

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MICHAEL G. BRAUTIGAM,	:	APPEAL NO. C-090295
Plaintiff-Appellant,	:	TRIAL NO. A-0811729
vs.	:	<i>JUDGMENT ENTRY.</i>
TAMA PORTER, M.D.,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellant Michael Brautigam sued defendant-appellee Tama Porter, M.D., for malicious prosecution and defamation. Each of these claims was based on Porter’s action of withdrawing her petition for a civil protection order (“CPO”) against Brautigam when Porter realized that the process was going to take longer than she anticipated. (Instead, Porter’s live-in boyfriend attempted to secure a CPO against Brautigam, which was denied following a hearing.) The trial court dismissed Brautigam’s complaint against Porter under Civ.R. 12(B)(6). In one assignment of error, Brautigam now appeals, contending that the trial court erred by dismissing his malicious-prosecution and defamation claims. We affirm.

We review the trial court’s judgment de novo.² To dismiss a claim under Civ.R. 12(B)(6), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief.³ The court must presume that all

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶15.

³ *O’Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

factual allegations in the complaint are true and make all reasonable inferences in favor of the nonmoving party.⁴

To state a cause of action for malicious civil prosecution, a plaintiff must allege the following: (1) malicious institution of prior proceedings against the plaintiff by the defendant, (2) lack of probable cause for the filing of the prior lawsuit, (3) termination of the prior proceedings in the plaintiff's favor, and (4) seizure of the plaintiff's person or property during the prior proceedings.⁵

Brautigam did not allege in his complaint that he or his property had been seized. Brautigam now argues that there should have been no seizure requirement in this case because the underlying CPO proceeding had referred to criminal statutes and therefore was criminal in nature. (There is no seizure requirement in a claim for malicious criminal prosecution.⁶) But the Ohio Supreme Court has determined that the seizure requirement reflects sound policy in a claim for malicious civil prosecution because the rules of civil procedure already provide several remedies to a defendant who has been unjustly sued but not necessarily "seized."⁷

So even though the underlying CPO referred to criminal statutes, the procedures and remedies available to Brautigam were controlled by the rules of civil procedure. *Robb's* seizure requirement therefore applied in this case.

Because Brautigam did not allege a seizure, the trial court properly dismissed the malicious-prosecution claim.

The trial court also properly dismissed Brautigam's defamation claim. In *Surace v. Wuliger*,⁸ the Ohio Supreme Court held that where an allegedly

⁴ *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

⁵ *Robb v. Chagrin Lagoon's Yacht Club, Inc.*, 75 Ohio St.3d 264, 1996-Ohio-189, 662 N.E.2d 9, syllabus.

⁶ See *Yaklevich v. Kemp, Schaeffer & Rowe Co, L.P.A.*, 68 Ohio St.3d 294, 1994-Ohio-503, 626 N.E.2d 115.

⁷ See *Robb*, supra; see, also, Civ.R. 11 and 12; R.C. 2323.51(B)(1).

⁸ (1986), 25 Ohio St.3d 229, 495 N.E.2d 939, syllabus.

defamatory statement bears some reasonable relation to the judicial proceedings in which it appears, that statement is privileged.

This case controls here. Brautigam's complaint did allege that Porter's statements were made without "privilege," but there were no factual allegations in Brautigam's complaint to support a finding that Porter's statements were not "reasonably related" to the CPO. And while we must presume the truth of all facts alleged in Brautigam's complaint, we do not presume the truth of conclusions that are unsupported by factual allegations.

We therefore overrule Brautigam's sole assignment of error. The judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on January 27, 2010

per order of the Court _____.
Presiding Judge