[Cite as *Martin v. Wills*, 2017-Ohio-9382.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JEANNE MARTIN	)	CASE NO. 16 MA 0091
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
WILLIAM WILLS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 15 CV 2842

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:
Atty. Anthony J. Farris
860 Boardman-Canfield Rd.
Suite 204
Youngstown, Ohio 44512

Atty. Douglas J. Neuman
Ancillary Administrator of the
Estate of Jeanne Martin, Deceased
761 N. Cedar Avenue
Niles, Ohio 44446

For Defendant-Appellant:
Atty. Harry J. DePietro
The DePietro Law Office LLC
1565 Woodland Street, N.E.
Warren, Ohio 44483

JUDGES:
Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 27, 2017

[Cite as *Martin v. Wills*, 2017-Ohio-9382.]
WAITE, J.

{¶1} Appellant William Wills appeals from a judgment of the Mahoning County Court of Common Pleas granting Appellee Jeanne Martin's motion for summary judgment on Appellant's counterclaims for nuisance, frivolous litigation, vexatious conduct, intentional infliction of emotional distress, invasion of privacy and defamation. The trial court did not err in ruling on the motion for summary judgment. This record reveals that Appellant raised no material issue of fact and that Appellee was entitled to judgment pursuant to law. Therefore, Appellant's assignments of error are without merit and are overruled and the judgment of the trial court is affirmed.

{¶2} This case arises from a long, contentious relationship between two neighbors who reside adjacent to one another on the north side of Youngstown. The parties have a history which includes multiple filings in small claims court, numerous police calls to their properties and mutual restraining orders. In this latest matter, Appellee filed a *pro se* small claims complaint against Appellant on August 6, 2015, alleging that Appellant's fence, which had been removed after it was determined that it encroached on Appellee's property, had interfered with Appellee's ability to repair her sewer line and that Appellant had engaged in acts of harassment against Appellee, among other things.

{¶3} In September of 2015, Appellant filed an answer and counterclaim. Appellant's counterclaims involved allegations of nuisance, frivolous litigation, vexatious conduct, intentional infliction of emotional distress, invasion of privacy and defamation. Appellant also requested that the matter be transferred from

Youngstown Municipal Court to the Mahoning County Court of Common Pleas (2015 CV 2842). Appellee, now represented by counsel, amended her complaint and the parties began discovery in the matter. The trial court set a dispositive deadline of May 9, 2016. Appellee filed a motion for summary judgment regarding Appellant's counterclaims and mailed the time-stamped copy to Appellant's counsel on the day the motion was filed, May 6, 2016. Appellant claims he received the motion on May 10. Appellant did not respond to the motion for summary judgment. Instead, he filed a motion to strike the summary judgment request, arguing that Appellee failed to properly serve him with her motion.

{¶4} In an entry dated June 3, 2016, the trial court denied Appellant's motion to strike and granted Appellee summary judgment, holding that service of the motion for summary judgment was complete once it was mailed on May 6, 2016 and that Appellant had failed to timely oppose the motion.

{¶5} On June 13, 2016, Appellee filed a motion to amend the prayer for relief in her action and asked to have the case transferred back to the Youngstown Municipal Court. Appellant sought to strike Appellee's motion to amend, but the trial court granted Appellee's motion, allowing both amendment of the complaint and transfer to Youngstown Municipal Court. Appellant filed this appeal. After a hearing before this Court, counsel for Appellee filed a notice of suggestion of Appellee's death as well as a motion to withdraw as counsel. We granted counsel's motion to withdraw on August 23, 2017 and granted the parties thirty days to substitute the proper party. A motion to substitute pursuant to App.R. 29 was filed by Appellant on

September 21, 2017, naming as Appellee Sheryl Bell, Administrator of the Estate of Jeanne Martin.

ASSIGNMENT OF ERROR NO. 1

THE COURT ERRED AS A MATTER OF LAW, AND ABUSED ITS DISCRETION TO THE APPELLANT'S HARM WHEN IT FAILED TO STRIKE, AND SUBSEQUENTLY GRANTED, THE APPELLEE'S SUMMARY JUDGMENT MOTION AS IT HAD NOT BEEN SERVED AS PURSUANT TO THE REQUIREMENTS OF CIV.R. 5(D) AND BORE A SHAM CERTIFICATE OF SERVICE IN VIOLATION OF CIVIL RULES 5(B)(4) AND 11.

{¶6} In Appellant’s first assignment of error he contends the trial court erred in granting Appellee summary judgment on his counterclaims. He argues that Appellee’s motion seeking summary judgment should have been stricken, because service was improper. The crux of Appellant’s argument is that Appellee’s motion should not have been considered because it was filed with the clerk before it was served on Appellee and because he claims the certificate of service attached to it was “a sham.”

{¶7} Appellee responds that the Civil Rules state that service is complete on mailing. Since she mailed Appellant’s counsel a copy of her motion for summary judgment on May 6, 2016, service on Appellant was completed on that date.

{¶8} Civ.R. 12(F) permits a court to strike any pleading or material determined to be insufficient, redundant, immaterial, impertinent or scandalous. “The

determination of a motion to strike is vested within the broad discretion of the court." *In re J.H.,* 7th Dist. No. 10 JE 15, 2011-Ohio-6536, ¶ 30, citing *State ex rel. Morgan v. New Lexington,* 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 26. A trial court's decision on a motion to strike will not be disturbed absent an abuse of discretion. *Id.*

{¶9} Appellant filed two motions to strike in the instant matter. The first was directed at Appellee's motion for summary judgment. The request to strike the summary judgment motion was based on Appellant's assertion that this motion had never been properly served, and so, was not properly before the court. Appellant centers this argument on the fact that Appellee filed her motion with the clerk before serving it on Appellant's counsel, as evidenced by the time-stamp that appears on the copy served to counsel.

{¶10} Civ.R. 5(D) provides in pertinent part as follows:

> Any paper after the complaint that is required to be served shall be filed with the court within three days after service. The following discovery requests and responses shall not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry on land, and requests for admission.

{¶11} A trial court abuses its discretion when it dismisses a case for a minor, inadvertent violation of the Civil Rules when (1) the mistake was made in good faith and not part of a continuing course of conduct for the purpose of delay; (2) neither

the opposing party nor the court is prejudiced by the error; (3) the dismissal is a sanction that is disproportionate to the error; (4) the litigant will be unfairly punished for the fault of counsel; and (5) dismissal frustrates the policy of deciding an action on its merits. *DeHart v. Aetna Life Insurance Co.,* 69 Ohio St.2d 189, 431 N.E.2d 644 (1982), syllabus.

{¶12} The trial court set a dispositive motion deadline of May 9, 2016 in this matter. Appellee's counsel filed the summary judgment motion on May 6th with the clerk and on the same day mailed the motion to Appellant's counsel. Pursuant to Civ.R. 5(B)(2)(c), service is considered completed once the document is mailed. This record shows that Appellant was served on May 6, 2016, prior to the court's deadline and within the three days required by rule. Appellee asserts, and Appellant does not dispute, that the motion was mailed within hours of filing with the clerk. Whether the motion was put into the mail prior to its filing with the clerk or after is completely immaterial. Appellant has not demonstrated any prejudice, nor is there any evidence of bad faith on the part of Appellee's counsel. There is nothing in this record that could lead us to conclude that this motion was not properly filed or served. We find no abuse of discretion in the decision of the trial court not to strike Appellee's motion for summary judgment.

{¶13} Appellant also contends the certificate of service attached to the summary judgment motion was a "sham." Appellant claims that the certificate of service "stated – in the past tense – that service was made before the appellee's motion for summary judgment was filed with the clerk of court." (Appellant's Brf., p.

15.) As the motion served on Appellant's counsel contained the time-stamp from the clerk, it was obviously filed prior to service. As such, Appellant argues it is fraudulent on its face.

{¶14} "A presumption of proper service arises when the record reflects that a party has followed the Civil Rules pertaining to service of process." *Poorman v. Ohio Adult Parole Authority*, 4th Dist. No. 01CA16, 2002-Ohio-1059, *2, citing *Potter v. Troy,* 78 Ohio App.3d 372, 377, 604 N.E.2d 828 (2d Dist.1992). Civ.R. 5(B)(4) requires that served documents be "accompanied by a completed proof of service which shall state the date and manner of service, specifically identify the division of Civ.R. 5(B)(2) by which the service was made, and be signed in accordance with Civ.R. 11."

{¶15} Ohio courts have held that a motion which is completely lacking a certificate of service is not properly before the trial court and the court has no jurisdiction. See *Schmuck v. Schmuck,* 8th Dist. No. 85793, 85864, 2005-Ohio-6357, ¶ 9; *Nosal v. Szabo,* 8th Dist. No. 83974, 83975, 2004-Ohio-4076, ¶ 21; *Watson v. Cedardale Homes, (NC) Inc.* 4th Dist. No. 92-CAE-11040, at *2. We are clearly not dealing with this issue, here. Appellant complains about the wording of the certificate of service. Because it states that service "was" accomplished, which reflects past tense, Appellant posits that this language proves the certificate of service is false or a "sham" because the document served contains a time-stamp showing that it was filed before, and not after, service. The certificate of service attached to the motion for summary judgment and signed by Appellee's counsel reads:

> The foregoing was served by regular U.S. Mail to the DePietro Law office, LLC, 7 West Liberty Street, Girard, Ohio 44420 on this 6 day of May, 2016.

{¶16} It is apparent that Appellee's certificate of service complies with Civ.R. 5(B)(3). It indicates the correct date of service, the stated manner of service, and was signed by Appellee's counsel. Although the motion was filed with the clerk's office before it was served, service was accomplished the same day. There is no evidence in the record supporting the contention that Appellee's counsel acted in bad faith or in an attempt to delay, nor does Appellant cite to such evidence. Appellant also does not cite to any prejudice to Appellant arising from this issue. Rather than responding to the motion for summary judgment, Appellant sought to have it stricken, and then filed a second motion to strike when Appellee moved to amend her prayer for relief and to transfer the case back to the Youngstown Municipal Court.

{¶17} Absent any indication that Appellee and her counsel acted in bad faith or that Appellant was somehow prejudiced, the trial court did not abuse its discretion in denying Appellant's motion to strike Appellee's properly filed and served motions. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE COURT ERRED AS A MATTER OF LAW, AND ABUSED ITS DISCRETION TO THE APPELLANT'S HARM WHEN IT GRANTED THE APPELLEE'S SUMMARY JUDGMENT MOTION BASED ON THE COURT'S MISTAKEN BELIEF THAT THE APPELLANT FAILED TO

RESPOND TO THE MOTION WHEN THE APPELLANT HAD NO DUTY TO DO SO.

{¶18} In his second assignment of error, Appellant claims the trial court erred in granting Appellee's summary judgment motion. Again urging that service was somehow invalid, Appellant argues that he had no duty to oppose the summary judgment motion because it was not properly before the court.

{¶19} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (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, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶20} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280,

296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶21} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

{¶22} We have already determined Appellant's first assignment, attacking the validity of the summary judgment motion, is meritless. Because Appellee's motion for summary judgment was properly before the trial court and the trial court had jurisdiction to rule on it, Appellant's argument that he had no duty to oppose the motion is also not well taken. Appellant makes no claim that timely response was impossible, nor does the record reflect that Appellant sought leave from the trial court for additional time to respond to the motion. Instead, Appellant bases his argument both to the trial court and again on appeal on his belief that the summary judgment motion was never served, was "illegally on file," and hence that the trial court had no

jurisdiction. (Appellant's Brf., p. 14.) These arguments are specious, and Appellant never attempted to oppose the actual merits of the summary judgment motion in any fashion.

{¶23} As Appellee's motion was not opposed by Appellant and Appellant makes no arguments either here or to the trial court regarding the substance of the motion, summary judgment may be appropriate when the nonmoving party does not produce evidence on any issue for which that party bears the burden of production at trial; *Abram v. Greater Cleveland Regional Transit Auth.,* 8th Dist. No. 80127, 2002-Ohio-2622 at ¶ 43. However, even when a summary judgment motion is unopposed, the motion and supporting evidence must reflect the absence of any material fact before the court can grant the motion. *Charles Gruenspan Co. v. Thompson,* 8th Dist. No. 80748, 2003-Ohio-3641.

{¶24} Appellee's motion for summary judgment related to Appellant's counterclaims: nuisance, frivolous litigation, vexatious conduct, intentional infliction of emotional distress, invasion of privacy and defamation.

{¶25} In Ohio, nuisance is defined as the wrongful invasion of a legal right or interest. *Taylor v. Cincinnati,* 143 Ohio St. 426, 436, 55 N.E.2d 724 (1944). A nuisance can be either public or private. *Brown v. Scioto Cty. Bd. Commrs.,* 87 Ohio App.3d 704, 712, 622 N.E.2d 1153 (4th Dist.1993). A public nuisance is "an unreasonable interference with a right common to the general public." *Id.* a private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land." *Id.*

{¶26} In Appellant's counterclaim he alleges "Plaintiff's conduct was designed and/or intended to create a nuisance." (9/30/15 Defendant's Answer and Counterclaim, p. 3.) It is apparent that Appellant alleged absolute nuisance. The alleged intentional conduct cited by Appellant in his counterclaim includes allowing water runoff into his property, allowing her dog to run loose, raising her voice to Appellant and making obscene gestures, and that she failed to put her trash out properly. *Id.* Appellee contended in her affidavit submitted with her motion for summary judgment that the allegations are untrue. Appellant did not provide any evidence to dispute this. Appellee also notes that, even if true, they do not constitute an absolute nuisance. Based on this record, we agree with Appellee. Appellant's allegations fail to assert a legally protected interest with which Appellee interfered, as required by *Taylor.* Further, absolute nuisance requires more than an allegation that an individual is annoyed or disturbed. It requires proof that there is an injury to a legal right of a neighbor which is real, material and substantial. *Banford v. Aldrich Chem. Co., Inc.,* 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 17. Appellant's counterclaim for nuisance does not, as a matter of law, meet the standard for absolute nuisance.

{¶27} Appellant raised a counterclaim seeking redress for "frivolous litigation." However, no separate cause of action exists for such a claim. *Shaver v. Wolske & Blue,* 138 Ohio App.3d 653, 673, 742 N.E.2d 164 (10th Dist.2000). In his counterclaim, Appellant asserts only that Appellee "repeatedly filed multiple baseless, improper and/or nonsensical court actions" against him. (9/30/15 Defendant's

Answer and Counterclaim, p. 4.) In this matter, Appellee filed the initial complaint which was not determined to be baseless. She also filed for a civil protection order, which resulted in an agreed judgment entry. It is axiomatic that the evidence in this record does not support Appellant's counterclaim.

{¶28} Appellant also raised a counterclaim pertaining to allegedly vexatious conduct on the part of Appellee. R.C. 2323.52 requires that Appellant show: 1) conduct that is meant to merely harass or maliciously injure another party in a civil action; 2) conduct that is not warranted by existing law or a good faith extension, modification or reversal of existing law; or 3) conduct that is used as a delay tactic. Appellant alleges Appellee made multiple false complaints against him to the City of Youngstown and the Youngstown Police Department. In her affidavit, Appellee stated that she sought a civil protection order against Appellant and made statements to the police about Appellant's conduct which were all true. Again, the request for a protection order resulted in an agreed entry. Appellant provided no evidentiary support for his claims, and because he failed to respond to Appellee's motion for summary judgment, no other evidence is present in this record. Appellee was entitled to summary judgment on this counterclaim.

{¶29} Appellant alleged intentional infliction of emotional distress in his counterclaim, as well. The elements required to recover in a claim for intentional infliction of emotional distress are:

> 1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional

> distress to the plaintiff; 2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it can be considered as "utterly intolerable in a civilized community," Restatement of Torts 2d (1965) 73, Section 46, comment d; 3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that "no reasonable man could be expected to endure it," Restatement of Torts 2d 77, Section 46, comment j.

Pyle v. Pyle, 11 Ohio App.3d 31, 34, 11 OBR 63, 463 N.E.2d 98 (1983).

{¶30} Appellant alleges Appellee was aware of his fear of clowns but proceeded to place clown pictures in the windows of her home, which faced Appellant's home and driveway, to "deliberately cause him anguish, anxiety and emotional distress due to his fear of clowns." (9/30/15 Defendant's Answer and Counterclaim, p. 5.) In addition, Appellant contends Appellee "directed cameras at the [Appellant's] home and driveway to observe [him], invade his privacy and otherwise cause him anguish, anxiety and emotional distress." *Id.* In her affidavit Appellee admitted she hung clown pictures to keep Appellant from trespassing but also stated she never used any "device or recording to view [Appellant's] private affairs. (5/6/16 Defendant's Motion for Summary Judgment.) While Appellee's conduct may be seen as unkind and beyond the bounds of adult maturity, it hardly rises to the requisite level of distress, which has been described as a level where "no reasonable man could be expected to endure it." Restatement of Torts 2d 77,

Section 46, comment j. Moreover, Appellant presented no evidence demonstrating that Appellee's conduct was the proximate cause of psychic injury or mental anguish. Appellant produced no evidence at all. For these reasons Appellee was entitled to summary judgment on this counterclaim.

{¶31} Appellant also included a counterclaim for invasion of privacy. To be successful in this claim, Appellant must prove 1) the unwarranted appropriation or exploitation of his personality; 2) the publicizing of his private affairs where there is no legitimate public concern; and 3) the wrongful intrusion into his private activities in such a manner as to cause outrage or mental suffering, shame or humiliation to a person of ordinary sensibilities. *Welling v. Weinfeld,* 113 Ohio St.3d 464, 466, 2007-Ohio-2451, 866 N.E.2d 1051. Appellant alleges Appellee utilized a camera and listening device to record his movements and conversations. Appellant did not allege there was any publication, a requirement in the second prong. Its absence is fatal to Appellant's claim. Moreover, Appellee stated in her affidavit that the camera was never operational but was placed only to discourage Appellant from continually trespassing on her property. Appellant did not rebut this evidence. As Appellant has not properly pleaded his claim and has failed to provide any evidentiary materials to support the allegations, Appellant's counterclaim for invasion of privacy fails. The trial court did not err in granting summary judgment to Appellee on this claim.

{¶32} Finally, Appellant alleged a counterclaim for defamation. Defamation is defined as a false publication that injures an individual's reputation. *Dales v. Ohio Civil Service Employees Assn.,* 57 Ohio St.3d 112, 117, 567 N.E.2d 253 (1991).

{¶33} Appellant that Appellee made false statements to the police and others about him. Appellee testified in her affidavit that her statements to the police were true. This was undisputed by Appellant. The record also lacks any evidence that Appellant suffered damage to his reputation as a result of these alleged statements. The trial court properly granted summary judgment on this counterclaim.

{¶34} The record reveals Appellant was properly served and the summary judgment motion was correctly before the trial court. In the absence of any opposition or evidentiary material to support such opposition by Appellant, the trial court correctly ruled in favor of Appellee. This record reveals no material question of fact as regards any claims correctly pleaded in Appellant's counterclaim. The court did not err in granting Appellee's motion for summary judgment and overruling Appellant's motion to strike. Appellant's second assignment of error is without merit and is overruled.

{¶35} For the foregoing reasons, Appellant's assignments of error and counterclaims are overruled and the judgment of the Mahoning County Court of Common Pleas is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.