STATE OF MICHIGAN

COURT OF APPEALS

PATRICK J. MORRISSEY,

Plaintiff-Appellant,

v

NEXTEL RETAIL STORES, L.L.C.,

Defendant,

and

STEELCASE, INC., BRENT GOLEMBIESKI, and STEVEN WOLFE

Defendants-Appellees.

UNPUBLISHED
February 17, 2009

Nos. 277893, 279153
Kent Circuit Court
LC No. 05-012048-NZ

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders, which granted summary disposition in favor of defendants Steelcase, Inc., Golembieski, and Wolfe, and which denied plaintiff's motion to review the clerk's taxation of costs.[1] We affirm in part, reverse in part and remand.

Plaintiff asserts that the trial court erroneously granted summary disposition in favor of defendants with respect to his invasion of privacy, conversion, and defamation claims. We disagree.

A trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) is subject to de novo review, where this Court considers the pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmovant. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 41-42; 672 NW2d 884 (2003). If the evidence fails to demonstrate a genuine issue of material fact, the movant is entitled to judgment as a matter of

[1] Plaintiff and Nextel Retail Services entered into a stipulation, which dismissed the claims with prejudice and without costs

law. *Franchino v Franchino*, 263 Mich App 172, 181; 687 NW2d 620 (2004). A genuine issue of material fact exists when, after viewing the record in the light most favorable to the nonmovant, there remains an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

With respect to plaintiff's invasion of privacy claims, our state recognizes the four common-law causes of action for invasion of privacy: (1) intrusion upon a plaintiff's seclusion or solitude, or into his or her private affairs; (2) public disclosure of embarrassing private facts; (3) publicity that places a plaintiff in a false light in the public eye; and (4) appropriation of a plaintiff's name or likeness for a defendant's advantage. *Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296, 300; 680 NW2d 915 (2004).

Plaintiff alleged in his first amended complaint that defendants intruded into his private affairs, and disclosed private facts, casting him in a false light. Plaintiff has conflated two of the invasion of privacy causes of action in his latter claim: publicity that places a plaintiff in a false light in the public eye, and public disclosure of embarrassing private facts. On appeal, plaintiff only provides cursory analysis and discussion of this issue, making a conclusory statement that "[b]ecause there was clearly an invasion of plaintiff's privacy, the trial court erred in granting summary disposition in favor of the Steelcase defendants." Plaintiff provides no support for this conclusion. We have repeatedly ruled that an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims; nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Plaintiff's failure to properly address the merits of his assertion of error constitutes abandonment of the issue on appeal. *Id.*

Nevertheless, we conclude that the trial court properly granted defendants summary disposition with respect to plaintiff's invasion of privacy claims. To establish a prima facie case of intrusion upon seclusion, solitude, or into private affairs, a plaintiff must establish: (1) the existence of a private and secret subject matter; (2) a right to keep that subject matter private; and, (3) that a defendant obtained that information through some manner objectionable to a reasonable person. *Tobin v Mich Civil Service Comm*, 416 Mich 661, 672; 331 NW2d 184 (1982); *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003). The intrusion upon seclusion cause of action "focuses on the manner in which the information was obtained, not on the information's publication." *Id.* at 193. Invasion of privacy claims require a fact-specific analysis. *Earp v Detroit*, 16 Mich App 270, 277; 167 NW2d 841 (1969).

In the instant case, it was undisputed that plaintiff placed numerous telephone calls regarding his personal business during work hours. When plaintiff's supervisor, Brent Golembieski, confronted him about such calls following a business trip, plaintiff claimed that he was using his personal cellular telephone. Later, Golembieski learned that plaintiff had two cellular telephones, both of which were paid for by Steelcase. Golembieski conducted an investigation, using information to which he readily had access, because the statements for his employees' cellular accounts were sent to him. The fact that plaintiff never authorized the change of his personal cellular account to the Steelcase corporate account does not "taint in any way the information received." *Id.* at 281. Further, plaintiff does not have a reasonable expectation of privacy in the phone numbers dialed from his telephone, because he disclosed such information to the third-party telephone company. *People v Gadomski*, 274 Mich App 174, 180; 731 NW2d 466 (2007). Defendants' duty to refrain from intruding into plaintiff's private

affairs is not absolute, because that duty is limited by those rights that arise from the parties' business relationship. *Lewis, supra* at 169. Ultimately, plaintiff's cause of action for intrusion upon private affairs depends on "the manner in which the information was obtained, not on the information's publication." *Id.* at 193. The challenged information was obtained during the course of the employer-employee relationship, where Steelcase received billing statements for plaintiff's cellular telephone, and Steelcase paid for those charges. See generally *Earp, supra* at 273-281. On this record, we conclude that liability should not attach because defendants' conduct would not "offend persons of ordinary sensibilities." *Id.* at 276-277 n 3. Thus, no issue as to any material fact exists, and defendants were entitled to summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff's claim of intrusion into private affairs. *Id.* at 282.

Next, plaintiff's first amended complaint combines the torts of false light and public disclosure of embarrassing facts into one cause of action. "False-light invasion of privacy requires a communication broadcast to the public in general or publicized to a large number of people that places the injured party in a light that would be highly offensive to a reasonable person." *Frohriep v Flanagan (On Remand)*, 278 Mich App 665, 684; 754 NW2d 912 (2008). "A cause of action for public disclosure of private facts requires the disclosure of information that would be highly offensive to a reasonable person and of no legitimate concern to the public, and the information disclosed must be of a private nature that excludes matters already of public record or otherwise open to the public eye." *Duran v Detroit News, Inc*, 200 Mich App 622, 631; 504 NW2d 715 (1993).

We conclude that plaintiff has not satisfied the "publicity" prong of either cause of action. Plaintiff merely alleged that third parties were told that he was fired. Plaintiff makes no allegations that any defendants told the third parties. The false-light tort does not lie unless a plaintiff demonstrates that the publication was made to the general public or a large number of people, *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 385; 689 NW2d 145 (2004), and a cause of action for private disclosure of embarrassing facts does not lie if the communication concerning the embarrassing facts is to a single person or a small group of persons, *Lansing Ass'n of School Administrators v Lansing School Dist Bd of Ed*, 216 Mich App 79, 89; 549 NW2d 15 (1996), rev'd in part on other grounds sub nom *Bradley v Bd of Ed of the Saranac Community Schools*, 455 Mich 285; 565 NW2d 650 (1997). Additionally, we note that plaintiff admitted that he recorded approximately two dozen conversations with his former coworkers following his termination, and we agree with defendants' assertion that "[p]laintiff can hardly claim a privacy interest exists when it is plaintiff himself who is disseminating the information he claims violates his privacy." Ultimately, plaintiff does not specify the nature of defendants' disclosure or identify the people to whom defendants disclosed the private information. Plaintiff only indicated that the information was disclosed to individuals in his professional organizations, his neighbors, or his church. Plaintiff alleges no facts indicating that any alleged disclosures were made to more than a few people. Without evidence of how many people constituted his professional organizations, his neighbors, or his church, there is no evidence to support the publicity element of plaintiff's false light claim. *Derderian, supra* at 387. Further, there is no evidence that the communication was "to *so many persons* that the matter is substantially certain to become public knowledge." *Lansing Ass'n of School Administrators, supra* at 89 (emphasis added). Accordingly, plaintiff failed to establish the publicity element of either cause of action; thus, plaintiff failed to present a genuine issue of material fact with respect to either claim, and defendants were entitled to summary disposition

pursuant to MCR 2.116(C)(10). *Derderian, supra* at 387; *Lansing Ass'n of School Administrators, supra* at 89.

Next, we reject plaintiff's claim that the trial court erroneously granted defendants summary disposition with respect to his conversion claim. Plaintiff devotes three paragraphs to this issue, where he ultimately concludes that "[i]t is foreaseeable that Steelcase's actions (or inactions) in transferring plaintiff's cell phone service and billing records could subject the employee to an invasion of his privacy and further embarrassment and humiliation by allowing others to review his personal information." Plaintiff cites no authority to support this conclusion. This issue is abandoned. *Peterson Novelties, Inc, supra* at 14.

Nevertheless, plaintiff's conversion claim lacks merit. Plaintiff claimed that the April 6, 2004, transfer of his personal cellular account to the Steelcase corporate account, and the May 11, 2005, termination of the cellular service constituted conversion. Even assuming that a cellular telephone account can be converted, plaintiff only first made a demand for the return of the cellular service from the corporate account to a personal account in May 2005, and the cellular account was ultimately reinstated in plaintiff's name on June 7, 2005. A plaintiff cannot maintain an action for conversion until he or she first makes a demand for the return of the converted property. *Bush v Hayes*, 286 Mich 546, 552; 282 NW 239 (1938). Moreover, defendants properly made a good-faith refusal of plaintiff's demand in order to investigate his title to the cellular account. *Parnell v Pungs*, 190 Mich 638, 643-644; 157 NW 357 (1916). Because defendants made a good-faith refusal to plaintiff's initial demand, we conclude that they were entitled to summary disposition pursuant to MCR 2.116(C)(10), where there was no genuine issue as to any material fact regarding plaintiff's conversion claim.

Next, we conclude that defendants were entitled to summary disposition pursuant to MCR 2.116(C)(10), because there was no genuine issue of material fact regarding plaintiff's defamation claim, where he failed to plead the elements of defamation with specificity. A defamation action consists of "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least 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 (defamation per quod)." *Frohriep, supra* at 680. "These elements must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991).

We conclude that plaintiff's pleadings do not rise to the requisite level of specificity for a defamation claim, where he failed to plead anything with respect to the publication of the defamatory word. *Id.* Plaintiff made only a general allegation that "[d]efendants published these remarks to third parties with knowledge of the falsity of these statements or in reckless disregard of their truth or falsity." See *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 589-590; 349 NW2d 529 (1984) (summary disposition proper where the failure of a plaintiff to set forth with specificity the necessary elements of a defamation cause of action); *Hernden v Consumers Power Co*, 72 Mich App 349, 356; 249 NW2d 419 (1976) (summary disposition proper where a plaintiff's failure to allege "where, when, or to whom" the alleged defamatory statement was published, or that there even was a publication to anyone other than the plaintiff himself).

In his first amended complaint, plaintiff alleged the following:

> The accusation that plaintiff transferred his personal cell phone account to a Steelcase corporate account or otherwise improperly converted phone service from Steelcase is false.
>
> The accusation that plaintiff conducted personal business during working hours beyond what is permitted in Steelcase's 2005 Employee Handbook is false.
>
> Defendants published these remarks to third parties with knowledge of the falsity of these statements or in reckless disregard of their truth or falsity.

In *Hernden, supra* at 356, this Court concluded that the plaintiff's allegations failed to state a cause of action for libel, where the plaintiff alleged that he "was defamed when defendant, through its agents, stated that plaintiff's employment was terminated because of his lack of productivity." We reach the same conclusion. Defendants were entitled to summary disposition, where plaintiff failed to make sufficient allegations regarding his defamation claim. *Id.* at 356-357.

Finally, plaintiff argues that the trial court erroneously awarded deposition costs to defendants, where they failed to file the complete transcripts in the clerk's office, as required under the plain and unambiguous language of MCL 600.2549. This Court reviews an award of costs for an abuse of discretion. *Badiee v Brighton Area Schools*, 265 Mich App 343, 377; 695 NW2d 521 (2005). We also review de novo questions of statutory interpretation. *Morrison v City of East Lansing*, 255 Mich App 505, 522; 660 NW2d 395 (2003).

MCL 600.2549 provides:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

We find that *Portelli v I R Constr Products Co, Inc*, 218 Mich App 591; 554 NW2d 591 (1996), is dispositive. In that case, after the trial court granted the defendant's motion for summary disposition, that defendant filed a motion to tax costs against the plaintiff, "seeking costs for four depositions necessarily used to procure summary disposition." *Id.* at 595-596. On appeal, the plaintiff argued "that the costs for the deposition transcripts were not taxable because the depositions were not 'filed in any clerk's office' as required by MCL 600.2549." *Id.* at 606. This Court reluctantly agreed, finding that it was undisputed that the defendant did not file the four deposition transcripts separately in any clerk's office. *Id.* This Court noted:

> When the issue was raised before the lower court, [the defendant] argued that excerpts of the depositions were incorporated with its motion for summary disposition that was filed with the court clerk. The lower court could not recall whether any excerpts were included with the motion, but upon plaintiff's failure to show that they had not been attached, the court granted the costs. [*Id.*]

This Court concluded that the trial court did not have statutory authority to tax costs for the depositions. *Id.* at 607. This Court opined that "logic would indicate that depositions used to resolve a case should be taxable"; however, it could not rewrite the statute, which plainly stated "that costs shall be allowed only for depositions 'filed in any clerk's office.' " *Id.* This Court held that the plain, clear, and unambiguous language of MCL 600.2549 demonstrated that "the Legislature intended the taxation of costs only for depositions filed in a clerk's office." *Id.*

In *Portelli, supra* at 606, the trial court accepted that excerpts of the depositions had been attached to the defendant's motion. This Court held that that was insufficient—costs for depositions could be taxed only if the depositions themselves have been filed in a clerk's office. *Id.* at 607. It is clear under *Portelli* that filing excerpts as attachments to a motion filed with the clerk's office is insufficient to authorize the taxation of costs under MCL 600.2549. See also *Elia v Hazen*, 242 Mich App 374; 619 NW2d 1 (2000).

Accordingly, we agree with plaintiff that the trial court erred in allowing the taxation of costs for depositions not separately filed with the clerk's office. On remand, the trial court shall modify the award of costs accordingly.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, no party having prevailed in full.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly