claims against the legal team who represented his ex-wife in their marriage dissolution proceedings. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Bruce Brown of Brown Family Law Group, PLC (“Brown Law”) represented Taraska’s now-ex-wife in the couple’s marriage dissolution proceedings. At some point during those proceedings, Thomas Morton took over the representation of Taraska’s ex-wife.

¶3 Following the conclusion of the proceedings, Taraska filed a complaint against Brown, Brown Law, Brown Law paralegal Kimberly Sisk, and Morton (collectively, “Appellees”) asserting claims of defamation, aiding and abetting tortious conduct, and abuse of process. Taraska alleged that during the dissolution proceedings, each of the Appellees completed and served discovery responses known by them to be false, or aided the others in doing so, without the knowledge or approval of his ex-wife. Among other things, Taraska alleged that the responses contained statements that he engaged in threatening and violent behavior toward his ex-wife.

¶4 Appellees moved to dismiss all claims for failure to state a claim upon which relief could be granted. *See* Ariz. R. Civ. P. 12(b)(6). The superior court dismissed the claims, but allowed leave to amend to include more specific allegations.

¶5 Taraska filed an amended complaint reasserting all three claims. The amended complaint further alleged that Taraska’s ex-wife’s counsel coerced her to verify the false information in the discovery responses in a subsequent signed statement that paralegal Sisk allegedly backdated and notarized. Taraska also contended that Brown told Taraska’s ex-wife to present copies of the discovery responses to the

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Phoenix Police Department, intending to pressure Taraska “with the threat of initiating . . . criminal charges” to settle the dissolution proceedings on unfavorable terms. Taraska claimed Appellees acted with “sheer hatred” toward him, primarily to threaten and publicly humiliate him. Taraska alleged that Appellees’ interference made it impossible to settle the dissolution proceedings and that he suffered a loss of reputation and emotional damage resulting in physical symptoms.

¶6 Appellees again moved to dismiss all three claims for failure to state a claim. After Taraska voluntarily dismissed the defamation claim, the superior court held oral argument on the two remaining claims and ultimately dismissed both with prejudice. The court ruled that Taraska’s abuse of process claim was barred by the absolute litigation privilege, and further held that because there was no underlying abuse of process tort, the aiding and abetting claim could not stand on its own.

¶7 Taraska timely appealed the superior court’s judgment of dismissal. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶8 We review de novo the dismissal of a complaint under Rule 12(b)(6) for failure to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). Dismissal is appropriate “only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.” *Id.* at ¶ 8 (citation omitted).

I. Abuse of Process.

¶9 Abuse of process requires proof of a willful act in using judicial process for an ulterior purpose not proper in the regular course of proceedings. *Nienstedt v. Wetzel*, 133 Ariz. 348, 353 (App. 1982). Using the judicial process for its authorized purposes—even if done with bad intentions—does not constitute abuse of process. *See id.* (citing Prosser, *Law of Torts*, § 121, p. 857 (4th ed. 1971)).

¶10 To establish an abuse of process, a plaintiff must present evidence of an act “that could not logically be explained without reference to the defendant’s improper motives.” *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 259, ¶ 19 (App. 2004). Regardless whether a party has brought or is defending a case, the key consideration is whether “the utilization of the procedure for the purposes for which it was designed becomes so lacking in justification as to lose its legitimate function as a reasonably justifiable

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litigation procedure.” *Nienstedt*, 133 Ariz. at 354. As set forth below, Taraska did not establish a viable abuse of process claim.

A. Absolute Litigation Privilege.

¶11 Taraska argues that the superior court improperly applied the absolute litigation privilege to dismiss his abuse of process claim predicated on Appellees’ conduct in completing and serving allegedly false and defamatory discovery responses. We disagree.

¶12 An attorney is “absolutely privileged to publish defamatory matter concerning another” in judicial proceedings so long as the content has some relation to the proceeding. *Green Acres Tr. v. London*, 141 Ariz. 609, 613 (1984) (quoting Restatement (Second) of Torts § 586 (1977)). The absolute litigation privilege protects judges, parties, lawyers, witnesses, and jurors. *Id.* “When statements are absolutely privileged, the speaker is immune from civil liability and courts do not inquire into the declarant’s motives or whether the statements were made in good faith.” *Ledvina v. Cerasani*, 213 Ariz. 569, 571, ¶ 4 (App. 2006).

¶13 Absolute litigation privilege applies to “defamatory statements” in defamation claims as well as in other torts based on such statements. *See Drummond v. Stahl*, 127 Ariz. 122, 125 (App. 1980) (applying absolute litigation privilege to a tortious interference with contract claim based on allegedly false allegations made in a complaint). The “overriding public interest that persons should speak freely and fearlessly in litigation” underlying the absolute litigation privilege entitles defendants to immunity from claims arising out of defamatory statements in a judicial proceeding. *Id.* (internal quotation and citation omitted). For these reasons, “[d]efamatory statements contained in pleadings are absolutely privileged if they are connected with or have any bearing on or are related to the subject of inquiry.” *Id.* (emphasis added).¹

¶14 Here, as the superior court noted, Taraska’s abuse of process claim arose from, and wholly depended on, the allegedly defamatory content of the discovery responses Appellees prepared and served.

¹ Taraska attempts to distinguish *Drummond* because it was an appeal from summary judgment rather than from dismissal based on a motion to dismiss. 127 Ariz. at 123. But regardless of the procedural posture of the case, *Drummond* highlights that the absolute litigation privilege is not restricted to defamation claims and applies more broadly to statements made in connection with judicial proceedings.

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Because the statements contained in the responses were absolutely privileged, the superior court properly dismissed Taraska's claim.

¶15 Taraska argues his abuse of process claim was not based on the content of the discovery responses, but rather on Appellees' conduct. He argues that the act of backdating verification forms, as well as coercing his ex-wife to verify the statements and to present them to the Phoenix Police Department, is beyond the appropriate scope of legal representation and is therefore outside the scope of litigation privilege. But what makes the conduct underlying Taraska's claim an alleged abuse—rather than merely a use—of the judicial process is the assertion that the *content* of the discovery responses was false and defamatory. And the content of the discovery responses was protected by the absolute litigation privilege. *Compare id.*, with *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 361, ¶¶ 3, 11 (App. 1999) (finding a viable abuse of process claim where counsel's conduct resulted in additional fees and counsel "failed to disclose certain documents, made incomplete and inadequate disclosure, and withheld information that contradicted [the client's] position"), and *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 312 (3d Cir. 2003) (holding that the litigation privilege does not apply when the plaintiff "does not base its cause of action merely on statements, but, rather, chiefly on conduct").

¶16 Taraska's reliance on *Crackel v. Allstate Insurance Company* is unavailing. In *Crackel*, the plaintiff brought an abuse of process claim alleging that the defendant's conduct during a mandatory settlement conference constituted an abuse of process. 208 Ariz. at 256–57, ¶¶ 8–9. This court held that even though a party has an "absolute right to refuse to settle," misconduct unrelated to the right not to settle (namely, violating court orders, misrepresenting facts, and failing to participate in good faith during the settlement conference) could still support an abuse of process claim. *Id.* at 263, ¶ 37.

¶17 Here, Taraska points primarily to his ex-wife's counsel allegedly coercing her to sign verification forms and backdating documents to support his abuse of process claim. But whether this conduct was improper was intertwined with the defamatory nature of the discovery responses' content. For example, the coercive conduct was relevant to Taraska's abuse of process claim only in that it tended to prove that the responses prepared by Appellees were false and defamatory. If the statements were true, coercion presumably would not be necessary to induce a client to verify them. Similarly, although backdating a document containing entirely truthful information may violate the relevant notary law, as the superior court pointed out, here the alleged backdating was only

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relevant to show that Appellees, rather than Taraska's ex-wife, made the allegedly false statements.

¶18 In sum, what would make the conduct underlying Taraska's claim an abuse—rather than merely a use—of process was the alleged falsity and defamatory nature of the discovery responses. Thus, the absolute litigation privilege applies and precludes the relief Taraska seeks.

¶19 We agree with the superior court that “any other rule would invite every party to a civil case who disputes the truthfulness of the opposing party's discovery responses to file a separate lawsuit against the opposing party's counsel.” Doing so would essentially allow defamation claims barred by the absolute litigation privilege to be reworked into abuse of process claims. Accordingly, we affirm the judgment of the superior court.

B. Due Process.

¶20 Taraska also argues that he was denied due process because Appellees only argued that absolute litigation privilege applied in the context of his original defamation claim, which he voluntarily dismissed. He claims the superior court “provid[ed] [Appellees] with an Affirmative Defense” by applying absolute litigation privilege to the abuse of process claim without giving him the opportunity to argue that it should not apply. He further argues that the superior court erred by citing to the Restatement (Second) of Torts and Texas case law in support of its ruling without giving him a chance to address them.

¶21 The cornerstone of due process is notice and an opportunity to be heard, *Iphaar v. Indus. Comm'n of Arizona*, 171 Ariz. 423, 426 (App. 1992), and here, Taraska received both.

¶22 Appellees argued in their motion to dismiss that defamatory statements are privileged. Although they pressed the argument in the context of the defamation claim rather than the abuse of process claim, the superior court noted that “the litigation privilege doesn't just apply to defamation.” And regardless of how Taraska labeled the claims, the abuse of process claim rose and fell on the defamatory nature of the discovery responses' content. The fact that Taraska addressed these statements in an abuse of process claim does not change the substance of his allegations. See *Shetter v. Rochelle*, 2 Ariz. App. 358, 366 (App. 1965), *modified*, 2 Ariz. App. 607 (App. 1966) (noting that “this court does not believe that a label placed upon a cause of action has any great significance”). Under these circumstances, Taraska had sufficient notice and opportunity to argue his

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case. In any event, even on appeal, Taraska has not proffered a meritorious argument showing that the absolute litigation privilege should not apply in this case.

¶23 Further, the superior court is, of course, free to consider Restatements and other states' case law to explain its decision. Section 586 of the Restatement (Second) of Torts, which the superior court cited, has been cited approvingly by our supreme court, *see Green Acres Tr.*, 141 Ariz. at 613-14, and the superior court cited Texas law only to provide an example of analogous reasoning. Accordingly, due process did not require that Taraska receive advance notice of, and a chance to address, each source on which the superior court relied.

II. Aiding and Abetting.

¶24 Taraska also challenges the dismissal of his aiding and abetting claim. An essential element of aiding and abetting tortious conduct is that a primary tortfeasor committed a tort that caused injury to the plaintiff. *See Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 406, ¶ 97 (App. 2012). Here, the absolute litigation privilege barred Taraska's abuse of process claim, so no underlying tort existed. Accordingly, the superior court did not err by dismissing the aiding and abetting claim.

CONCLUSION

¶25 For the foregoing reasons, we affirm.



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