

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 0705

JOHN WELLS, JANICE WELLS

VERSUS

GARY KNIGHT, VETERANS FOR LAMZ

JW
NAW by

Judgment Rendered: December 23, 2009

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2004-15,207

Honorable Martin E. Coady, Judge

John B. Wells
Slidell, LA

Attorney for & In Proper Person
Plaintiffs – Appellants
John Wells and Janice Wells

Robert C. Stern
New Orleans, LA

Attorney for
Defendants – Appellees
Gary Knight, Veterans for Lamz

Adrienne Baumgartner
Katheleen E. Simon
Covington, LA

Attorneys for
Defendant – Appellee
James Lamz

Gus A. Fritchie, III
New Orleans, LA

Attorney for
Defendants – Appellees
Tom W. Thornhill and Thornhill Law
Firm, L.C.

William J. Faustermann, Jr.
Slidell, LA

Attorney for
Defendant – Appellee
Committee to Elect Jim Lamz

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

John Wells appeals a motion for summary judgment granted in favor of the defendants, James “Jim” Lamz, The Committee to Elect Jim Lamz, Tom W. Thornhill, and Thornhill Law Firm, L.C. (“Thornhill Law”), which dismissed his claims against the defendants. For reasons that follow, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

Mr. Lamz (now Judge Lamz) and Mr. Wells were both judicial candidates for Slidell City Court in 2004. The election was scheduled for November 2, 2004. Before the election, Mr. Wells published two political flyers containing statements about Judge Lamz and his family with regard to a prior bankruptcy proceeding in which Judge Lamz was personally involved. Judge Lamz retained Mr. Thornhill and Thornhill Law to obtain injunctive relief on the basis that the flyers were in violation of La. R.S. 18:1463¹ and were defamatory.

On October 29, 2004, Mr. Thornhill, on behalf of Judge Lamz, filed a petition for injunctive relief alleging that Mr. Wells had violated the provisions of La. R.S. 18:1463, by “causing to be distributed, transmitted and published many oral, visual and written statements” containing numerous false allegations about Judge Lamz and requesting a temporary restraining order prohibiting the publication and distribution of any false advertisements concerning Judge Lamz,

¹ Specifically, at issue in this case are the following provisions of La. R.S. 18:1463:

C. (1) No person shall cause to be distributed, or transmitted, any oral, visual, or written material containing any statement which he knows or should be reasonably expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters.

D. (1) An affected candidate or voter shall be entitled to an injunction to restrain future violations of Subsections B and C of this Section.

(2) In the event a permanent injunction is granted, reasonable attorney fees shall be allowed the petitioner by the court which shall be taxed as costs to be paid by the defendant.

E. Whoever violates any provision of this Section may be punished by a fine not to exceed five hundred dollars or be imprisoned for not more than six months, or both.

that Mr. Wells be ordered to immediately retract any false advertisements, that Mr. Wells be ordered to pay reasonable attorney fees incurred by Judge Lamz in presenting the matter, and that Mr. Wells “be punished by a fine not to exceed five hundred dollars or imprisoned for not more than six months, or both.” Judge Lamz’s request for the temporary restraining order was denied without a hearing; therefore, Mr. Wells was not prohibited from distributing his advertisements. The hearing on the preliminary injunction was scheduled for November 3, 2004, the day following the election. On November 2, 2004, Judge Lamz was elected as judge for the Slidell City Court.

On November 3, 2004, at the hearing on the preliminary injunction, the trial court concluded that the petition for injunctive relief was moot. Judge Lamz was subsequently allowed to file a supplemental and amending petition asserting a defamation cause of action against Mr. Wells. Therefore, the issues remaining following the election were Judge Lamz’s request for relief under La. R.S. 18:1463(E) and for damages due to defamation. In response, Mr. Wells filed a special motion to strike pursuant to La. C.C.P. art. 971,² arguing that Judge Lamz had maliciously sued him in a brazen attempt to curtail protected political speech in direct violation of the First Amendment to the Constitution of the United States.

After a number of delays, Mr. Wells’s special motion to strike was scheduled for hearing on March 24, 2005, along with several other related matters, including exceptions raising the objection of prematurity and improper use of summary proceedings filed by Judge Lamz. Prior to the commencement of the hearing, Mr. Thornhill advised the court that the request for relief under La. R.S. 18:1463(E) was not being pursued and that the only remaining claim was for

² Louisiana Code of Civil Procedure article 971(A)(1) provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.”

defamation. Thereafter, the court denied the exceptions and granted the special motion to strike finding that Judge Lamz had not met his burden of proof on the motion.³

In ruling on the special motion to strike, the court made the following observations about the political flyers that were to be distributed by Mr. Wells:

Now I've reviewed [the political flyers] ... and I must say that what is contained in those pieces is truly political speak. It is carefully worded to imply egregious behavior, and I think I would have to call it "the art of innuendo."

But is it false? Because ultimately truth is a defense to defamation and when you carefully read it, putting aside all the angst and turmoil that candidates and their supporters feel, particularly as the election draws nigh, it says "Lamz declared bankruptcy owing creditors X, Y, Z," whatever amounts, and it doesn't say that he was discharged and that he didn't pay all those creditors. It says he filed bankruptcy and it talks about stiffing people and this and that and the other, and that's certainly subject to interpretation. But getting back to the probability of success on that claim, I don't think that the plaintiff has met the burden of proof establishing a probability of success on that claim.

On October 27, 2005, Mr. Wells commenced this suit, in state court, against Mr. Thornhill, Thornhill Law, Judge Lamz, and the Committee to Elect Jim Lamz, asserting that he was entitled to damages from these defendants arising out of Judge Lamz's lawsuit pursuant to La. R.S. 18:1463.⁴ Essentially, Mr. Wells asserted three causes of action against the defendants: (1) malicious prosecution, (2) abuse of process, and (3) intentional infliction of emotional distress.⁵

In response to Mr. Wells's petition, various exceptions and motions for summary judgment were filed. On April 23, 2008, the trial court signed a

³ Judge Lamz appealed the court's judgment in this regard, and another panel of this court affirmed the decision. See *Lamz v. Wells*, 2005-1497 (La. App. 1st Cir. 6/9/06), 938 So.2d 792.

⁴ Notably, Mr. Wells's suit for damages was not directed at Judge Lamz's claims against Mr. Wells for defamation.

⁵ On April 22, 2005, Mr. Wells also filed an action in federal court, which included the same claims based on state law that were asserted in this petition, along with other claims based on federal law. On July 13, 2005, the district judge dismissed the federal claims with prejudice and the state claims without prejudice. That decision was affirmed on appeal, and a writ of certiorari was denied by the United States Supreme Court. See *Wells v. Lamz*, 206 Fed. Appx. 345 (5th Cir. 2006), cert. denied, 549 U.S. 1340, 127 S.Ct. 2043, 167 L.Ed.2d 767 (2007).

judgment granting the motions for summary judgment filed by Mr. Thornhill, Thornhill Law, Judge Lamz, and the Committee to Elect Jim Lamz, and denied the motion for partial summary judgment filed by Mr. Wells. From this judgment, Mr. Wells has appealed.

II. SUMMARY JUDGMENT

Summary judgments are reviewed on appeal *de novo*. **Granda v. State Farm Mutual Insurance Company**, 2004-2012, p. 4 (La. App. 1st Cir. 2/10/06), 935 So.2d 698, 701. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

On a motion for summary judgment, the initial burden of proof is on the moving party. However, if the moving party will not bear the burden of proof at trial on the matter before the court, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the non-moving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Accordingly, once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078, p. 4 (La. 6/30/00), 764 So.2d 37, 40; see also La. C.C.P. art. 967(B).

III. LAW AND DISCUSSION

As previously stated, Mr. Wells asserted three causes of action against the defendants: (1) malicious prosecution, (2) abuse of process, and (3) intentional

infliction of emotional distress. We address each of these claims individually in the context of the motions for summary judgment filed by the defendants.

A. Malicious Prosecution

The elements essential to a malicious prosecution claim are: (1) the commencement or continuance of an original criminal or civil judicial pleading; (2) its legal causation by the present defendant in the original proceeding; (3) its *bona fide* termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damages conforming to legal standards resulting to plaintiff. **Jones v. Soileau**, 448 So.2d 1268, 1271 (La. 1984).

The defendants assert in their motions for summary judgment that there is an absence of factual support for at least one element essential to Mr. Wells's claim for malicious prosecution—specifically, that there was a *bona fide* termination in favor of Mr. Wells in the underlying suit based on La. R.S. 18:1463. We agree.

The purpose of the *bona fide* termination requirement in a malicious prosecution case is that the underlying litigation should be brought to a conclusion *on the merits* before a malicious prosecution suit based on the underlying litigation is allowed to proceed. **Savoie v. Rubin**, 2001-3275, 2001-3276, p. 4 (La. 6/21/02), 820 So.2d 486, 488. This requirement is not satisfied when the merits of the underlying proceeding have not been reached. *Id.* Procedural victories and judgments that are not rendered on the merits of the underlying suit, such as interlocutory judgments, are not *bona fide* terminations. See **Savoie v. Rubin**, 2001-3275 at p. 5, 820 So.2d at 489 (dismissal of the underlying suit based upon an exception raising the objection of improper venue is not a *bona fide* termination of the underlying litigation in the plaintiff's favor); **Milling, Benson, Woodward, Hillyer, Pierson and Miller, L.L.P. v. American Marine Holding Company**, 98-1462, p. 5 (La. App. 4th Cir 3/3/99), 729 So.2d 139, 142, writ denied, 99-0937

(La. 5/28/99), 743 So.2d 678 (dismissal of the underlying suit based upon an exception raising the objection of prescription is not a *bona fide* termination of the underlying litigation in the plaintiffs favor); and **Terro v. Chamblee**, 95-70, p. 5 (La. App. 3rd Cir. 7/19/95), 663 So.2d 75, 77-78 (dismissal of the underlying suit based upon a failure to allow discovery is not a *bona fide* termination of the underlying litigation in the plaintiffs favor).

In this case, the evidence offered by the defendants established that Judge Lamz's claims against Mr. Wells under La. R.S. 18:1463 were not resolved in favor of Mr. Wells. The request for the temporary restraining order was denied without a hearing, the request for the preliminary injunction was rendered moot by the time of the hearing, and the claim for relief under La. R.S. 18:1463(E) was voluntarily withdrawn prior to the hearing. Since there was no adjudication on the merits of the underlying suit, there was no *bona fide* termination of the La. R.S. 18:1463 claim in Mr. Wells's favor. Thus, Mr. Wells is unable to offer any factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proving at trial this essential element to his claim. Accordingly, we find that summary judgment dismissing Mr. Wells's claims for malicious prosecution against the defendants was proper.

B. Abuse of process

The elements essential to an abuse of process claim are: (1) the existence of an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular prosecution of the proceedings. **Nathans v. Vuci**, 443 So.2d 690, 694 (La. App. 1st Cir. 1983).

The defendants assert in their motions for summary judgment that there is an absence of factual support to establish that the process used by Judge Lamz and his attorney, Mr. Thornhill, was improper—an element essential to Mr. Wells's claim for abuse of process. We agree. The regular use of process does not constitute an

abuse of process; there must be a showing of an abuse through an illegal, improper, or irregular use of process. **Waguespack, Seago and Carmichael (A PLC) v. Lincoln**, 99-2016, p. 8 (La. App. 1st Cir. 9/22/00), 768 So.2d 287, 292.

The evidence offered by the defendants in their motions for summary judgment established that Judge Lamz made a claim against Mr. Wells for injunctive relief, reasonable attorney fees, and a fine and/or imprisonment based on Mr. Wells's distribution or publication of political materials concerning Judge Lamz which Judge Lamz alleged were false. Such process and relief is specifically authorized by La. R.S. 18:1463(D)(1), La. R.S. 18:1463(D)(2), and La. R.S. 18:1463(E). Hence, there was nothing irregular in the process used by Judge Lamz. Rather, it appears that he was taking advantage of the statutes that specifically provide such relief.

In opposition to the motion for summary judgment, Mr. Wells claimed that Judge Lamz and Mr. Thornhill were not the proper parties to assert a request for relief under La. R.S. 18:1463(E), because those provisions contain "criminal sanctions," and therefore, must be initiated by the State of Louisiana. Additionally, Mr. Wells asserted that when Judge Lamz attempted to obtain a temporary restraining order without a hearing and/or without posting a bond, the process he was using became improper.

First, we disagree with Mr. Wells's assertion that Judge Lamz and Mr. Thornhill were not the proper parties to assert a request for relief under La. R.S. 18:1463(E). The sanctions that may be imposed on a person that violates the provisions of La. R.S. 18:1463 are a "fine not to exceed five hundred dollars" and/or "imprison[ment] for not more than six months." The fact that the sanction of imprisonment may be imposed does not necessarily mean that such sanctions must be initiated by the State of Louisiana or that the State of Louisiana is the only party or entity that may invoke the remedies set forth in La. R.S. 18:1463(E). *See*

e.g., La. R.S. 13:4611 and La. C.C.P. art. 225 providing for the sanction of imprisonment for contempt of court with no requirement that the State of Louisiana is required to initiate the proceeding in order for a court to impose such sanction.

We also find no merit to Mr. Wells's contention that the process used by Judge Lamz and Mr. Thornhill became improper when they attempted to obtain the temporary restraining order without a hearing and/or without a bond. In this case, the evidence established that a temporary restraining order was never issued; therefore, notice or a hearing and security or a bond was unnecessary. See La. C.C.P. arts. 3603(A), 3610, and La. R.S. 18:1471.

We find that the evidence established that the process used by Judge Lamz and Mr. Thornhill was intended by and within the scope of La. R.S. 18:1463. Mr. Wells was unable to offer any factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proving at trial that the process used was improper, illegal, or irregular. Accordingly, we find summary judgment dismissing Mr. Wells's claims for abuse of process against the defendants was proper.

C. Intentional infliction of emotional distress

In order to recover for intentional infliction of emotional distress, a plaintiff must establish: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. **White v. Monsanto Co.**, 585 So.2d 1205, 1209 (La. 1991).

The defendants asserted in their motions for summary judgment that there was an absence of factual support to establish that the conduct of Judge Lamz and his attorney, Mr. Thornhill, was extreme and outrageous—an element essential to

Mr. Wells's claim for intentional infliction of emotional distress. We agree.

In order to be actionable, the conduct of the defendant must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id.* Furthermore, liability does not attach where the actor has done no more than to insist upon his legal rights in a permissible way, even though he is aware that such insistence is certain to cause emotional stress.

Judge Lamz and Mr. Thornhill filed for an injunction and other relief in accordance with the provisions of La. R.S. 18:1463. As the trial court very perceptively recognized, and we agree, political campaigns have become increasingly adversarial and unpleasant for the candidates and the public. While Judge Lamz's action under the provisions of La. R.S. 18:1463 may have been unpleasant for and caused some stress to Mr. Wells, as he was forced to defend the action days before the election, Judge Lamz and Mr. Thornhill were doing nothing more than insisting upon their legal rights in a permissible way. Accordingly, we find that Mr. Wells failed to offer any evidence establishing that Judge Lamz's and Mr. Thornhill's conduct was "extreme and outrageous," and therefore, summary judgment dismissing Mr. Wells's claims for intentional infliction of emotional distress against the defendants was proper.

IV. CONCLUSION

In this case, after a *de novo* review of the record, we conclude that the defendants have pointed out an absence of factual support for at least one element essential to each of Mr. Wells's claims against them, and that Mr. Wells failed to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial as to each of those elements. Therefore,

pursuant to La. C.C.P. art. 966(C)(2), there is no genuine issue of material fact, and summary judgment dismissing his claims against the defendants was proper. The April 23, 2008 judgment of the trial court is hereby affirmed.

All costs of this appeal are hereby assessed to the plaintiff/appellant, John B. Wells.

AFFIRMED.