

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DONALD J. RHOADS,

Plaintiff-Appellant,

v

BAKER COLLEGE, AMY DISONIA,  
TOM POKORA, and JOWANNE CARRIGAN,

Defendants-Appellees.

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UNPUBLISHED

October 21, 2008

No. 280150

Genesee Circuit Court

LC No. 06-084339-CZ

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DONALD J. RHOADS,

Plaintiff-Appellant,

v

PRISCILLA ANN KIDD,

Defendant-Appellee.

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No. 280187

Genesee Circuit Court

LC No. 06-084338-CZ

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right orders granting summary disposition in defendants' favor. We affirm.

On July 19, 2006, plaintiff filed his complaint against defendant Priscilla Ann Kidd, after Kidd obtained an ex-parte Personal Protection Order (PPO) against him.<sup>1</sup> In Count I, plaintiff asserted a "libel, slander, and defamation of character" claim premised on the falsity of the allegations Kidd made in support of her request for a PPO, as well as on Kidd allegedly passing out a leaflet to her neighbors with plaintiff's picture and identifying information that warned them to watch out for him. In Count II, plaintiff asserted an invasion of privacy claim premised

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<sup>1</sup> Shortly before this PPO was issued, Kidd's request for a PPO against defendant was denied for failure to allege two acts of physical violence.

on Kidd allegedly retrieving plaintiff's personal information from the Baker College computer system in the course of her employment and using it to support her request for a PPO.

On July 19, 2006, plaintiff also filed a complaint against Baker College, Dean Amy Disonia, Campus Safety Director Tom Pokora, Officer Jowanne Carrigan, and "John Doe whose name is unknown but whose person is well known, a Flint campus Vice president." Plaintiff asserted claims of "conspiracy to aid and abet libel and slander" and intentional infliction of emotional distress premised on actions related to Kidd's pursuit of the PPO. This case was eventually consolidated with the case against Kidd.

On May 29, 2007, plaintiff moved to amend his complaint against defendant Kidd. Plaintiff sought to add, as Count III, an intentional infliction of emotional distress claim premised on Kidd obtaining the PPO. He also sought to add, as Count IV, an "identity theft" claim premised on Kidd allegedly passing out a leaflet to her neighbors with plaintiff's picture and identifying information that warned them to watch out for him. On June 4, 2007, plaintiff's motion to amend his complaint against Kidd was granted.

On May 29, 2007, plaintiff also moved to amend his complaint against the Baker College defendants. Count I was amended to "conspiracy to aid and abet libel and slander and the actual commitment of libel and slander." The claim was premised on actions related to Kidd's pursuit of the PPO and the fact that, prior to Kidd seeking a PPO, these defendants placed a picture and information regarding plaintiff in the Student Learning Center with the following comment: "Please post for employees to view. Notify Campus Safety @4223 if you see this individual on Campus." Count II was added to plead an "invasion of privacy and violation of FERPA" claim premised on the actions described under Count I. Count III was the intentional infliction of emotional distress claim, which remained substantially the same. In Count IV, plaintiff pleaded an "identity theft" claim arising from the posting of his picture and information at the Student Learning Center. On June 4, 2007, plaintiff's motion to amend his complaint was granted.

On June 21, 2007, defendant Kidd moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). First, Kidd argued that plaintiff's claims were barred by res judicata because plaintiff's motion to terminate the PPO was denied on its merits after a full hearing at which time plaintiff called seven witnesses. Second, Kidd argued that there was no basis at law for plaintiff's defamation claim because it was premised on the allegations she made in her petition for a PPO—a pleading in a judicial proceeding—and thus her statements were absolutely privileged. Third, Kidd argued that no invasion of plaintiff's privacy occurred because the information she obtained and distributed about plaintiff to her immediate neighbors was not private. Fourth, Kidd argued that no basis existed for plaintiff's intentional infliction of emotional distress claim because her conduct in seeking and obtaining a PPO was not extreme and outrageous. And fifth, Kidd argued that there was no cognizable claim for identity theft. Thus, defendant Kidd requested that the entire matter be dismissed and that she be awarded sanctions and attorney fees for having to defend against the frivolous action.

On June 25, 2007, the Baker College defendants also moved for summary disposition under MCR 2.116(C)(8) and (C)(10). They argued, first, that plaintiff's cause of action was barred by res judicata. Second, the conspiracy to commit libel and slander claim should fail because it was premised on statements defendant Kidd made in her petition for a PPO and those statements were absolutely privileged. Third, the libel and slander claim should fail because

providing a photograph of plaintiff and directing its employees to contact campus security if plaintiff was seen was not a statement capable of defamatory meaning and, even if it was, it was a privileged communication. Fourth, if plaintiff pleaded a false light invasion of privacy claim, it too should fail because the notice published to Baker College employees was not broadcasted to the public, was not unreasonable or highly objectionable, and did not place plaintiff in a false light. And, the FERPA does not create a private right of action. Fifth, because their conduct was not extreme and outrageous, plaintiff's intentional infliction of emotional distress claim must fail. And finally, because an "identity theft" cause of action does not exist, this claim must be dismissed. In summary, the Baker College defendants argued that they were entitled to summary dismissal of plaintiff's entire case.

Plaintiff's briefs in opposition to both motions for summary disposition were similar. Plaintiff argued that res judicata did not apply because the denial of his motion to terminate the ex-parte PPO was not a decision on the merits of each of plaintiff's claims. Plaintiff argued that his defamation claim was not entirely premised on the accusations Kidd made in her petition for the PPO. And, because the underlying defamation claim was viable, the conspiracy claim should not be summarily dismissed. He also argued that defendants used his personal information gathered as a consequence of his student status at Baker College to invade his privacy. And banning plaintiff from the campus of Baker College constituted extreme and outrageous conduct which supported his intentional infliction of emotional distress claim. Although plaintiff admitted that "identity theft" may be an example of invasion of privacy rather than a stand alone action, he requested that defendants' motions for summary disposition be denied in their entirety.

On August 6, 2007, lengthy oral arguments were held on the motion. In a well-reasoned opinion, the trial court held:

I'm not persuaded on the res judicata argument because in fact the issues may have been slightly different.

However, on the defamation count, number one, I believe the statements in the PPO were privileged and therefore not actionable for defamation. Additionally, I don't believe that the picture defamed him in anyway. It simply being his likeness. It wasn't done to make him look sinister or to make him look angry or anything of that nature. It wasn't defaced in anyway. Indeed, on top of that, anybody who saw it didn't take any negative inference from it being posted.

The same thing would apply on the invasion of privacy. I don't believe that the information that was obtained has anything to do with privacy concerns. And, on top of that, it appears that it was used for a legitimate purpose by the school, that is to try to get to the bottom of an employee's concern about her safety.

Intentional infliction of emotional distress, I think I can sum up that count by simply saying, number one, there was an appropriate purpose involved here, and, number two, I don't consider this to be an outrageous situation where simply a picture is posted after discussions, internal discussions, within the school are conducted to attempt to alleviate an employee's concern.

The Court will fold into the analysis the identity theft and FERPA claims in the invasion of privacy.

So, in the Court's view, we have no defamation, we have no invasion of privacy, we have no intentional infliction for emotional distress and we have no case. Summary disposition is granted to defendants on all counts.

Orders granting summary disposition to defendant Kidd and the Baker College defendants were entered. This appeal followed.

First, plaintiff argues that summary dismissal of his defamation claim on the ground that the actionable statements were privileged or not defamatory was erroneous. After de novo review of the trial court's decision, we disagree. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The elements of defamation are "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). "A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998).

In his brief on appeal, plaintiff claims to have "identified three separate defamatory communications: (1) the statements made by Appellee Kidd in discussing [plaintiff] with staff at Baker College and in the petition for the first PPO against [plaintiff], (2) the picture that was posted of [plaintiff] by Baker College and shown to neighbors by Kidd, (3) the e-mails that were written and circulated throughout Baker College by several Baker College administrators." Plaintiff's amended complaints, however, only reference the "statements" made in (2) above. There are no factual allegations in his amended complaints that even suggest the communications he identifies in (1) and (3); thus, these allegations were not considered by the trial court.

Pursuant to MCR 2.111(B)(1), the complaint must include "[a] statement of facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." The purpose of a complaint "is to give notice of the nature of the claim sufficient to permit the opposite party to take a responsive position." *City of Auburn v Brown*, 60 Mich App 258, 263; 230 NW2d 385 (1975). Motions brought under MCR 2.116(C)(8) test the legal sufficiency of the complaint, and motions brought under MCR 2.116(C)(10) test the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002).

In this case, the "libel, slander, and defamation of character" claim set forth in plaintiff's complaint against defendant Kidd was premised on the purported fact that all of the allegations Kidd made in support of her successful petition for a PPO were "absolutely false and untrue."

Accordingly, defendant Kidd argued in her motion for summary disposition that dismissal of the defamation claim was proper because the alleged defamatory statements were contained within a pleading—the successful petition for a PPO—in a judicial proceeding and, thus, defendant Kidd’s statements were absolutely privileged. The trial court agreed, as do we.

“Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried.” *Oesterle v Wallace*, 272 Mich App 260, 264; 725 NW2d 470 (2006). A “judicial proceeding” is “any court proceeding.” Black’s Law Dictionary (7th ed). MCR 3.703(A) provides that “[a] personal protection action is an independent action commenced by filing a petition with a court.” “An absolutely privileged communication is one for which no remedy is provided for damages in a defamation action because of the occasion on which the communication is made.” *Oesterle, supra*, quoting *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992).

In dismissing this claim, the trial court held that “the statements in the PPO were privileged and therefore not actionable for defamation.” Thus, although not specified, this claim was dismissed pursuant to MCR 2.116(C)(8). When the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, summary dismissal is permitted under MCR 2.116(C)(8). *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Here, the alleged defamatory statements that were made by defendant Kidd in her petition for a PPO, as set forth in plaintiff’s complaint, constituted absolutely privileged communications. Therefore, this claim was properly dismissed as a matter of law.

To the extent that plaintiff’s defamation claim was premised on the alleged fact that defendant Kidd passed out of a “leaflet” to her neighbors with plaintiff’s picture and identifying information that warned them to watch out for him, that claim too is without merit. Plaintiff did not attach the disputed leaflet to his amended complaint and we are unable to locate a copy of the leaflet in the lower court file. Likely as a consequence of plaintiff’s failure to argue the merits of this issue and submit a copy of the leaflet, the trial court considered the issue abandoned and did not address this claim. In light of the deficient record, we need not address it either.

The “conspiracy to aid and abet libel and slander” claim filed against the Baker College defendants was also properly dismissed. This claim was premised on the alleged facts that these defendants assisted Kidd in her pursuit of the PPO against him. As discussed above, though, plaintiff’s “libel, slander, and defamation of character” claim against defendant Kidd was properly dismissed because the allegations Kidd made in her petition for a PPO were absolutely privileged.

Plaintiff’s “libel and slander” claim asserted against the Baker College defendants was also properly dismissed. This claim was premised on the fact that prior to Kidd seeking a PPO, these defendants placed a picture and information regarding plaintiff in the Student Learning Center with the following comment: “Please post for employees to view. Notify Campus Safety @4223 if you see this individual on Campus.” The trial court dismissed this claim on the ground that it did not constitute a false and defamatory statement concerning plaintiff. See *Mitan, supra* at 24. We agree. The posting simply did not tend to lower plaintiff’s reputation in the

community or deter third persons from associating or dealing with him. See *Ireland, supra* at 614.

On appeal plaintiff claims that this posting at the Student Learning Center constituted defamation by implication but, again, plaintiff did not plead such a claim in his amended complaint. See *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 36; 627 NW2d 5 (2001). If he had, the claim would fail. To establish a claim of defamation by implication, the plaintiff must prove defamatory implications that are materially false. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 330; 583 NW2d 725 (1998). “[T]he questions whether a statement is capable of rendering a defamatory implication and whether, in fact, a plaintiff has proved falsity in an implication are separate inquiries.” *Locricchio v Evening News Ass’n*, 438 Mich 84, 130; 476 NW2d 112 (1991). Here, contrary to plaintiff’s claim, the posting was not capable of rendering a defamatory implication that was materially false. Thus, it was not actionable. See *Ireland, supra* at 616.

Plaintiff also appears to argue on appeal that the allegations defendant Kidd made in her first, but unsuccessful, petition for a PPO lost their privileged status when the petition was denied by the lower court; thus, those allegations were defamatory. Again, this was not the claim pleaded in plaintiff’s amended complaints and, further, plaintiff has failed to cite any legal authority in support of this position. Thus, we need not consider this issue but, if we did, we would conclude that it is meritless. The allegations Kidd made in her first, albeit unsuccessful, petition for a PPO were made in a judicial proceeding and thus were absolutely privileged for the same reasons discussed above. As for the other arguments plaintiff asserts on appeal in support of his defamation claims, they were neither properly pleaded in his complaints nor decided by the trial court; thus, we need not address them on appeal. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005); *Collins, supra*.

Next, plaintiff argues that the trial court’s dismissal of his invasion of privacy claim asserted against Baker College was erroneous because the posting of his “picture in six places on the Baker College campus implicitly attributed to [plaintiff] characteristics and conduct that were false and placed [him] in a false position.” Although it does not appear that plaintiff pleaded a claim of false light invasion of privacy in his amended complaint, the trial court apparently addressed the issue and so we shall also.

In *Duran v Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993), this Court held:

In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.

Here, plaintiff argues that this claim should not have been dismissed because “there are issues of disputed fact regarding the implication of ‘negative and objectionable traits’ attributed to [plaintiff] by the photograph.” Further, he argues, the posting of his picture on the campus “implicitly attributed to [him] characteristics and conduct that were false and placed [plaintiff] in a false position.” We disagree.

As noted above, the disputed posting included plaintiff's photograph and provided: "Please post for employees to view. Notify Campus Safety @4223 if you see this individual on Campus." It is undisputed that the photograph of plaintiff bears his true likeness. And, as we held with regard to plaintiff's defamation by implication claim, the posting did not imply that plaintiff was dangerous or a criminal. Even if plaintiff could establish that the posting was broadcast to a large number of people, the posting did not constitute "information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran, supra*. Thus, this claim was properly dismissed.

Finally, plaintiff argues that his intentional infliction of emotional distress claims were erroneously dismissed because defendant Kidd made numerous false statements about him and the Baker College defendants were responsible for the posting around campus that implied that he was a criminal—such conduct was outrageous. We disagree.

The elements of intentional infliction of emotional distress are: extreme and outrageous conduct, that was intentional or reckless, and caused the plaintiff's injuries, which included severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). The conduct must be more than mere insulting, malicious, or aggravating behavior. *Id.* It must be "atrocious" and "utterly intolerable in a civilized community." *Id.*

Here, the allegations defendant Kidd asserted in her petition for a PPO were absolutely privileged. And defendant Kidd's statements to the Baker College defendants during the course of her pursuit of the PPO cannot be considered extreme and outrageous conduct. Defendant Kidd was an instructor at the school and plaintiff, her former student, was the subject of her fear, as well as the PPO. Such notification to her employer does not cause one to exclaim "Outrageous!" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985). And, the response by the Baker College defendants to defendant Kidd's fears was posting a note to employees directing that campus security be notified if plaintiff was seen on campus. This conduct was clearly not extreme and outrageous. Therefore, summary disposition of these claims pursuant to MCR 2.116(C)(10) was justified.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Brian K. Zahra