[Cite as *McWreath v. Cortland Bank*, 2012-Ohio-3013.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

LARRY J. MCWREATH,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2010-T-0023
- vs -	:	
CORTLAND BANK, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CV 00182.

Judgment: Affirmed in part; reversed in part and remanded.

Bryan L. Carr and *Leonard F. Carr*, Carr, Feneli & Carbone Co., L.P.A., 1392 S.O.M. Center Road, Mayfield Heights, OH 44124 (For Plaintiff-Appellant).

Ronald H. Isroff and *Elizabeth M. Hill*, Ulmer & Berne, L.L.P., 1100 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113-1448 (For Appellees Cortland Bank and Charles Commons).

Dennis Watkins, Trumbull County Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Appellee Donna Rish).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Larry J. McWreath, appeals from four separate judgment entries of the Trumbull County Court of Common Pleas: the August 28, 2009 entry, dismissing all claims against appellee, Donna Rish, and six of nine claims against

appellees, Cortland Bank and Charles Commons, for failure to state a claim; the October 26, 2009 entry, denying as untimely appellant's motion to compel answers to written discovery and a request for a deposition of Ms. Rish as well as finding Cortland Bank's and Mr. Commons' motion for an emergency protective order well-taken; the January 19, 2010 entry, denying appellant's motion to compel discovery; and the January 19, 2010 entry, granting the motion for summary judgment of Cortland Bank and Mr. Commons.[1]

Factual Background

{¶2} The following facts are pertinent to this appeal: according to appellant's deposition, Frank Kopervac, who is now deceased, had no living relatives and named appellant as the sole beneficiary of his estate in 1997, which was worth over one million dollars. Appellant indicated that he and Mr. Kopervac were very close and had a grandfather-grandson relationship. On December 27, 2007, appellant took Mr. Kopervac to Cortland Bank to cash multiple checks, many of which were outdated, and to transfer $20,000 from his savings account to his checking account. Appellant initially introduced Mr. Kopervac as his grandfather to Carole Bixler, the drive-thru manager. Appellant later admitted that he and Mr. Kopervac were not related. Because Mr. Kopervac did not have any identification with him in order to cash the valid checks, Ms. Bixler deposited approximately $12,000 into his checking account. Later that day, appellant returned to the bank by himself with Mr. Kopervac's driver's license.

1. Ms. Rish is an investigator with the Trumbull County Court of Common Pleas, Probate Division. Cortland Bank is an Ohio corporation with its principal place of business in Trumbull County. It is a full-service community bank engaged in commercial and retail banking services. Mr. Commons is the Vice President of Cortland Bank.

However, Cortland Bank refused to disburse the $12,000 to appellant because he was not listed on Mr. Kopervac's account. Appellant left the bank, then returned for a third time that day. At the drive-thru, appellant presented a check signed by Mr. Kopervac made out to appellant for $12,000. However, Cortland Bank could not disburse the funds because it was near closing time and it did not have enough cash on hand at the drive-thru to process appellant's request.

{¶3} The following day, appellant returned to Cortland Bank to cash the check. A bank teller contacted Mr. Commons. According to the deposition of Mr. Commons, appellant initially told him that he was Mr. Kopervac's grandson, then later admitted that the two were not related. Appellant complained to Mr. Commons that he had to come to the bank three different times the day before and his check was never cashed. Mr. Commons explained to appellant that Cortland Bank was taking appropriate steps to ensure that Mr. Kopervac's funds were properly protected. Mr. Commons advised appellant that it would be easier if appellant obtained a power of attorney in order to manage Mr. Kopervac's finances.

{¶4} On January 4, 2008, Mr. Kopervac executed a power of attorney naming appellant as attorney-in-fact. Cortland Bank initially rejected the power of attorney because it appeared that appellant had also witnessed the document's execution. Mr. Commons stated that the rationale regarding Cortland Bank's decision was set forth in a January 9, 2008 letter to appellant. After receiving the letter, appellant returned to Cortland Bank and gave Mr. Commons his father's driver's license to show that the two shared the same first and last names and that it was his father who witnessed the

document. After reviewing the identification, Mr. Commons advised appellant that Cortland Bank would accept the power of attorney.

{¶5} Contrary to appellant's assertion that Cortland Bank and Mr. Commons continued to refuse to allow him to act under the power of attorney, appellant began accessing Mr. Kopervac's safe deposit box on multiple occasions, including January 16, 17, and 24, 2008. Also that month, Mr. Kopervac's home was burglarized. According to the Vienna police report, $10,000 in cash, four checks, and two guns were taken from his residence. It is unclear whether the burglar broke into Mr. Kopervac's home or whether he impersonated a police officer and convinced Mr. Kopervac to turn over the money and items. Appellant maintains in his appellate brief that Mr. Commons took it upon himself to contact Judge Swift at the Trumbull County Court of Common Pleas, Probate Division. However, there is no dispute in the record that it was Chief Ovesny of the Vienna Police Department who actually contacted Judge Swift regarding Mr. Kopervac's competency. Ms. Rish interviewed Mr. Kopervac and appellant. Judge Swift later initiated an emergency guardianship proceeding over Mr. Kopervac on February 7, 2008, Case No. 08 GDP 0016, and a hold was placed on Mr. Kopervac's bank accounts.

{¶6} Appellant was ultimately named as Mr. Kopervac's guardian. On March 15, 2008, Mr. Kopervac died, and the guardianship proceeding was converted to a probate proceeding. The probate court appointed appellant as executor and accepted Mr. Kopervac's will on June 18, 2008. On that same date, appellant closed all of Mr. Kopervac's accounts at Cortland Bank.

Procedural History

{¶7} On September 8, 2008, appellant filed a complaint against appellees in the Cuyahoga County Court of Common Pleas, asserting nine causes of action: (1) negligence; (2) defamation; (3) interference with expectancy interest; (4) intentional interference with contract; (5) fraud; (6) breach of contract; (7) civil conspiracy; (8) breach of obligation of good faith and fair dealing; and (9) abuse of process. In November of 2008, appellees filed motions to dismiss for improper venue or, in the alternative, to transfer the case to Trumbull County. Appellant filed a brief in opposition the following month, to which appellees filed replies. On January 15, 2009, the Cuyahoga County Court of Common Pleas granted appellees' motions to transfer the matter to Trumbull County.

{¶8} On February 11, 2009, Cortland Bank and Mr. Commons filed a motion to dismiss pursuant to Civ.R. 12(B)(6) in the Trumbull County Court of Common Pleas, and Ms. Rish filed her motion to dismiss one month later. Thereafter, appellant filed a brief in opposition to appellees' motions to dismiss. Cortland Bank and Mr. Commons filed a reply brief.

{¶9} On May 13, 2009, the trial court ordered, inter alia, that all written discovery be completed by July 8, 2009.

{¶10} Pursuant to its August 28, 2009 judgment entry, the trial court dismissed all claims against Ms. Rish and six of nine claims against Cortland Bank and Mr. Commons for failure to state a claim. The trial court indicated that the only remaining claims pending for disposition regarding Cortland Bank and Mr. Commons include count one, negligence; count six, breach of contract; and count eight, breach of obligation of good faith and fair dealing.

{¶11} On October 9, 2009, appellant filed a motion to compel discovery with respect to Ms. Rish. Ms. Rish filed a response. Cortland Bank and Mr. Commons filed a brief in opposition and a motion for emergency protective order.

{¶12} Pursuant to its October 26, 2009 judgment entry, the trial court denied as untimely appellant's motion to compel answers to written discovery and a request for a deposition of Ms. Rish. Furthermore, the court found Cortland Bank's and Mr. Commons' motion for an emergency protective order well-taken.

{¶13} On October 29, 2009, Cortland Bank and Mr. Commons filed a motion for summary judgment pursuant to Civ.R. 56 on the remaining three claims. Appellant filed a brief in opposition the following month, to which Cortland Bank and Mr. Commons filed a reply.

{¶14} Pursuant to its January 19, 2010 judgment entries, the trial court denied appellant's motion to compel discovery and granted the motion for summary judgment of Cortland Bank and Mr. Commons.

{¶15} It is from the foregoing August 28, 2009, October 26, 2009, and January 19, 2010 judgment entries that appellant filed a timely appeal, asserting the following assignments of error for our review:

{¶16} "[1.] The Trial Court Erred in Granting Appellees' Motion for Summary Judgment[.]

{¶17} "[2.] The Trial Court Erred In Granting Appellees' Motions to Dismiss[.]

{¶18} "[3.] The Trial Court Erred In Transferring the Case to Trumbull County[.]

{¶19} "[4.] The Trial Court Erred In Precluding Appellant from Conducting Discovery[.]"

First Assignment of Error

{¶20} In his first assignment of error, appellant argues that the trial court erred in granting the motion for summary judgment of Cortland Bank and Mr. Commons. Appellant maintains that the trial court improperly held that he failed to present a genuine issue of material fact regarding his claims for breach of contract, breach of duty of good faith and fair dealing, and negligence.

Summary Judgment Standard of Review

{¶21} An appellate court reviews a trial court's decision to grant a motion for summary judgment under a de novo standard. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is proper when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Civ.R. 56(C); *Welco Indus., Inc. v. Applied Cos*., 67 Ohio St.3d 344, 346 (1993).

{¶22} Once the moving party has met its burden of supporting its motion with sufficient admissible evidence, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing that there is a genuine issue for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). If the nonmoving party does not satisfy this reciprocal burden, summary judgment, if appropriate, shall be granted against the nonmoving party. Civ.R. 56(E).

Breach of Contract Claim

{¶23} In order to be successful on a breach of contract claim, appellant was required to provide evidence of (1) the existence of a contract; (2) performance on the part of appellant; (3) breach by appellees; and (4) damages. *Huffman v. Kazak Brothers*, 11th Dist. No. 2000-L-152, 2002 Ohio App. LEXIS 1660, *11 (Apr. 12, 2002), citing *Doner v. Snapp*, 98 Ohio App.3d 597, 600 (1994).

{¶24} Appellant's "breach of contract" claim against Mr. Commons and the bank was based solely upon the power of attorney which he sought to use as a means of gaining access to Mr. Kopervac's financial accounts. Appellant asserted before the trial court that, once he had properly presented the power of attorney to Mr. Commons, he "stood in the shoes" of Mr. Kopervac, and therefore should have been given immediate access to the funds in the bank accounts. Appellant further asserted that Mr. Commons and the bank breached its contract with him and Mr. Kopervac by refusing to immediately honor the power of attorney and delaying his access to the funds.

{¶25} In granting summary judgment as to this claim, the trial court predicated its ruling solely upon the conclusion that appellant had failed to establish that he had suffered any true damages due to the delay in access. As to this point, the evidentiary materials showed that, after reviewing the power of attorney, Mr. Commons sent appellant a letter stating that the bank believed that the document had not been properly witnessed. The materials also showed that the "witness" problem was resolved within ten days, and that appellant was then given access to Mr. Kopervac's security boxes. Although appellant was still denied direct access to the funds in the accounts, this was due solely to the order of the probate court.

{¶26} Before this court, appellant has not raised any challenge to the trial court's legal analysis on the "damages" issue. Furthermore, our review of the evidentiary materials supports the trial court's conclusion on that point. That is, appellant failed to show that he had suffered any damages as a result of the one-week delay. Therefore, since there was no dispute that appellant could unable to satisfy the "damages" element, summary judgment was appropriate as to claim of breach of contract.

Breach of Duty of Good Faith and Fair Dealing Claim

{¶27} Parties to a contract are "bound toward one another by standards of good faith and fair dealing." *Boiling v. Clevepak Corp.,* 20 Ohio App.3d 113, 121 (1984). However, this "does not stand for the proposition that breach of good faith exists as a separate claim." *Wauseon Plaza, Ltd. Partnership v. Wauseon Hardware Co.,* 156 Ohio App.3d 575, 2004-Ohio-1661, ¶52. Rather, "good faith is part of a contract claim and does not stand alone." *Id.*

{¶28} Appellant's "bad faith" claim was predicated upon the same sets of facts as his "breach of contract" claim; i.e., the delay in honoring the power of attorney. Given that the "breach of contract" claim failed for the reason that appellant could not establish any damages stemming from the delay, it follows that the same analysis would apply to the "bad faith" claim. Hence, Mr. Commons and the bank were also entitled to summary judgment on this particular claim.

Negligence Claim

{¶29} "To establish a claim for negligence, appellant must prove the following: '(1) that appellee owed a duty to appellant; (2) that appellee breached that duty; (3) that appellee's breach of duty directly and proximately caused appellant's injury; and (4)

damages.'" *Wike v. Giant Eagle, Inc*., 11th Dist. No. 2002-P-0049, 2003-Ohio-4034, at ¶14, quoting *Kornowski v. Chester Properties, Inc.*, 11th Dist. No. 99-G-2221, 2000 Ohio App. LEXIS 3001, *7 (June 30, 2000).

{¶30} Like appellant's two contract claims, his negligence claim was also based upon his factual assertions regarding Mr. Commons' treatment of the power of attorney; i.e., he maintained that Mr. Commons acted negligently in not giving him immediate access to the accounts. In granting summary judgment on this particular claim, the trial court again concluded, inter alia, that appellant's evidentiary materials failed to demonstrate any damages resulting from the delay.

{¶31} In contesting the trial court's "damages" conclusion under this claim, appellant contends that he was harmed as a result of the ensuing proceedings before the probate court. However, in raising this contention, appellant has failed to establish any logical connection between Mr. Commons' initial treatment of the power of attorney and the initiation of the probate proceedings. As to this point, this court would emphasize that the allegations in appellant's complaint tended to support the conclusion that the initiation of the probate proceedings were due to the alleged false statements Mr. Commons made to the probate court and Ms. Rish, not upon his actions in relation to the acceptance of the power of attorney.

{¶32} Nevertheless, even if a logical connection did exist, the evidentiary materials before the trial court still supported the conclusion that appellant did not sustain any harm due to Mr. Commons' alleged statements. Specifically, the materials did not support appellant's contention that the bank and Mr. Commons were involved with initiating the emergency guardianship proceedings. Again, Chief Ovesny contacted

Judge Swift regarding Mr. Kopervac's competency, not Mr. Commons. Also, the evidence does not establish that the bank and Mr. Commons were involved in any of the statements made in Ms. Rish's report.

{¶33} In light of the foregoing, the trial court properly granted summary judgment in favor of Cortland Bank and Mr. Commons because appellant failed to present any genuine issue of fact regarding the "damages" element of his claim for negligence.

{¶34} Appellant's first assignment of error is without merit.

Second Assignment of Error

{¶35} In his second assignment of error, appellant contends that the trial court erred in granting appellees' motions to dismiss his claims for defamation, interference with expectancy interest, intentional interference with contract, fraud, civil conspiracy, and abuse of process.

Motion to Dismiss Standard of Review

{¶36} This court stated in *Andrews v. Lampert*, 11th Dist. No. 2002-L-022, 2003-Ohio-2370, at ¶11:

{¶37} "A defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted, according to Civ.R. 12(B)(6). An appellate court's review of a dismissal under Civ.R. 12(B)(6) is de novo. *West v. Sheets*, 11th Dist. No. 2001-L-183, 2002-Ohio-7143, at ¶9, citing *Mitchell v. Speedy Car X, Inc.* (1998), 127 Ohio App.3d 229, 231 ***. In order for a court to dismiss a complaint 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 recovery."' *Taylor v. London* (2000), 88 Ohio St.3d 137, 139 ***, quoting *O'Brien v. Univ. Comm. Tenants Union, Inc.* (1975), 42 Ohio St.2d

242 ***, syllabus. '"A complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theory on which the plaintiff relies. Instead, a trial court must examine the complaint to determine if the allegations provide for relief on any possible theory."' *Firstmerit Corp. v. Convenient Food Mart, Inc.* (Mar. 7, 2003), 11th Dist. No. 2001-L-226, 2003 Ohio 1094, at ¶7, quoting *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 667 ***. Thus, 'in construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.' *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192 *** ." (Parallel citations omitted.)

{¶38} "Because Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity. *** Rather, Civ.R. 8(A) requires only a short and plain statement of the claim that gives the defendant fair notice of the plaintiff's claim and the grounds upon which it is based. *** Thus, a plaintiff is not required to plead the legal theory of the case at the pleading stage and need only give reasonable notice of the claim. *** Outside of a few exceptions, *** a complaint need not contain more than 'brief and sketchy allegations of fact to survive a motion to dismiss under the notice pleading rule.' ***." (Internal citations omitted.) *Ogle v. Ohio Power Co.,* 180 Ohio App.3d 44, 2008-Ohio-7042, at ¶5.

{¶39} Similarly, with respect to Fed.R.Civ.P. 12(b)(6), "[t]he complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *** 'Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures

established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues.' *** It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, ***, or 'plead law or match facts to every element of a legal theory,' ***." (Internal citations omitted.) *Nader v. Democratic Natl. Commt.*, 590 F. Supp.2d 164, 167 (D.D.C. 2008).

{¶40} Although a complaint need not state with precision all elements that give rise to a legal basis for recovery, fair notice of the nature of the action must be provided. *Bridge v. Park Nat'l Bank*, 10th Dist. No. 03AP-380, 2003-Ohio-6932, ¶5. Under the notice pleading requirements, "to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions." *Gonzalez v. Posner*, 6th Dist. No. F-09-017, 2010-Ohio-2117, ¶11.

Defamation Claim

{¶41} The essential elements of a defamation action are "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Vaughn v. Lake Metro. Hous. Auth.*, 11th Dist. No. 2009-L-153, 2010-Ohio-3686, ¶44, citing *Akron-Canton Waste Oil v. Safety-Kleen Oil Servs.*, 81 Ohio App.3d 591, 601 (1992), citing 3 Restatement of the Law 2d, Torts 155, Section 558 (1977).

{¶42} "There are two types of defamation claims: defamation per se and defamation per quod. Defamation per se occurs when a statement is defamatory on its

face; defamation per quod occurs when a statement is defamatory through interpretation or innuendo. *Whiteside v. United Paramount Network,* [12th Dist.] No. CA2003-02-008, 2004-Ohio-800, ¶14. When a complaint alleges defamation per se, damages are presumed; when a complaint alleges defamation per quod, the complaint must allege special damages. *Williams v. Gannett Satellite Information Network, Inc.,* 162 Ohio App.3d 596, 2005-Ohio-4141, at ¶7 ***.

{¶43} "In order for a statement to constitute defamation per se, it must 'consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, impute *** some loathsome or contagious disease which excludes one from society or tend *** to injure one in his trade or occupation.' *Heidel v. Amburgy,* [12th Dist.] No. CA2002-09-092, 2003-Ohio-3073, ¶30, citing *McCartney v. Oblates of St. Francis de Sales* (1992), 80 Ohio App.3d 345, 353, ***." *Whiteside v. Williams*, 12th Dist. No. CA2006-06-021, 2007-Ohio-1100, ¶4-5.

{¶44} In his complaint, appellant alleged that "[t]he Defendants made false and defamatory statements of fact about [him]"; "[w]ith fault of, at least, negligence, the Defendants published these false and defamatory statements, without privilege, to third parties"; and "[t]he statements made by the Defendants were Defamatory, Defamatory *Per Se*, Defamatory *Per Quod* and/or caused special harm to [him]."

{¶45} The trial court correctly stated the following in its August 28, 2009 judgment entry:

{¶46} "The Court finds nothing in the body of the complaint sufficient to state a claim for defamation against any of the named defendants; Cortland Bank, Commons or Rish. There is no reference within the complaint to what statements were made by

defendants that constituted defamation. Nor is there any indication as to the method of publication or resulting damage."

{¶47} A review of appellant's complaint clearly shows that he did not state a claim for defamation per se or per quod. With respect to defamation per se, appellant's complaint did not assert that the alleged statements made by Mr. Commons or Ms. Rish imported an indictable criminal offense involving moral turpitude or infamous punishment, or that they imputed a loathsome or contagious disease that excludes one from society. Also, appellant's complaint did not allege that the alleged statements affected him in his trade or occupation. As such, appellant did not state a claim for defamation per se.

{¶48} With regard to defamation per quod, appellant was required to allege special damages. Appellant did assert, in conclusory fashion, that the alleged statements made by the defendants caused him "special harm." However, appellant did not provide any explanation for this conclusory assertion, and did not attempt to tie it to separate allegations in other sections of the complaint. Accordingly, he did not comply with Civ.R. 9(G), which states that "[w]hen items of special damage are claimed, they shall be specifically stated."

{¶49} Thus, the trial court did not err in granting appellees' motions to dismiss appellant's claim for defamation, as he did not state a claim for defamation per se or per quod.

Interference with Expectancy Interest Claim

{¶50} The following elements must be proven to maintain a claim for interference with expectancy interest: "'(1) an existence of an expectancy of inheritance

in the plaintiff; (2) an intentional interference by a defendant(s) with that expectancy of inheritance; (3) conduct by the defendant involving the interference which is tortious, such as fraud, duress or undue influence, in nature; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and (5) damage resulting from the interference.'" *Werman v. Green*, 11th Dist. No. 2000-L-033, 2001 Ohio App. LEXIS 1555, *6 (Mar. 30, 2001), quoting *Firestone v. Galbreath*, 67 Ohio St.3d 87, 88 (1993).

{¶51} In concluding that appellant's allegations were legally insufficient to satisfy the foregoing elements, the trial court held that it was not possible for him to have had a reasonable expectancy of an inheritance because he was not related to Mr. Kopervac. As to this point, this court would note that appellant expressly asserted in his complaint that Mr. Kopervac had informed appellant that he had been named as a beneficiary in Kopervac's Last Will and Testament. In construing the first element of an "interference with expectancy" claim, the Eighth Appellate District has held that the terms of a will or a trust can suffice, in and of themselves, to establish the existence of a proper expectancy of an inheritance. *Sull v. Kaim*, 172 Ohio App.3d 297, 2007-Ohio-3269, ¶14 (8th Dist.). In the absence of a valid will, logic dictates that the existence of a familial relationship would be the controlling factor in determining the "expectancy" issue; however, when a valid will specifically names a non-relative as a beneficiary, the wording of the will would obviously be controlling for purposes of deciding whether the "inheritance" expectancy was reasonable.

{¶52} In relation to the remaining elements of this particular claim, our review of appellant's complaint indicates that it was alleged that Mr. Commons had made certain

"bad faith" statements which were designed to protect the bank's interest in keeping Mr. Kopervac's accounts. The complaint further asserted that, after the probate court had assigned Ms. Rish to investigation the general situation, Mr. Commons had "assisted" her in producing her report. According to the complaint, the report had false statements regarding whether Mr. Kopervac had a will and whether he needed to be protected from appellant. In addition, it was alleged that, as a result of the false statements made by Mr. Commons and Ms. Rish, a special probate proceeding was filed to determine if Mr. Kopervac's assets needed to be protected.

{¶53} As part of his allegations, appellant did admit that Mr. Kopervac's will was ultimately accepted by the probate court, and that the special probate action relating to him was dismissed. Hence, his own allegations supported the conclusion he was not denied his rights under the will. Nevertheless, the complaint also asserted that it was necessary for Mr. Kopervac's estate to expend over $10,000 in defending against the probate proceedings. Given that the funds could have gone to appellant under the will if the probate proceedings had never occurred, it could be inferred that appellant suffered monetary damages as a result of Mr. Commons' and Ms. Rish's alleged acts.

{¶54} When viewed as a whole, the factual assertions in appellant's complaint were legally sufficient to allege that, after having some form of communications with Mr. Commons, Ms. Rish engaged in tortuous conduct by intentionally issuing a report that included false statements as to aspects of appellant's relationship with Mr. Kopervac. The assertions were also sufficient to indicate that, as a consequence of Mr. Common's and Ms. Rish's actions, appellant had to employ estate funds to defend against frivolous probate proceedings which were ultimately decided in his favor. Therefore, given that

Civ.R. 8(A) generally requires only a short and plain statement of a claim, the dismissal of appellant's "interference with expectancy" claim was not justified because appellant's factual assertions stated a viable cause of action against Ms. Rish, Mr. Commons, and the bank.

{¶55} As a final point, this court would again note that, after the trial court had dismissed the majority of the pending claims under Civ.R. 12(B)(6), the underlying case then proceeded to summary judgment. As part of the latter procedure under Civ.R. 56, evidentiary materials may have been presented which were relevant to the "interference with expectancy" claim. However, in reviewing the substance of the trial court's ruling on the motions to dismiss, the effect or relevancy of the evidentiary materials have not been considered. Instead, the scope of our review has been limited to the assertions in appellant's complaint.

Intentional Interference with Contract Claim

{¶56} "In order to recover for a claim of intentional interference with a contract, one must prove (1) the existence of a contract, (2) the wrongdoers (sic) knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Parker v. Priorway Farms Homeowners' Assn.*, 11th Dist. No. 99-G-2257, 2000 Ohio App. LEXIS 5356, *6-7 (Nov. 17, 2000), citing *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, paragraph two of syllabus (1995).

{¶57} In his complaint, appellant alleged that there was "a contractual arrangement[;]" "[t]he Defendants had knowledge of the contract[;]" "[t]he Defendants

intentionally procured the contract's breach, without any justification[;]" and "[t]he Defendant's conduct has caused [him] damages."

{¶58} In this case, there were no allegations in the complaint that appellees improperly interfered with the performance of the contract (i.e., the power of attorney) between appellant and Mr. Kopervac by inducing or otherwise causing Mr. Kopervac to not perform the contract. Appellant failed to allege in his complaint that appellees induced or caused Mr. Kopervac to revoke the power of attorney. Thus, after independently and thoroughly examining appellant's complaint and construing the facts and all inferences as being true, we determine the trial court did not err in granting appellees' motions to dismiss appellant's claim for intentional interference with contract pursuant to Civ.R. 12(B)(6).

Fraud Claim

{¶59} Civ.R. 9(B) provides in part: "In all averments of fraud ***, the circumstances constituting fraud *** shall be stated with particularity. ***"

{¶60} This court set forth guidelines to determine whether a fraud claim meets the Civ.R. 9(B) requirement of particularity in *Johnson v. F & R Equip. Co*., 11th Dist. Nos. 94-T-5092, 94-T-5142 and 94-T-5147, 1996 Ohio App. LEXIS 4211 (Sept. 27, 1996). This court held: "'(1) plaintiff must specify the statements claimed to be false; (2) the complaint must state the time and place where the statements were made; and, (3) plaintiff must identify the defendant claimed to have made the statement.'" *Id.* at *6, quoting *Korodi v. Minot*, 40 Ohio App.3d 1, 4 (1987).

{¶61} "Fraud has various elements: (1) a representation (or concealment of a fact when there is a duty to disclose) (2) that is material to the transaction at hand, (3)

made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance." *Volbers-Klarich v. Middletown Mgt*., 125 Ohio St.3d 494, 2010-Ohio-2057, ¶27, citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 73 (1986).

{¶62} As an initial point, this court would indicate that appellant's complaint did not expressly state what alleged statements formed the basis of his fraud claim. As was previously discussed, his complaint generally referred to two sets of statements. The first set consisted of the alleged statements which Mr. Commons and Ms. Rish made to a third party, i.e., the Trumbull County probate court, regarding the nature of appellant's relationship with Mr. Kopervac. Pursuant to appellant's allegations, Mr. Commons had certain communications with Ms. Rish, which led to the inclusion of false statements in Ms. Rish's investigative report to the probate court. The second set of statements was the alleged representations Mr. Commons made directly to appellant as to whether he needed a power of attorney in order to access Mr. Kopervac's account.

{¶63} Under Ohio law, a claim in fraud cannot be predicated upon statements or representations made to a third party; i.e., the communication must have been directly with the person who has brought the action. *Edwards v. Owen*, 15 Ohio 500 (1846). Despite the fact that the *Edwards* precedent was issued more than one hundred years ago, our review of the subsequent case law shows that the Supreme Court of Ohio has never reconsidered this specific point. Therefore, for this reason alone, any alleged statement not made directly to appellant cannot form the basis of a viable fraud claim.

{¶64} Alternatively, this court would further note that, in addressing the foregoing basic issue, other states have held that fraud claims can be based upon statements to a third party, but only when the statements were made with the intent or knowledge that the third party would repeat them to the plaintiff, with the purpose of deceiving him. *See* 50 Ohio Jurisprudence 3d (2002) 496, Fraud and Deceit, Section 75. Under this new precedent, a viable fraud claim would necessarily include the factual allegations that the plaintiff was informed of the statement to the third party, and that he justifiably relied upon that statement to his detriment.

{¶65} Even if Ohio were to recognize fraud claims based upon statements to a third party, appellant's allegations regarding the statements of Mr. Commons and Ms. Rish were still not sufficient to state a viable claim for relief. As discussed above, the complaint in this case attributed two statements to Mr. Commons and Ms. Rish which were included in her report: (1) that Mr. Kopervac did not have a will; and (2) that it was necessary to protect Mr. Kopervac from appellant. Although appellant's allegations were sufficient to support an inference that he was informed of these statements after the report was given to the probate court, no inference could be drawn that appellant relied upon the statements to his detriment. Even when his allegations are construed in a manner most favorable to him, they would only support the inference that he believed the statements were false, and thus did not base any of his subsequent acts upon them.

{¶66} In regard to representations made directly to appellant, his complaint only referred to Mr. Commons' alleged statement concerning the need for a power of attorney. According to appellant, Mr. Commons made this statement despite the fact that he had no intention of ever honoring a power of attorney.

{¶67} As part of his complaint, appellant referred to a conversation between himself and Mr. Commons as to the need for a power of attorney. Yet, in making this reference, appellant never indicated what specific statements Mr. Commons supposedly made as to the effect of obtaining a power of attorney. In the absence of a clear assertion regarding exactly what Mr. Commons said, the complaint's allegations were insufficient to satisfy the "particularity" requirement of Civ.R. 9(B). For this reason, the dismissal of appellant's fraud claim was justified.

Civil Conspiracy Claim

{¶68} "'Civil conspiracy' has been defined as 'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.'" *Kenty*, *supra*, at 419, quoting *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 126 (1987), citing *Minarik v. Nagy*, 8 Ohio App.2d 194, 196 (1963). "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464, 475 (1998).

{¶69} Consistent with our analysis concerning the "interference with expectancy" claim, this court further concludes that appellant's factual allegations were sufficient to state a viable claim of civil conspiracy. That is, when his assertions are construed in a manner most favorable to him, they support a direct inference that Mr. Commons and Ms. Rish had reached an agreement to engage in tortuous acts which would have the effect of depriving appellant of his inheritance under Mr. Kopervac's will and his position as the executor of the estate. Furthermore, his complaint specifically alleged that the acts in question had been done intentionally and maliciously. Accordingly, the trial court

should have allowed appellant to proceed on this claim as to Ms. Rish, Mr. Commons, and the bank.

Abuse of Process Claim

{¶70} To state a claim for abuse of process, the plaintiff must allege the following: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A*., 68 Ohio St.3d 294, 298 (1994).

{¶71} As previously noted, appellant's complaint expressly asserted that, as a result of the acts done after the alleged communication between Ms. Rish and Mr. Commons, a special probate proceeding was instituted to determine if appellant was exercising undue influence over Mr. Kopervac in regard to his assets. The complaint also asserted that a possible motive for the special proceeding was to ensure that Mr. Kopervac's financial accounts remain with Mr. Commons' bank. Additionally, it was alleged that, in defending against the special proceeding, it was necessary for appellant to pay at least $10,000 in funds belonging to Mr. Kopervac's estate. Thus, since appellant's factual assertions were sufficient to state a viable claim in abuse of process, the dismissal of that claim in relation to all three defendants-appellees was not warranted.

Ms. Rish

{¶72} Before this court, appellant has not raised any specific argument in regard to Ms. Rish as it pertains to the following six claims: negligence, defamation, fraud,

intentional interference with a contract, breach of contract, and breach of obligation of good faith and fair dealing. Upon reviewing the allegations in appellant's complaint as they relate to Ms. Rish and the foregoing six claims, this court holds that the trial court's decision to dismiss the six claims as to her was justified.

{¶73} In relation to all nine of the stated claims, appellant's brief did raise an argument concerning whether Ms. Rish was immune from any liability as an employee of the probate court. A review of the trial record shows that, even though Ms. Rish asserted the issue of governmental immunity as part of her motion to dismiss, the trial court did not address the point in dismissing her as a party. Moreover, our review of appellant's complaint indicates that he did make the general allegation that the acts of Ms. Rish and Mr. Commons in regard to her report had been done intentionally, maliciously, and with a disregard for the truth. If this allegation were ultimately proven true, a factual issue could exist as to whether an exception to the general grant of immunity is applicable to Ms. Rish under R.C. 2744.03(A)(6).

{¶74} In summation, this court concludes that the trial court did not err in dismissing six of the nine claims in appellant's complaint as to appellee Rish. Similarly, in regard to appellees Commons and Cortland Bank, we conclude that the trial court did not err in dismissing the three claims of defamation, fraud, and intentional interference with a contract. However, as to all three appellees, we hold that appellant did state viable claims against them for interference with an expectancy interest, civil conspiracy, and abuse of process. Therefore, since the dismissal of those three claims was not justified under Civ.R. 12(B)(6), appellant's second assignment is well taken in part.

Third Assignment of Error

{¶75} In his third assignment of error, appellant alleges that the Cuyahoga County Court of Common Pleas erred in transferring the case to Trumbull County.

{¶76} R.C. 2501.02 provides in part: "[i]n addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals *within the district* * * * [.]" (Emphasis added.) In applying the foregoing provisions, the appellate courts of this state have concluded that when the original trial court orders a transfer of venue to a second trial court which lies within the territorial jurisdiction of a different appellate district, the venue determination can only be appealed to the appellate court which has superior jurisdiction over the original trial court. *Krassen v. Climaco, Climaco, Lefkowitz & Garofoli Co.*, 8th Dist. No. 80305, 2002-Ohio-3438 ¶30; *Bratton v. Kremer*, 5th Dist. No. 1997CA00339, 1998 Ohio App. LEXIS 2490.

{¶77} As the Cuyahoga County Court of Common Pleas is in the Eighth Appellate District and not within this court's district, we do not have jurisdiction pursuant to R.C. 2501.02 to review its decision.

{¶78} However, even assuming arguendo that this court does have jurisdiction to review the order of the Cuyahoga County Court of Common Pleas transferring venue to Trumbull County, we note that such a transfer was proper.

{¶79} "An appellate court's review of a trial court's decision to change venue is based on an abuse of discretion standard." *WRG Servs. v. Eilers*, 11th Dist. No. 2008-L-057, 2008-Ohio-5854, ¶66, citing *Premier Assocs., Ltd. v. Loper*, 149 Ohio App.3d 660, 2002-Ohio-5538, ¶37. An abuse of discretion is the trial court's "'failure to exercise

sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶80} Civ.R. 3(B) states in part:

{¶81} "(B) Venue: where proper.

{¶82} "Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, 'county,' as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

{¶83} "(1) The county in which the defendant resides;

{¶84} "(2) The county in which the defendant has his or her principal place of business;

{¶85} "(3) A county in which the defendant conducted activity that gave rise to the claim for relief;

{¶86} "***

{¶87} "(6) The county in which all or part of the claim for relief arose ***[.]"

{¶88} In the present case, the record establishes that the individual parties reside in Trumbull County; Cortland Bank has its principal place of business in Trumbull County; the conducted activity that gave rise to the claim occurred in Trumbull County; and the claim for relief arose in Trumbull County. Thus, pursuant to Civ.R. 3(B)(1), (2), (3), and (6), venue in Trumbull County was proper.

{¶89} Also, the argument made by appellant in his appellate brief that he did not receive a fair and equitable opportunity to be heard in Trumbull County is belied by the record in addition to being waived, as he did not bring this allegation to the trial court's

attention. *LeFort*, *supra*, at 123 (holding generally that in civil cases, errors which arise during the course of the proceedings and are not brought to the attention of the trial court by objection, or otherwise, at the time they could be remedied, are waived and may not be reviewed on appeal.) Appellant now takes issue with the fact that the trial court disclosed that he did his banking at Cortland Bank and casually met Mr. Commons. However, appellant did not make an issue out of this at the time the trial court made the disclosure and has, therefore, waived any right to raise this issue now. In addition, the trial court's disclosure does not rise to the level of establishing that appellant did not receive a fair and equitable opportunity to be heard. Appellant fails to show that he was prejudiced.

{¶90} Appellant's third assignment of error is without merit.

Fourth Assignment of Error

{¶91} In his fourth assignment of error, appellant maintains that the trial court erred in precluding him from obtaining discovery.

{¶92} It is well established that a trial court enjoys considerable discretion in the regulation of discovery proceedings. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55 (1973); *Clark Cty. Solid Waste Mgt. Dist. v. Danis Clarkco. Landfill Co*., 109 Ohio App.3d 19, 38 (1996). "'The standard of review of a trial court's decision in a discovery matter is whether the court abused its discretion.'" *Maschari v. Tone*, 103 Ohio St.3d 411, 2004-Ohio-5342, ¶18, quoting *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, ¶31.

{¶93} Again, on May 13, 2009, the trial court ordered that all written discovery be *completed* by July 8, 2009. On July 7, 2009, appellant served written discovery

requests on Ms. Rish. We note that the trial court's order directed that discovery be completed and not merely solicited by the July 8, 2009 deadline.

{¶94} Shortly thereafter, all of the parties on two occasions jointly requested the extension of certain deadlines, including the deadline to depose initial witnesses and the dispositive motion deadline. The parties, however, did *not* request the extension of the written discovery deadline. Ms. Rish was dismissed from the case on August 28, 2009. The trial court ultimately granted the foregoing two motions, which extended the deadline for deposing witnesses to September 30, 2009, and for filing dispositive motions to October 30, 2009.

{¶95} On October 15, 2009, appellant served notices of depositions and subpoenas duces tecum on Daniel B. Letson and Robert G. Kroner, both non-parties. The record reveals that appellant knew about Mr. Letson and Mr. Kroner prior to the filing of his complaint, as they were involved in the emergency guardianship and special administrative proceeding for Mr. Kopervac. Thus, the trial court did not abuse its discretion by finding that appellant's deposition notices and accompanying subpoenas duces tecum were improper and untimely. *See Singleton v. Ohio Concrete Resurfacing, Inc.*, 10th Dist. No. 06AP-991, 2007-Ohio-2012, ¶26; *Harvey v. Republic Servs. of Ohio II, LLC*, 5th Dist. No. 2007 CA 00278, 2009-Ohio-1343, ¶88; *Penix v. Avon Laundry & Dry Cleaners*, 8th Dist. No. 91355, 2009-Ohio-1362, ¶33-36. Accordingly, the trial court properly granted Cortland Bank's and Mr. Commons' motion for emergency protective order and denied appellant's motion to compel discovery against Ms. Rish.

{¶96} Appellant's fourth assignment of error is without merit.

{¶97} Consistent with the foregoing analysis, this court concludes that appellant's first, third and fourth assignments do not have merit. However, appellant's second assignment is well taken in part. Specifically, we hold that the trial court erred in dismissing three of appellant's claims in regard to all three appellees.

{¶98} Accordingly, the judgment of the Trumbull County Court of Common Pleas is reversed as to the dismissal of the claims of interference with an expectancy interest, civil conspiracy, and abuse of process. The case is hereby remanded for further proceedings on those three claims as to defendants-appellees Cortland Bank, Commons, and Rish. In all other respects, the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.