

[Cite as *Davis v. Spriggs*, 2010-Ohio-5802.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS DAVIS, et al.

Plaintiffs-Appellees

-vs-

CLAUDIA SPRIGGS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 09CAE090082

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 06CVC020165

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

November 24, 2010

APPEARANCES:

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Wise, J.

{¶1} This is an appeal by Defendant-Appellant Claudia Spriggs from the August 21, 2009, Judgment Entry of the Delaware County Common Pleas Court granting summary judgment in favor of Plaintiff-Appellee Thomas G. Davis.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts are as follows:

{¶3} Claudia Spriggs and Thomas G. Davis were married on January 9, 1999, and divorced on May 25, 2005.

{¶4} During their marriage, Spriggs allowed Davis to take intimate photographs of her using a digital camera. According to Spriggs, she agreed only to the taking of digital pictures and not to digital video recordings. (Spriggs Depo. at 47-49, 50, 54, 56-57).

{¶5} As part of the separation agreement contained in the Divorce Decree, the parties agreed that they “will not distribute, disseminate, copy, duplicate, or in any other way disclose to anyone any photographs, or electronic images of the other party which either accumulated, collected, gathered, intercepted, obtained or otherwise come into possession of, whether by legal or other means or methods.” The Decree provided for sanctions in the form of “attorney fees, expert fees, costs to repair and resolve the problem, and any additional costs or expenses related to sanctions awarded by the Court in a Motion for Contempt.”

{¶6} In July, 2005, Spriggs received a number of e-mails to both her personal and work accounts containing vulgar content and links to a members-only, adult content website which contained intimate photographs of her. She subsequently learned that

more photographs were posted to the website in August and September, 2005, and video was posted on a related website. Spriggs also discovered pictures of Davis' current girlfriend on these websites.

{¶7} Spriggs contacted these websites in an attempt to have the images removed but was told that the images could only be removed by the person who posted them. When she inquired as to the identity of the person who posted the images, she was informed that such would only be provided at the request of law enforcement.

{¶8} Spriggs initiated a "*Jane Doe v. John Doe*" lawsuit in the Franklin County Court of Common Pleas, through which she issued subpoenas to Verizon Wireless, Yahoo, AOL and the owner of the company which ran the adult websites. This lawsuit was dismissed by the court.

{¶9} Spriggs also filed a contempt action in the Delaware County Court of Common Pleas in Case No. 05-DRB-03-087 based on a violation of the terms of the May 25, 2005, divorce decree.¹

{¶10} On February 24, 2006, Davis filed a Complaint in the Delaware County Court of Common Pleas alleging abuse of process, malicious prosecution, slander and intentional infliction of emotional distress based on Spriggs' actions in the *Doe* lawsuit. Spriggs filed a counterclaim in this case asserting claims for invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, civil conspiracy, libel per se and spoliation. Appellant Spriggs also filed a Third-Party

¹ The contempt action is the subject of a separate appeal before this Court. See *Thomas G. Davis v. Claudia L. Spriggs*, Delaware App. No. 10 CAF 01-004.

Complaint against Future Net, Inc.,² Joseph Abdo³, Hospitality Risk Controls, Inc., Security Litigation Consultants, Inc. and others asserting similar claims of invasion of privacy, libel per se, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, civil conspiracy, and spoliation of evidence.

{¶11} On March 23, 2007, Appellant Spriggs filed a Motion to Deem Matters Admitted regarding requests for admission served upon Future Net, Inc. and Joseph Abdo.

{¶12} On April 2, 2007, Future Net, Inc. and Joseph Abdo filed a Civ.R. 60(B) motion to set aside an earlier Entry ordering them to provide the identity of the person who posted the pictures on their websites and to remove all postings. In this motion Future Net and Abdo also raised the issue of lack of personal jurisdiction.

{¶13} On June 7, 2007, the Motion to Deem Matters Admitted was overruled and the trial court dismissed Future Net, Inc. and Joseph Abdo for lack of personal jurisdiction.

{¶14} On April 25, 2008, Appellant Spriggs filed a Motion for Partial Summary Judgment based in part on spoliation of evidence.

{¶15} By Judgment Entry filed January 15, 2009, the trial court denied Appellant's Motion for Partial Summary Judgment.

{¶16} On June 15, 2009, Davis filed a Motion for Summary Judgment as to Spriggs' counterclaims.

² Future Net, Inc. at one time owned several adult entertainment websites, including Funbags.com, Homeclips.com and Redclouds.com. The company ceased all adult business operations as a result of legislation passed in the state of Florida making it illegal to operate such web sites. (See Affidavit of Joseph Abdo).

³ Joseph Abdo is the president and director of the corporation known as Future Net, Inc.

{¶17} By Judgment Entry filed August 21, 2009, the trial court granted Defendant-Appellee Thomas Davis' Motion for Summary Judgment. The trial court found that Appellant Spriggs' claims for invasion of privacy, intentional infliction of emotional distress and spoliation were barred by the doctrine of claim preclusion by Case No. 05-DRB-03-387; that the libel per se claim was barred by the statute of limitations and further that Appellant failed to properly state a claim for negligent infliction of emotional distress. The trial court also dismissed Appellant's claim for civil conspiracy, finding that Appellant could not conspire with himself.

{¶18} On August 21, 2009, Davis voluntarily dismissed his remaining claims.

{¶19} On September 23, 2009, Davis committed suicide. On October 13, 2009, Appellant Spriggs filed a Motion to Substitute the Executors of Mr. Davis' Estate, which was later granted.

{¶20} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶21} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THOMAS DAVIS AND AGAINST CLAUDIA SPRIGGS.

{¶22} "II. THE TRIAL COURT ERRED DENYING CLAUDIA SPRIGGS' SUMMARY JUDGMENT FOR SPOILIATION.

{¶23} "III. TRIAL COURT ERRED DISMISSING FUTURE NET, INC. AND MR. ABDO FOR LACK OF PERSONAL JURISDICTION."

"Summary Judgment Standard"

{¶24} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court.

Smiddy v. The Wedding Party, Inc. (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶25} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.”

{¶26} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶27} It is based upon this standard that we review Appellant's assignments of error.

I.

{¶28} In her first assignment of error, Appellant argues that the trial court erred in finding that her claims were barred by *res judicata* and in granting Appellee's motion for summary judgment based on same. We agree.

{¶29} In Ohio, the doctrine of *res judicata* provides that an existing final judgment or decree between the parties is conclusive as to all claims that were or might have been litigated in the first lawsuit. *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 494 N.E.2d 1387. The doctrine of *res judicata* may be broken into two branches: "Claim preclusion, historically called estoppel by judgment in Ohio, and issue preclusion, traditionally known as collateral estoppel." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381, 653 N.E.2d 226. "The doctrine of collateral estoppel, or, more correctly, issue preclusion, precludes further action on an identical issue that has been actually litigated and determined by a valid and final judgment as part of a prior action among the same parties or those in privity with those parties." *State v. Williams* (1996), 76 Ohio St.3d 290, 294, 667 N.E.2d 932, citing *Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71, 369 N.E.2d 776.

{¶30} In the instant case, the trial court found that Appellant's claims against Appellee Davis were barred because they had been asserted in the motion for contempt filed in the domestic relations court. The trial court likewise held that Appellant's claims against third-party defendants Hospitality Risk Controls, Inc. and Security Litigation Consultants, Inc. were barred by *res judicata* because Davis is in privity with those

parties because Davis' conduct occurred under the scope of his employment with such parties.

{¶31} It has been held that “a domestic relations forum is not the proper forum in which to litigate a tort claim.” *Koepke v. Koepke*, 52 Ohio App.3d 47, 49, 556 N.E.2d 1198 (1989). In such case, the husband sued his wife for intentional infliction of emotional distress after divorce proceedings had been initiated. In *Koepke*, the court held, in relevant part, as follows: “Clearly, it is inconsistent to combine intentional tort claims with divorce actions since a party to a divorce cannot recover damages.” *Id.* See, also, *State, ex rel. Cook v. Cook* (1902), 66 Ohio St. 566, 573, 64 N.E. 567, 569. Whereas, the main objective behind tort litigation is the recovery of damages. *Gates v. Brewer* (1981), 2 Ohio App.3d 347, 349, 442 N.E.2d 72, 75

{¶32} “Moreover, there is no right to a jury trial in a divorce proceeding. Civ.R. 75(C). Thus, spouses who wish to bring an action in tort separate from their divorce action inadvertently lose their right to a jury trial for the tort claim when a court chooses to combine the two causes of action.” *Id.* at 348, 442 N.E.2d 72.

{¶33} In *Gibson v. Gibson* (1993), 87 Ohio App.3d 426, 622 N.E.2d 425, after a complaint for divorce was filed, the trial court ordered the parties to exchange motor vehicles in their possession and to refrain from encumbering, disposing of, or causing any loss of value to the vehicles. After the parties exchanged vehicles, the appellant filed a motion for appellee to show cause why she should not be found in contempt because of damage done to the appellant's pickup truck. The domestic relations court in the divorce action awarded an \$1,800.00 judgment in damages to the appellant.

{¶34} On appeal, the court concluded that R.C. §3105.011 gave the domestic relations court the equitable power to divide property and to consider the damage done to the vehicle in the court's property division, but not the power to award damages. The court held, therefore, that entering a judgment for damages was beyond the authority of the domestic relations court.

{¶35} We find, based on the foregoing, that the trial court in the domestic relations court did not have jurisdiction to litigate Appellant's tort claims against Appellee and award damages.

{¶36} Additionally, the burden of proof in a contempt hearing is clear and convincing, whereas the burden of proof in a tort action would be by a preponderance of the evidence.

{¶37} Based on the foregoing, we find that the trial court erred in finding that the Appellant's tort claims were barred by the doctrine of *res judicata*.

{¶38} Appellant's first assignment of error is sustained.

III.

{¶39} In her third and final assignment of error, Appellant argues that the trial court erred in dismissing Future Net, Inc. and Joseph Abdo for lack of personal jurisdiction.

{¶40} In their Civ.R. 60(B) motion, which the trial court converted to a motion for reconsideration, Future Net and Abdo claimed the trial court lacked personal jurisdiction over them, arguing that Future Net had not transacted business in Ohio and did not have sufficient minimum contacts with the State. They further argued that Future Net did not conduct commercial activity over the internet and that the website run by the

company involved still photography and did not involve interactive material. Additionally, they argued that Abdo did not own any Ohio businesses and neither Abdo nor Future Net owned any real property in Ohio.

{¶41} The trial court, in dismissing Future Net and Abdo, found that the subject websites fell somewhere “between a mere internet posting and an interactive website” and that upon reviewing “the facts as a whole and analyzing the level of activity and commercial nature of the sites...that sufficient minimum contacts do not exist to confer personal jurisdiction.” The trial court further found that the websites containing the photographs and/or videos of Spriggs are no longer owned or operated by either Future Net or Abdo. (See June 7, 2007, Judgment Entry).

{¶42} Personal jurisdiction is a question of law that appellate courts review de novo. *King v. Sinon*, Stark App.No. 2009CA00039, 209-Ohio-5792, citing *Joffe v. Cable Tech, Inc.* 163 Ohio App.3d 479.

{¶43} The Ohio Supreme Court recently addressed the issue of personal jurisdiction in relation to internet-related actions, wherein it stated:

{¶44} “The rise in Internet-related disputes does not mean courts should ignore traditional jurisdiction principles. ‘[T]he Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time. Although the Internet may have increased the quantity of these occurrences, it has not created problems that are qualitatively more difficult.’ ” Jansen, 71 Mo.L.Rev. at 182, 183, quoting Allen R. Stein, Symposium, Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision (2004), 98 Nw.U.L.Rev. 411.”

{¶45} The Supreme Court went on to hold:

{¶46} “In some cases involving the Internet, the *Zippo* test, developed in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* (W.D.Pa.1997), 952 F.Supp. 1119, 1124, has been employed to determine whether Internet activity between the defendant and the forum state establishes jurisdiction. The Court established a “sliding scale” approach to Internet-based jurisdiction whereby the level of interactivity of the website is examined to determine whether the exercise of personal jurisdiction is proper. At one end of the scale are “situations where a defendant clearly does business over the Internet.” *Id.* “A defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with residents of the state.” *Neogen Corp. v. Neo Gen Screening, Inc.* (C.A.6, 2002), 282 F.3d 883, 890. At the other end of the *Zippo* scale are informational websites. *Zippo*, 952 F.Supp. at 1124. But as Roberts points out in his brief, “[t]he *Zippo* model was developed in a commercial or business context and is factually distinct from this case.” When the Internet activity in question “is non-commercial in nature, the *Zippo* analysis * * * offers little to supplement the traditional framework for considering questions of personal jurisdiction.” *Oasis Corp. v. Judd* (S.D.Ohio 2001), 132 F.Supp.2d 612, 622, fn. 9, citing *Mink v. AAAA Dev. L.L.C.* (C.A.5, 1999), 190 F.3d 333, 336. We continue, then, with a traditional jurisdictional analysis.” *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 85, 930 N.E.2d 784, 2010-Ohio-2551.

{¶47} Determining whether an Ohio trial court has personal jurisdiction over a nonresident defendant involves a two-step analysis: (1) whether the long-arm statute and the applicable rule of civil procedure confer jurisdiction and, if so, (2) whether the exercise of jurisdiction would deprive the nonresident defendant of the right to due

process of law under the Fourteenth Amendment to the United States Constitution. *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-184, 624 N.E.2d 1048.

{¶48} Ohio's long-arm statute, R.C. §2307.382, enumerates specific acts that give rise to personal jurisdiction and provides:

{¶49} “(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

{¶50} “(1) Transacting any business in this state;

{¶51} “(2) Contracting to supply services or goods in this state;

{¶52} “(3) Causing tortious injury by an act or omission in this state;

{¶53} “(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

{¶54} “ ***

{¶55} “(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

{¶56} “***”

{¶57} Civ.R. 4.3 allows service of process on nonresidents in certain circumstances and for the most part, mirrors the long-arm statute.

{¶58} Upon review, we find that the website was a commercial enterprise. Customers of the website must pay a membership fee to view such website. Once a

member, customers may read and/or post comments on a billboard, enter picture contests for cash prizes, and post pictures and videos to be viewed by other members.

{¶59} We also find that photographs and/or videos of Spriggs were posted on these websites on the Internet, and while we do not know how many people have seen them, we do know that at least two Ohioans saw them, i.e. Spriggs and Davis. The photographs were thus published in Ohio.

{¶60} Based on the foregoing, we find that Future Net, Inc. and Joseph Abdo had sufficient minimum contacts with the State of Ohio and that they therefore fall within the grasp of R.C. §2307.382 and Civ.R. 4.3.

{¶61} Appellant's third assignment of error is sustained

II.

{¶62} In her second assignment of error, Appellant argues that the trial court erred in denying her motion for partial summary judgment as to her spoliation claim. We disagree.

{¶63} Based on our disposition of assignments of error I and III, we find the denial of Appellant's partial motion for summary judgment is not a final appealable order.

{¶64} For the foregoing reasons, the judgment of the Court of Common Pleas, Delaware County, Ohio, is reversed and remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

JUDGES

JWW/d 1027

