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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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BARBARA A. WIEDENBACH
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

WILLIAM D. FOX :
Plaintiff : **CASE NO. 2013 CVC 01684**
vs. :
Judge McBride
DENISE A. ASKREN :
Defendant : **DECISION/ENTRY**

William D. Fox, plaintiff appearing *pro se*, 104 Regatta Drive, New Richmond, Ohio 45157.

Finney Law Firm, LLC, Bradley M. Gibson, 4270 Ivy Pointe Blvd., Suite 225, Cincinnati, Ohio 45245.

This cause is before the court for consideration of a motion to dismiss filed by the plaintiff William Fox and a motion for judgment on the pleadings filed by the defendant Denise Askren. The defendant also filed a motion to strike the plaintiff's "Supplemental Arguments and Evidence" filed on November 5, 2014.

The court entered a briefing order on the motion for judgment on the pleadings. Upon the filing of the final memorandum, the court took the issues raised by the motion under advisement.

The plaintiff William Fox and defense counsel Bradley Gibson conferenced by telephone with the court on November 17, 2014 and agreed to the submission of both the motion to dismiss and the motion to strike for decision by the court without oral argument and without the submission of further written arguments.

Upon consideration of the motions, the record of the proceeding, the written arguments of counsel and the *pro se* party, and the applicable law, the court now renders this written decision.

I. MOTION FOR JUDGMENT ON THE PLEADINGS

(A) FACTS AS SET FORTH IN THE COMPLAINT

The complaint in the case at bar sets forth the following claims: (1) "Malicious Prosecution and Filing a Deceptive Police Report;" and, (2) "Willful harassment and reckless violation of Fox's civil rights." However, the motion for judgment on the pleadings requests judgment on all counts of the "Complaint for Malicious Prosecution." It is unclear to the court whether Count Two is even intended to be brought against Denise Askren. However, the court need not address that question at this time as the plaintiff has only requested judgment as to the malicious prosecution claims.

The complaint sets forth the following relevant facts which will be taken as true for the purpose of considering the defendant's motion for judgment on the pleadings:

The defendant Denise Askren is the former wife of the plaintiff William Fox.¹ Askren filed a protection order petition alleging Fox was stalking her and stealing her mail.² This action resulted in a "mutual consent agreement" which resulted in a civil protection order being entered against Fox in favor of Askren for a period of three years.³

On June 11, 2013, Askren filed a complaint with the New Richmond Police Department.⁴ That written complaint, which plaintiff attached to the complaint, reads as follows:

"William D. Fox and I are divorced. I have a 3 yr. CPO against him. He has planted surveillance cameras to spy on me [and] stolen my mail among other things. Part of the stipulations within the CPO is that William is not to pass messages thru the minor children. Sunday morning June 9, 2013 at 10:30 a.m., I went to his house to pick up William (16 yr. old son) and Grace (age 12) to take them to church. My son handed me a piece of paper in it from his dad. The paper was Bill's calendar for June. Bill picked the kids up from church early in the afternoon. At 6:00 p.m. that day, I went back to his house in New Richmond to pick the 2 kids up and bring them home with me. William (16 yr. old) handed me another envelope with more calendars from his dad."⁵

According to the complaint filed in the Clermont County Municipal Court regarding the criminal charge of violation of a protection order, Paragraph #5 of the protection order against Fox states as follows:

" 'All non-emergency and non-school related communications regarding the children shall be in written form, either electronic (text, email, etc.) or in writing delivered through regular/ordinary mail. No messages shall

¹ Complaint at ¶ 15.

² Id. at ¶ 25.

³ Id.

⁴ Id. at ¶ 26.

⁵ Id., Exhibit, New Richmond Police Department Witness Statement pgs. 1-2.

be passed through the child(ren). Each parent shall ensure that the communications between the parents shall not be read by the child(ren)."⁶

The plaintiff indicates in his complaint that he did ask "his son William to hand Askren a sealed envelope containing a summer calendar proposal * * * ." ⁷ He also states that a "Post-It" note was included in the envelope on which he wrote a note asking Askren to review the calendar and agree to it or offer alternate suggestions. ⁸

As a result of the complaint filed with the New Richmond Police Department, Fox was arrested on June 11, 2013 and was released late the next day. ⁹ Fox alleges in the complaint that this was a "deceitful complaint" filed to fulfill "Askren's vendetta to unjust punish and harass Fox * * * ." ¹⁰

On June 13th or 17th, 2013, Askren filed a complaint with the Domestic Relations court which alleged that Fox was in contempt of the protection order. ¹¹ A hearing was set before Magistrate Winslow Johnson on July 18, 2013. ¹² The matter was ultimately heard on August 6, 2013, and the decision of the magistrate indicates that Askren brought seven specific allegations of contempt, one of those being "using the minor child to deliver a message." ¹³ Some of the other allegations included "sending repeated text messages;" "following [Askren] to McDonald's;" and "planting a camera on her neighbor's property to watch [Askren][.]" ¹⁴

⁶ Id., Exhibit, Clermont County Municipal Court Complaint.

⁷ Id. at ¶¶ 7, 26, and 36.

⁸ Id. at ¶ 37.

⁹ Id. at ¶ 28.

¹⁰ Id. at ¶ 5.

¹¹ Id. at ¶ 29 and Exhibit, Decision of the Magistrate.

¹² Id., Exhibit, Notice of Hearing.

¹³ Id.

¹⁴ Id.

The magistrate found that Fox did text Askren about parenting time but that she did not cite any examples of texts not about the children.¹⁵ Regarding the camera on her neighbor's property, the magistrate found that Askren offered no evidence that it was Fox who put the camera on her neighbor's property.¹⁶

Regarding the passing of the calendar through the child, the magistrate found as follows: "The message delivered by the child was [Fox's] calendar listing events that [Fox] had scheduled during the summer. Although this action may violate the terms of the CPO, it simply does not rise to the level of contempt."¹⁷ Based on all of these findings, the motion for contempt was dismissed.¹⁸ The criminal proceeding was also dismissed in Fox's favor.¹⁹ Fox alleges that this motion for contempt was based on "the same false allegation" as the criminal complaint.²⁰

(B) LEGAL ANALYSIS

Pursuant to Civ.R. 12(C), "[a]fter the pleadings are closed but within such time as not to delay the trial, a party may move for judgment on the pleadings."

"Judgment on the pleadings is appropriate under Civ.R. 12(C) 'where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id. at ¶¶ 30 and 46.

²⁰ Id. at ¶ 29.

to relief.’²¹ “Furthermore, in ruling on a Civ.R. 12(C) motion, a court is ‘limited solely to the allegations in the pleadings and any writings attached to the pleadings.’²²

(1) MALICIOUS CIVIL PROSECUTION

The first claim against the defendant is for malicious civil prosecution based on the filing of the motion for contempt.

“To prevail on a claim for malicious prosecution of a civil action, a plaintiff must prove the following: (1) the defendant maliciously instituted the prior proceedings against the plaintiff, (2) the lack of probable cause for filing the prior lawsuit, (3) the prior proceedings terminated in the plaintiff’s favor, and (4) the plaintiff’s person or property was seized during the course of the prior proceedings.”²³

The plaintiff has sufficiently alleged malice to meet the first prong of the standard above. Furthermore, the motion for contempt was dismissed by the magistrate and, as such, was terminated in the plaintiff’s favor, satisfying the third prong.

However, the claim for malicious civil prosecution fails for two reasons. First, there was no seizure of the plaintiff’s person or property during the course of the contempt proceedings.

In *Kelly v. Whiting*, 17 Ohio St.3d 91, 477 N.E.2d 1123 (1985), the plaintiff brought a malicious civil prosecution claim against various parties involved in the

²¹ *Liberty Retirement Community of Middletown, Inc. v. Hurston*, 12th Dist. Butler No. CA2013-01-006, 2013-Ohio-4979, ¶ 7, quoting *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996).

²² *Id.*, quoting *J.H. v. Hamilton City School Dist.*, 12th Dist. Butler No. CA2012-11-236, 2013-Ohio-2967, ¶ 8, citing *Vinicky v. Pristas*, 163 Ohio App.3d 508, 2005-Ohio-5196, 839 N.E.2d 88, ¶ 7 (8th Dist.).

²³ *Jones v. Nichols*, 12th Dist. No. CA2012-02-009, 2012-Ohio-4344, ¶ 12, citing *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 662 N.E.2d 9 (1996).

contempt proceeding against him.²⁴ The plaintiff's ex-wife filed an affidavit detailing the plaintiff's noncompliance with a court order.²⁵ While a *capias* was issued for the plaintiff to appear on the contempt charge, the plaintiff voluntarily complied with the court order.²⁶ The court held that the plaintiff's malicious prosecution claim was properly dismissed because he was never arrested nor was his property ever seized.²⁷

While the plaintiff in the case at bar was arrested related to the criminal complaint lodged with the New Richmond Police Department, that action was wholly separate from the motion for contempt in the civil protection order proceedings. There is no allegation in the complaint that the plaintiff's person or property was seized in conjunction with the motion for contempt. As a result, the plaintiff cannot meet the fourth prong of the test set forth above and his claim for malicious civil prosecution must fail.

The second reason the malicious civil prosecution claim fails is that the plaintiff cannot prove, based on the facts set forth in his pleading, that there was a lack of probable cause for filing the contempt motion.

"If probable cause exists, no action for malicious prosecution will lie, even if the plaintiff can demonstrate actual malice."²⁸ "For purposes of malicious prosecution, probable cause is defined as '[a] reasonable ground of suspicion, supported by

²⁴ *Kelly v. Whiting*, *supra*, 17 Ohio St.3d at 91-92.

²⁵ *Id.* at 91.

²⁶ *Id.* at 94.

²⁷ *Id.*

²⁸ *Pierson v. Aaron's Rental*, 10th Dist. Franklin No. 10AP-245, 2010-Ohio-5443, ¶ 25, citing *Waller v. Foxx*, 1st Dist. Hamilton No. C-810568, 1982 WL 4753 (Oct. 6, 1982).

circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.”²⁹

As set forth above, the protection order against the plaintiff prohibited him from passing any messages to Askren through the children. The plaintiff admits in his complaint that he did exactly that. Magistrate Johnson found that “[a]lthough this action may violate the terms of the CPO, it simply does not rise to the level of contempt.” However, “ [a] prima facie case of civil contempt is made when the moving party proves both the existence of a court order and the nonmoving party’s noncompliance with the terms of that order.”³⁰ The magistrate, in his discretion, chose to find that the technical noncompliance with the protection order did not rise to the level which would merit a finding of contempt. However, the fact remains that the plaintiff’s actions did violate the written terms of the CPO.

As a result, the plaintiff cannot demonstrate a lack of probable cause for the motion for contempt, even construing all of the facts and the reasonable inferences that can be made therefrom in his favor.

Due to the fact that the plaintiff cannot satisfy prongs two or four of the required elements for a claim of malicious civil prosecution, that claims must fail and judgment on the pleadings as to that claim must be granted.

(2) MALICIOUS CRIMINAL PROSECUTION

²⁹ *Id.*, quoting *Dailey v. First Bank of Ohio*, 10th Dist. Franklin No. 04AP-1309, 2005-Ohio-3152, ¶ 15, quoting *Ash v. Marlow*, 20 Ohio 119, paragraph one of the syllabus.

³⁰ *Owais v. Costandinidis*, 2nd Dist. Greene No. 2014-CA-5, 2014-Ohio-4103, ¶ 86, quoting *Jenkins v. Jenkins*, 2nd Dist. Clark No. 2011-CA-86, 2012-Ohio-4182, ¶12, quoting *Wolf v. Wolf*, 1st Dist. Hamilton No. C-090587, 2010-Ohio-2762, ¶ 4.

"The tort of malicious criminal prosecution protects a criminal defendant's right to recover damages caused by misuse of criminal actions."³¹ "A private person who initiates or procures the institution of criminal proceedings against another is not subject to liability unless the person against whom the proceedings were initiated proves all three of the following elements: (1) malice in instituting or continuing the prosecution, (2) lack of probable cause for undertaking the prosecution, and (3) termination of the prosecution in favor of the accused."³²

"The determination of whether a criminal prosecution was initiated or continued in the absence of probable cause requires examination of the facts and circumstances known to or reasonably within the contemplation of the defendant at the time of the instigation of criminal proceedings."³³ "The defendant need not have evidence sufficient to ensure a conviction; rather, the defendant need only have evidence sufficient to justify an honest belief in the defendant's guilt."³⁴ The definition of probable cause has already been set forth in the preceding section.

The plaintiff was charged with violation of a protection order in violation of R.C. 2919.27(A)(1), which states that "[n]o person shall recklessly violate the terms of * * * [a] protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code." "A person acts recklessly when, with heedless

³¹ *Pierson*, supra, 2010-Ohio-5443 at ¶ 24, citing *Trussell v. Gen. Motors Corp.*, 52 Ohio St.3d 142, 144, 559 N.E.2d 732 (1990).

³² *Id.*, quoting *Fair v. Litel Comm., Inc.*, 10th Dist. No. 97APE06-804, 1998 WL 107350 (Mar. 12, 1998).

³³ *Id.* at ¶ 26, citing *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App. 3d 613, 616-617 (1st Dist., 1992).

³⁴ *Id.*, citing *Brown v. Crestmont Cadillac*, 8th Dist. Cuyahoga No. 87460, 2006-Ohio-5734, ¶ 14, citing *Epling v. Pacific Intermountain Express Co.*, 55 Ohio App.2d 59, 62, 379 N.E.2d 239 (9th Dist., 1977).

indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature."³⁵

There was a protection order in place against the plaintiff issued by the Domestic Relations Court. The criminal complaint cites to the relevant provision in that order which prohibits passing messages through the children. The defendant admits in his complaint that he passed a calendar with a post-it note asking Askren to review the calendar and agree to it or offer alternatives to the suggested dates. This clearly meets the definition of passing a message through the children. As a result, this was a technical violation of the protection order. The statute does not require that the violation be serious or violent, only that the terms of the order are recklessly violated.

The plaintiff argues that the defendant included past allegations in her written statement which had already been adjudicated in the protection order proceeding. However, the officer filing the charge does not indicate any basis for the charge other than the violation of the term of the CPO which prohibited passing messages through the children.

Even taking all of the facts in the complaint as true and making all reasonable inferences from those facts in favor of the plaintiff, the plaintiff can prove no set of facts that the defendant did not have a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the plaintiff was guilty of the offense of violating the protection order. Therefore, judgment on the pleadings must be granted as to this claim.

II. DEFENDANT'S MOTION TO STRIKE

³⁵ R.C. 2901.22(C).

On November 5, 2014, the plaintiff filed a document captioned "Supplemental Arguments & Evidence Re: Plaintiff's Complaint For Damages For Relating To (*sic*) Malicious Prosecution and Reckless Violation of Plaintiff's Civil Rights." Thereafter, the defendant filed a motion to strike the filing, arguing that "[t]he Filing is not a pleading or a motion recognized by the Civil Rules, and to the extent that it could be construed as a response to Askren's Motion for Judgment on the Pleadings, the time for such response has passed."³⁶

The defendant is correct that the time to respond to the motion for judgment on the pleadings has long passed. Furthermore, the court cannot consider documents or other evidence outside of the pleadings when ruling on a motion for judgment on the pleadings. For those reasons, the motion to strike shall be granted.

III. PLAINTIFF'S MOTION TO DISMISS

(A) FACTS AS SET FORTH IN THE COUNTERCLAIMS

The following relevant facts are alleged in the counterclaims and shall be taken as true for the purpose of considering the motion to dismiss:

William Fox followed and photographed Denise Askren.³⁷ He also searched through the trash of Askren's father in an attempt to find private and personal

³⁶ Defendant Denise Askren's Motion to Strike the Plaintiff's Filing at pg. 1.

³⁷ Answer and Counterclaim of Defendant Denise Askren, Counterclaim at ¶¶ 19, 30 and 35.

information.³⁸ Fox also concealed two motion-activated video cameras at or immediately adjacent to Askren's property which were intended to capture images of Askren.³⁹ After Askren did not receive some expected mail, she set up a motion-activated camera to film her mailbox, which captured Fox in the middle of the night on twelve occasions removing, opening, viewing, resealing and returning mail that was delivered to her mailbox.⁴⁰ Askren states that, by viewing said mail, Fox was able to discover private and sensitive information pertaining to her.⁴¹

(B) LEGAL ANALYSIS

"A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint."⁴² "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party."⁴³ "In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond a reasonable doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery."⁴⁴ When ruling upon a Civ.R. 12(B)(6) motion, a court

³⁸ Id. at ¶ 22.

³⁹ Id. at ¶¶ 23 and 45.

⁴⁰ Id. at ¶¶ 24-25.

⁴¹ Id. at ¶ 27.

⁴² *York v. Hutchins*, 12th Dist. Butler No. CA2013-09-173, 2014-Ohio-988, ¶ 9, citing *Buckner v. Bank of New York*, 12th Dist. Clermont No. CA2013-07-053, 2014-Ohio-568, ¶ 13, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

⁴³ Id., quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991).

⁴⁴ Id., citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

may only consider statements and facts contained in the pleadings and may not consider evidence outside the complaint.⁴⁵

The plaintiff did not indicate in his “request for dismissal of the counterclaims” the legal basis for his request. However, the court agrees that Civ.R. 12(B)(6) is the most reasonable standard to apply.

(1) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

“To survive a motion to dismiss when alleging a claim for intentional infliction of emotional distress, a complaint must include allegations that (1) the defendant intended to cause emotional distress or knew or should have known that actions taken would result in severe emotional distress, (2) the defendant’s conduct was so extreme and outrageous that it went beyond all bounds of decency and was such as to be considered utterly intolerable in a civilized community, (3) the defendant’s actions proximately caused plaintiff’s psychic suffering, and (4) the plaintiff suffered serious mental anguish of a nature that no reasonable man could be expected to endure.”⁴⁶

“The Ohio Supreme Court has described the outrageous behavior that supports this type of claim as requiring something beyond a ‘tortious or even criminal’ intent to cause harm.”⁴⁷

Regarding this claim, Askren alleges among other things that Fox has stalked her, concealed camouflaged, motion-activated video cameras on her property, searched

⁴⁵ *Eichenberger v. Woodlands Assisted Living Residence, LLC*, 10th Dist. Franklin No. 12AP-987, 2013-Ohio-4057, ¶ 18.

⁴⁶ *Brown v. Ohio Dept. of Rehab/ & Corr.*, 10th Dist. Franklin No. 12AP-815, 2013-Ohio-4012, ¶ 9, citing *Perry v. Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-814, 2013-Ohio-3828, ¶ 16.

⁴⁷ *Croskey v. Universal Health Servs.*, 5th Dist. Richland No. 09-CA-37, 2009-Ohio-5951, ¶ 44.

through her trash, and stolen her mail.⁴⁸ She alleges that this behavior was intended to cause emotional distress and that, as a result of Fox's actions, she has suffered severe emotional distress including anxiety and depression, for which she has sought medical attention.⁴⁹

Taking all the allegations set forth in the counterclaims as true for the purposes of considering this motion, the court cannot find beyond a reasonable doubt from the complaint that Askren can prove no set of facts entitling her to recovery. She has alleged that Fox has stalked her and concealed video cameras on her property. This behavior, if true, is such that one should have known that it would cause severe emotional distress. Askren has alleged that the actions have caused her severe mental distress to the extent that she has sought medical attention. Further, the court cannot find as a matter of law that stalking someone and/or concealing video cameras on another's property could not be considered conduct so extreme and outrageous that it went beyond all bounds of decency and was such as to be considered utterly intolerable in a civilized community.

As a result, at this early juncture of this case, the court cannot find that the claim for intentional infliction of emotional distress can be dismissed.

(2) INVASION OF PRIVACY

"In order to establish a claim for invasion of privacy, appellant is required to show a wrongful intrusion into one's private activities in a manner that outrages or causes

⁴⁸ Answer and Counterclaim of Defendant Denise Askren, Counterclaim at ¶ 55.

⁴⁹ Id. at ¶¶ 56-60.

mental suffering, shame, or humiliation to a person of ordinary sensibilities.”⁵⁰ “The intrusion must be ‘highly offensive’ to a reasonable person.”⁵¹

The plaintiff bringing an invasion of privacy claim must have a reasonable expectation of privacy in the activities alleged to be intruded upon.⁵² Many of the activities alleged to have been committed by Fox occurred when Askren was in public and it cannot be said that she would have had a reasonable expectation of privacy at McDonald’s or even in her front driveway. However, Fox is also alleged to have taken mail out of Askren’s mailbox, read it, resealed it and then returned it to the mailbox in the middle of the night. The court cannot find at this time that Askren did not have a reasonable expectation of privacy in the contents of her mailbox and in her personal mail.⁵³

As set forth above, Askren has alleged that, by stealing her mail, Fox was able to discover private and sensitive information pertaining to her. She further alleges that this conduct was done in such a manner as to cause mental suffering, as discussed in the previous section.

Under the motion to dismiss standard, the court cannot find beyond a reasonable doubt from the complaint that Askren can prove no set of facts entitling her to recovery on her claim for invasion of privacy and, as such, the claim cannot be dismissed.

(3) TRESPASS

⁵⁰ *Peitsmeyer v. Jackson Tp. Bd. of Trustees*, 10th Dist. Franklin No. 02AP-1174, 2003-Ohio-4302, ¶ 26, citing *Browning v. Ohio State Hwy. Patrol*, 151 Ohio App.3d 798, 814, 2003-Ohio-1108, 786 N.E.2d 94.

⁵¹ *Id.*

⁵² *Id.* at ¶ 27.

⁵³ See *State v. Beltran*, 8th Dist. Cuyahoga Nos. 86359 and 86360, 2006-Ohio-1085, ¶ 34 (“Here, appellees clearly have established a proprietary and possessory interest in their apartment and designated mailbox. Therefore, they possessed the right to exclude others from access to the mailbox in question. This avails them of a right to an expectation of privacy in that area * * *”).

"A common-law tort in trespass upon real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue."⁵⁴

In this counterclaim, Askren has failed to allege any physical damage to her real or personal property as a result of the alleged trespass. However, damages are available in every case where trespass is proven and once a party proves they have been trespassed against, that party has a right to nominal damages without proving any actual damages.⁵⁵ Askren has sufficiently alleged that Fox unlawfully entered onto her private premises and, as a result, this claim cannot be dismissed under Civ.R. 12(B)(6).

The court would note that, as to all of the counterclaims, the counterclaim-defendant's main argument in support of dismissal is that the counterclaims are "false assertions." However, this court must presume all of the factual allegations are true when examining a pleading under Civ.R. 12(B)(6) and cannot consider arguments of alleged falsity.

Fox's other main argument in support of the motion to dismiss the counterclaims is that these claims were previously "abandoned" in a Hamilton County court. However, the document attached to Fox's answer to the counterclaims states that what was filed was a stipulation of dismissal without prejudice.⁵⁶ Since the claims were voluntarily

⁵⁴ *Apel v. Katz*, 83 Ohio St.3d 11, 20, 697 N.E.2d 600 (1998), quoting *Linley v. DeMoss*, 83 Ohio App.3d 594, 598, 615 N.E.2d 631 (10th Dist., 1992).

⁵⁵ *West Channel Yacht Club v. Turner*, 11th Dist. No. 98-L-156, 1999 WL 1313694, *4 (Dec. 3, 1999), quoting *Fairfield Commons Condominium Assn. v. Stasa*, 30 Ohio App.3d 11, 20, 506 N.E.2d 237 (6th Dist., 1985).

⁵⁶ Plaintiff's Answer to Defendant's Counterclaims and Motion to Dismiss Same Due to Frivolity and Prior Abandonment in Hamilton County Court, Appendix A.

dismissed without prejudice, Askren is not prevented from reasserting those claims in this case.⁵⁷

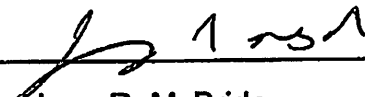
CONCLUSION

The defendant's motion for judgment on the pleadings as to the claims for malicious prosecution is well-taken and is hereby granted.

The plaintiff's motion to dismiss the defendant's counterclaims is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 11-17-14



Judge Jerry R. McBride

⁵⁷ See, *McCann v. Lakewood*, 95 Ohio App.3d 226, 233, 642 N.E.2d 48 (8th Dist., 1994) ("* * * [T]he term without prejudice means the party may refile the action at a later date.").