MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Mia Miller and The Otis R. Bowen Center for Human Services, Inc.,

Appellants-Defendants,

v.

Kimberly Hyslop,

Appellee-Plaintiff.

April 27, 2021

Court of Appeals Case No. 20A-CT-1998

Appeal from the Wabash Circuit Court

The Honorable Robert R. McCallen, III, Judge

Trial Court Cause No. 85C01-1808-CT-618

Altice, Judge.

Case Summary

[1] Mia Miller and The Otis R. Bowen Center for Human Services, Inc. (Bowen Center) (collectively, "Appellants"), appeal the trial court's denial of their motion for summary judgment with respect to Kimberly Hyslop's claims against them for negligently or recklessly disseminating her medical information and drug test results to others. Appellants contend that they were entitled to summary judgment because Hyslop's claims were merely speculative and the only evidence that Hyslop designated in opposition to the motion for summary judgment was inadmissible hearsay.

[2] We reverse and remand.

Facts and Procedural History

[3] Bowen Center is a mental health and addiction facility in Wabash. On August 15, 2016, Bowen Center hired Miller as a client services representative. Miller's duties at Bowen Center included appointment scheduling, processing payments, performing client intakes, answering the telephone, and filing documents. Miller knew that Bowen Center's patients' records were confidential, and she attended an orientation program that instructed her about the facility's privacy and security policies.

[4] In September 2016, Hyslop, the mother of two pre-teen children, Mason and Alisha, sought help at Bowen Center for depression and drug addiction. Hyslop had become addicted to pain medication including percocet and methadone after falling and injuring her knee in 2012. Hyslop began using her

husband's pain medication and sometimes obtained pain medication from others in the community. Hyslop also smoked marijuana on occasion.

[5] Prior to seeking treatment, Hyslop had become familiar with nine-year-old Alisha's friend and classmate, Joree Fields. As a result of that friendship, Hyslop was also acquainted with Miller, Joree's grandmother. Sometime during the early part of the 2016 school year, Alisha began to receive disturbing and annoying texts from Joree. In response, Hyslop texted Joree and instructed her to stop communicating with Alisha, thus ending the girls' friendship.

[6] On September 20, 2016, Hyslop entered Bowen Center for treatment and unbeknownst to her, Miller was working at the reception desk. After exchanging greetings, Miller gave Hyslop several documents to complete and sign, including a statement of client rights and responsibilities, which provided that Bowen Center would protect her "privacy and confidentiality under state and federal guidelines." *Appellant's Appendix Vol. II* at 24-28.

[7] Hyslop did not tell Miller why she was at Bowen Center, nor did she disclose on any of the forms that she had addiction issues. Miller's direct involvement with Hyslop was limited to checking her in at Bowen Center, and Miller had no role in the clinical components of Hyslop's treatment.

[8] During the September 20 appointment, Hyslop underwent a drug test after consulting with Bowen Center employee, Rhonda Hall. The preliminary drug test showed the presence of percocet, methadone, and THC in Hyslop's system. Those results were then sent to Redwood Toxicology Laboratory (Redwood)

for further analysis and confirmation. Redwood returned its findings by mail or facsimile to Bowen Center on or after September 24, 2016, that confirmed the preliminary results.

[9] Bowen Center's log revealed that Miller accessed Hyslop's records on September 20, 2016 at 8:24 a.m., and on two occasions the next day. Bowen Center maintains both electronic and physical records of its patients' drug test results and medical reports. Patients' drug test results become part of a physical record that are locked in filing cabinets and can be accessed only by Bowen Center employees. Miller had access to the physical and Electronic Medical Records (EMR) of Bowen Center's patients.

[10] On December 31, 2016, Hyslop overheard a conversation between Alisha and Emma L. (Emma), who was also a friend of Joree's. During that exchange, Emma told Alisha that she heard a "secret" from Joree while they were eating lunch at school. *Appellant's Appendix Vol. II* at 81. Emma stated that Joree told her that Hyslop had taken a "pee test" that came back positive for "pot" and two other drugs. *Id.* at 82. When Hyslop asked Emma about what she had heard, Emma stated that Joree told her that Hyslop had used methadone and marijuana, and one other drug, but she could not recall the name of it. Emma recounted that same conversation again to Hyslop later that evening. Nearly two weeks later, Hyslop's mother was attending Alisha's birthday party at Sky Zone and overheard Emma tell another classmate about Hyslop's drug use.

[11] Although Hyslop never heard this information directly from Miller or Joree, she believed "100 per cent" that the information conveyed to Joree initially came from Miller because she "[didn't] know of anyone else that would tell [Joree] about [her] private information." *Id.* at 93. Hyslop also did not know if Joree had told anyone else about the drug use and test results.

[12] On August 27, 2018, Hyslop filed a complaint against Appellants for breach of contract, negligence, negligent training and supervision of employees, breach of privacy, and negligent infliction of emotional distress. Appellants denied all liability.

[13] During the discovery phase of the proceedings, Miller executed an affidavit and swore under oath that she never accessed Hyslop's medical records that related to substance abuse treatment and drug testing. Miller averred that she only accessed the non-clinical portions of Hyslop's records to schedule appointments, check her in and out of appointments, and to retrieve medical insurance information.

[14] Bowen Center's privacy and compliance officer, Rebekah Hanes, averred that the data revealed that Miller never accessed information concerning Hyslop's substance abuse information or drug screen results. According to Haynes, Bowen Center's log showed that Miller had accessed Hyslop's EMR only for purposes of checking her in, scheduling appointments, and retrieving financial and health insurance information.

[15] Lori Pernod—Bowen Center's office manager—indicated in an affidavit that she is the sole employee responsible for retrieving client-specific documents, including drug test results that are sent to Bowen Center by mail, fax, and/or email. Pernod stated that she—not Miller—placed Hyslop's drug screen results in the file cabinet.

[16] On March 16, 2020, Appellants filed a motion for summary judgment as to all claims. Appellants asserted that the designated evidence proved as a matter of law that Miller did not access and disseminate Hyslop's protected health information. Appellants claimed that Hyslop failed to create a genuine issue of material fact and that the entire case was based only on speculation and gossip. Moreover, Appellants asserted that the basis of Hyslop's conjecture and speculation was merely "totem pole hearsay from adolescent girls." *Appellant's Appendix Vol. II* at 49.

[17] In opposition to the motion for summary judgment, Hyslop designated an affidavit from Emma, stating:

> 10. During that year, I would eat lunch at school with Joree Fields at times. I also would stay overnight on occasion with Alisha Hyslop and go places with her.
>
> 11. One day at lunch Joree Fields leaned over to me and told me that she had a secret about Alisha Hyslop's mom. Joree then told me that Alisha's mom had taken a pee test and that it came back positive for pot and a couple of different drugs. I don't remember now what those drugs were.

> 12. Sometime after that, I was with Alisha, I believe for her birthday party. I told Alisha about what Joree said and Alisha's mom heard what was said. Alisha's mom then said that she did not use drugs.

Appellants' Appendix Vol. III at 14.

[18] Following a hearing, the trial court summarily denied the motion for summary judgment on September 15, 2020. Thereafter, Appellants filed a motion to certify the trial court's order for interlocutory appeal. The trial court certified its ruling and we accepted jurisdiction of the appeal on November 20, 2020.

Discussion and Decision

I. Standard of Review

[19] Our standard of review on summary judgment is well settled:

> The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Reed v. Reid,* 980 N.E.2d 277, 285 (Ind. 2012). Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Id.* Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. *Id.* Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law.

A House Mechanics, Inc. v. Massey, 124 N.E.3d 1257, 1262 (Ind. Ct. App. 2019) (quoting *Goodwin v. Yeakle's Sports Bar and Grill, Inc.,* 62 N.E.3d 384, 386 (Ind. 2016)).

[20] In ruling on a motion for summary judgment, the trial court will consider only properly designated evidence that would be admissible at trial. *487 Broadway Co., LLC v. Robinson,* 147 N.E.3d 347, 353 (Ind. Ct. App. 2020). A nonmoving party cannot create a genuine issue of material fact by relying on hearsay and/or unsworn documents. *Kronmiller v. Wangberg,* 665 N.E.2d 624, 627 (Ind. Ct. App. 1996), *trans. denied*. Additionally, conjecture or speculation cannot defeat a prima facie case for summary judgment. *Beckom v. Quigley,* 824 N.E.2d 420, 424 (Ind. Ct. App. 2005); *see also Kincade v. MAC Corp.,* 773 N.E.2d 909, 911 (Ind. Ct. App. 2002) (holding that an inference is not reasonable when it rests on no more than speculation or conjecture).

II. The Appellants' Contentions

[21] Appellants argue that the trial court erred in denying their motion for summary judgment because Hyslop failed to present admissible and specific evidence in opposition to their motion. More particularly, Appellants argue that the designated evidence established that Miller did not access Hyslop's drug screen results and that Hyslop's designated evidence failed to include admissible evidence that would create a genuine issue of material fact. Appellants maintain that Emma's affidavit was inadmissible hearsay and that Hyslop's

assumption that it must have been Miller who disclosed the information was based on mere speculation and conjecture.

[22] We initially observe that it is undisputed that Hyslop never disclosed any protected health information to Miller; nor did she tell Miller why she was at Bowen Center. Additionally, the completed paperwork that Hyslop returned to Miller while waiting for her appointment did not contain or refer to any confidential clinical information.

[23] Miller averred that she "never made an unauthorized access of [Hyslop's] medical and therapy records maintained by Bowen Center," and "never accessed the sensitive sections of [Hyslop's] medical and therapy records, including those related to [Hyslop's] substance abuse treatment, drug test results, or clinical course at Bowen Center." *Appellants' Appendix Vol. II* at 60. Miller also stated that she accessed only the non-clinical portions of the record for purposes of scheduling and checking Hyslop in and out of appointments.

[24] As for Bowen Center's physical files, Miller averred that she "was not responsible for filing [Hyslop's] physical record," and "never accessed [Hyslop's] physical record." *Id.* Miller also stated that she never spoke with anyone outside Bowen Center regarding Hyslop's drug test results and private health information. In fact, Miller averred that she did not know Hyslop's drug test results prior to the filing of the complaint.

[25] Haynes substantiated Miller's testimony, in that she averred that Bowen Center maintains a log that shows when an employee accesses a patient's EMR. The log revealed that Miller checked in Hyslop for scheduled appointments on September 20, 2016, and October 11, 2016. Miller also accessed Hyslop's EMR on September 21, 2016 for scheduling purposes.

[26] Similarly, Pernod—Bowen Center's office manager—testified that she was the sole employee responsible for retrieving all incoming client-specific documents, including drug test results. Pernod also averred that she was directly responsible for placing a copy of Hyslop's drug screen results in the physical file.

[27] Notwithstanding Appellants' designated evidence, Hyslop was confident that the information about her drug test "came from [Miller]." *Appellants' Appendix Vol. II* at 88, 89. Hyslop acknowledged, however, that she "didn't have anything factual . . . and guess[ed] in [her] heart" that it was Miller. *Id.*

[28] While Hyslop attempts to counter Appellants' designated evidence and attempts to create a genuine issue of material fact by way of Emma's affidavit, it is readily apparent that Emma's testimony is comprised largely of inadmissible hearsay. Hearsay is "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evid. Rule 801(c). Hearsay is inadmissible unless a delineated exception applies. Ind. Evid. Rule 802, 803.

[29] This court has explained that "when an out-of-court statement is challenged as hearsay, we must first determine whether the statement asserts a fact susceptible of being true or false." *Phillips v. State*, 25 N.E.3d 1284, 1288 (Ind. Ct. App. 2015). If there is no such assertion, the statement is not hearsay. *Id.* However, if the out-of-court statement "does contain an assertion of fact, we consider the evidentiary purpose of the proffered statement to determine if it is to prove the fact asserted." *Id.* If the statement is offered to prove that fact, the statement is inadmissible absent an exception to the hearsay rule. *See* Evid. R. 803, 804.

[30] Emma averred in her affidavit that

> One day at lunch Joree Fields leaned over to me and told me that she had a secret about Alisha Hyslop's mom. Joree then told me that Alisha's mom had taken a pee test and that it came back positive for pot and a couple of different drugs. I don't remember now what those drugs were.

Appellants' Appendix Vol III at 14.

[31] Emma's testimony contains the following factual assertions that are capable of being proven as true or false: (1) Joree told Emma a secret; (2) that Hyslop had taken a urine test; and (3) that Hyslop's urine screen was positive for marijuana (and methadone, per Hyslop's testimony as to what Emma told her).

[32] Although Hyslop maintains that Emma's statements were not hearsay because the were offered to show only "a breach of privacy rights" rather than "for the

truth of the matter asserted," *appellee's brief* at 15, this court's opinion in *Stewart v. State*, 945 N.E.2d 1277, 1287 (Ind. Ct. App. 2011) instructs otherwise.

[33] In *Stewart,* the State alleged that the defendant had been involved with co-defendant Turner in several murders. At trial, Stewart denied participating in the murders and alleged that Turner's accomplice was a man with the nickname of "Lucky." *Stewart,* 945 N.E.2d at 1287. In support of that claim, Stewart sought to admit testimony at trial from a neighborhood teenager who allegedly overheard Turner state to another man, "Lucky, man, go back to the truck," and ask another at the scene, "what's Lucky's phone number?" *Id.*

[34] The trial court excluded the proffered testimony as inadmissible hearsay and the jury found Stewart guilty of several offenses. Stewart appealed, claiming that the statements were not offered to prove the truth of the matter asserted because they merely constituted "a command and a question." *Id.* This court rejected that argument and affirmed the trial court's evidentiary ruling, observing that

> the clear purpose and the entire reason why [the defendant] wanted to have the statements admitted at trial, was not that Turner had commanded someone to get into his truck or that [the neighborhood teenager] had asked for a phone number. Instead, it was the fact that the individual who he commanded to get back in the truck was named 'Lucky' and that the phone number requested was for someone named 'Lucky.' Therefore, the relevant purpose of these statements was the fact that individual's name was 'Lucky.' Implicit in both the command and the question at issue was the factual assertion that the person with Turner or being contacted by Turner was 'Lucky.' *Stewart was attempting to admit these statements to prove the truth of the matter*

> *asserted—that Turner's accomplice was named 'Lucky' and could not have been Stewart because his nickname was not 'Lucky.'*

Id. at 1288 (emphasis added).

[35] Like the circumstances in *Stewart*, Hyslop's real purpose in offering Emma's testimony was to establish the truth of various factual assertions. More particularly, Hyslop cannot establish that a Bowen Center employee leaked private information if the truth of the matter set forth in Emma's testimony is not proven. Hyslop must also raise a question of fact regarding whether Joree learned the secret from Miller and whether Miller improperly obtained the information from Bowen Center's records. Thus, it is the truthfulness of the specific information within Emma's testimony that Hyslop must prove to create a reasonable inference that Miller improperly disseminated Hyslop's medical information while employed at Bowen Center. In short, Emma's statements were hearsay, and they could not create a genuine issue of fact to preclude summary judgment for Appellants.

[36] In light of these circumstances, Hyslop has not presented admissible evidence to counter Appellants' designated evidence. And even if we accepted as true that Joree told Emma, who told Alisha, that Hyslop tested positive for drugs in a urine screen, the only way to connect that information with Miller is to afford credibility to Hyslop's conjecture that Miller had disseminated the confidential medical information. The source of the information that Joree allegedly spread cannot be ascertained without resorting to speculation. And to conclude that Hyslop has satisfied her burden under T.R. 56 by allowing her to advance

speculative theories as to what "might have happened," would defeat the purpose of summary judgment inasmuch as a plaintiff could proceed to trial on any theory regardless of proof. *See Wright v. Quack,* 526 N.E.2d 216, 218 (Ind. Ct. App. 1998) (in reversing a judgment for the plaintiff in a slip and fall case, plaintiff's contentions that "there *could* have been a water fight between students, that water or other foreign substance *could* have been mopped up with her blood by [the defendant's] employee, that a wet spot *could* have been absorbed in her clothing when she fell or that [a defendant's] employee's own shoes *could* have scuffed up the wetness, are attempts to establish [the defendant's] negligence by mere guess, conjecture, and speculation") (emphases in original), *trans. denied.*

[37] When considering the properly designated evidence before us, we conclude that Hyslop's claims against Appellants fail as a matter of law, and the trial court erred in denying Appellants' motion for summary judgment. We therefore remand this cause to the trial court with instructions that it enter summary judgment in favor of Appellants.

[38] Reversed and remanded.

Kirsch, J. and Weissmann, J., concur.