IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

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| **DR. JIM SISNEY, an individual,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **Case Number: CJ-2008-06173** |
| | ) | **Judge: Daman Cantrell** |
| **MIKE RAMPEY, an individual;** | ) | |
| **DOUGLAS J. HUDKINS, an individual;** | ) | |
| **MARYANNE FLIPPO, an individual;** | ) | |
| **SHARI WILKINS, an individual;** | ) | |
| **SHARON WHELPLEY, an individual,** | ) | |
| | ) | |
| **Defendants.** | ) | |



**PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS OF DEFENDANTS MARYANNE FLIPPO, SHARI WILKINS AND SHARON WHELPLEY**

**COMES NOW** the Plaintiff, Jim Sisney (hereinafter "Plaintiff"), and hereby moves to dismiss the Abuse of Process and Intentional Infliction of Emotional Distress (hereinafter "Counts I and II" respectively) of Defendants Maryanne Flippo, Shari Wilkins and Sharon Whelpley (hereinafter "Defendants") Counterclaims pursuant to OKLA. STAT. TIT. 12 § 2012(b)(6) for failure to state a claim upon which relief may be granted. In submitting this Motion to Dismiss, Plaintiff does so specially and specifically reserve any and all defenses to which he is entitled under OKLA. STAT. TIT. 12 § 2012. Plaintiff offers the following:

1. On September 3, 2008, Plaintiff Jim Sisney filed a Petition in this Court against Defendants, Mike Rampey, Narissa Rampey, Douglas J. Hudkins and Three (3) Unnamed Co-Conspirators, alleging defamation, injurious falsehood, invasion of privacy- false light, tortious interference with a business contract and intentional infliction of emotional distress.

2. On October 1, 2008, Plaintiff Jim Sisney filed an Amended Petition in this Court adding Maryanne Flippo, Shari Wilkins, Sharon Whelpley and Douglas Mann as Defendants,

alleging defamation, injurious falsehood, invasion of privacy-false light, tortious interference with a business contract and intentional infliction of emotional distress. Defendants Narissa Rampey and Douglas Mann were dismissed without prejudice by Plaintiff.

3. Both Petitions were filed based upon the individual and collective actions and/or involvement of the Defendants in alleged unlawful and or wrongful conduct, involving the Broken Arrow School System, its employees and vendors, and said conduct having occurred to the detriment of the Plaintiff.

4. Defendants filed a Motion to Dismiss Plaintiff's Amended Petition on October 30, 2008. The Court denied the Motion as to the Defamation, Tortious Interference and Intentional Infliction claims on April 16, 2009. Defendants Maryanne Flippo, Shari Wilkins and Sharon Whelpley now file Counterclaims for Abuse of Process and Intentional Infliction of Emotional Distress against the Plaintiff.

## ARGUMENTS AND AUTHORITIES

A pleading may be dismissed as a matter of law for two reasons: (1) lack of any cognizable legal theory, or (2) insufficient facts under a cognizable theory. *Tucker v. New Dominion, L.L.C.*, 2008 OK CIV APP 42, 182 P.3d 169. A petition is dismissed for failure to state a claim when it appears that the party can prove no set of facts in support of its claim which would entitle it to relief. *Darrow v. Integris Health, Inc.*, 2008 OK 1, 176 P.3d 1204.

### I. DEFENDANTS FAIL TO STATE A CLAIM FOR ABUSE OF PROCESS

Defendants' Counterclaim states that Jim D. Sisney "continued with his preconceived, methodical and malicious plan to wreak havoc, cause a public relations nightmare, publicly humiliate Flippo, Wilkins and Whelpley, and make things difficult for the School District" (The

Defendants Flippo, Wilkins and Whelpley's Answer to First Amended Petition and Counterclaims, p. 40 at ¶97). Defendants claim that Jim Sisney had premeditated intent in conjunction with no evidence to support his allegations of wrongdoing on the underlying lawsuit. Defendants have failed to allege any process that was utilized unlawfully by Jim D. Sisney.

The allegations of Defendants' Counterclaim ignore the essential elements of an action for abuse of process in the in the state of Oklahoma. It is well established that those elements consist of the following: "(1) issuance of process, (2) *primarily* for an ulterior or improper purpose, and (3) a wilful act in the use of process not proper in the regular conduct of the proceeding." *Tulsa Radiology Assoc., Inc. v. Hickman*, 1984 OK CIV APP 11, 683 P.2d 537, 539. In explaining the third element, the *Hickman* court noted that a wilful act is:

> "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process...; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." *Id.* At 539 (quoting Prosser *Handbook of the Law of Torts*, at p. 857 (4th Ed. 1971)). The *Hickman* court found that, in the absence of a showing that there was some wilful act in the use of process, a claim for abuse of process must be dismissed.

The "mere filing or maintenance of a lawsuit even for an improper purpose or motive is not an abuse of process." *Gore v. Taylor*, 1990 OK CIV APP 24, 792 Px2d 432, 435. Although a plaintiff in a predicate action may have been motivated by bad intention, there is no abuse of process if the court's process is used legitimately to its *authorized* conclusion. *Greenberg v. Wolfberg*, 1994 OK 147; 890 P.2d 895, 905. The Defendants' counterclaim herein contains the same deficiencies as those analyzed by the court in *Gore*. As the *Gore* court explained that "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even

though with bad intentions." *Id.* At 435-436 (footnotes omitted). In further explaining the "general principle" of abuse of process, the court quoted the following: "One who uses a legal process, whether criminal or civil, against another *primarily to accomplish a purpose for which it is not designed*, is subject to liability to the other for harm caused by the abuse of process." *Id.* at 436 (quoting *Restatement (Second) of Torts* §682 (1977)(emphasis added). Quoting further from the *Restatement*, the court set out the explanation of the word "primarily":

> "The significance of this word is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. Thus the entirely justified prosecution of another on a criminal charge, does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm; nor does the instigation of justified bankruptcy proceedings become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business of a competitor."

*Id.* (quoting *Restatement, supra*, at comment b). Thus it has been held that if process "is used for its proper and intended purpose, the mere fact that it has some other collateral effect...does not constitute abuse of process." *Id.*

Explaining the necessity of pleading the elements of an abuse of process claim under Oklahoma law, the Tenth Circuit in *Meyers v. Ideal Basic Industries, Inc.*, 940 F.2d 1379 (10th Cir. 1991), affirmed the trial court's dismissal of the plaintiffs' claims. In *Meyers*, the plaintiffs sued their former employer for abuse of process after the employer filed a lawsuit against them which alleged that they had conspired to file false worker's compensation claims. The complaint which had been filed by the employer had been dismissed by a consent order. The Tenth Circuit found that the employees could not maintain a cause of action for either abuse of process or malicious prosecution.

Even viewing Defendants' Counterclaims in the favorable light that we must, taking the allegations therein as true, the claim nevertheless fails to establish the necessary elements of a claim for abuse of process. While we must take as true Defendants' claim that the purpose in bringing the claims against Defendants was to expose wrongdoing of the Defendants and other employees of Broken Arrow School System, as well as the school system itself, Defendants' Counterclaim still fails to establish an abuse of process claim since there are material facts and evidence to substantiate the Plaintiffs' claims. The Defendant, Maryanne Flippo, herself, at the very least admits to secrecy and an unwillingness to participate in full disclosure of pertinent facts on the part of the School Board, The School District and its employees, supporting the claims of the Plaintiff, as evidenced by the e-mail correspondence attached hereto as Exhibit "A". If Defendants have been humiliated, embarrassed, or suffered emotional distress, it is through no one's fault but their own. *See* Plaintiff's Amended Petition; *See also* Exhibit "A". Without an allegation of a willful and improper use of the process, *primarily* for an ulterior purpose not proper in the regular conduct of the proceeding, the elements of a claim for abuse of process cannot be satisfied. Therefore, This Court should dismiss the Defendants' Counterclaim for abuse of process. *See id.*

Finally, to the extent that the Defendants are attempting to claim that Plaintiff's conduct in the coarse of litigation is/was somehow improper, any statements made in such coarse, together with accusations and assertions raised in that litigation, are privileged under Oklahoma law. *Kirschstein v. Haynes*, 1990 OK 8, 788 P.2d 941. Nothing which has occurred in any of the lawsuits, relating to this action or pending before this court can form the basis of an "abuse of process" claim which Defendants might assert. As the Oklahoma courts have stated, it "is black-letter law in Oklahoma that *no civil remedy is available for litigation-related misconduct." Hutchinson v. Carter*, 2001 OK

CIV APP 124, ¶7, 33 P.3d 958, 961 (emphasis added).

## II. DEFENDANTS FAIL TO STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The torts of intentional infliction of emotional distress and outrage are two titles for the same tort. *Eddy v. Brown*, 1986 OK 3, 715 P.2d 74, 76. In order to state a claim for outrage, the conduct complained of must either be so outrageous as to give rise to an independent tort, or if merely negligent, must be accompanied by a physical injury. *Breeden v. League Services Corp.*, 1978 OK 27, 575 P.2d 1374. One may be subject to liability if he, "by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another." *Zahorsky v. Community Nat'l Bank of Alva*, 1994 OK CIV APP 104, 883 P.2d 198, 199.

The *Breeden* court adopted the process described in comments (h) and (I) to § 46, *Restatement (Second) of Torts*. Under *Breeden*, it is up to the court to "determine whether the defendant's conduct may reasonably be regarded so extreme and outrageous as to permit recovery or whether it is necessarily so." It is the duty of the *court* to decide whether, based on the evidence, severe emotional distress can be found. 1978 OK 27, ¶12, 575 P.2d at 1377-78. The standard against which the defendant's conduct is to be measured is whether the conduct was "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." *Id.* at ¶15, 575 P.2d at 1378. As the *Zahorsky* court noted, it is the trial court's responsibility initially to determine whether the conduct complained of may reasonably be regarded as sufficiently extreme and outrageous to meet these standards. 1994 OK CIV APP 104, 883 P.2d at 199-200. Liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Breeden*, 1978 OK

27, ¶8, 575 P.2d at 1376.

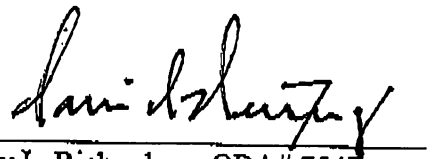
The allegations of Defendants' Counterclaim, even when viewed in the light most favorable to Defendants, do not support any claim of "intentional infliction of emotional distress" based on asserted allegations in the pleadings filed in the District Court of Tulsa County. As noted above, the conduct complained of must either be *outrageous* and go "beyond all possible bounds of decency." *Breeden*, 1978 OK 27, ¶12, 575 P.2d 1374. The claim for intentional infliction of emotional distress here must be dismissed because it completely fails to meet this standard. *See id.* The Defendants have accused Jim Sisney of extreme and outrageous conduct merely because he has a reasonable belief the Defendants were involved in wrongdoing, attempted to investigate, address and resolve the issues he uncovered in his role as Superintendent of Schools, and subsequently and necessarily, filed a lawsuit against the Defendants for the conduct that Plaintiff reasonably believes is unlawful and redressable in a court of law. It is without question that Plaintiff had a duty in his former position to address the Defendants' actions and that he is entitled to seek legal recourse for their wrongdoing and the damages which have resulted therefrom. *See* Plaintiff's First Amended Petition; *See also* Defendant Flippo, Wilkins and Whelpleys' Answer to the First Amended Petition and Counterclaim.

The fact that Plaintiff has created public awareness of Defendants' wrongdoing and filed a lawsuit to address the issues herein is hardly intentional infliction of emotional distress. The Defendants claim that accusing them of wrongdoing and forcing them to defend against Dr. Sisney's allegations in litigation is outrageous behavior. The Defendants are voluntary members of the Broken Arrow School District Board of Education and the actions in which they choose to participate are clearly of interest and concern to the public. The Superintendent, likewise, as This Court has noticed, is a public figure whose actions are of concern and interest to the public.

Therefore, it was not only Jim Sisney's right to address the concerns of impropriety enunciated herein, but his duty as well and no argument can be made that any actions on the part of Plaintiff related to this law suit fall "beyond all possible bounds of decency." *Breeden*, 1978 OK 27. Further, the courts of Oklahoma are well versed in dealing with a varied range of disputes between employees, former employees and employers. Such disputes do not go "beyond all possible bounds of decency." Oklahoma law is clear that where there are absolutely no acts of outrage, the claims of intentional infliction of emotional distress must be dismissed. *Eddy*, 1986 OK 3, 715 P.2d at 76-77.

**WHEREFORE**, Plaintiff respectfully requests this Court dismiss Defendants' claims for Abuse of Process and Intentional Infliction of Emotional Distress for failure to state a claim upon which relief may be granted. Plaintiff requests all other relief this Court deems just and equitable.

Respectfully submitted,
**RICHARDSON RICHARDSON BOUDREAUX**



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of February, 2010, a true and correct copy of the foregoing instrument was mailed with proper postage prepaid thereon to:

Graydon Dean Luthey, Jr.
HALL, STILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, Oklahoma 74103-3706

Clark O. Brewster
BREWSTER & DE ANGELIS, P.L.L.C.
2617 East 21st Street
Tulsa, Oklahoma 74114

Phyllis L. Walta
WALTA & WALTA
120 East Oklahoma
Hennessy, Oklahoma 73742

FOR THE FIRM

Gmail

Beth Snellgrove <bcsnellgrove@gmail.com>

# FW: REPORT ON RFR BILLINGS TO BASE

1 message

**Stephanie Updike <stephanieupdike@hotmail.com>** Mon, Feb 8, 2010 at 3:41 PM
To: Beth Snellgrove <bcsnellgrove@gmail.com>

I don't know if you ever saw this. . . I don't remember it. Just thought you might be interested.

> From: supdike@baschools.org
> To: stephanieupdike@hotmail.com
> Date: Mon, 8 Feb 2010 15:38:37 -0600
> Subject: FW: REPORT ON RFR BILLINGS TO BASE
>
>
> _____
> From: Maryanne Flippo [maryanneflippo@hotmail.com]
> Sent: Thursday, April 02, 2009 11:09 PM
> To: Doug Mann
> Cc: Gerber, Gary; Updike, Stephanie
> Subject: RE: REPORT ON RFR BILLINGS TO BASE
>
> Doug,
>
> While I think it could be a good idea to analyze the legal bills in order to plan appropriately for next year's budget, I do not know if it is the most important thing Dr. Gerber could be doing with his time in the next two weeks. Certainly he is the only one who could do it because no other employees are authorized to look at the itemized bills. While I do not object to releasing a categorized report on your legal bills in time to prepare next year's budget, I am not sure I am comfortable with insisting that it be done immediately.
>
> If the goal is truly to produce a report to aid the board in decision-making for the future, and to give the public an accurate understanding of how and why BAPS has incurred legal costs, I think the report needs to include some additional information. I think if we are going to produce a report analyzing our legal bills it should include an analysis of all the legal bills in this fiscal year from all of the attorneys who have done work for BAPS since July 1, 2008. It should also compare the bills with legal bills from the last five years, accompanied by an explanation for the previous years as well. A comparison of total costs with those of neighboring districts would also be good to include. (I believe most of this additional information was prepared last fall and even aired on TV.) In my opinion, the report should suggest an appropriate amount to budget annually.
>
> The public also needs to be reminded that costs for legal bills vary according to the needs of a particular year, just as medical bills vary according to personal illness or injury. The year in which you have a heart attack, you will have higher medical bills than the previous year when you had no known heart problems. Even though it will not matter to the board members or the citizens who refuse to objectively consider the facts, I think the invalid comparison between this year's legal bills and last year's legal bills needs to be addressed for open-minded citizens and board members to consider.
>
> In my opinion, preparing a report to release right now will be interpreted as an attempt to placate Mrs. Updike and a few vocal citizens with whom she shares an agenda to discredit RFR and Dr. Gerber. I do not agree with setting a precedent of giving in to the demands of a board member who is actively and unceasingly working to publicly discredit the superintendent and a vendor with whom BAPS has a board-approved contract. Furthermore, I do not believe Mrs. Updike (or the few vocal citizens Mrs. Updike seems pa... interested in pleasing) will be satisfied by the release of this information. She (and they) will not be s...



PLAINTIFF'S EXHIBIT A

until BAPS cancels its contract with your firm.
>
> I believe Mrs. Updike is one of the citizens to whom you refer in your email who "seeks information about your billings because she has her own agendas unrelated to the underlying billings or even why the services were needed." I do not believe Mrs. Updike has any motive for seeking the release of the itemization of the legal bills other than a desire to embarrass or discredit Dr. Gerber, and/or a desire to harm me or some of the other board members personally. She has never apologized for, nor retracted, her inaccurate statements on Aug. 12, 2008. Mrs. Updike has attempted on several occasions since then to publicly discredit RFR. She has also repeatedly asked to release information that would incur liability for the district and for all board members. She has even refused to acknowledge the seriousness of the potential liability to all board members (including herself) if all the issues are clearly identified to the public.
>
> Additionally, I do not think it is wise to set the precedent of allowing Mrs. Updike to succeed in demanding a report from Dr. Gerber that she never would have asked for from the previous administration, particularly when a.) a majority of the board has not voted to direct Dr. Gerber to produce this report, and b.) the parameters of the report have not been clearly set. As stated earlier, I would like to increase the scope of the report and would like for the board to have the opportunity to vote on that.
>
> If you do release the billing information in categories, I think you should consider special categories for the hours billed to the district in attempts to minimize the damage and the potential liability to the district and to individual board members as a result of a.) the efforts of Mr. Lare, Mr. Richardson and Mr. Sisney, b.) Mrs. Updike's and Mr. Stover's words and actions, c.) complying with the Open Records requests from certain citizens, d.) responses to Mr. Reynolds' comments, e.) responding to the taxpayer demand letter, including considering a state audit, f.) preparations for and responses to the special audit requested last fall. You could also include a category for the costs of the investigation, and the subsequent suspension and dismissal of the previous superintendent. (Although I defer to your legal wisdom, I am not kidding about suggesting these categories. I think the public could benefit from understanding the root cause of most of the legal bills.)
>
> I have only voted not to release the itemized legal bills to honor confidentiality laws and to protect the district and board members from liability if certain information became public. I did not wish to identify the information, so I have been unable to explain my decision in detail to the public. However, if I had not voted to block Mrs. Updike's previous requests, the public would have read many problematic details and names of individuals months ago. Even though she should know better, Mrs. Updike so far has refused to acknowledge there are many details that would be very unwise to release to the public, which is how this issue has become so controversial (see suggested category b. above).
>
> If Mrs. Updike is at all sincere about caring for this district more than she desires to discredit Dr. Gerber, it would be helpful if she would publicly state her agreement to give up demanding the release of itemized billing descriptions. A public acknowledgement that she will accept as the wise and appropriate solution (not just the best she could achieve under the circumstances) the report of categories of legal bills would be evidence that her concern for the welfare of the district is greater than her desire to discredit Dr. Gerber and/or RFR, and that she is truly interested in moving forward.
>
> In conclusion, if you and Dr. Gerber do want prepare a report on the legal bills right now, I would like for the scope to be expanded to include the additional items I mentioned, and I would like some assurance that everyone is aware of the precedents being set and is comfortable with those precedents, or agrees to clarify that a particular precedent is not being set. I will be very happy to give an expanded report my public blessing as long as the precedents being set are clearly agreed upon and understood. In the interests of moving the district forward, I would even be willing to make a joint statement of approval of the proposed report on the legal bills with Mrs. Updike, if she is willing to not just grudgingly accept, but endorse, this solution. Whether or not Mrs. Updike cares to make a joint statement with me, if she is not willing to publicly endorse this solution to releasing the legal bills, it will be a waste of time, effort and money to complete the proposed report (see paragraph 4 and 5 above.)
>
> Maryanne
>
>
>
>