STATE OF MICHIGAN

COURT OF APPEALS

JANE DOE,

Plaintiff-Appellant,

v

VIDAL D. BORROMEO, JR.,

Defendant,

and

WILLIAM BEAUMONT HOSPITAL;

Defendant-Appellee.

UNPUBLISHED
September 20, 2012

No. 305162; 305163
Oakland Circuit Court
LC No. 2009-099890-NO;
2009-104414-NM

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition to defendant, William Beaumont Hospital (WBH).[1] For the reasons set forth below, we remand for further discovery and a determination regarding whether WBH is entitled to summary disposition under MCR 2.116(C)(10) on plaintiff's negligent supervision claim. However, we hold that summary disposition under MCR 2.116(C)(8) is improper on plaintiff's negligent supervision claim, and accordingly deny WBH's summary disposition motion on that ground. We also remand to the trial court for further proceedings regarding plaintiff's pseudonymous status. In all other respects, we affirm the judgment of the trial court.

I. FACTS

This case arises from an alleged sexual assault under the guise of a medical examination that occurred on April 15, 2007. According to plaintiff, she was admitted to WBH with "vaccine paralysis," which affected her ability to move her arms and speak. While she was in an examination room, Borromeo allegedly entered her room and "did willfully, harmfully and offensively touch the Plaintiffs [sic] bodily parts in such a manner as was improper, unlawful and

[1] Defendant Vidal Borromeo did not participate in this litigation on appeal.

resulted in an assault upon the Plaintiff, and in such a manner that did not constitute medical care and treatment." Specifically, plaintiff alleges that Borromeo "with his stethoscope slid his hand underneath the Plaintiff's gown, then without the stethoscope grabbed the Plaintiff's breasts, and continued to do so. Defendant then placed his hands on the Plaintiff's lower anatomy and sexually assaulted her without medical basis." Borromeo was apparently in plaintiff's room because he was asked to fill in for plaintiff's primary care doctor, who was unable to work that day. Plaintiff claims that this incident has had a dramatic negative impact on her life, both physically and psychologically.

II. PROCEDURAL HISTORY

On April 10, 2009, in Docket No. 305162, plaintiff filed her first action against WBH and Borromeo; plaintiff filed her first amended complaint on May 14, 2009. On July 1, 2009, in Docket No. 305162, the lower court issued an ex parte protective order, instructing 1) that the parties refrain from using plaintiff's legal name in any subsequent court filing; 2) that any filing which already used plaintiff's legal name be sealed; and 3) that all depositions, affidavits, and other discovery methods not use plaintiff's legal name.

On July 2, 2009, in Docket No. 305162, plaintiff filed her second amended complaint, which alleged four counts: assault and battery, intentional infliction of emotional distress, vicarious liability, and negligent infliction of emotional distress. Specifically with regard to WBH, plaintiff alleged that WBH was directly and vicariously liable for Borromeo's conduct.

On July 15, 2009, in Docket No. 305162, WBH filed a motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). WBH argued that plaintiff's claims sounded in medical malpractice, and not intentional tort, as pleaded, and that plaintiff failed to wait the appropriate 182 days or file an affidavit of merit for this malpractice claim. WBH also argued that plaintiff failed to state a claim for negligent infliction of emotional distress, because there was no identified bystander to the incident, as required by the elements of the tort. On August 4, 2009, Borromeo field a joinder/concurrence in WBH's motion for summary disposition.

On September 10, 2009, plaintiff filed her response to defendant's summary disposition motion in Docket No. 305162. Plaintiff argued that injuries that arise in a medical setting are cognizable as torts other than medical malpractice, and that vicarious liability was appropriate here. Plaintiff withdrew her claim for negligent infliction of emotional distress.

On October 6, 2009, in Docket No. 305163, plaintiff filed a second action. In the complaint for her second action, plaintiff again alleged that WBH was directly and vicariously liable, and added a claim of medical malpractice against Borromeo. On the same day, the trial court entered a second ex parte protective order ordering granting her pseudonymous "Jane Doe" status.

On November 4, 2009, in Docket No. 305162, the lower court heard arguments regarding defendants' July 15, 2009 motion for summary disposition. WBH asked the trial court to grant it summary disposition regarding all claims that were not medical malpractice claims. WBH also argued that, under MCR 2.116(C)(8), plaintiff failed to state a claim of vicarious liability for Borromeo's alleged intentional conduct. The court disagreed that plaintiff's claims sounded in

malpractice because plaintiff's claims alleged an unwanted touching, rather than questions related to medical judgment. Accordingly, the court denied summary disposition to Borromeo (except regarding infliction of emotional distress, which was granted), but granted summary disposition to WBH on the other claims because an employer is not responsible for the torts of employees acting outside the scope of their employment. The trial court reasoned that if Borromeo improperly touched plaintiff, he would have been acting outside the scope of his employment.

On January 7, 2010, WBH filed a summary disposition motion under MCR 2.116(C)(8) and MCR 2.116(C)(10) in Docket No. 305163. WBH, noting that the court had already granted summary disposition in its favor in Docket No. 305162, argued that courts must read claims as a whole to determine the gravamen of the case. WBH argued that, when the claim is read as a whole, it is clear that plaintiff merely sought to resurrect claims already decided on the previous motion for summary disposition; plaintiff was simply attempting a second time to establish that WBH was liable for the intentional tort of its agent.

On March 2, 2010, in Docket No. 305162, Borromeo filed a motion to quash the court's July 1, 2009 protective order which granted plaintiff pseudonymous status. Borromeo argued that none of the factors under which granting "Jane Doe" status is appropriate were present in this case, nor is there any evidence that granting the motion to quash would negatively impact plaintiff psychologically. Borromeo also argued that plaintiff's "Jane Doe" status had affected his ability to conduct discovery.

On March 25, 2010, in Docket No. 305162, the trial court issued an opinion and order granting Borromeo's motion to quash. Specifically, the trial court held:

> The decision whether to permit the use of fictitious names is left to the discretion of the trial court. . . . Among the factors to be considered by the Court in balancing the maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings are whether (1) the prosecution of the suit compels the plaintiff to disclose information of a private nature, (2) the plaintiff is challenging a governmental or private activity and (3) the plaintiff is compelled to admit an intent to engage in illegal activity. The most common cases allowing party anonymity are those involving abortion, religion, illegitimate abandoned or abused children, birth control, homosexuality, mental illness and public safety.
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> As to the first factor, the Court does not find that Plaintiff will have to disclose information of a private nature which falls within the realm of the cases which have allowed anonymity. As to the remaining factors, neither of these factors would outweigh the constitutionally-embedded presumption of openness in a judicial proceeding.

On April 16, 2010, the lower court issued an order clarifying its March 25, 2010 opinion and order granting Borromeo's motion to quash. The trial court indicated that its March 25, 2010 Opinion and Order meant that all documents in the case were henceforth to refer to plaintiff by her legal name, not Jane Doe, and that any documents that had been sealed were to be unsealed.

Docket Nos. 305162 and 305163 were consolidated on April 14, 2010. On May 5, 2010, the trial court heard arguments regarding WBH's January 7, 2010 summary disposition motion. WBH argued that plaintiff's complaint in Docket No. 305163 was merely an exercise in creative pleading, because it essentially alleged the same things as the complaint in Docket No. 305162. The trial court agreed and granted summary disposition in favor of WBH, reasoning:

> [T]he plaintiff has failed to state a claim and has failed to create a genuine issue of material fact that would establish defendant's liability in this action. The gravamen of an action is determined by reading the complaint as a whole and that [sic] plaintiff cannot avoid summery [sic] disposition by artful drafting . . . .
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> Here regardless of plaintiff's labeling of her claims against defendant, plaintiff seeks to recover for an intentional harm, not negligence. The law is clear that defendant would not be responsible for the intentional torts of his employees committed outside the scope of employment . . . . Accordingly, defendant's motion is granted.

Apparently, at some point after he filed his answer, Borromeo stopped participating in the litigation. On March 29, 2011, Borromeo's counsel moved to withdraw because Borromeo had declared bankruptcy and had failed to pay his counsel, breaching their retainer agreement. On May 16, 2011, the lower court entered a default judgment against Borromeo. On May 26, 2011, the trial court held a default judgment hearing at which it heard testimony from plaintiff, and subsequently awarded plaintiff a $500,000 default judgment.

Plaintiff now appeals the trial court's grant of summary disposition to WBH in Docket No. 305163.

III. PLAINTIFF'S NEGLIGENT SUPERVISION CLAIM

A. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law."[2]

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings.[3]

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[2] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[3] *Id*. at 119-120 (citations and quotations omitted).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.[4]

B. ANALYSIS

A threshold determination with regard to plaintiff's first issue on appeal is whether plaintiff properly pled a claim of direct liability against WBH in the form of negligent supervision, and, if so, whether the trial court properly considered it. Defendant argues that this issue on appeal is really an attempt to circumvent the trial court's ruling with regard to vicarious liability, and is therefore nothing more than artful pleading. We disagree. "A party's choice of label for a cause of action is not dispositive. We are not bound by the choice of label because to do so would exalt form over substance."[5] In her second amended complaint (in Docket No. 305162), plaintiff alleged:

> Defendant hospital and its administrator and its employees were aware of or had knowledge of the inappropriate acts of the Defendant physicians [sic] and failed to use all reasonable efforts to protect the plaintiff, [sic] knowledge that she and others similarly situated to her were vulnerable to attack and assault in light of their medical condition. Defendant hospital owes a duty to protect the plaintiff from such acts, but failed to do the same. Such breach of duty resulted in permanent injury and damage to the plaintiff as set forth above.

Although this passage was contained in a count labeled "Vicarious Liability," it clearly alleges direct liability against WBH for failure to properly supervise Borromeo. Similarly, in plaintiff's second cause of action in Docket No. 305163, her complaint alleged direct liability against WBH for failing to properly supervise Borromeo. When it granted both of WBH's motions for summary disposition, the trial court did not squarely address whether WBH was directly liable for negligently supervising Borromeo. Rather, in both instances, the trial court focused on vicarious liability, granting WBH summary disposition on the basis that plaintiff had alleged Borromeo committed an intentional tort for which WBH could not be vicariously liable. Accordingly, the record reflects that the trial court did not address the issue of WBH's potential direct liability on a negligent supervision theory.

We now turn to the legal framework controlling the merits of plaintiff's negligent supervision claim. Michigan courts have explicitly stated that negligent supervision is

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[4] *Id*. at 120 (citations omitted).

[5] *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011) (citations and quotations omitted).

cognizable as a claim separate and distinct from a claim based on vicarious liability, but have not outlined with specificity the elements of such a claim.[6] However, case law does offer some clues.

For example, in *Millross v Plum Hollow Golf Club*,[7] the Michigan Supreme Court touched on the duty element of a negligent supervision claim. In *Millross*, the plaintiff was injured in a motor vehicle accident by a drunk country club employee who had been provided liquor by the club, and subsequently drove home.[8] The plaintiff sued, alleging, inter alia, that the club was negligent in supervising the employee's alcohol intake.[9] Although the Supreme Court held that the dram shop act was the plaintiff's exclusive remedy,[10] it did discuss the duty element of a negligent supervision claim. Specifically, the Court held that the plaintiff did not establish that the club owed a duty to the plaintiff because "it ha[d] not been alleged that the defendant knew or should have known of the existence of any special circumstances regarding [the employee] that could establish a duty of care to third persons."[11]

The duty standard articulated in *Millross* mirrors the one Michigan courts have long relied upon in the closely related context of negligent retention. In the context of negligent retention, an employer owes no duty to protect a third party from an employee unless the employer "knew or should have known of his employee's propensities and criminal record before [the] commission of an intentional tort by [an] employee upon customer who came to [the] employer's place of business."[12] Accordingly, in sum, WBH owed a duty of care to protect plaintiff from Borromeo only if WBH "knew or should have known of the existence of . .

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[6] See, e.g. *Cox ex rel Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 11; 651 NW2d 356 (2002), citing *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 478, n 3, 424 NW2d 478 (1988) (noting that, in addition to vicarious liability, "[a] hospital may be . . . directly liable . . . through claims of negligence in supervision of staff physicians as well as selection and retention of medical staff . . ." but not proving elements for such a claim); *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006) (while declining to adopt certain exceptions to the general rule that employers are not liable for employees' actions committed outside the scope of employment, noting that "employers will continue to be subject to [direct] liability for their negligence in hiring, training, and supervising their employees" but not explaining when or how).

[7] 429 Mich 178; 413 NW2d 17 (1987).

[8] *Id*. at 181-183.

[9] *Id*. at 182.

[10] *Id*. at 183-190.

[11] *Id*. at 197.

[12] *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412; 189 NW2d 286 (1971), *quoting Bradley v Stevens*, 329 Mich 556, headnote 2, 46 NW2d 382 (1951).

.special circumstances regarding [Borromeo]."[13] Those "special circumstances" focus on Borromeo's propensities, if any, to commit criminal and tortious acts.[14]

As noted above, the trial court failed to address plaintiff's negligent supervision claim. As explained, WBH would only owe a duty to protect plaintiff from Borromeo if it knew or should have known of his propensity, if any, to commit criminal or tortious acts. No discovery into this issue has yet been conducted; accordingly, plaintiff has not had the opportunity to develop facts regarding whether WBH owed her a duty. Therefore, we remand for completion of discovery and subsequent consideration regarding whether summary disposition is proper under MCR 2.116(C)(10).

However, because determining whether WBH owed plaintiff a duty necessarily requires an inquiry into whether WBH should have known about Borromeo's propensity, if any, to commit criminal or tortious acts, some factual discovery is required to determine whether WBH owed plaintiff a duty. Accordingly, neither we nor the lower court can conclude, solely by reference to the pleadings, that "the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery,"[15] and summary disposition under MCR 2.116(C)(8) is therefore improper. Accordingly, regarding plaintiff's negligent supervision claim, we deny WBH's motion for summary disposition under MCR 2.116(C)(8).

IV. PLAINTIFF'S VICARIOUS LIABILITY CLAIM

A. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law."[16]

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings.[17]
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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this

[13] *Millross*, 429 Mich at 193.

[14] *Hersh*, 385 Mich at 412.

[15] *Maiden*, 461 Mich at 119-120 (citations and quotations omitted).

[16] *Maiden* 461 Mich 109 at 118.

[17] *Id*. at 119-120 (citations and quotations omitted).

> subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.[18]

B. ANALYSIS

It is settled law that hospitals are not liable for the intentional torts of their employees. For example, in *Salinas v Genesys Health Systems*,[19] the plaintiff, a patient in a "diminished physical state" in the intensive care unit of the defendant's hospital, alleged that she had been sexually assaulted by a nurse, the defendant's employee.[20] This Court held that employers are not liable for the intentional torts of their agents, and that the "mere fact that an employee's employment situation may offer an opportunity for tortious activity does not mean that he was aided in accomplishing the tort by the existence of the agency relationship."[21] Accordingly, the *Salinas* Court affirmed the trial court's grant of summary disposition to the defendant.

The Michigan Supreme Court, in *Zsigo v Hurley Medical Center*,[22] went farther than *Salinas*. In *Zsigo*, the plaintiff alleged that she had been sexually assaulted by a nursing aid while restrained physically in the emergency room of a hospital.[23] The plaintiff urged the Supreme Court to adopt an exception to the general rule of vicarious liability, whereby an employer could be liable for the intentional tort of its employees if the employee "was aided in accomplishing the tort by the existence of the agency relation."[24] The Court declined to adopt this exception, because doing so would, in effect, impose strict liability on employers: "[B]ecause the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of respondeat superior employer nonliability."[25] Indeed, *Zsigo* went farther than *Salinas* because *Zsigo* acknowledged that the agency relationship would, by definition, aid the employee in accomplishing the tort, and declined to find liability nonetheless.[26]

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[18] *Id*. at 120 (citations omitted).

[19] 263 Mich App 315; 688 NW2d 112.

[20] *Id*. at 316-317.

[21] *Id*. at 323 (citations and quotations omitted).

[22] 475 Mich 215; 716 NW2d 220 (2006).

[23] *Id*. at 220.

[24] *Id*. at 221.

[25] *Id*. at 226.

[26] *Id*. at 226 ("It is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is

On appeal, plaintiff argues that summary disposition was improper because Borromeo was WBH's ostensible agent. We agree that Borromeo likely was WBH's ostensible agent under the test articulated in *Grewe v Mt. Clemens General Hospital*.[27] When Borromeo, wearing a WBH employee identification badge and presenting himself as a WBH doctor, entered plaintiff's room and began to touch her, it was reasonable for plaintiff to believe that Borromeo was WBH's agent.

However, plaintiff fails to show that Borromeo's status as an ostensible agent requires reversal. In both *Salinas* and *Zsigo*, the courts determined that those agents' employers were not liable for their intentional torts because those intentional torts were outside the scope of the agency relationship. Plaintiff makes an argument with regard to why Borromeo was WBH's ostensible agent. However, plaintiff makes no argument regarding why the outcome here should be any different than the outcome in *Salinas* or *Zsigo* merely because Borromeo was an ostensible agent. Simply put, plaintiff cites no authority for, and makes no argument in support of, the proposition that an employer may be vicariously liable for the intentional torts of its ostensible agents acting outside the scope of their ostensible authority.

Plaintiff also claims that WBH argues that plaintiff's claim in the second action, in Docket No. 305163, a vicarious liability claim, sounds in medical malpractice, and that the trial court erred when it ruled that the second action was, in substance, an intentional tort claim which had already been ruled on in the first action, Docket No. 305162. Specifically, plaintiff argues:

> [WBH is using a] one-two punch [maneuver by arguing that] (1) if the complaint asserts an intentional tort claim (which it clearly did against Borromeo), [WBH] is not responsible because Borromeo was not acting within the scope of his employment or agency at that time and [WBH] could not foresee such intentionally criminal conduct; and (2) if the allegations in the complaint are simply an intentional tort claim, the medical malpractice claim should be dismissed . . . Effectively, [WBH] wields a 'double-edged sword' by arguing that the tort claim is not viable in this instance, and then, contending, after summary disposition is granted on the tort claim, that the medical malpractice claim cannot be maintained because it is actually a tort claim and the tort claim was already dismissed.

We disagree. Plaintiff attempts to frame the issue simultaneously as negligence and as an intentional tort, and argues that WBH is vicariously liable for both. However, again, "[a] party's choice of label for a cause of action is not dispositive. We are not bound by the choice of label

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always 'aided in accomplishing' the tort. Because the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of respondeat superior employer nonliability.").

[27] 404 Mich 240; 273 NW2d 429 (1978). In *Grewe*, the Supreme Court held that three elements must be met to find ostensible agency: "[1]The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [2] such belief must be generated by some act or neglect of the principal sought to be charged; and [3] the third person relying on the agent's apparent authority must not be guilty of negligence." *Id*. at 252-253.

because to do so would exalt form over substance."[28] The trial court was correct: The substance of both of plaintiff's vicarious liability claims in both complaints was the same. In both, plaintiff alleged that Borromeo groped her while she was his patient. To the extent plaintiff argues that her second complaint was different than the first because the second alleged vicarious liability based on Borromeo's malpractice and not an intentional tort, plaintiff engages in a semantic exercise, and "[a]n exercise in semantics will not create a factual issue precluding summary disposition."[29]

V: PLAINTIFF'S PSEUDONYMOUS STATUS

The case controlling the use of fictitious names in Michigan is *Doe v Bodwin*, which is cited by all parties. In *Doe*, the plaintiff sued her psychologist for malpractice, battery and criminal sexual conduct, "alleging that he had sexual intercourse with her during therapy."[30] The trial judge granted the defendant's motion to deny the plaintiff Jane Doe status.[31] On appeal, this Court noted that the "right to proceed anonymously, as derived from the right to privacy, is not absolute."[32] The Court determined that whether it is appropriate to grant a litigant anonymity by way of a fictitious name "requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings."[33]

> Among the factors to be considered in the balancing process are whether:
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> (1) prosecution of the suit compels the plaintiff to disclose information of a private nature,
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> (2) the plaintiff seeks to challenge governmental or private activity, and
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> (3) the plaintiff is compelled to admit an intention to engage in illegal conduct.[34]

The Court conducted a survey of decisions of courts of other jurisdictions, and concluded:

> The common thread running through these cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record. However, the cases make it clear that the

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[28] *Norris*, 292 Mich App at 582 (citations and quotations omitted).

[29] *Camden v Kaufman*, 240 Mich App 389, 397; 613 NW2d 335 (2000).

[30] *Doe*, 119 Mich App at 266.

[31] *Id*.

[32] *Id*. at 267.

[33] *Id*. (citations and quotations omitted).

[34] *Id*. (citations and quotations omitted).

> decision whether to permit the use of fictitious names is one that is left to the discretion of the trial court.[35]

The court identified abortion, religion, illegitimate or abandoned children subject to welfare proceedings, birth control, homosexuality, transsexuality, mental illness, and personal safety as the types of cases where other courts had found it appropriate to grant a party pseudonymous status.[36]

Here, WBH never raised a specific objection to plaintiff's pseudonymous status. Borromeo, not WBH, moved to quash the protective order, and the trial court granted it. Accordingly, we remand to the trial court for a determination with regard to whether plaintiff is entitled to pseudonymous status in her lawsuit against WBH, or whether, as the court determined in the lawsuit against Borromeo, it is appropriate to lift the reputational protection such status affords. To the extent that WBH desires to object to the propriety of plaintiff continuing to receive pseudonymous status in her suit against WBH, WBH may raise such an objection on remand.

Plaintiff's negligent supervision claim is remanded for further proceedings consistent with Part III of this opinion, and whether plaintiff is entitled to pseudonymous status in her lawsuit against WBH is remanded to the lower court for further proceedings consistent with Part IV of this opinion. In all other respects, the judgment of the lower court is affirmed. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering

[35] *Id*. at 267-268 (citations and quotations omitted).

[36] *Id*. at 267 (citations omitted).