STATE OF MICHIGAN

COURT OF APPEALS

JOANN RAMSEY,

Plaintiff-Appellant,

v

SPEEDWAY SUPERAMERICA, L.L.C., and MICHAEL SICH,

Defendants-Appellees.

UNPUBLISHED
August 14, 2008

No. 279034
Eaton Circuit Court
LC No. 05-000660-CZ

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants summary disposition regarding her claims of defamation and wrongful discharge.[1] We affirm.

I. Facts and Proceedings

In May 1989, plaintiff commenced employment with the Emro Marketing Company. On June 19, 1989, plaintiff signed a document entitled "Nature of Employment Relationship," which provided in relevant part,

> Set forth below is a list of violations of the Company's policies and practices which are most often the cause of discipline and discharge. This list is not all-inclusive nor does it alter your "at will" employment with the Company. The Company retains its right to discipline or discharge any employee at any time for any reason it deems advisable.
>
> * * *
>
> I have read the above statements and understand that they do not alter the fact that Emro Marketing Company is an "at will" employer. I understand that nothing herein or otherwise shall be deemed to create any contract of employment between myself and the Company, in that, if

[1] The circuit court also granted summary disposition of plaintiff's claim for intentional infliction of emotional distress, but plaintiff has not appealed this aspect of the circuit court's decision.

> employed I realize that my employment may be terminated at will by either myself or the Company at any time without advance notice and without cause.

Defendant Speedway SuperAmerica, L.L.C. purchased Emro and continued plaintiff's employment. By 2004, plaintiff had become the manager of an Eaton Rapids Speedway store.

On October 27, 2004, Speedway terminated plaintiff's employment. Defendant Michael Sich, a Speedway "advanced district manager" and plaintiff's direct supervisor, had accused plaintiff of fraudulently using her husband's "Speedy Rewards" card to accumulate points that could be redeemed for goods. Plaintiff strenuously denied misuse of the card and the Speedy Rewards point program.

Plaintiff filed suit against defendants on May 27, 2005, alleging defamation and intentional infliction of emotional distress. According to plaintiff's complaint, defendants defamed her by communicating "false and defamatory statements" to the Eaton County Sheriff's Department and the Michigan Department of Labor and Economic Growth, Division of Unemployment Appeals. Plaintiff's complaint additionally alleged that Sich defamed plaintiff "to third persons including but not limited to the new store manager, the speedway (sic) employees, and the Eaton County Sheriff's office." On December 5, 2005, the circuit court granted plaintiff leave to file a first amended complaint adding a claim for wrongful discharge.

On August 1, 2006, the circuit court entered a "Stipulated Revised Scheduling Order" that extended the close of discovery through November 5, 2006. On September 27, 2006, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Defendants contended that plaintiff failed to "sufficiently identify what defamatory words were allegedly published by whom and to whom," contravening the defamation pleading rules described in *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74; 480 NW2d 297 (1991). Defendants additionally argued that an absolute privilege shielded Sich's communications with the Eaton County Sheriff and the Michigan Department of Labor, and challenged plaintiff's claim for intentional infliction of emotional distress on the basis that Sich's statements did not qualify as outrageous. Concerning the wrongful discharge count, Speedway asserted that plaintiff's deposition acknowledgement of her status as an at-will employee precluded her from maintaining this claim.

On October 10, 2006, the circuit court stayed the proceedings for 60 days at plaintiff's request because she had filed a bankruptcy petition and her counsel was seeking the bankruptcy trustee's authorization to represent her in the instant case. The circuit court renewed the stay for an additional 30 days commencing on February 9, 2007. On March 28, 2007, the bankruptcy trustee authorized plaintiff's counsel's retention. Plaintiff then responded to defendants' summary disposition motion on April 19, 2007.

The circuit court conducted a hearing on April 25, 2007, and a month later rendered a written opinion granting defendants summary disposition. In its opinion, the circuit court explained that although plaintiff had adequately pleaded the content of Sich's "alleged defamatory words," she did not specifically identify any Speedway employees who heard them. The circuit court found that Sich's communications to the Eaton County Sheriff's Department, the Michigan Department of Labor, and the Speedway store manager who succeeded plaintiff qualified as privileged, and thus dismissed plaintiff's defamation claims under MCR 2.116(C)(7) and (10). The circuit court granted summary disposition of plaintiff's intentional infliction of emotional distress claim on the basis of its finding that Sich's actions did not rise to the level of outrageous conduct. The circuit court also granted summary disposition of plaintiff's wrongful discharge claim because she failed to overcome the legal presumption of at-will employment.

II. Summary Disposition Standard of Review

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion for summary disposition brought under MCR 2.116(C)(7) does not test the merits of a claim, but rather certain defenses that may eliminate the need for a trial. *DMI Design & Mfg, Inc v ADAC Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). Although neither party need file supportive material, we will consider any submitted, admissible evidence supporting or opposing the plaintiff's claims. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006). "[T]he plaintiff's well-pleaded factual allegations, affidavits, and other admissible documentary evidence are accepted as true and construed in the plaintiff's favor unless contradicted by documentation submitted by the movant." *Id*. If no material facts remain in dispute, this Court's analysis under subrule (C)(7) parallels that employed under (C)(10). *Id*. at 111-112.

"Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion invoking subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh*, *supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

III. Summary Disposition Analysis

A. Timing of Summary Disposition

Plaintiff first contends that the circuit court prematurely granted summary disposition because (1) Speedway failed to "specifically inquire of its employees" whether they "communicated . . . defamatory statements about her"; (2) Speedway had not yet produced videotapes that would "prove [plaintiff's] innocence" of misusing the

Speedway Rewards program, and (3) plaintiff needed to depose additional Speedway employees to determine whether Sich made defamatory statements in their presence.

"A motion for summary disposition under MCR 2.116(C)(10) is premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party's position." *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006). A party opposing summary disposition on the ground of incomplete discovery "must provide some independent evidence that a factual dispute exists." *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Although this Court generally construes discovery rules broadly, "Michigan's commitment to open and far-reaching discovery does not encompass 'fishing expeditions.'" *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004) (citation omitted).

Defendants moved for summary disposition approximately five weeks before discovery closed on November 5, 2006. By October 10, 2006, when the circuit court stayed the proceedings, the parties had engaged in approximately 18 months of discovery and the circuit court had entered three orders extending the discovery period. Plaintiff obtained depositions from Sich, two members of the Eaton County Sheriff's Department and two Speedway employees. These depositions failed to reveal any evidence that Sich had unlawfully published defamatory statements regarding plaintiff.[2] When the circuit court lifted the stay of proceedings in March 2007, plaintiff did not request additional time for discovery.

Although plaintiff claims that Speedway failed to "specifically inquire" of its employees about their knowledge of any defamatory statements concerning plaintiff, she has produced no evidence suggesting that any additional inquiry would likely have yielded relevant information. Plaintiff identified only one Speedway employee, Angie Rawson, who allegedly had discussed her termination with Sich. But plaintiff conceded that she had no specific knowledge regarding the contents of the Sich-Rawson discussion, plaintiff inexplicably failed to present Rawson's testimony to the circuit court, and she produced no other evidence of this alleged defamation.

In summary, plaintiff offers only her conjecture that Sich publicly reviled her, and nothing disclosing a fair chance of finding additional factual support for her defamation claim. Plaintiff's asserted need for additional Speedway videotapes is unavailing because the truth or falsity of Sich's statements regarding plaintiff's alleged misuse of the Speedy Rewards program lacks any relevance to defendant's summary disposition motion, which did not challenge plaintiff's claim that Sich's statements qualified as defamatory. We therefore conclude that the circuit court afforded plaintiff ample time and opportunity to discover evidence supporting her defamation claims, and that it did not prematurely grant summary disposition.

[2] Plaintiff did not file with the circuit court the deposition transcript of Angie Rawson, one of the two Speedway employees deposed.

B. Signed Authorization for Release of Information

Plaintiff next contends that the circuit court erred by concluding that a privilege shielded Speedway's communications with the Eaton County Sheriff's Department. Plaintiff had served as a volunteer member of the department's "mounted patrol." Carrie Winters, a Speedway cashier, told a sheriff's deputy that plaintiff had been fired and that "there was (sic) some allegations of drug use." The sheriff's department then sought additional information regarding plaintiff's termination, and requested that plaintiff sign a release authorizing Speedway to disclose her employment information. On appeal, plaintiff does not challenge the circuit court's finding that a qualified privilege protected Speedway's communication with the sheriff's department, but instead contends that Speedway failed to timely plead the existence of the release as an affirmative defense.

According to MCR 2.111(F)(3), "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." An amended pleading "supersedes the former pleading" unless otherwise indicated. MCR 2.118(A)(4).

Contrary to plaintiff's argument, defendants did not "waive" a release-based affirmative defense by failing to timely plead it. Defendants filed amended affirmative defenses in accordance with the circuit court's December 5, 2005 order, and the amendments included a defense concerning "the Authorization for Release of Information signed by Plaintiff on January 4, 2005." Furthermore, plaintiff's contention that the amended affirmative defenses do not "relate back" is simply incorrect. The relation-back doctrine validates claims that would be otherwise barred by the statute of limitations, and thus has no application here. *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996).

Plaintiff next contends that the document she signed authorizing disclosure of information "was not with Speedway who is not released from anything." According to plaintiff's brief on appeal, "The Sheriff's Department's potential liability was released by obtaining or receiving information about Ms. Ramsey, *not* Speedway." (Emphasis in original).

We review de novo the interpretation of a release and whether a privilege applies in a defamation action. *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 669; 635 NW2d 36 (2001); *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). "The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Cole*, *supra* at 13. A communication is privileged if the subject of the communication consented to it. *Hollowell v Career Decisions, Inc*, 100 Mich App 561, 575; 298 NW2d 915 (1980). The privilege applies if "(1) there was either express or implied consent to the publication; (2) the statements were relevant to the purpose for which consent was given; and (3) the publication of those statements was limited to those with a legitimate interest in their content." 50 Am Jur 2d, Libel & Slander, § 254, p 592.

The authorization, directed "To Whom It May Concern," permitted any recipient to provide the Eaton County Sheriff information regarding plaintiff's "employment history" and the "terms/reasons for separation." The authorization additionally stated that any information conveyed was "for official use by the Eaton County Sheriff's Office," and continued in relevant part as follows:

> I hereby release you, the institution or establishment which you represent, including its officers, employees, and related personnel, both individually and collectively, from any and all liability for damages of whatever kind, which may at any time result to me, my heirs, family or associates because of compliance with this Authorization for Release of Information, or any attempt to comply with it.

At her deposition, plaintiff acknowledged her understanding that the authorization permitted Speedway to provide the Eaton County Sheriff's Department information regarding the reasons for her termination.

We find no merit in plaintiff's suggestion that the authorization did not apply to Speedway, its sole recipient. Applying the release construction principles to this case, the clear and express terms of the release given by plaintiff encompass "the institution or establishment" that "compl[ied]" with it. We conclude that the circuit court properly determined that the release unambiguously permitted Speedway to provide the sheriff with employment information about plaintiff, and absolved Speedway of any potential liability attending its compliance with the sheriff's request.

Plaintiff contends that *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646; 624 NW2d 903 (2001), supports her argument that the release did not shield Speedway from liability. In *Batshon*, however, the language of the release specifically referred to a single released party. *Id*. at 648-650. Here, the release plainly and unambiguously permits any recipient to provide employment information to the Eaton County Sheriff, and releases the provider of information from "all liability . . . because of compliance with this Authorization for Release of Information." Plaintiff consented to the disclosure of employment information and knew that Speedway would communicate with the sheriff's department regarding the reasons for her termination. Therefore, we reject plaintiff's claim that the release did not encompass Speedway.

C. Wrongful Discharge Claim

Plaintiff lastly asserts that the circuit court erred by concluding that she was an at-will Speedway employee because she only signed a 1989 at-will employment agreement with Emro Marketing, not with Speedway. Plaintiff additionally contends that Sich's deposition testimony supports her claim that Speedway could fire her only for just cause.

"Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998) (opinion by Weaver, J.). The presumption of at-will employment can be rebutted "with proof of either a contract provision for a definite term

of employment, or one that forbids discharge absent just cause." *Id*. at 164. Statements by management personnel may create a "legitimate expectation of termination for cause only." *Gonyea*, *supra* at 83. However, a statement regarding job security must qualify as "clear and unequivocal" to support a claim for just cause employment. *Lytle*, *supra* at 164.

Regardless of the at-will employment agreement plaintiff signed with Emro, plaintiff clearly understood that her Speedway employment could be terminated at will. Plaintiff admitted during her deposition that Speedway was "an at will employer." Speedway's employee handbook unequivocally states that Speedway "is an ***at-will*** employer and reserves the right to discharge or terminate an associate at any time, for any reason, or no reason at all, with or without notice." (Emphasis in original). Given plaintiff's deposition testimony and the plain at-will language contained in the Speedway handbook, we conclude that plaintiff could not reasonably have believed that Sich's general statements, that he had to "follow through with documentation and just cause [i.e., violation of Speedway policies or procedures] to terminate an employee," modified the express terms of her employment, as described in Speedway's policy manual.

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher