STATE OF MICHIGAN

COURT OF APPEALS

CHARLES J. MELKI, Plaintiff-Appellant, v CLAYTON CHARTER TOWNSHIP, DALE JONES, MICHAEL POWERS, CHARLOTTE BROWN, STEVEN MOORE, ERIC ECKLES, and JAMES PRIESTLY, Defendants-Appellees.	UNPUBLISHED July 25, 2013 No. 309964 Genesee Circuit Court LC No. 10-094216-CZ

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Charles J. Melki, appeals as of right an order granting summary disposition in favor of the defendants Clayton Charter Township, Dale Jones, Michael Powers, Charlotte Brown, Steven Moore, Eric Eckles, and James Priestly. Melki asserted claims of "abuse of power" and violation of the Freedom of Information Act (FOIA)[1] against Powers, Clayton Township's police chief, and Jones, Clayton Township's deputy supervisor and FOIA coordinator. He also asserted claims of defamation against Powers and police officers Charlotte Brown, Steven Moore, Eric Eckles, and James Priestley for statements that the officers made after the termination of Melki's employment as the Clayton Township police chief. We affirm.

I. FACTS

A. ASSERTIONS THAT MELKI ASSAULTED ARRESTEES

According to the internal allegations memo prepared by Powers, while Brown was the Township's interim police chief, Brown informed Powers that she had received allegations that Melki assaulted an arrestee. Brown assigned Powers to investigate the matter. Powers interviewed Eckles, Priestly, Brown, and another officer, summarized the content of interviews in the internal allegations memo, and forwarded it to the Michigan State Police. The Michigan

[1] MCL 15.231 *et seq*.

State Police assigned Detective Mark Reaves to investigate the allegations. After interviewing the arrestees and Melki, Reaves concluded in a report that "[t]his investigation did not reveal any clear criminal assault and/or battery incidents[.]"

B. ASSERTIONS THAT MELKI STOLE PERSONNEL FILES

Melki testified at his deposition that in January or February 2009, he asked his secretarial staff to make copies of the police department's disciplinary records, because some files were missing after he returned from a suspension. Melki testified that he gave the copies of the records to Steven Iamarino, who was Clayton Township's attorney at that time.

In April 2009, after Melki's termination, Clayton Township attorney Kenneth Tucker asked Melki to return any items that he had removed from the police department, including personnel reports. In August 2009, Brown, Eckles, and Moore each wrote a letter to Clayton Township's Board, asking that Clayton Township retrieve Melki's copies of their personnel files. Township Clerk Dennis Milem asked Melki to return any personnel files that he had removed from the police department.

C. THE FOIA REQUEST

In December 2009, Iamarino sent Jones a letter that requested "copies of the information sent to the Michigan State Police for investigation and disclosure of those who participated in the preparation of such materials . . . ." Iamarino's letter did not indicate that he was representing Melki or making the request on his behalf. Jones treated Iamarino's letter as a FOIA request, and denied it on the basis that the records were compiled for law enforcement purposes.

Iamarino appealed the denial of his FOIA request to Clayton Township's Board. The Board granted his request. Jones sent Iamarino a letter that included a copy of the internal allegations memo, but not the Michigan State Police report. Mary Sly subsequently requested "[i]nformation regarding wrong doing of Charles Melki that was approved for release by the Township Board to Steven Iamarino on January 14, 2010." Jones sent a copy of the internal allegations memo to Sly in February 2010.

D. PROCEDURAL HISTORY

In August 2010, Melki initiated this action, asserting (1) defamation per se against Brown, Eckles, Priestly, and Powers concerning the statements that Melki had assaulted persons in custody, (2) defamation per se against Powers, Brown, Moore, and Eckles concerning the statements that Melki stole personnel files, and (3) "abuse of power" and FOIA violation against Jones and Powers, asserting in parts pertinent to this appeal that Jones produced only the internal allegations memo, and not the exonerating Michigan State Police report. Despite naming Clayton Township as a defendant, Melki did not assert any claims against Clayton Township.

The defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The trial court granted the defendants' motion. It dismissed Melki's claim of defamation per se against Brown, Eckles, Priestly, and Powers because the statute of limitations barred the claim. It dismissed Melki's defamation per se claim against Powers, Brown, Moore, and Eckles because the officers were entitled to absolute governmental immunity, the statements were substantially

true, and the officers made them without malice. And it dismissed Melki's abuse of process and FOIA claim because Melki lacked standing and individuals cannot be liable under FOIA.

II. DEFAMATION

A. STANDARD OF REVIEW

This Court reviews de novo whether a statute of limitations bars a claim.[2] This Court also reviews de novo the trial court's determination on a motion for summary disposition.[3] MCR 2.116(C)(10) provides that a party is entitled to summary disposition if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We review de novo whether a publication is privileged.[4]

B. LEGAL STANDARDS

The limitations period for a defamation claim is one year.[5] "A defamation claim accrues when 'the wrong upon which the claim is based was done regardless of the time when damage results.'"[6]

> The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.[7]

C. APPLYING THE STANDARDS

Melki asserts that the trial court improperly dismissed his defamation claim against Brown, Eckles, Priestly, and Powers. Melki contends that his defamation claim did not accrue in March 2009 because the statements were at that time privileged, and his defamation claim did not accrue until the first unprivileged communication was made. We agree.

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[2] *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006).

[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326 (1991).

[5] MCL 600.5805(1) and (9).

[6] *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

[7] *Id*. at 24.

Michigan follows a rule of first accrual, not a rule of last accrual.[8] A party must file a defamation claim "within one year from the date that the claim *first* accrued."[9] The limitations period is not extended when the defamatory statement is republished.

Here, Brown, Eckles, and Priestly, made the statements about Melki's assaults to Powers in March 2009. Powers compiled those assertions into a memo that he forwarded to the Michigan State Police in May 2009. In Michigan, all statements made to law enforcement during an investigation are absolutely privileged.[10] The Clayton Township Board subsequently published the original statements to Iamarino in January 2010 and republished them to Sly in February 2010. There was no *unprivileged* communication until early 2010. Melki filed suit in August 2010, which was less than one year after his defamation claims actually accrued. Thus, the trial court improperly determined that the statue of limitations barred his claim.

However, this Court will not modify a decision of the trial court on the basis of a harmless error.[11] The trial court correctly ruled that the statements were absolutely privileged as a matter of law. Statements made to public officials who are in the process of carrying out their official duties are absolutely privileged.[12] As previously noted, statements made to law enforcement officers during an investigation are absolutely privileged.[13]

Here, Brown's, Eckles's, and Priestly's statements were all made to Powers, who was a law enforcement officer engaged in an investigation. And Powers in turn released the statements to the Michigan State Police, in his capacity as a law enforcement officer engaged in an investigation. Because these statements were all made to law enforcement officers in the course of an investigation, they were absolutely privileged as a matter of law.

Melki also asserts that the trial court improperly determined that Powers, Brown, Moore, and Eckles were entitled to summary disposition on his defamation claim concerning the statement that he stole their personnel files. We conclude that Melki has not sufficiently addressed this issue on appeal, and decline to consider it.

The trial court determined in part that the officers were entitled to summary disposition because the statements were substantially true. "[S]ubstantial truth is an absolute defense to a defamation claim."[14] Melki does not address this determination on appeal. If a party does not

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[8] See *Id*. at 25.

[9] *Id*. at 24-25.

[10] *Shinglemeyer v Wright*, 124 Mich 230, 239-240; 82 NW 887 (1900); see *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 619; 396 NW2d 809 (1986).

[11] MCR 2.613(A).

[12] *Froling v Carpenter*, 203 Mich App 368, 371-372; 512 NW2d 6 (1993).

[13] *Shinglemeyer*, 124 Mich at 239-240; see *Hall*, 153 Mich App at 619.

[14] *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001).

address the basis of the trial court's decision, we need not even consider granting them relief.[15] Because this issue formed the basis of the trial court's decision, we decline to consider the remainder of Melki's assertions concerning Powers, Brown, Moore, and Eckles, as Melki would not be entitled to relief even if we resolved those issues in his favor.

III. ABUSE OF PROCESS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition.[16] A party may move for summary disposition if the opposing party has failed to state a claim on which relief can be granted.[17]

B. LEGAL STANDARDS

"Abuse of process is the wrongful use of the process of a court."[18] A party abuses a process when he or she uses a proper legal procedure for an improper purpose.[19] The alleged improper purpose must be more than defamation or harassment.[20]

C. APPLYING THE STANDARDS

Melki asserts that Jones and Powers abused a process when they released the internal allegations memo as part of the FOIA process, and that the trial court erred when it treated this claim as a claim under FOIA. We disagree.

We conclude that the trial court correctly treated Melki's "abuse of power" claim as a FOIA claim. Courts consider the plaintiff's entire claim to determine the gravamen of his or her action.[21] This Court need not accept a plaintiff's choice of label for his or her action, because we

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[15] *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

[16] *Maiden*, 461 Mich at 118.

[17] MCR 2.116(C)(8).

[18] *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911).

[19] *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 322; 788 NW2d 679 (2010), quoting *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987).

[20] *Dalley*, 287 Mich App at 323, quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 629; 403 NW2d 830 (1986).

[21] *Maiden*, 461 Mich at 135.

do not "exalt form over substance."[22] We reiterate that an abuse of process claim involves "the wrongful use *of the process of a court*."[23]

Here, Melki's asserted that Jones and Powers abused the FOIA process. FOIA is not a process of the court. It is a statutory process designed to protect the rights of citizens to information, so that they might fully participate in the democratic process.[24] None of Melki's claims contended that Jones and Powers abused a process of a court. Instead, the crux of Melki's claim was that Jones and Powers should have released the Michigan State Police report exonerating him as well as the internal allegations memo, or that it should not have released the internal affairs memo at all pursuant to the exemption for records of law enforcement agencies from FOIA. We conclude that the trial court properly treated Melki's claim as a claim that Clayton Township violated FOIA, rather than a claim that Clayton Township abused a court process.

In his brief on appeal, Melki concedes that FOIA does not articulate a cause of action for an incomplete release of documents, concedes that there was no denial from which Melki could appeal because Clayton Township eventually granted Iamarino's request, and concedes that FOIA does not provide remedies against individuals. Melki contends that, because FOIA does not provide for individual remedies, Melki is left without a remedy for Clayton Township's incomplete disclosure. But we do not believe that an abuse of process claim is the proper cause of action for asserting such a grievance. We conclude that the trial court properly determined that Jones and Powers were entitled to summary disposition as a matter of law on Melki's "abuse of power" claim.

We affirm.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

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[22] *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

[23] *Spear*, 164 Mich at 623 (emphasis supplied).

[24] See MCL 15.231(2).