STATE OF MICHIGAN

COURT OF APPEALS

GARY OLIVER, Plaintiff-Appellant,	UNPUBLISHED March 3, 2005
v MARIE PENCZAK, f/k/a MARIE OLIVER, Defendant-Appellee.	No. 250560 Wayne Circuit Court LC No. 02-241841-NO

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff, Gary Oliver, appeals as of right the trial court order granting summary disposition to defendant, Marie Penczak, pursuant to MCR 2.116(C)(8) with respect to plaintiff's false light and abuse of process claims. We affirm.

Plaintiff and defendant were married for nineteen years. Defendant filed for divorce. In April 2000, while the divorce case was still pending, defendant sought a Personal Protection Order (PPO) against plaintiff. In her application for this PPO, defendant included the following statements: (1) plaintiff owned many weapons; (2) plaintiff called defendant names and slapped her; (3) plaintiff came home late, drank, went to strip bars, and watched pornography; (4) plaintiff passed defendant's home while revving his truck engine; (5) plaintiff called defendant on her cell phone three times in the middle of the night; and (6) plaintiff threatened defendant's friends. The PPO was issued, and shortly thereafter defendant was arrested for violating it. After the PPO expired, defendant sought and obtained a second PPO against plaintiff.

In November 2002, plaintiff filed the complaint in the instant case, alleging libel and slander, false light, and abuse of process. Plaintiff's theory was that the statements contained in defendant's PPO application and statements made to the police portrayed plaintiff in a false light and constituted libel and slander. The trial court granted defendant summary disposition on all counts, found plaintiff's complaint to be frivolous, and awarded defendant attorney fees.

Plaintiff first challenges the order granting defendant summary disposition pursuant to MCR 2.116(C)(8) with respect to plaintiff's false light claim. Plaintiff argues that defendant's statements were not absolutely privileged. We review de novo a grant of summary disposition based upon a failure to state a claim. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone, and the motion may not, therefore, be supported with documentary evidence.

Mable Cleary Trust v Edward-Marlah Muzyl Trust, 262 Mich App 485, 491; 686 NW2d 770 (2004). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Adair, supra* at 119, quoting *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). A motion pursuant to MCR 2.116(C)(8) should be granted only when the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Adair, supra* at 119, quoting *Maiden*, *supra* at 119.

Each statement that plaintiff relied upon in support of his false light claim was a statement made by defendant to the police, either in connection with obtaining a PPO or in connection with a claim that plaintiff was violating the PPOs or otherwise was committing some wrongdoing. Where an absolute privilege exists, there can be no action for defamation. *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992). With regard to privileges accorded to statements, in *Hall v Pizza Hut*, 153 Mich App 609, 619; 396 NW2d 809 (1986), this Court held that "information given to police officers regarding criminal activity is absolutely privileged." Although the *Hall* Court may have retreated slightly from this statement, the case it relied on, *Shinglemeyer v Wright*, 124 Mich 230, 239-240; 82 NW 887 (1900), unequivocally states that statements made to police regarding criminal activity are absolutely privileged. Moreover, we note that the Supreme Court reiterated this finding:

> The private citizen, as a part of his moral duty to the public, should undoubtedly convey to the police officers any information he may have in regard to a crime believed to have been committed, and the perpetrator thereof. Such communications are absolutely privileged. [*Gowan v Smith*, 157 Mich 443, 450; 122 NW 286 (1909), citing *Shinglemeyer, supra*.]

Thus, pursuant to Michigan law, all communications made to police concerning criminal activity are absolutely privileged. Because all the statements at issue were made by defendant to the police in connection with the PPOs, we conclude that the trial court did not err in granting defendant summary disposition on plaintiff's false light claim.

Plaintiff also challenges the order granting defendant summary disposition pursuant to MCR 2.116(C)(8) with respect to his abuse of process claim.

Plaintiff first asserts that the court based its ruling on a finding that defendant's statements were absolutely privileged and that privilege was a bar to an abuse of process claim. We are not entirely certain, based on the court's statements, that the court did in fact find that privilege was a defense to an abuse of process claim. It appears that the trial court was merely stating that it was granting summary disposition with respect to this claim on the basis that plaintiff had failed to state a valid claim. In any event, we will not reverse a trial court's decision where it reached the correct result, but for the wrong reason. *Gleason v Michigan Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

The elements of an abuse of process claim are: "(1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). A meritorious abuse of process claim arises out of a situation where a defendant has used a proper legal procedure for an improper purpose given the intended use of that procedure. *Id*. A bad motive alone will not establish an abuse of process; the plaintiff must set forth some corroborating act that

demonstrates the ulterior purpose. *Id*. Therefore, to survive summary disposition pursuant to MCR 2.116(C)(8), plaintiff must plead an ulterior motive and some corroborating act that demonstrates the ulterior purpose.

In the present case, plaintiff pleaded an ulterior motive—that defendant sought and obtained the PPOs for the purpose of having plaintiff arrested and, thereby, gaining an advantage in their divorce action. However, plaintiff failed to plead a corroborating act that demonstrates that ulterior purpose. Plaintiff asserts in his complaint that defendant had him arrested on two separate occasions when he came into her presence. However, the mere fact that plaintiff was arrested does not demonstrate that defendant obtained the PPOs for the purpose of having plaintiff arrested. Indeed, the fact that defendant caused plaintiff to be arrested does not appear to relate to the reason or reasons for which defendant sought the PPOs. Moreover, we note that the second PPO was actually obtained several months after the parties' divorce judgment was final. This undermines plaintiff's argument that defendant had the stated ulterior motive in obtaining that PPO. Accordingly, the trial court properly granted summary disposition pursuant to MCR 2.116(C)(8) with respect to plaintiff's abuse of process claim.

Plaintiff next argues that the trial court erred in finding that plaintiff's complaint was frivolous. We review a trial court's determination whether a claim is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A determination is clearly erroneous when the reviewing court is left with "a definite and firm conviction that a mistake has been made." *Id*. at 661-662.

MCL 600.2591 provides in pertinent part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> (3)(a) "Frivolous" means that at least 1 of the following conditions is met:
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> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

Whether a claim is frivolous within the meaning of MCL 600.2591 depends on the facts of each case, *Kitchen*, *supra* at 662, and must be determined on the basis of the circumstances existing at the time the claim was asserted, *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). Moreover, "merely because this Court concludes that a legal position asserted by a

party should be rejected does not mean that the party was acting frivolously in advocating its position." *Kitchen*, *supra* at 663.

In the present case, plaintiff's first two claims were clearly without legal merit. His libel and slander claim was barred by the statute of limitations, and he conceded as much. As discussed *supra*, plaintiff's false light claim was barred by privilege. The essence of plaintiff's argument supporting his abuse of process claim was that defendant obtained the PPOs for the improper purpose of having plaintiff arrested and, thereby, gaining an advantage in their divorce action. The first PPO was obtained in the spring of 2000, approximately one year before the parties' divorce was finalized. To the extent that plaintiff's abuse of process claim was based on defendant's obtaining the first PPO, his claim may not have been completely devoid of arguable legal merit. Moreover, the fact that the court found that plaintiff had failed to state a claim upon which relief could be granted does not necessarily lead to the conclusion that plaintiff's abuse of process claim was devoid of arguable legal merit. *Kitchen*, *supra* at 663. Thus, we believe that defendant's third claim, at least in part, cannot be said to have been devoid of arguable legal merit. However, the second PPO was obtained in the fall of 2001, several months *after* the parties' divorce was finalized. Therefore, defendant's second PPO could not form the basis for plaintiff's abuse of process claim because the proceeding in which plaintiff alleged defendant had sought to obtain an advantage by committing abuse of process in obtaining the PPO had already been completed. Given that two of plaintiff's three claims were absolutely without merit, and that plaintiff's final claim was at least partially devoid of arguable legal merit, we are not left with the definite and firm conviction that a mistake has been made. Accordingly, we conclude that the trial court did not commit clear error when it found plaintiff's complaint to be frivolous.

Lastly, plaintiff argues that the trial court awarded excessive attorney fees and costs to defendant and that he was denied a meaningful opportunity to be heard on this question. Plaintiff asserts that defendant's pleadings were poorly prepared and written and that defendant began discovery before the court ruled on her motion for summary disposition. We review an award of attorney fees for an abuse of discretion. *In re Attorney Fees & Costs*, *supra* at 104. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 612; 643 NW2d 600 (2002), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Gates v Gates,* 256 Mich App 420, 437-438; 664 NW2d 231 (2003).

There is no precise formula for determining the reasonableness of an attorney's fee. *Michigan Tax Mgmt Services Co v City of Warren*, 437 Mich 506, 509; 473 NW2d 263 (1991). We consider the following factors: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Id*. at 509-510 (citation omitted).

Looking at the record in this case, defendant attached to her motion for attorney fees a detailed two-page listing of the attorney fees charged in connection with this matter. She cited exact dates for work completed, the number of hours worked, and specific details of what the attorney's work entailed. In making its ruling on the question of attorney fees, the court stated

the factors it would consider in determining the reasonableness of the fee. These factors are the same as those listed above in *Michigan Tax Mgmt Services Co, supra* at 509. The court then reviewed the listing and stated its opinion that nothing in the list was excessive. The court then reduced the amount of fees to take into account that certain filing fees had been included, which the court felt should not have been included. Thus, the court carefully considered the actual fees requested by defendant and made appropriate adjustments before making its award. As a result, we find that an unprejudiced person, considering the facts on which the trial court acted, would not say that there was no justification or excuse for the ruling made. Accordingly, we conclude that the trial court did not abuse its discretion when it granted defendant attorney fees in the amount of $4,480.

Plaintiff's assertion that he was denied a meaningful opportunity to be heard on this question is without merit. As plaintiff asserts, he had a right to be heard on this question. *Klco v Dynamic Training Corp*, 192 Mich App 39, 42-43; 480 NW2d 596 (1991). The opportunity to be heard "does not require a full triallike proceeding, but does require a hearing to the extent that a party has a chance to know and respond to the evidence." *Id.* In the instant case, the court permitted plaintiff to state in detail his objections to the amount of attorney fees defendant was requesting before making its ruling. As a result, we conclude that plaintiff was given a meaningful opportunity to be heard regarding the matter.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M Fort Hood