NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0666

SAMANTHA GRAY

VERSUS

WALGREENS LONG-TERM CARE PHARMACY,
ZURICH AMERICAN INSURANCE COMPANY,
SEDGWICK CMS AND CHELSEY LANDRY

Judgment Rendered: DEC 22 2016

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Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension, Louisiana
Trial Court Number 108459

Honorable Jessie M. LeBlanc, Judge

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J. Courtney Wilson
Metairie, LA

Attorney for Appellant
Plaintiff – Samantha Gray

Gregory C. Weiss
Mandeville, LA

Attorney for Appellee
Defendant – Walgreen Louisiana Co., Inc.

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

WELCH, J.

The plaintiff, Samantha Gray, appeals a summary judgment granted in favor of the defendants, Walgreen Louisiana Co., Inc.[1] ("Walgreens"), Sedgwick CMS ("Sedgwick"), Chelsea Landry,[2] and their liability insurer, Zurich American Insurance Company, which dismissed the plaintiff's petition for damages and for violation of her rights under the Health Insurance Portability and Accountability Act ("HIPAA"). We affirm the judgment of the district court and issue this memorandum opinion in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

This action arises out of an incident that occurred in October 2012 when the plaintiff posted a picture of herself on Facebook and the employees at a Walgreens pharmacy in Geismar, Louisiana, who knew and were Facebook friends with the plaintiff, made comments about the picture while they were at work. According to the plaintiff, after viewing the plaintiff's Facebook picture, the employees "discuss[ed] medical and/or personal information about the [plaintiff] via social media and verbally ...." The plaintiff filed the instant suit, claiming that as a result of the incident, she suffered injuries and damages, which were attributable to the negligence of Walgreens and Ms. Landry, a Walgreens' employee, and their failure to abide by HIPAA. The defendants answered the suit, generally denying the allegations of the plaintiff's petition.[3]

The defendants subsequently filed a motion for summary judgment,[4] seeking the dismissal of the plaintiff's claims on the basis that the plaintiff would be unable

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[1] The plaintiff's petition erroneously identified "Walgreen Louisiana Co., Inc." as "Walgreens Long-Term Care Pharmacy."

[2] The plaintiff's petition erroneously identified "Chelsea Landry" as "Chelsey Landry"

[3] The record reflects that Zurich filed various exceptions to the plaintiff's petition; however, the record before us contains no ruling on those exceptions.

[4] Louisiana Code of Civil Procedure article 966, which governs motions for summary judgment, was recently amended by 2015 La. Acts, No. 422 § 1, eff. January 1, 2016. As the defendants'

to prove the essential elements of her negligence claim and that the plaintiff had not stated a cause of action for alleged violations of HIPAA. With respect to HIPAA, the defendants maintained that although unauthorized disclosure of medical records was a violation of the privacy rule of HIPAA, such violations were enforced by the United States Department of Health and Human Services Office for Civil Rights through the imposition of a fine and was not a private cause of action for damages. See 45 C.F.R. § 164.502. The defendants, noting that the plaintiff had not filed a claim with the United States Department of Health and Human Services Office for Civil Rights, argued that the plaintiff could not support a claim for alleged violations of HIPAA. With respect to the absence of factual support for the other claims made by the plaintiff, the defendants relied on the deposition testimony of Chelsea Landry, Tonya Anthony, and Karen Brown.

Ms. Landry testified that she was employed as a pharmacy technician at Walgreens and that she knew the plaintiff before she started working at Walgreens. She further testified that while using her own phone at work, she discussed the picture the plaintiff posted on Facebook with the pharmacist, Latisha Lucas, who is the plaintiff's cousin. According to Ms. Landry, in the picture the plaintiff posted of herself, the plaintiff was crying and had mucus coming out of her nose. Therefore, she showed the picture to Ms. Lucas and said, "Oh, my god, like, why does she [(the plaintiff)] have this picture on Facebook." (R45) Ms. Landry testified that she never mentioned or discussed the plaintiff's medical records, patient information, or medication, that the plaintiff was not a patient or customer of that Walgreens pharmacy, and that she did not know what medications the

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motion for summary judgment was filed on April 24, 2015 and adjudicated on September 4, 2015, which was before the effective date of 2015 La. Acts, No. 422, the motion is governed by the provisions of La. C.C.P. art. 966 that were in effect prior to its amendment by 2015 La. Acts, No. 422.

plaintiff took. Ms. Landry did admit that she was "written up" for using her phone while at work.

Ms. Anthony, who is also a pharmacy technician at Walgreens, testified that she did not know if the plaintiff was a customer of Walgreens and she had never seen the plaintiff get a prescription filled at the Walgreens pharmacy where Ms. Anthony worked. Ms. Anthony admitted that the picture the plaintiff posted of herself on Facebook was discussed in the pharmacy and that the gist of that conversation was "how ugly [the plaintiff's] face looked and why she would put a picture ... up like that for the public to see." She further testified that there was never a discussion about the health or medication of the plaintiff.

Ms. Brown, the store manager, testified that shortly after the incident, she called Sedgwick, the third-party administrator, to report what happened. Ms. Brown further testified that the pharmacy technicians were reprimanded for using their cell phones in the pharmacy, but they were not disciplined for any HIPAA violation. Ms. Brown explained that she "was told that they [(the employees)] saw her on Facebook crying and said, Why did she post a picture like this on Facebook" and that based on this explanation, Walgreens determined there had been no violation of HIPAA.

In opposition to the defendants' motion for summary judgment, the plaintiff relied on an affidavit from Crystal Payne.[5] According to Ms. Payne, on the date in

[5] We note that the plaintiff also relied on a document that purports to be her own affidavit, as well as documents purporting to be the plaintiff's pharmacy records from Walgreens. With respect to the document purporting to be the plaintiff's affidavit, that document is not signed by either the plaintiff or a notary, and therefore, it is not an affidavit. See **Gorman v. Miller**, 2012-0412 (La. App. 1st Cir. 11/13/13), 136 So.3d 834, 841, writ denied, 2013-2909 (La. 3/21/14), 135 So.3d 620, and **Patterson in Interest of Patterson v. Johnson**, 509 So.2d 35, 38 (La. App. 1st Cir. 1987) (recognizing that "[a]n affidavit is a declaration or statement of facts personally known to the affiant, reduced to writing and sworn to by the affiant before an officer who has authority to administer oaths, such as a notary public."). As such, that document is not competent summary judgment evidence and will not be considered by this court on *de novo* review. See La. C.C.P. arts. 966 and 967; but cf. La. C.C.P. art. 966(A)(4) and (D)(2) as amended by 2015 La. Acts, No.422, § 1, eff. Jan 1, 2016 and footnote 3.

question, she went to Walgreens to fill a prescription, and while she was there, "she heard the defendants' employee's, [*sic*]" who "were standing in a circle and wearing uniforms of some type[,]" make the following remark: "How crazy and stupid she looked. She's crazy for posting and knowing she's on crazy medicine." Ms. Payne also stated that she knew the remark was about the plaintiff because the employees mentioned her name.

After a hearing on the matter, the trial court took the matter under advisement. By judgment signed on September 4, 2015, the trial court granted the defendants' motion and dismissed the plaintiff's claims. From this judgment, the plaintiff now appeals, challenging the dismissal of her claims.[6]

It is evident from the record herein that this suit is based on gossip that the employees of a Walgreens pharmacy engaged in (while at work) about a picture that the plaintiff posted of herself on her Facebook page. While the plaintiff contends that during this discussion, the employees disclosed her confidential pharmacy records or her health condition, *i.e.*, that she (the plaintiff) was "on crazy medicine," the defendants maintain that the discussion focused on the picture itself and negative comments about how the plaintiff looked, and that there was no discussion regarding the plaintiff's pharmacy records or her health condition. Regardless of the substance of the conversation about the plaintiff by the

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Next, with respect to the documents that purport to be the plaintiff's pharmacy records from Walgreens, those documents were likewise not affidavits or sworn to in any way, were not certified or attached to an affidavit, and therefore, had no evidentiary value on a motion for summary judgment. Accordingly, those documents were not proper summary judgment evidence and will not be considered by this court on *de novo* review. See **Bunge North America, Inc. v. Board of Commerce & Industry and Louisiana Department of Economic Development**, 2007-1746 (La. App. 1st Cir. 5/2/08), 991 So.2d 511, 527, writ denied, 2008-1594 (La. 11/21/08), 996 So.2d 1106, and **Robertson v. Doug Ashy Building Materials, Inc.**, 2014-0141 (La. App. 1st Cir. 12/23/14), 168 So.3d 556, 581 n.27, writ denied, 2015-0365 (La. 4/24/15), 169 So.3d 364.

[6] On appeal, the plaintiff did not challenge the dismissal of her claim that the defendants allegedly violated HIPAA. Therefore, the plaintiff's appeal is limited to the dismissal of her negligence claim.

Walgreens' employees, in order for the plaintiff to succeed in her claim against the defendants, it was essential for the plaintiff to establish that she was a customer of Walgreens such that the employees who were talking about her knew (or could have known) what medications she was taking. The evidence offered by the defendants pointed out the absence of factual support for this essential element of the plaintiff's claims—both of the Walgreens' employees testified that they had never seen the plaintiff at the Walgreens pharmacy and that she was not a customer of Walgreens. In response to the motion, the plaintiff failed to present any competent evidence establishing that she would be able to satisfy this element of her evidentiary burden of proof at trial. Accordingly, based on our *de novo* review of the record, we find the trial court properly granted the defendants' motion for summary judgment and dismissed the plaintiff's claims.

For all of the above and foregoing reasons, the September 4, 2015 judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Samantha Gray.

AFFIRMED.