# STATE OF MICHIGAN

# COURT OF APPEALS

JOANN VALENTI,

Plaintiff-Appellant,

v

GKN AUTOMOTIVE, INC.,

Defendant-Appellee.

UNPUBLISHED
February 4, 1997

No. 151613
LC No. 90-387972-CL

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for partial summary disposition in this wrongful discharge/invasion of privacy action. We reverse.

This Court's jurisdiction of an appeal of right from a circuit court is limited to final judgments or final orders. MCR 7.203(A); *McCarthy & Associates, Inc v Washburn*, 194 Mich App 676, 678; 488 NW2d 785 (1992). Prior to a May 16, 1995, amendment, MCR 2.604 provided that a circuit court could direct entry of a final judgment on fewer than all claims or parties "when more than one claim for relief is presented in an action." *McCarthy & Associates*, *supra*, p 679. However, if a claimant presented merely alternative theories, such that he would be permitted to recover on at most one of them, his possible recoveries were mutually exclusive, and he had presented only a single claim of relief. *Id.*, pp 679-680. A preliminary disposition of one of his alternative theories could not be made the subject of a final judgment and resulting appeal under MCR 2.604(A). *Id.*

Here, although plaintiff's complaints lists seven counts, only counts I and VII are independent of each other. Counts II through VI present alternative theories such that plaintiff can recover on at most one of them. Because the trial court's order granting partial summary disposition did not dispose of counts II and III, and because this is an appeal as of right, this Court does not have jurisdiction to consider plaintiff's issues on appeal that relate to the trial court's disposition of counts IV, V, and VI. MCR 2.604; *McCarthy & Associates*, *supra*, pp 680-681. None of plaintiff's issues on appeal

* Circuit judge, sitting on the Court of Appeals by assignment.

concern count VII. Accordingly, we only address the issues relating to plaintiff's Count I – invasion of privacy.

Plaintiff was employed with defendant as a payroll and benefits administrator. In April, 1989, plaintiff took a medical leave of absence related to vertigo. While she was on medical leave, plaintiff's immediate supervisor, Judi Gross, called her every day, sometimes several times, for up to two hours at a time. Eventually, plaintiff thought that these calls were harassing, and sent Gross a note from her doctor which stated that plaintiff was unable to use the telephone for work. In addition, plaintiff told Gross that Gross and other employees were not to telephone plaintiff regarding work matters.

In August, 1989, plaintiff's doctor stated that plaintiff could return to work. Upon receiving plaintiff's certificate to return to work, Gross informed plaintiff that defendant wanted a second opinion as to plaintiff's condition, but did not want to send plaintiff to the clinic it usually used. Plaintiff was the only employee that Gross could remember who was required, as a condition of returning to work, to obtain a medical report from a place other than the clinic that defendant usually used. A department head at Crittendon Hospital who specialized in stress-related illnesses recommended that defendant set up appointments for plaintiff with both an internist and a psychiatrist because plaintiff's vertigo could have been caused by psychiatric or physiological conditions.

Plaintiff went to both appointments. The internist saw no reason that plaintiff could not return to work. Plaintiff did not realize that the second appointment was with a psychiatrist until the interview was under way. Plaintiff testified that this psychiatrist, Dr. Raymond Mercier, asked her questions that indicated that he had spoken with Gross about plaintiff's personal matters. Gross denied this. Plaintiff also thought that Mercier was rude, vulgar, and argumentative. Mercier concluded that plaintiff had "hysterical personality disorder," and lacked the mental stability to return to work full time.

Because plaintiff was dissatisfied with Mercier's report, defendant set up an appointment with another psychiatrist, Dr. Gordon Forrer, who worked for the same medical organization as Mercier. Forrer was also designated by defendant, and also concluded that plaintiff was unable to return to work. Plaintiff then went to Dr. Louis Meldman, a psychiatrist of her own choosing, who stated that plaintiff was not suffering from any mental disorder and could return to work.

Defendant agreed to let plaintiff have another examination, and provided a list of three psychiatrists from which plaintiff could choose one for an appointment. Plaintiff objected to this procedure. Defendant set up an appointment, and advised plaintiff that failure to appear for her appointment would result in the termination of her benefits and employment. Plaintiff responded that she would be examined again only by a psychiatrist of her own choosing. When plaintiff did not appear at the appointment which defendant had arranged, she was terminated for insubordination. Later, plaintiff was examined by another psychiatrist of her own choosing, Dr. Richard Feldstein, who concluded that plaintiff was not suffering from any psychiatric disorders, and could return to work immediately.

Plaintiff argues that the trial court erred in granting summary disposition on her invasion of privacy action. We agree. This Court reviews grants and denials of summary disposition motions de

novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief may be granted. *Id.* The court must accept as true all well-pleaded facts. *Id.* MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. *Id.* A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. *Id.*

This Court has recognized four types of invasion of privacy, including the variety alleged here: intrusion upon the plaintiff's seclusion or solitude or into her private affairs. *Doe v Mills*, 212 Mich App 73, 79-80; 536 NW2d 824 (1995). An action for intrusion upon seclusion focuses on the manner in which information is obtained, not its publication. *Id.*, p 88. There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable person. *Id.*

We agree with plaintiff that she generally had a right to keep private her "personal affairs, marital history, and other private matters." See generally *Tobin v Civil Service Comm*, 416 Mich 661, 672-675; 331 NW2d 184 (1982). However, defendant's medical policy provided for physical, psychological and psychiatric examination of an employee before returning to work after a medical leave. Although such a policy effectively acted as a waiver of plaintiff's right to privacy in relation to defendant, the waiver was not absolute. There can never be a waiver of the right to privacy in the absence of knowledge and consent of the person entitled to waive. *Doe*, *supra*, pp 86-87. The waiver of a constitutional right requires an intentional decision to abandon the protection of the right. *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 641-642; 506 NW2d 920 (1993). Courts indulge every reasonable presumption against waivers of fundamental constitutional rights. *Id.* The determination of whether a waiver was intelligently and knowingly made depends upon the facts and circumstances of each particular case. *Id.*

Here, a reasonable person would interpret defendant's policy as a consent to allow physical, psychological, and psychiatric examinations only for the purpose of determining whether the condition which required a medical leave of absence was still operating to disable the person. A reasonable person would not expect that this waiver would allow defendant to require examinations for the purpose of discovering otherwise private information simply because the timing was coincident with a return from medical leave. Accordingly, under the facts of this case, plaintiff did not waive her right to privacy in such a circumstance. *Id.*

Granting the benefit of reasonable doubt to plaintiff, there are enough circumstances which would allow a reasonable trier of fact to find that defendant required plaintiff to be examined by a psychiatrist for the purpose of discovering private information. First, when plaintiff was on medical leave, she felt that the frequency and length of telephone calls from Gross were harassing. Second, when plaintiff did wish to return to work, defendant did not send plaintiff to its usual clinic. Third,

plaintiff was surprised when she discovered that defendant had set up an appointment with a psychiatrist. Fourth, plaintiff presented evidence to create a genuine issue of material fact that Mercier had spoken to Gross about plaintiff's personal matters prior to the appointment. Fifth, Mercier asked plaintiff about her feelings toward Gross and about details of her personal relationships. Sixth, the psychiatrists designated by defendant and those chosen by plaintiff disagreed as to whether plaintiff suffered from a mental disorder. Although this fact alone would not be enough to create a genuine issue of material fact as to an invasion of privacy, it does provide circumstantial evidence that the appointments were set up for other than legitimate medical reasons.

When reviewing the pleadings, affidavits, depositions, admissions, and other evidence in favor of plaintiff, and granting the benefit of reasonable doubt to plaintiff, a genuine issue of material fact exists that defendant required plaintiff to submit to a psychological examination in order to discover personal facts. *Stehlik*, *supra*, p 85. In the absence of a waiver by plaintiff that would pertain to this factual situation, a reasonable person could find that defendant's requirement to see a psychiatrist under threat of job loss constituted an objectionable method of information discovery. *Tobin*, *supra*, p 672; *Doe*, *supra*, p 88. Accordingly, the trial court erred in granting defendant's motion for summary disposition as to this claim. *Stehlik*, *supra*, p 85.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Marilyn Kelly
/s/ Myron H. Wahls