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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

WAYNE E. COATES and PATRICIA WIERCINSKI, husband and wife, Plaintiffs/Appellants, v. GREGORY H. SCHEID and BETH ANN SCHEID, husband and wife, Defendants/Appellees.	2 CA-CV 2010-0114 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause Nos. CV07-704, CV08-10, CV08-65 (Consolidated)

Honorable James A. Soto, Judge

AFFIRMED IN PART; DISMISSED IN PART

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B R A M M E R, Presiding Judge.

¶1 Wayne Coates and Patricia Wiercinski appeal from the trial court's order dismissing their claims for defamation and invasion of privacy against Gregory and Beth

Scheid. Coates and Wiercinski argue the court erred in granting the Scheids' motion for summary judgment by finding the alleged invasion of privacy was absolutely privileged as a report of information to law enforcement, and the alleged defamatory communications were absolutely privileged as statements made in relation to a pending judicial proceeding. They also argue the court erred in granting the Scheids' motion to strike their notice of supplementing the record, in quashing a subpoena served on nonparty Costco Wholesale, Inc. (Costco), and in granting Costco its attorney fees and costs incurred in quashing the subpoena. We affirm, but dismiss the portion of the appeal related to the discovery issue.

Factual and Procedural Background

¶2 "When reviewing a grant of summary judgment, we view the evidence and reasonable inferences from it in the light most favorable to the nonmoving party." *Williams v. Baugh*, 214 Ariz. 471, ¶ 2, 154 P.3d 373, 374 (App. 2007). Coates and Wiercinski and the Scheids are neighbors. Wiercinski alleged she was bitten by a neighborhood dog, and the Scheids "publish[ed] to the community," including another neighbor Susan Minnick, reports that Coates and Wiercinski were lying about the dog bite and that Wiercinski either was faking the injury or lying about a pre-existing injury. Beth had told Minnick that, near the date of the alleged dog bite, the Scheids had been told by their children that Wiercinski, a teacher at their school, had injured her knee at school and left work early, and that Gregory, a Costco manager, had seen Wiercinski shopping at Costco during school hours. Beth conveyed this information to Minnick

because she believed Minnick was being sued for the dog bite. Coates and Wiercinski also alleged Gregory had reviewed their personal Costco shopping records and provided information from those records to law enforcement.

¶3 Coates and Wiercinski had sued the Scheids over an unrelated dispute, and later amended their complaint to add a defamation claim based on the Scheids' statements to others regarding the dog bite. They later filed a second amended complaint adding, inter alia, a claim asserting Gregory had invaded their privacy by reviewing their Costco customer records both to verify Wiercinski's presence at Costco and then to provide the information he had discovered to law enforcement officers.

¶4 Coates and Wiercinski served a subpoena duces tecum on Costco requiring a custodian of records to produce Costco's policy for releasing customer information to law enforcement personnel. Costco denied any relevant documents existed, but stated the company had an unwritten policy that it would release information to law enforcement regarding criminal investigations without requiring a subpoena. Coates and Wiercinski, dissatisfied with Costco's response, issued an amended subpoena duces tecum requiring a custodian of records to appear for deposition. Costco moved to quash the amended subpoena, and the trial court both granted the motion and awarded Costco reasonable attorney fees and costs associated with its motion.

¶5 The Scheids moved for summary judgment on the defamation and invasion of privacy claims. Coates and Wiercinski, approximately ten days after oral argument on that motion, filed a "notice of supplementing record." The trial court granted the

Scheids' motions for summary judgment and to strike the notice of supplementing the record.

¶6 On May 14, 2010, Coates and Wiercinski filed a notice of appeal from the trial court's ruling granting the Scheids' motions, and from its orders granting the motion to quash and awarding attorney fees and costs to Costco.[1] On May 26, the court entered final judgment pursuant to Rule 54(b), Ariz. R. Civ. P., dismissing the defamation and invasion of privacy claims. Coates and Wiercinski filed an amended notice of appeal to include the May 26 judgment.[2]

Discussion

¶7 Coates and Wiercinski argue the trial court erred in granting the Scheids' motion for summary judgment on their claims for defamation and invasion of privacy. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law."

[1]The trial court partially dismissed as untimely the first notice of appeal taken from a March 10 unsigned minute entry. Although the trial court lacked authority to dismiss the notice of appeal, *see Schultz v. Hinshaw*, 18 Ariz. App. 557, 558, 504 P.2d 498, 499 (1972), the minute entry indeed was not appealable, A.R.S. § 12-2101, and Coates and Wiercinski do not contest the partial dismissal on appeal.

[2]For reasons discussed herein, the May 26 order is the only appealable order that we review.

Bothell v. Two Point Acres, Inc., 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should grant a motion for summary judgment only "if the facts produced in support of the claim or defense 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 or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. We may affirm the court's grant of summary judgment if it is correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001).

Defamation

¶8 Coates and Wiercinski asserted the defamation claim in their first amended complaint, and their second amended complaint incorporated the first amended complaint's defamation allegations, but neither incorporated by reference their prior prayer for relief, nor asserted a new prayer for relief, on that claim. An amended complaint supersedes the preceding complaint, and that preceding pleading therefore becomes a nullity. *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 586, 937 P.2d 1382, 1392 (App. 1996). To state a claim for relief under Rule 8(a)(3), Ariz. R. Civ. P., a pleading must contain "[a] demand for judgment for the relief the pleader seeks."[3] Because the first amended complaint was nullified by the second amended complaint, and because the latter fails to state any prayer for relief on the defamation claim,

[3]Although allegations solely contained in the prayer for relief are not considered in determining the sufficiency of the complaint, *see Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192, 507 P.2d 113, 117 (1973), a complaint must nonetheless include a prayer for relief under Rule 8(a)(3), Ariz. R. Civ. P.

judgment for the Scheids on that claim was appropriate. *See Giles v. Hill Lewis Marce*, 195 Ariz. 358, ¶ 2, 988 P.2d 143, 144 (App. 1999) ("[J]udgment should be entered for the defendant if the complaint fails to state a claim for relief."). Although the trial court resolved this claim on its merits, we need not reach the merits because we may affirm the court's ruling if correct on any ground. *City of Tempe*, 201 Ariz. 106, ¶ 14, 32 P.3d at 36.

Invasion of Privacy

¶9 Coates and Wiercinski alleged that Gregory had "intentionally intruded upon the private affairs and concerns of [Coates and Wiercinski]" by accessing their personal accounts at Costco and turning account information over to law enforcement. Arizona has adopted the Restatement (Second) of Torts § 652B (1977), which defines the tort of intrusion upon seclusion by providing that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[4] *Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 279, 947 P.2d 846, 853 (App. 1997).

¶10 A plaintiff may recover for intrusion "'only if he had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source.'" *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 30 F. Supp. 2d 1182, 1188-

[4]Arizona recognizes the four-part classification of the tort of invasion of privacy laid out in the Restatement (Second) of Torts § 652A. *Hart*, 190 Ariz. at 279, 947 P.2d at 853. However, because Coates and Wiercinski made no allegations in their complaint regarding false light, appropriation, or unreasonable publicity, we limit our analysis to their claim of unreasonable intrusion upon the seclusion of another.

89 (D. Ariz. 1998), *quoting Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 490 (Cal. 1998) (emphasis omitted) (no intrusion where television network used false pretenses to enter laboratory and secretly videotaped meeting where owner freely shared information). Liability arises only when one has "invaded a private seclusion that the plaintiff has thrown about his person or affairs," such as by opening private and personal mail, but not by examining a public record. Restatement (Second) Torts § 652B, cmts. b, c; *see, e.g.*, *Bratt v. Int'l Bus. Machines Corp.*, 785 F.2d 352, 359 (1st Cir. 1986) (limited dissemination of employee's frequent use of confidential grievance process "not of such a personal nature" to constitute intrusion of privacy).

¶11 Coates and Wiercinski's invasion of privacy claim is based upon Gregory "going into Costco's records" in order to show Wiercinski had been present at Costco the day before the alleged dog bite. Coates and Wiercinski do not claim the information Gregory had accessed was of a private or personal nature beyond Wiercinski's mere presence in the store. They suggest Wiercinski's presence at Costco was a private matter because "Costco is a private club for members only," but do not dispute appellees' statement that the store is open to the public. Because reasonable people could not agree that customers have a reasonable expectation that their presence in the store will not be observed, or that Costco employees will not have access to customer records such as receipts, Coates and Wiercinski failed to present a genuine issue of material fact as to whether Gregory had intruded upon their solitude or seclusion in their private affairs or

concerns. Therefore, the trial court did not err in granting summary judgment on the invasion of privacy claim. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.[5]

Notice of Supplementing Record

¶12 Coates and Wiercinski also assert the trial court abused its discretion when it refused to consider their notice of supplementing the record. As they concede, however, this issue is material only if this court concludes the trial court erroneously granted summary judgment on their defamation and invasion of privacy claims. Through their supplemental filing, Coates and Wiercinski sought to challenge Gregory's truthfulness and whether he had accessed the Costco records at the request of law enforcement. Because we have concluded Gregory's actions did not constitute an intrusion into Coates and Wiercinski's privacy, even absent a request from law enforcement, addressing this issue is unnecessary to the resolution of this appeal. *See Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229, 696 P.2d 1376, 1378 (App. 1985) ("The court is not empowered to decide moot questions or abstract propositions.").

Motion to Quash Subpoena, Attorneys Fees and Costs

¶13 Coates and Wiercinski further assert the trial court erred in quashing their subpoena duces tecum summoning Costco's custodian of records and in awarding Costco attorney fees and costs. They have appealed the court's April 22, 2010 order awarding

[5]Coates and Wiercinski argue the trial court erred in finding that Gregory's actions in turning the information over to law enforcement were absolutely privileged. Because we hold that accessing the records was not an intrusion, we need not decide whether their publication to police would have been privileged. *See* Restatement (Second) Torts § 652B, cmt. a (publicity not element of intrusion upon seclusion).

attorney fees to Costco and denying their request to reconsider the grant of attorney fees and quashing of the subpoenas. But the April 22 order is not a final and appealable order. *See Schwartz v. Superior Court in and for County of Maricopa*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996) (order denying motion to quash subpoena duces tecum not appealable). The order did not adjudicate all of the claims of all the parties in the action and the court did not direct the entry of a final judgment in that order. *See* Ariz. R. Civ. P. 54(b). Nor is the order rendered appealable by the May 26 judgment, which is only a final and appealable judgment as to the defamation and invasion of privacy claims. *See* Ariz. R. Civ. P. 54(b). Accordingly, because we lack jurisdiction over Coates and Wiercinski's appeal as it relates to the April 22 order, *see* A.R.S. § 12-2101(B), we dismiss that portion of the appeal.

Costco's Brief

¶14 Costco filed an answering appellate brief addressing the issues raised by Coates and Wiercinski and requesting attorney fees and costs, asserting Coates and Wiercinski's appeal is frivolous. *See* Ariz. R. Civ. App. P. 25. Because Costco is not a party to this action, and because we lack jurisdiction over the portion of the appeal Costco addresses in its brief, we neither consider nor address the issues it raises, nor do we award Costco attorney fees and costs on appeal.

Disposition

¶15 For the foregoing reasons, although we affirm the trial court's grant of summary judgment in favor of the Scheids, we dismiss that portion of the appeal relating to quashing the Costco subpoena and the related award of fees and costs.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge