

IN THE SUPREME COURT OF THE STATE OF NEVADA^[BM1]

BENJAMIN CHILDS,

Appellant,

vs.

JAY K. SELZNICK, D.M.D., M.D.; AND

JAMES P. THOMAS, INDIVIDUALLY

AND D/B/A JIM THOMAS &

ASSOCIATES,

Respondents.

BENJAMIN B. CHILDS,

Appellant,

vs.

JAY K. SELZNICK, D.M.D., M.D.,

Respondent.

No. 49342

FILED

SEP 28 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

No. 51919

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court summary judgment in a defamation action and a post-judgment order denying attorney fees and costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Benjamin Childs challenges the district court's grant of summary judgment on, among others things, his abuse-of-process counterclaim against respondent Dr. Jay Selznick and his third-party claim of fraudulent misrepresentation against respondent James Thomas. For the following reasons, we conclude that Childs' arguments fail and therefore affirm the district court's judgment and post-judgment order

denying attorney fees and costs.¹ The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Summary judgment standard

This court reviews de novo whether the district court appropriately granted summary judgment. See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence on file demonstrate that there are no genuine issues of material fact, when viewed in the light most favorable to the nonmoving party. Id.

While this court views such evidence in the light most favorable to the nonmoving party, that party must,

do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. The nonmoving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.

Id. at 732, 121 P.3d at 1031 (internal quotations omitted). Since the substantive law controls which factual disputes are material for purposes of summary judgment, see id. at 731, 121 P.3d at 1031, we must look at the substantive law for the torts of abuse of process and fraudulent

¹At the outset, we note that Childs contends that his due process rights were violated because the district court misinformed him that the hearing regarding Dr. Selznick's and Thomas' motions for summary judgment would be held in chambers and without the parties present, causing him not to attend the hearing. Having considered this argument, we conclude that it is without merit.

misrepresentation to determine whether the district court erred by granting Dr. Selznick's and Thomas' motions for summary judgment.

Dr. Selznick's motion for summary judgment on the abuse-of-process claim

Under Nevada law, "the two essential elements of abuse of process are: (1) [an] ulterior purpose, . . . and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." Laxalt v. McClatchy, 622 F. Supp. 737, 751 (1985) (citing Bull v. McCuskey, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980) (upholding a jury award for abuse of process where an attorney did not investigate the medical malpractice claim before filing the lawsuit, failed to offer any essential expert evidence, and offered a meager sum for settlement), abrogated on other grounds by Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987), abrogated on other grounds by Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006)).

In defending against Dr. Selznick's motion for summary judgment, Childs only offered the deposition transcript of Dr. Selznick's attorney, Dominic Gentile, to support his allegation that Dr. Selznick brought his defamation lawsuit for an ulterior motive—i.e., to coerce Childs to stop running newspaper advertisements that involved Dr. Selznick.

Even a generous reading of Gentile's deposition transcript does not seem to support Childs' position that Dr. Selznick filed his complaint with an ulterior motive to get him to stop advertising for new clients. Instead, Gentile appeared to be attempting to negotiate with Childs so that he would stop running the ads. Thus, we reject Childs' assertion that somehow Gentile's deposition transcript necessarily

indicates that Dr. Selznick filed a frivolous lawsuit in order to force Childs to stop running the newspaper ads.

Moreover, Gentile's deposition transcript was the only evidence that Childs offered to defeat summary judgment. He did not put forth any persuasive evidence to satisfy the second prong necessary to support an abuse-of-process claim. Accordingly, since "the mere filing of [a] complaint is insufficient to establish the tort of abuse of process," see Laxalt, 622 F.Supp. at 752, we conclude that Childs failed to show that there was a genuine issue of material fact to preclude summary judgment. See Wood, 121 Nev. at 732, 121 P.3d at 1031. Therefore, the district court's grant of summary judgment on Childs' abuse-of-process claim was appropriate.²

Thomas' motion for summary judgment on the fraudulent misrepresentation claim

To succeed on a fraudulent misrepresentation cause of action, the plaintiff must prove that, "(1) [a] false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the

²Childs also argues that the district court erred by denying the following motions: (1) motion for continuance under NRCP 56(f), (2) motion to amend his abuse-of-process counterclaim with additional facts, (3) motion to seal Dr. Selznick's complaint, (4) motion to strike Dr. Selznick's complaint, (5) motion for sanctions, (6) motions for attorney fees and costs. Separately, Childs contends that the district court erred by granting Dr. Selznick's protective order. Having reviewed all of these arguments, we conclude that they are without merit.

plaintiff as a result of relying on the misrepresentation.” Barmettler v. Reno Air, Inc., 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998).

Undoubtedly, Childs could prevail on the first and second elements because Thomas readily admits that by posing as a prospective client, he made knowingly false statements to Childs. However, Childs did not demonstrate that there was a genuine issue of material fact in regard to the fourth element.³

Instead, Childs merely made the conclusory claim that he suffered damages as a result of Thomas’ conduct and failed to submit any specific evidence of those damages; therefore, he did not carry his burden of proof.⁴ See Wood, 121 Nev. at 732, 121 P.3d at 1031. In addition, litigation expenses alone cannot be considered “damages” in this context. Cf. Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 957, 35 P.3d 964, 970 (2001) (“[T]he mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages”),

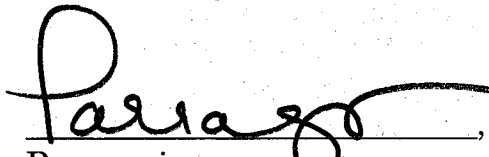
³Since Childs could not prevail on the fourth element, we do not need to address the third element. See Barmettler, 114 Nev. at 447, 956 P.2d at 1386 (stating that “[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper.” (quoting Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992))).

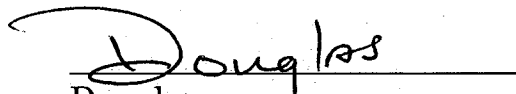
⁴Instead, Childs relied solely on his complaint, which stated that he “has had to incur legal fees and costs in defending against [Dr. Selznick’s] frivolous lawsuit,” and his opposition to Dr. Selznick’s motion for summary judgment, which stated that, “[t]here is no doubt that [he] has been damaged by having to defend against the claims brought by [Dr. Selznick] for defamation and defamation per se which were based upon the false statements made by [Thomas] upon which [he] relied.”

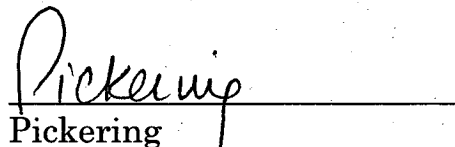
receded from on other grounds by Horgan v. Felton, 123 Nev. 577, 170 P.3d 982 (2007). Therefore, because Childs could not demonstrate that there were genuine issues of material fact that he suffered any damages as a result of relying on Thomas' misrepresentations, we conclude that the district court did not err in granting Thomas' motion for summary judgment.⁵

For the reasons set forth above, we conclude that Childs' arguments on appeal lack merit. Accordingly, we

ORDER the judgment and order of the district court
AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

⁵Childs also alleges that the district court erred by (1) denying his motion for continuance under NRCP 56(f) to defend against Thomas' motion for summary judgment, (2) implicitly denying his own motion for summary judgment, and (3) granting Thomas' motion for summary judgment on his remaining claims of promissory estoppel, conspiracy, and concert of action. Having reviewed these arguments, we conclude that they are without merit.

cc: Chief Judge, Eighth Judicial District
Hon. Jessie Elizabeth Walsh, District Judge
Hon. Joseph T. Bonaventure, Senior Judge
Leonard I. Gang, Settlement Judge
Kenneth L. Hall
Lewis Brisbois Bisgaard & Smith, LLP
Yampolsky, Ltd.
Eighth District Court Clerk