[Cite as *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

JOYCE TEODECKI Appellant v. LITCHFIELD TOWNSHIP, et al. Appellees	C.A. No. 14CA0035-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 12CIV1104

DECISION AND JOURNAL ENTRY

Dated: June 15, 2015

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, Joyce Teodecki, appeals from the judgments and final order of the Medina County Court of Common Pleas respectively granting summary judgment, a protective order, and a motion to quash in favor of the Defendants-Appellees, Litchfield Township, Nancy Wargo, Michael Pope, and Dennis Horvath. For the reasons set forth below, we affirm.

I.

{¶2} In January 2011, the Litchfield Township Trustees, Nancy Wargo, Michael Pope, and Dennis Horvath ("Trustees"), appointed Sergeant Joseph McDermott pursuant to R.C. 505.38 to investigate the activities of Joyce Teodecki in her capacity as fire chief of the Litchfield Fire Department. The investigation stemmed from the Trustees learning that the Litchfield Township Fire Department had compliance issues with Ohio law.

{¶3} On July 25, 2011, Sergeant McDermott issued a report ("Report") containing the findings of his investigation. The Report implicated Mrs. Teodecki in the fire department's noncompliance with Ohio law. Sergeant McDermott sent a copy of the Report to the Medina County Prosecutor's Office through Assistant Prosecutor Carol Shockley. Sergeant McDermott also claims to have sent a copy to Mrs. Teodecki in July of 2011, although Mrs. Teodecki claims that she never received the Report at that time. At a Trustees meeting held on July 25, 2011, Mrs. Teodecki and the Trustees agreed that Mrs. Teodecki would resign from her position as fire chief in exchange for the township not pursuing charges against her. They also agreed that Mrs. Teodecki would stay on as a consultant for the fire department through the end of the year. The Trustees memorialized this agreement in Litchfield Resolution No. 22-11. This resolution also accepted Mrs. Teodecki's resignation. At the bottom of Litchfield Resolution No. 22-11, the assistant prosecutor added a handwritten note, stating: "The results of the investigation shall be kept confidential between the Medina County Prosecutor's Office and the Investigator." It is disputed whether this added confidentiality clause was part of the agreement struck at the Trustees meeting between the Trustees and Mrs. Teodecki.

{¶4} In October 2011, Mrs. Teodecki penned an open letter to the citizens of Litchfield in a local newspaper wherein she criticized the three Litchfield Township Trustees by name and accused them of employing "bully tactics" in order to further their own agendas. The letter referenced the township's investigation of her and the fire department. The Trustees then held a special meeting in November of 2011, where they unanimously voted to remove the handwritten confidentiality clause from Litchfield Resolution 22-11 and to release the Report to the public. Trustee Wargo read a statement at the meeting, stating that Mrs. Teodecki knew that the charges

against her involved misfeasance, malfeasance, nonfeasance and misconduct in office, the creation of a hostile work environment, and gross neglect of duty.

{¶5} On January 18, 2012, Trustee Pope filed a Complaint with the Ohio Elections Commission alleging that Mrs. Teodecki's open letter in the local newspaper made false statements about the Trustees in violation of Ohio law. The Commission found probable cause for one of Trustee Pope's claims, but found that his other three claims lacked probable cause. The Commission scheduled a hearing for May 24, 2012. Trustee Pope withdrew his Complaint via email prior to that hearing, but failed to notify Mrs. Teodecki or her attorney that he had done so. Thus, on May 24, 2012, Mrs. Teodecki and her lawyer unnecessarily travelled to Columbus, Ohio in order to attend the hearing. Mrs. Teodecki claims that responding to Trustee Pope's Complaint before the Ohio Elections Commission and traveling to the hearing in Columbus cost her in excess of $6,000.00 in attorney fees.

{¶6} On July 26, 2012, Mrs. Teodecki filed a Complaint in the Medina County Court of Common Pleas against Litchfield Township and the township's three Trustees, Nancy Wargo, Dennis Horvath, and Michael Pope (collectively, "Defendants-Appellees"). Mrs. Teodecki's Complaint alleged breach of contract, intentional infliction of emotional distress, defamation, malicious prosecution, and abuse of process. All of these claims relate to the circumstances under which Mrs. Teodecki left her position as fire chief of the Litchfield Township Fire Department and the aftermath of her resignation.

{¶7} On June 6, 2013, during the discovery process, Mrs. Teodecki and her attorney served a subpoena demanding that the Medina County Prosecutor "produce any and all documents and/or other written or recorded material in possession of the Medina County Prosecutors [sic] Office regarding [Mrs. Teodecki] and/or the Litchfield Township Fire

Department from January 1, 2008 to the present." The subpoena also demanded that the Medina County Prosecutor "produce any documents and/or other written or recorded materials in possession of the Medina County Prosecutors [sic] Office regarding the special investigation of [Mrs. Teodecki] and/or the Litchfield Township Fire Department undertaken by Special Investigator Joseph McDermott in 2010-11," along with "any written and/or recorded communications between the Medina County Prosecutor's Office and Litchfield Township, Ohio and/or the Litchfield Township Trustees regarding [Mrs. Teodecki] and/or the Litchfield Township Fire Department from January 1, 2008 to the present." Mrs. Teodecki and her attorney also served subpoenas upon Medina County Prosecutor Dean Holman and former Assistant Prosecutor Carol Shockley to take their depositions.

{¶8} In June of 2013, Defendants-Appellees filed a motion to quash the subpoenas and a motion for a protective order asserting that the materials and testimony sought through the subpoenas constituted privileged attorney-client communications. The trial court held a hearing on the motions and granted the Defendants-Appellees' motions via entry on July 19, 2013.

{¶9} On September 17, 2013, Defendants-Appellees filed a motion for summary judgment as to all claims contained in Mrs. Teodecki's Complaint. Mrs. Teodecki filed a brief in opposition. On November 26, 2013 and November 27, 2013, the trial court granted the Defendants-Appellees' motion for summary judgment in four separate entries on Mrs. Teodecki's claims for malicious prosecution, abuse of process, defamation, and breach of contract with respect to the individual Trustees. The trial court, however, denied Defendants-Appellees' motion for summary judgment on the breach of contract claim with respect to Litchfield Township, but expressly reserved consideration of additional reasons for summary judgment which were not fully addressed in Defendants-Appellees' motion.

{¶10} On January 8, 2014, Defendants-Appellees filed a supplemental motion for summary judgment regarding Mrs. Teodecki's breach of contract and intentional infliction of emotional distress claims. Mrs. Teodecki again filed a brief in opposition. The trial court judge then recused himself from the case on February 10, 2014.

{¶11} On March 21, 2014, Mrs. Teodecki filed a motion asking the newly assigned trial judge to reconsider the previous judge's orders granting summary judgment in favor of the Defendants-Appellee on all claims except for intentional infliction of emotional distress and the breach of contract with respect to Litchfield Township. On April 2, 2014, Mrs. Teodecki also filed a motion asking the newly assigned judge to reconsider the previous trial judge's order quashing the subpoenas for the Medina County Prosecutor and his assistant. The trial court reconsidered the previous judges' rulings on both motions, but ultimately adopted the previous judge's decisions.

{¶12} On April 22, 2014, the trial court granted summary judgment in favor of Defendants-Appellees on Mrs. Teodecki's claims for breach of contract with respect to Litchfield Township and intentional infliction of emotional distress. The trial court then entered final judgment for Defendants-Appellees and dismissed Mrs. Teodecki's lawsuit with prejudice.

{¶13} Mrs. Teodecki now appeals from the trial court's judgments rendered on July 19, 2013, November 26, 2013, November 27, 2013, and the Final Order of April 22, 2014, raising two assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES.

{¶14} In her first assignment of error, Mrs. Teodecki argues that the trial court erred in granting summary judgment in favor of Defendants-Appellees as to her breach of contract, intentional infliction of emotional distress, defamation, and abuse of process claims. We disagree with respect to all four claims.

{¶15} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 (1996). This Court views the facts in the case in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Viock v. Stowe–Woodward Co.,* 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶16} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶17} Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt,* 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of

responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 449 (1996).

{¶18} The non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. To do so, the moving party must set forth evidence of the limited types enumerated in Civ.R. 56(C), specifically, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

Breach of Contract

{¶19} Mrs. Teodecki argues that Litchfield Township breached its agreement to keep the results of its investigation confidential by revoking the confidentiality clause of Litchfield Resolution 22-11 at the November 2011 Trustees meeting and subsequently making the Report available to the public.

{¶20} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002–Ohio–2985, ¶ 16, quoting *Perlmuter Printing Co. v. Strome Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976).

{¶21} In this case, the trial court granted summary judgment in favor of Defendants-Appellees on Mrs. Teodecki's breach of contract claim in two separate judgment entries. In the first entry, dated November 26, 2013, the trial court found no issue of material fact regarding whether the Trustees were liable to Mrs. Teodecki as individuals. This decision was later

adopted by the new trial judge who was appointed following the initial trial judge's recusal in the matter. In the second judgment entry, dated April 22, 2014, the trial court found there to be no evidence in the record indicating that the confidentiality clause was part of an agreement between Mrs. Teodecki and Litchfield Township. Additionally, the trial court found that even if a contract existed between Mrs. Teodecki and the township, there was no actionable breach because (1) neither the Trustees nor the prosecutor could legally keep a public record, i.e. the Report, confidential from the public by means of a confidentiality agreement, and (2) Mrs. Teodecki provoked the Trustees to publicly disclose the Report by publishing an open letter in the local newspaper wherein she attacked the individual Trustees by name and challenged the Trustees to release the findings of their investigation. Lastly, the trial court found that Mrs. Teodecki failed to put forth any evidence demonstrating that the release of the Report caused her any legally cognizable damages.

{¶22} While the freedom to contract is fundamental and courts should not lightly disregard agreements that are freely entered into between parties, *Brown v. Gallagher*, 179 Ohio App.3d 577, 2008-Ohio-6270, ¶ 10 (4th Dist.), citing *Core Funding Group, L.L.C. v. McDonald*, 6th Dist. Lucas No. L-05-1291, 2006-Ohio-1625, ¶ 59, it is well-settled that a valid contract cannot be made if its purpose or performance is contrary to statute. *Bell v. N. Ohio Tel. Co.*, 149 Ohio St. 157, 158 (1948); *Elephant Lumber Co. v. Johnson*, 120 Ohio App. 266, 269 (4th Dist.1964). Similarly, a contract may be void if it violates public policy, "the legal principle which declares that one may not lawfully do that which has the tendency to injure the public welfare." *Garretson v. S.D. Myers, Inc.*, 72 Ohio App.3d 785, 788 (9th Dist.1991).

{¶23} Ohio's Public Records Act requires a public office or person responsible for public records to promptly disclose a public record unless the record falls within one of the

clearly defined exceptions to the mandate of R.C. 149.43. R.C. 149.43(B)(1). As used in R.C. 149.43, public records are "records kept by any public office, including, but not limited to, state, county, city, village, *township*, and school district units * * *." (Emphasis added). R.C. 149.43(A)(1). Moreover, "records" include "any document * * * created or received by or coming under the jurisdiction of any public office * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). A "public office" includes "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A).

{¶24} We conclude that the Report prepared by Sergeant McDermott following his extensive investigation into the Litchfield Township Fire Department and Mrs. Teodecki falls squarely within R.C. 149.43's definition of a public record. The Report, which was commissioned by the township and kept in the township's possession, was a document detailing findings concerning the fire department's alleged noncompliance with state law. The township's fire department is without question a public office. Thus, by statute, the Report is required to be disclosed to the general public. *See* R.C. 149.43. Mrs. Teodecki does not argue on appeal that any exception to R.C. 149.43's mandate applies in this case. As such, we conclude that because enforcement of the confidentiality clause in this case would violate Ohio's Public Records Act, that contractual provision constitutes an invalid contract.

{¶25} Mrs. Teodecki argues in her brief that "whether the Report was accessible by a public records request is inconsequential" because the Report was not publically disclosed until after the township allegedly breached the confidentiality agreement. We disagree. Because the confidentiality clause within Litchfield Resolution 22-11 would violate R.C. 149.43 if enforced,

that provision is void *ab initio*. *See Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, ¶ 81 (7th Dist.). Thus, even assuming that Mrs. Teodecki provided consideration for the confidentiality clause, and assuming further that Litchfield Township and Mrs. Teodecki were parties who were intended to be bound by it, the confidentiality clause was unenforceable from the date of its inception. *See Langer v. Langer*, 123 Ohio App.3d 348, 354 (2d Dist.1997).

{¶26} Therefore, we conclude that the trial court did not err in granting summary judgment in favor of Defendants-Appellees on Mrs. Teodecki's breach of contract claims.

Intentional Infliction of Emotional Distress

{¶27} Mrs. Teodecki's intentional infliction of emotional distress claim stems from the emotional distress that she allegedly suffered from the purported breach of the confidentiality clause in Litchfield Resolution 22-11 when the Trustees made the Report public. Specifically, Mrs. Teodecki claims in her response to Defendants-Appellees' supplemental motion for summary judgment that the Trustees' release of the Report caused her to experience psychiatric and psychosocial problems, including depression and anxiety.

{¶28} To prevail on a claim for intentional infliction of emotional distress, a party must prove the following elements:

> (1) [t]he defendant intended to cause emotional distress, or knew or should have known his actions would result in serious emotional distress, (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community, (3) the defendant's actions proximately caused psychic injury to the plaintiff, and (4) the plaintiff suffered serious mental anguish of the nature no reasonable [person] could be expected to endure.

Finley v. First Realty Property Mgt., Ltd., 185 Ohio App.3d 366, 2009-Ohio-6797, ¶ 33 (9th Dist.), citing *Shetterly v. WHR Health Sys.*, 9th Dist. Medina No. 08CA0026–M, 2009-Ohio-673, ¶ 15, quoting *Jones v. White*, 9th Dist. Summit No. 18109, 1997 WL 669737, *8 (Oct. 15, 1997).

{¶29} The trial court granted summary judgment in favor of Defendants-Appellees on Mrs. Teodecki's intentional infliction of emotional distress claim. The trial court provided three reasons for doing so. First, the trial court found that Mrs. Teodecki "supplied no evidence that any of the defendants engaged in 'extreme and outrageous conduct.' "[1] Second, the trial court found that because there was no breach of contract, Mrs. Teodecki's emotional distress claim must also fail as it is derivative of her breach of contract claim. Lastly, the trial court found that even if a breach of contract did occur here, a confidentiality agreement within a government report concerning the conduct of a public official is "not a contract for which serious emotional distress is a particularly likely result[.]"

{¶30} The trial court correctly noted that Mrs. Teodecki does not argue in her response to Defendant-Appellees' supplemental motion for summary judgment that, without a contract, the Trustees' conduct was actionable under an emotional distress theory. Because we determined above that the trial court's grant of summary judgment to Defendants-Appellees on Mrs. Teodecki's breach of contract claim was proper in this case, we now conclude that the trial court's grant of summary judgment to Defendants-Appellees on Mrs. Teodecki's intentional infliction of emotional distress claim was also proper.

{¶31} Therefore, we determine that the trial court did not err in granting summary judgment in favor of Defendants-Appellees on Mrs. Teodecki's intentional infliction of emotional distress claim. In agreeing with the trial court that Mrs. Teodecki's emotional distress

---

[1] The trial court considered the Ohio Supreme Court's explanation of the meaning "extreme and outrageous" conduct and concluded that the Trustees' action in the present case did not rise to such a level. *See Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374 (1983), *overruled on other grounds, Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, quoting Restatement of the Law 2d, Torts, Section 46, comment d (1965).

claim is derivative of her breach of contract claim, we decline to address Mrs. Teodecki's remaining arguments regarding her intentional infliction of emotional distress claim.

Defamation

{¶32} Mrs. Teodecki's defamation claim arises from a statement that Trustee Wargo made at a November 2011 Litchfield Township Trustees meeting. At that meeting, Trustee Wargo read the following statement aloud: "[Mrs. Teodecki] and her attorney met with the prosecutors [sic.] office and therefore, [Mrs. Teodecki] knew that the charges [against her] included allegedly being guilty of misfeasance, malfeasance, nonfeasance and misconduct in office, creating a hostile work environment and gross neglect of duty. [Mrs. Teodecki] chose to resign from the department rather than face these charges." Trustee Wargo's statement was later published in a local newspaper. No criminal charges were ever filed against Mrs. Teodecki. Mrs. Teodecki claims that Trustee Wargo's public statement at the Trustees meeting was defamatory.

{¶33} "Defamation is a false publication that injures a person's reputation." *Gosden v. Louis*, 116 Ohio App.3d 195, 206 (9th Dist.1996). To prevail in a defamation case, Mrs. Teodecki must prove five elements: "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory per se or caused special harm to the plaintiff." *Northeast Ohio Elite Gymnastics Training Ctr., Inc. v. Osborne*, 183 Ohio App.3d 104, 2009–Ohio–2612, ¶ 7 (9th Dist.), quoting *Gosden* at 206. However, the parties here do not dispute that, as the former fire chief of Litchfield Township, Mrs. Teodecki is a public official. Therefore, in regard to the fault element, Mrs. Teodecki must demonstrate that the offending

statement was made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

{¶34} The Supreme Court of Ohio has defined actual malice as follows:

> The proof of actual malice must be clear and convincing. In making that measurement, the focus is upon the defendant's attitude toward the truth or falsity of the published statements, rather than upon the existence of hatefulness or ill will. The plaintiff's burden is to show with convincing clarity that: (1) the false statements were made with a high degree of awareness of their probable falsity, or (2) the defendant entertained serious doubts as to the truth of the publication. On appeal, the appellate court must exercise its independent judgment in deciding whether the evidence of record meets these tests.

(Internal citations omitted.) *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218 (1988).

{¶35} The trial court granted summary judgment in favor of the Defendants-Appellees on Mrs. Tedoecki's defamation claim. The trial court did so after concluding that Mrs. Teodecki had failed to demonstrate that Trustee Wargo acted with malice in reading her public statement at the Trustees meeting. Additionally, the trial court reasoned that even if Trustee Wargo's statement was false, she had a qualified privilege to share the contents of the Report with her constituents as it concerned a matter of public importance.

{¶36} In her partial response to Defendants-Appellees' motion for summary judgment, Mrs. Teodecki asserts, without any citation to the record, that Trustee Wargo's public statement was made with actual malice. Mrs. Teodecki's response states that Trustee Wargo "published the false statement with a high degree of awareness of its probable falsity, or she entertained serious doubts as to the truth of the publication." It goes on to state that "[i]t is axiomatic that Wargo knew her statement was false as there were no charges against Teodecki [at that point in time]."

{¶37} After thoroughly reviewing the record, and specifically Trustee Wargo's March 8, 2013 deposition, we determine that Mrs. Teodecki has failed to meet her burden of showing with convincing clarity that Trustee Wargo made her public statement with actual malice. To the contrary, Trustee Wargo expressly stated in her deposition that she believed that Mrs. Teodecki had engaged in criminal activity during her tenure as fire chief, and that the contents of the Report could have been grounds for the prosecutor's office bringing charges against Mrs. Teodecki. Even assuming arguendo that Trustee Wargo's public statement was false, there is no clear evidence in the record indicating that she was either highly aware that her statement was probably false, or that she made her statement while seriously doubting its veracity. Thus, Mrs. Teodecki's defamation claim cannot survive summary judgment because there is no evidence in the record demonstrating the existence of a genuine issue of material fact as to the actual malice element.

{¶38} As such, we conclude that the trial court did not err in granting summary judgment in favor of Defendants-Appellees on Mrs. Teodecki's defamation claim. Because Mrs. Teodecki has failed to establish a prima facie case of defamation, we need not consider whether Trustee Wargo had qualified privilege to disclose the Report's findings to the residents of Litchfield Township.

Abuse of Process

{¶39} Mrs. Teodecki's abuse of process claim relates to Trustee Pope's filing of a Complaint against her with the Ohio Elections Commission, and then subsequently withdrawing his Complaint without giving her notice. Mrs. Teodecki asserts that she was forced to spend $6,380.00 in attorney fees in order to defend against Trustee Pope's Complaint.

{¶40} To prevail on a claim for abuse of process, Mrs. Teodecki must establish:

> (1) that a legal proceeding was properly initiated and supported by probable cause, (2) that same legal proceeding was perverted by the nonmoving party in order to achieve 'an ulterior motive for which it was not designed,' and (3) that the moving party has incurred damages as a result of the nonmoving party's wrongful use of process.

Jarvis v. First Resolution Mgt. Corp., 9th Dist. Summit No. 26042, 2012-Ohio-5653, ¶ 14, citing *Gugliotta v. Morano*, 161 Ohio App.3d 152, 2005-Ohio-2570, ¶ 47 (9th Dist.), quoting *Levey & Co. v. Oravecz*, 9th Dist. Summit No. 21768, 2004-Ohio-3418, ¶ 8, citing *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298 (1994).

{¶41} The trial court granted summary judgment in favor of the Defendants-Appellees on Mrs. Tedoecki's abuse of process claim. It did so after determining that Mrs. Teodecki had failed to meet her reciprocal burden of putting forth any evidence showing the existence of a genuine triable issue surrounding whether Trustee Pope had an ulterior motive in dismissing his Complaint before the Commission without notifying Mrs. Teodecki. *See Zimmerman*, 75 Ohio St.3d at 449.

{¶42} While we agree with the trial court that the procedure employed by Trustee Pope in withdrawing his Complaint before the Ohio Elections Commission was aggravating, we also agree that granting summary judgment in favor of the Defendants-Appellees was proper. Mrs. Teodecki's response to Defendants-Appellees' motion for summary judgment failed to demonstrate the existence of any evidence within the record showing that Trustee Pope perverted the legal proceeding before the Commission in order to achieve some ulterior motive. While Mrs. Teodecki claimed in her response to motion for summary judgment that Trustee Pope perverted the process by improperly withdrawing his Complaint in order "to achieve his goal of causing [her] additional * * * legal expense and inconvenience," we find nothing in the record to

support such an assertion. Therefore, we conclude that the trial court did not err in granting summary judgment in favor of Defendants-Appellees on Mrs. Teodecki's abuse of process claim.

{¶43} Mrs. Teodecki's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN GRANTING A PROTECTIVE ORDER AND A MOTION TO QUASH A SUBPOENA IN FAVOR OF THE DEFENDANTS-APPELLEES AND THE MEDINA COUNTY PROSECUTOR.

{¶44} Mrs. Teodecki argues in her second assignment of error that the trial court erred in granting Defendants-Appellees' motion for a protective order and motions to quash her subpoenas to the Medina County Prosecutor and his assistant. Specifically, Mrs. Teodecki argues that Defendants-Appellees waived the attorney-client privilege when their attorney introduced a letter dated November 8, 2011 from Assistant Prosecutor Shockley to the Trustees at the April 25, 2013 deposition of Sergeant McDermott. We do not agree.

{¶45} "This court generally reviews discovery orders for an abuse of discretion." *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008–Ohio–4333, at ¶ 12 (9th Dist.). However, the Supreme Court of Ohio has stated that the issue of whether sought information is confidential and privileged from disclosure is a question of law that should be reviewed de novo. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009–Ohio–2496, ¶ 13; *see also MA Equip. Leasing I, L.L.C. v. Tilton*, 10th Dist. Franklin Nos. 12AP-564, 12AP-586, 2012-Ohio-4668, ¶ 13, 16, 18. As Mrs. Teodecki's assignment of error raises the issue of whether the discovery information sought is protected from disclosure under the attorney-client privilege, we conduct a de novo review. *Schlotterer at ¶ 13.*

{¶46} "In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law." *State ex rel. Leslie v.*

Ohio Hous. Fin. Agency, 105 Ohio St.3d 261, 2005–Ohio–1508, ¶ 18. R.C. 2317.02 states in relevant part:

> The following persons shall not testify in certain respects:
>
> (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client * * *. However, if *the client* voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

(Emphasis added). While the statute precludes an attorney from *testifying* about confidential communications, the common-law privilege " 'reaches far beyond a proscription against testimonial speech [and] protects against any dissemination of information obtained in the confidential relationship.' " *Leslie* at ¶ 26, quoting *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348 (1991). The purpose of the attorney-client privilege " 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " *Id.* at ¶ 20, quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

{¶47} The attorney-client privilege provides that:

> (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.

Id. at ¶ 21, quoting *Reed v. Baxter*, 134 F.3d 351, 355–356 (6th Cir.1998). While Ohio recognizes several common-law exceptions to the attorney-client privilege, *see Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, ¶ 47, none are applicable in this case.

{¶48} Here, the trial court held a hearing on July 15, 2013 on the issue of Defendants-Appellees' motions to quash and motion for a protective order. The trial court subsequently granted both motions via entry after determining that the documents and other written materials in the possession of the Medina County Prosecutor's Office were protected by the attorney-client privilege. Mrs. Teodecki contends that Defendants-Appellees' counsel voluntarily waived the attorney-client privilege during the deposition of Sergeant McDermott by introducing a privileged communication, namely a letter from Assistant Prosecutor Shockley to the Trustees dated November 8, 2011. However, R.C. 2317.02(A) "provides the exclusive means by which privileged communications directly between an attorney and a client can be waived." *Jackson v. Greger,* 110 Ohio St.3d 488, 2006–Ohio–4968, paragraph one of the syllabus. According to the clear and plain language of R.C. 2317.02, express waiver and voluntary testimony by the client about privileged matter are the only two methods by which the attorney-client privilege may be waived. *State v. McDermott,* 72 Ohio St.3d 570, 574 (1995). An attorney cannot waive the attorney-client privilege on his client's behalf.

{¶49} Therefore, counsel for the Defendants-Appellees did not waive the attorney-client privilege by disclosing an otherwise privileged document during Sergeant McDermott's deposition. As such, we conclude that the trial court did not err in granting Defendants-Appellees' motions to quash and motion for a protective order.

{¶50} Mrs. Teodecki's second assignment of error is overruled.

III.

{¶51} Mrs. Teodecki's assignments of error are overruled and the judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

WHITMORE, P. J.
CONCURS.

MOORE, J.
CONCURRING IN JUDGMENT ONLY.

{¶52} I concur in the majority's judgment. I agree with the analysis regarding the breach of contract claim. With respect to the arguments concerning Mrs. Teodecki's claim for intentional infliction of emotional distress, the majority has labeled her claim as being derivative of her breach of contract claim without any citations to authority or much explanation. In

resolving the claim regarding the breach of contract unfavorably to Mrs. Teodecki, the majority summarily dismisses the argument in the intentional infliction claim based on its decision that the count is derivative of the breach of contract. Generally, "[a] 'derivative claim' or action is a lawsuit resulting from an injury to another person, such as one spouse's action for loss of consortium arising from an injury to the other spouse caused by a third person." *Thomson v. OHIC Ins. Co.*, 12th Dist. Butler Nos. CA2002-03-055, CA2002-03-064, 2002-Ohio-6517, ¶ 17. Intentional infliction of emotional distress is an independent cause of action. *See Czerkas v. United States Steel Corp.*, 9th Dist. Lorain No. 3823, 1985 WL 3639, *4 (Nov. 13, 1985). Accordingly, referring to Mrs. Teodecki's intentional infliction of emotional distress claim as being derivative of her breach of contract claim is somewhat misleading and could lead to confusion in the case law. Instead, I would proceed to examine the merits of Mrs. Teodecki's independent claim for intentional infliction of emotional distress and would conclude that the alleged conduct at issue – releasing a public record about an investigation of a public official to the public – did not amount to extreme and outrageous conduct.

{¶53} With respect to Mrs. Teodecki's defamation claim, I agree that Mrs. Teodecki has not demonstrated that the trial court erred in granting summary judgment. However, I do not agree that the evidence pointed to by the majority negates Mrs. Teodecki's argument. The fact that Trustee Wargo believed charges *could* issue and that she believed Mrs. Teodecki had engaged in criminal conduct is irrelevant to whether Trustee Wargo knew that charges had not been filed against Mrs. Teodecki at the time her statement was published. Accordingly, I cannot say that the evidence pointed to by the majority demonstrates lack of actual malice, given the specific language articulated in the press release.

{¶54} As to Mrs. Teodecki's abuse of process claim, I agree that she has not demonstrated error. Mrs. Teodecki asserts on appeal that Trustee Pope perverted the legal proceeding by failing to comply with the applicable rules and statutes in withdrawing his complaint. However, Mrs. Teodecki has not cited any case law that indicates that a pro se complainant's failure to comply with all of the applicable rules and statutes in withdrawing his complaint amounts to a perversion of the legal proceedings. Accordingly, I cannot say that she has met her burden of demonstrating reversible error.

APPEARANCES:

THEODORE J. LESIAK, Attorney at Law, for Appellant.

TIMOTHY T. REID and JACLYN C. STAPLE, Attorneys at Law, for Appellees.