STATE OF MICHIGAN

COURT OF APPEALS

NILGUN CAMILLA FRENGELL, M.D., Plaintiff-Appellant,	UNPUBLISHED November 9, 2010
v	No. 287379 Van Buren Circuit Court
INTERCARE COMMUNITY HEALTH NETWORK and LISA M. FINK, M.D., Defendants-Appellees.	LC No. 07-055872-CZ

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff Nilgun Camilla Frengell, M.D., worked as a family practitioner for defendant InterCare Community Health Network (InterCare) in a clinic that offered medical services to low-income patients. In January 2007, InterCare's peer review committee determined that Frengell had improperly prescribed controlled substances, terminated her employment, and reported its action to the National Practitioner Data Bank (NPDB). Frengell claims that InterCare's report to the NPDB defamed her, and challenges the trial court's decision to grant defendants' motion for involuntary dismissal under MCR 2.504(B)(2). We affirm.

I. ORIGIN AND OPERATION OF THE NPDB

In 1986, Congress enacted the Health Care Quality Improvement Act, 42 USC 11101 *et seq*. (the Act) "to improve the quality of medical care," and "to provide incentive and protection for physicians engaging in effective professional peer review." 42 USC 11101(1), (5). Section 11133(a)(1)(A) of the Act mandates that health care entities report to their state's Board of Medical Examiners any "professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days." State authorities must then convey reported information to an agency established by the Secretary of Health and Human Services. See 42 USC 11134(a), (b). In 1990, the Department of Health and Human Services promulgated regulations creating the NPDB and imbuing it with authority to receive, store and disseminate reported information. 45 CFR 60.

The Act affords to persons and entities that report professional peer review actions immunity from suits for damages, provided that the peer review action meets certain specific requirements. 42 USC 11111(a). One requirement incorporates basic due process principles, including "adequate notice" to the involved physician and an opportunity for a hearing. 42 USC

11112(b). But even if immunity does not exist in a particular case, the Act itself "does not expressly create a cause of action in favor of a physician against a professional peer review group that has violated its due process requirements." *Hancock v Blue Cross-Blue Shield of Kansas, Inc*, 21 F3d 373, 374 (CA 10, 1994).

II. UNDERLYING FACTS AND PROCEEDINGS

Frengell's employment with InterCare commenced in 2003. In 2006, Frengell received a negative performance evaluation arising from her treatment of a patient with hepatitis C, who had filed a medical malpractice claim against InterCare. As a result of the medical malpractice claim, InterCare's medical director, defendant Lisa Fink, M.D., initiated an audit of the medical records of 25% of Frengell's patients. In July 2006, Fink authored a report referred to as an "Area of Clinical Concern" (AOCC) about Frengell's treatment of a patient suffering chronic pain. The AOCC expressed that Frengell had inappropriately prescribed methadone to wean the patient from narcotics, a "prohibited use" of the drug by a physician lacking specific training. In December 2006, a different InterCare physician submitted a second AOCC criticizing Frengell's treatment of the same patient. The second AOCC expressed general concerns regarding Frengell's prescription of narcotics. Subsequently, Fink and Frengell reviewed the patient's chart, and Fink opined that Frengell had prescribed the patient a large number of Vicodin over a relatively short period.

After the chart review, Fink discussed Frengell's treatment of the patient with InterCare's peer review committee. The committee decided that Frengell had breached the standard of care, revoked her clinical privileges, and recommended termination of Frengell's employment. InterCare admits that it did not give Frengell notice of the peer review meeting or an opportunity to participate in it. Despite these omissions, on February 6, 2007, InterCare notified the NPDB as follows of its action concerning Frengell: "A physician within the organization filed a complaint with the Chief Medical Officer regarding the excessive prescribing of narcotics. The Peer Review Committee met to investigate this allegation. The Committee determined that the standard of care for pain management was violated. Her employment ended 1-26-07." Ten days later, Frengell notified the InterCare that its peer review committee had not given her notice or an opportunity to be heard. Frengell's counsel urged that InterCare "void the report as soon as possible." Approximately one year later, InterCare voided the report.

Meanwhile, Frengell sued InterCare and Fink in the Van Buren Circuit Court, seeking injunctive relief compelling InterCare to void the report. In June 2007, Frengell filed a first amended complaint setting forth claims for libel and a "physician data bank act violation." Frengell's libel claim asserted:

> 14. That Defendant did not have or follow by-laws mandating procedures for investigation and due process hearings prior to reporting information to the Data Bank.
>
> 15. That Defendants' statements to the Data Bank that medications prescribed by Plaintiff to patients were "excessive" is false.
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> 16. That Plaintiff's Peer Review Committee did not contain any physicians adequately trained and familiar with the standard of care for pain

management to arrive at the determination that the standard of care for that area of medicine had been violated; therefore, this statement is false.

InterCare and Fink filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), challenging the viability of both claims pleaded in the first amended complaint. Frengell later conceded that the Act did not invest her with an independent cause of action for its violation, and the trial court dismissed the "physician data bank violation" claim. The trial court denied InterCare's motion for summary disposition of the libel count, finding that InterCare's NPDB statement

> was placed where others were intended to see it. It was intended to convey the message that Plaintiff, in violation of the standard of care, excessively prescribed narcotics and was, for that reason, fired. The Defendants could have accomplished the purpose of the posting, and protected themselves from liability by complying with the standards of the Physician Data Bank Act, after complying with the Act's requirements for by-laws establishing a peer review, and appropriate due process protections. They lost that immunity from a libel or slander suit by their failure to comply. Therefore, to defend against a libel suit they must show that the truth is Dr. Frengell *did* excessive [sic] prescribe narcotics in violation of the standard of care, if she shows that she did not. The falsity is in the meaning of the message, and that meaning was clear—this Dr. was fired for violating the standard of care, in the area of proscribing [sic] narcotics for pain management. [Emphasis in original.]

On July 22, 2008, the parties commenced a bench trial. Frengell presented her own testimony and that of a damages expert. After Frengell concluded her proofs, InterCare moved for involuntary dismissal under MCR 2.504(B)(2). The trial court found that Frengell had failed to prove by a preponderance of the evidence that InterCare's statement to the NPDB qualified as false, reasoning as follows:

> I'm not satisfied by a preponderance of the evidence this was false by the Plaintiff's own testimony. In looking at everything that was raised with her and told to her and . . . that she was informed about, the concerns about the standard, I would have to say at this time, if I have to say is there a preponderance of the evidence that it was false that she violated the standard of care, I couldn't say it. I might not say that I am satisfied by a preponderance of the evidence that she did either, although I am more inclined to say that than to say otherwise so just as a fact finder, I'm just not satisfied that that's a false statement given the information we've heard from her about how much you should prescribe, given the lack of certainty about whether she did or didn't do it and whether or not she saw the patient and whether or not she just took a report over the phone and the idea that prescription and consumption are two different things. It seems there were a lot of assumptions made that shouldn't be if one is concerned in that area, so I very honestly am not satisfied that the evidence preponderates in favor of false statement and for that reason, I'm going to grant the defense's motion.

III. ANALYSIS

Frengell now challenges the trial court's involuntary dismissal ruling. "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that on the facts and the law the plaintiff has shown no right to relief." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995) (internal quotation omitted). "[A] motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). This Court reviews the decision to grant or deny a motion for involuntary dismissal under the clearly erroneous standard, and the trial court "will not be overturned unless the evidence manifestly preponderates against the decision." *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1991).

Frengell first contends that the trial court erroneously "focused on the wrong falsity and therefore made an error of law by requiring" her to disprove InterCare's assertion that she had breached the standard of care by excessively prescribing narcotics. Frengell argues that her defamation claim instead arose from InterCare's false representation that its peer review committee had confirmed the allegations against her. According to Frengell, "[t]he gist or sting of the report was the false inference of context that [Frengell's] professional medical competency had been fully reviewed and found lacking by a formal peer review process at a properly constituted health care facility."

"A communication is defamatory if, considering all the circumstances, it tends to so harm the reputation of an individual as to lower that individual's reputation in the community or deter third persons from associating or dealing with that individual." *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). "[T]ruth is an absolute defense to a defamation claim." *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995). However, "[t]he common law has never required defendants to prove that a publication is literally and absolutely accurate in every minute detail. For example, the Restatement of Torts provides that '(s)light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance.'" *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 258-259; 487 NW2d 205 (1992). If the gist or sting of the alleged defamatory statements is "substantially accurate," a defendant cannot be held liable. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 333; 583 NW2d 725 (1998).

Here, the purportedly defamatory statement asserted, "The Committee determined that the standard of care for pain management was violated." In the summary disposition ruling, the trial court correctly identified the potentially defamatory "gist" or "sting" of the statement as the charge that Frengell had breached the standard of care by over prescribing narcotics. After hearing Frengell's testimony relating the reasons she prescribed certain quantities of narcotics for the patients at issue, the trial court found that the evidence preponderated in favor of the statement's truth. When reviewing the trial court's findings, we defer to the court's assessment of a witness's credibility. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). Having reviewed the record evidence, we cannot characterize as clearly erroneous the trial court's decision that Frengell did not substantiate by a preponderance of the evidence the falsity of the InterCare report to the NPDB concerning Frengell's violation of the standard of care.

Furthermore, we detect no merit in Frengell's position that InterCare defamed her by suggesting that the peer review meeting had complied with the immunity conditions contained in the Act. "[A] cause of action for defamation by implication exists in Michigan, but only if the plaintiff proves that the defamatory *implications* are materially false . . . ." *Hawkins*, 230 Mich at 330 (emphasis in original). "[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). We reject that InterCare's statement yielded any defamatory implication. The mere assertion that a peer review meeting took place, without more, simply communicated no message or inference that harmed Frengell's reputation or could have deterred third persons from dealing with her. Consequently, the trial court did not err by focusing its inquiry on whether Frengell had breached the standard of care.

Frengell lastly contends that the trial evidence "manifestly preponderates against the trial court's holding that a peer review committee had met and conducted an investigation." Contrary to this assertion, the relevant evidence agreed that InterCare's peer review committee met and decided that Frengell had violated the pain management standard of care. At trial, Frengell acknowledged the literal truth of InterCare's statement concerning the peer review meeting. Notwithstanding that InterCare's peer review process failed to meet the standards set forth in the Act, we discern no clear error in the trial court's finding that Frengell did not prove that InterCare published a defamatory falsehood concerning the occurrence of a peer review meeting.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher