

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

ROBERT SCHUTTE

Appellant

v.

SUMMIT COUNTY SHERIFF’S OFFICE,  
et al.

Appellees

C.A. No.       28856

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CV 2015 07 3633

DECISION AND JOURNAL ENTRY

Dated: June 29, 2018

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CALLAHAN, Judge.

{¶1} Plaintiff-Appellant, Robert Schutte, appeals from a judgment entry of the Summit County Common Pleas Court, granting summary judgment and dismissing his complaint.<sup>1</sup> This Court affirms.

I.

{¶2} In early 2013, Mr. Schutte spread gravel over a city-owned right-of-way that he uses to access his property in Green, Ohio. Mr. Schutte was charged with violating a City of Green ordinance for performing this work without a permit. The Summit County Sheriff also revoked Mr. Schutte’s special deputy commission. The city prosecutor dismissed the criminal case without prejudice on July 18, 2013.

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<sup>1</sup> Mr. Schutte’s notice of appeal states that “Plaintiffs” are appealing, and his docketing statement lists Susan Schutte as a “Plaintiff-Appellant.” Susan Schutte was not a party to the action below. Consequently, she cannot appeal the judgment.

{¶3} On July 20, 2015, Mr. Schutte filed a complaint against the Summit County Sheriff's Office; Sheriff Steve Barry, individually and in his official capacity; and Deputy Robert DiSabato, individually and in his official capacity (collectively "Defendants"). Mr. Schutte's complaint alleged the following four counts: (1) malicious prosecution, (2) selective prosecution, (3) abuse of process, and (4) wrongful discharge.

{¶4} Defendants answered and moved for judgment on the pleadings. Defendants argued that the Summit County Sheriff's Office was not a legal entity capable of being sued; the statute of limitations barred the malicious prosecution claim against Sheriff Barry and Deputy DiSabato in their individual capacities; Defendants were entitled to immunity on the claims for malicious prosecution, selective prosecution, and abuse of process; and Mr. Schutte had not alleged sufficient facts to support any of his causes of action. Mr. Schutte opposed the motion, arguing that he had pleaded sufficient facts on his claims and that it was premature to rule on the immunity defense until after discovery was completed. He did not respond to Defendants' argument that the Summit County Sheriff's Office was not a legal entity capable of being sued or their statute of limitations argument. The trial court dismissed the malicious prosecution claim against Sheriff Barry and Deputy DiSabato in their individual capacities based on the statute of limitations and converted the balance of the motion to a motion for summary judgment.

{¶5} Thereafter, the parties engaged in discovery and filed additional briefs supporting and opposing summary judgment. Defendants again presented alternative arguments. Defendants reiterated that the Summit County Sheriff's Office was not a legal entity capable of being sued, but contended that, even if it was, it was entitled to immunity as were the other defendants. Defendants also argued that there were no facts to support any of Mr. Schutte's causes of action. In his opposition brief, Mr. Schutte argued that sheriff departments are often sued without the

court discussing whether they are a sui juris entity. He did not respond to Defendants' immunity argument. Mr. Schutte contended that "[d]ue to the unusual facts adduced through the discovery process, a jury could find an improper motive and/or malice" and "issue a verdict in [his] favor" on all of his claims. Both sides cited Civ.R. 56(C) evidentiary materials in support of their positions.

{¶6} In a brief entry, the trial court identified the parties' respective burdens on a summary judgment motion, listed the causes of action, and granted Defendants summary judgment on all of Mr. Schutte's claims. Mr. Schutte appealed, and this Court reversed and remanded the matter for clarification from the trial court. *Schutte v. Summit Cty. Sheriff's Office*, 9th Dist. Summit No. 28203, 2017-Ohio-4172, ¶ 1.

{¶7} On remand, the parties filed supplemental briefs for the trial court. Thereafter, the court issued a five-page judgment entry explaining its grant of summary judgment to Defendants. The court found Defendants were entitled to immunity on the malicious prosecution claim. The court further found that there were no facts in the record to support Mr. Schutte's malicious prosecution, selective prosecution, abuse of process, or wrongful discharge claims. The court found it unnecessary to decide the issue of whether the Summit County Sheriff's Office was a legal entity capable of being sued.

{¶8} Mr. Schutte appeals from that judgment entry, raising three assignments of error.

## II.

### **ASSIGNMENT OF ERROR NO. 1**

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT WITHOUT CONDUCTING ANY LEGAL ANALYSIS AND WITHOUT PROVIDING ANY LEGAL REASONING.

{¶9} In his first assignment of error, Mr. Schutte contends that “the lower court disregarded this Court’s prior directive” by failing to provide a more detailed judgment entry on remand. Mr. Schutte misconstrues this Court’s prior opinion.

{¶10} In that opinion, this Court noted that Defendants had advanced multiple, alternative theories in support of summary judgment. *Schutte*, 2017-Ohio-4172, at ¶ 5, 10. In addition, there were multiple causes of action. *Id.* at ¶ 4, 11. This Court stated, “because we cannot discern the trial court’s basis for the award of summary judgment in Defendants’ favor on all four counts of the complaint, we reverse its judgment and remand the matter so that the trial court can create an entry sufficient to permit appellate review.” *Id.* at ¶ 11.

{¶11} On remand, the trial court stated the bases for its grant of summary judgment as to each of the counts in the complaint. The court found Defendants immune pursuant to R.C. Chapter 2744 on Mr. Schutte’s malicious prosecution claim. The court also found that the record did not contain facts to support Mr. Schutte’s malicious prosecution, selective prosecution, abuse of process, and wrongful discharge claims.

{¶12} Mr. Schutte contends that the trial court should have cited more cases and facts within its entry. Mr. Schutte first faults the trial court for citing just one case (*Dresher v. Burt*, 75 Ohio St.3d 280 (1996)) in its judgment entry following remand.<sup>2</sup> In their motions and briefs to the trial court, Defendants set forth the law governing the elements for each of Mr. Schutte’s claims and the legal framework for deciding an immunity issue. Mr. Schutte set forth the elements for malicious prosecution and abuse of process, but did not identify the elements for

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<sup>2</sup> Despite this criticism, Mr. Schutte also cited just one case (*Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977)) in his supplemental brief to the trial court following remand. Both *Dresher* and *Temple* concern the standard for granting or denying a motion for summary judgment.

selective prosecution or wrongful discharge. He also failed to respond to Defendants' immunity argument on the merits. In its judgment entry, the court stated that Mr. Schutte "does not challenge any of the legal principles enunciated by the Defendants." On appeal, Mr. Schutte has not challenged this finding, nor has he identified what additional case law he believes the court should have cited. *See* App.R. 16(A)(7). While it might have been a better practice by the trial court to recite the law within its judgment entry, such was not required by this Court's prior remand nor is it required by Civ.R. 56.

{¶13} As to the facts, Mr. Schutte provides this Court with a list of citations to various pages in depositions that he claims the trial court failed to consider. While the trial court did not explicitly mention each of these items in its entry, it specified multiple times that it had reviewed the record and the facts before it. Moreover, on appeal, Mr. Schutte does not state what the testimony on those pages was, nor does he indicate how it related to any of his causes of action. *See City of Elyria v. Elbert*, 143 Ohio App.3d 530, 532 (9th Dist.2001) (factual disputes unrelated to the applicable substantive law are irrelevant). His contention seems to be that the trial court was required to explicitly reference each and every portion of a deposition that he referenced. Mr. Schutte does not explain how this Court's prior remand, or Civ.R. 56, can be read to impose such a requirement.

{¶14} Mr. Schutte's first assignment of error is overruled.

#### **ASSIGNMENT OF ERROR NO. 2**

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON [MR.] SCHUTTE'S CLAIMS FOR MALICIOUS PROSECUTION, SELECT[IVE] PROSECUTION, AND ABUSE OF PROCESS.

{¶15} In his second assignment of error, Mr. Schutte argues that there were issues of fact concerning whether Defendants acted with malice and whether they lacked probable cause

to institute a criminal prosecution against him. While Mr. Schutte lists three causes of action in his stated assignment of error, within the body of his argument he only identifies the elements and discusses the facts relative to his malicious prosecution claim. This Court likewise limits its review.

{¶16} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). 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*, 50 Ohio St.2d at 327.

{¶17} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher*, 75 Ohio St.3d at 292. Specifically, the moving party must support the motion by pointing to some evidence of the type listed in Civ.R. 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. The non-moving party may not rest upon the mere allegations or denials in their pleadings, but must point to or submit evidence of the type specified in Civ.R. 56(C). *Id.* at 293; Civ.R. 56(E).

{¶18} “The substantive law involved controls which facts are considered material.” *Elbert*, 143 Ohio App.3d at 532. When a non-moving party has no evidence concerning an essential element of its case, other facts are immaterial. *Black v. Cosentino*, 117 Ohio App.3d 40,

43 (9th Dist.1996). “As a result, a moving party is entitled to judgment as a matter of law where the non-moving party failed to come forth with evidence of specific facts on an essential element of the case with respect to which they have the burden of proof.” *Id.*

{¶19} “The elements of the tort of malicious criminal prosecution are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused.” *Trussell v. Gen. Motors Corp.*, 53 Ohio St.3d 142 (1990), syllabus. Mr. Schutte claims that he presented facts to support each of these prongs and that the trial court erred in finding that he presented no evidence to support the malice and lack of probable cause prongs.

{¶20} The trial court granted summary judgment on the malicious prosecution claim for two independent reasons. First, it found Defendants were immune under R.C. Chapter 2744. Second, it found that Mr. Schutte had not presented any evidence of malice or a lack of probable cause. Mr. Schutte challenges only the second basis and does not address the immunity determination.

{¶21} To demonstrate reversible error, an appellant has the burden to demonstrate error as well as prejudice resulting from that error. *In re P.T.*, 9th Dist. Summit No. 24207, 2008-Ohio-4690, ¶ 17. When a trial court grants judgment on multiple, alternative bases and an appellant does not challenge one of those bases on appeal, this Court will uphold the judgment on the unchallenged basis. *See Tabatabai v. Thompson*, 9th Dist. Medina No. 16CA0044-M, 2017-Ohio-361, ¶ 15. Thus, even if this Court were to agree with Mr. Schutte regarding the evidence on malice or probable cause, that would not amount to reversible error because Mr. Schutte has not challenged the trial court’s alternative basis for granting judgment to Defendants

on this claim. *See Princess Kim LLC v. U.S. Bank, Natl. Assn.*, 9th Dist. Summit No. 27401, 2015-Ohio-4472, ¶ 18.

{¶22} Mr. Schutte’s second assignment of error is overruled.

### **ASSIGNMENT OF ERROR NO. 3**

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON  
[MR.] SCHUTTE’S CLAIM FOR WRONGFUL TERMINATION.

{¶23} In his third assignments of error, Mr. Schutte contends that the trial court erred in granting summary judgment to Defendants on his wrongful discharge claim.

{¶24} The elements of wrongful discharge in violation of public policy are:

1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
2. That dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the *jeopardy* element).
3. The plaintiff’s dismissal was motivated by conduct related to the public policy (the *causation* element).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

(Emphasis sic.) (Internal quotation marks and citations omitted.) *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, ¶ 12-16.

{¶25} As to this cause of action, the trial court once again granted summary judgment on two bases. The court first found that Mr. Schutte was not an employee of the Summit County Sheriff’s Office when his commission was revoked, and therefore, he could not bring a wrongful discharge claim. The court also found that there were “no facts provided to show that any discharge was wrongful.”

{¶26} On appeal, Mr. Schutte argues that there is a factual dispute as to whether he was an employee based on ““extra detail”” assignments he worked for third-parties. He further argues that a jury might find an “improper motive” and that he was terminated contrary to certain Ohio

statutes. This Court finds it unnecessary to address whether Mr. Schutte was an employee because, even assuming arguendo that he was, he failed to demonstrate a genuine issue of material fact concerning the elements for a wrongful discharge claim.

{¶27} “To satisfy the clarity element of a claim of wrongful discharge in violation of public policy, a terminated employee must articulate a clear public policy by citation to specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law.” *Dohme*, 130 Ohio St.3d 168, 2011-Ohio-4609, at syllabus.

{¶28} In his complaint, Mr. Schutte alleged that he was discharged “for exercising his fundamental constitutional right to maintain safe ingress and egress to his property.” Defendants argued, inter alia, that Mr. Schutte failed to state “the specific fundamental constitutional right he has not been allowed to exercise, nor whether it is a right under the state or federal constitution \* \* \* [and] cannot show any set of facts which permits him to violate a statute or ordinance in order to ‘protect’ his property rights.” Mr. Schutte did not respond by identifying any specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law. Rather, he merely restated that Defendants “conspired to keep [him and his family] from having road access to their own property, and used \* \* \* wrongful termination to achieve this ulterior motive.” Thus, Mr. Schutte failed to satisfy the clarity element of a wrongful discharge claim.

{¶29} On appeal, Mr. Schutte posits that he was terminated contrary to the provisions of R.C. 311.04(C)(4) and R.C. Chapter 119. This is not the theory that Mr. Schutte set forth in the trial court. “[A]n appellant cannot change h[is] theory of the case on appeal in the hope of obtaining reversal.” *Bradley v. Sprenger Enters., Inc.*, 9th Dist. Lorain No. 07CA009238, 2008-

Ohio-1988, ¶ 10, citing *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992).

{¶30} Mr. Schutte's third assignment of error is overruled.

III.

{¶31} Mr. Schutte's assignments of error are overruled. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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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 Summit, 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.

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LYNNE S. CALLAHAN  
FOR THE COURT

SCHAFFER, P. J.  
CONCURS.

CARR, J.  
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

DONALD GALLICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and COLLEEN SIMS, Assistant Prosecuting Attorney, for Appellees.