

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY J. KELLY,

Plaintiff-Appellant,

v

DEBRA ANN KELLY-WHEELER,

Defendant-Appellee.

UNPUBLISHED

June 24, 2004

No. 246604

Shiawassee Circuit Court

LC No. 02-007900-CZ

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition in favor of defendant on plaintiff's claims of defamation and tortious interference with contract. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff is the current wife, and defendant is the ex-wife, of Steven Kelly. The incident which gives rise to the allegations in this case occurred while defendant and Kelly were engaged in a custody dispute. Plaintiff alleges that she was enrolled in a medical assistant program at Baker College and was placed in an externship at North Street Medical Center. Successful completion of an internship is a prerequisite to graduation from the program. As it happens, defendant is a patient at North Street Medical Center. Although there is some dispute over the exact details of the incident, it is undisputed that, during plaintiff's externship at North Street Medical Center, defendant contacted the office manager there and expressed concern that plaintiff had improperly disclosed confidential information from defendant's medical records. According to plaintiff, this caused her to be removed from the externship and, while another placement was found for her, it caused a delay in her graduation from the program.

The trial court granted summary disposition pursuant to MCR 2.116(C)(10), concluding that there was no genuine issue of material fact. Specifically, the trial court concluded that plaintiff was unable to establish that defendant's statements to North Street Medical Center were untruthful and that any statement by defendant to the medical office regarding her medical records were privileged. The trial court also concluded that plaintiff's inability to establish the falsity of defendant's statements also warranted summary disposition on the tortious interference claim.

On appeal, plaintiff first argues that the trial court erred in concluding that there was no genuine issue of material fact regarding the falsity of defendant's statement. We disagree. In her

deposition, defendant admitted that she had contacted Karen Stewart at the medical office and expressed concern regarding the confidentiality of her medical records. Specifically, defendant told Stewart that defendant's daughter informed her that, while at plaintiff's and her father's home, she had seen defendant's medical records containing a listing of the medicines that had been prescribed for defendant. Defendant also testified that she contacted Baker College with her concerns that plaintiff may have violated her medical privacy.

Karen Stewart, the office manager for North Street Medical Center, testified in her deposition that, during plaintiff's externship at the medical office, defendant contacted Stewart and expressed concern that plaintiff may have seen defendant's medical records because her daughter had given her some information that was in defendant's medical chart. Defendant further told Stewart that there was litigation going on between herself and her ex-husband. Stewart contacted Baker College and indicated that they could not have a situation where there even was a concern regarding confidentiality. According to Stewart, the person she spoke with at Baker College indicated that they would not have placed plaintiff at the medical office had they been aware of the situation. Stewart specifically testified that defendant never stated as a fact that plaintiff had seen her medical records, but only that she was concerned that plaintiff had seen the records based upon the information provided by defendant's daughter.

In order for a statement to be actionable as defamation, it must be provable as false. *Mino v Clio School Dist*, 255 Mich App 60, 77; 661 NW2d 586 (2003). Here, plaintiff points to no evidence that defendant made a false statement. The only allegedly false statement made by defendant set out in plaintiff's complaint is the allegation that defendant falsely complained to Karen Stewart that plaintiff had stolen defendant's medical records. Plaintiff points to no evidence that defendant did, in fact, make such a false statement. Defendant admits to talking to Karen Stewart regarding this issue, essentially making two statements: (1) that her daughter told her that she had seen a paper at her father's and plaintiff's house with defendant's name on it and listing the medications that defendant was on and (2) that defendant was concerned that plaintiff may have improperly viewed defendant's medical records.

With respect to the first statement, that defendant's daughter (plaintiff's stepdaughter) told defendant she had seen the paper, plaintiff points to no evidence to show that the daughter did not, in fact, make such a statement to defendant. At best, plaintiff can produce evidence (her own testimony) that the daughter could not have seen such a document because no such document was present in the home. But that would not establish that the daughter did not make the statement. It would only establish that, if the daughter did make the statement, she did so without a factual basis for doing so. And if the daughter made the statement, then defendant telling Stewart that the daughter made the statement is not a false statement by defendant and, therefore, not actionable.

Turning to the second statement, defendant expressed her concern that plaintiff had seen her medical records during her externship at the medical office. Both defendant and Stewart in their depositions described this statement as defendant expressing concern that plaintiff may have seen defendant's medical records, not a statement of fact that she had. In other words, if defendant's daughter did tell her that she had seen defendant's medical information on a sheet of paper at plaintiff's house, defendant likely was concerned that her medical privacy had been breached by plaintiff, who was at that time working in the medical office. And if so, the second statement to Stewart is not demonstrably false.

In short, at most plaintiff can demonstrate a motive for defendant's fabricating of a story to seek revenge against plaintiff. Plaintiff, however, cannot point to any evidence that defendant did, in fact, fabricate the story. Thus, unless plaintiff can demonstrate that defendant's daughter never made the statement to defendant regarding seeing the sheet of paper with defendant's medical information on it, plaintiff cannot demonstrate the falsity of defendant's statement to Stewart. And plaintiff can make no such showing with the available evidence.

A decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed *de novo*. *Mino, supra* at 67. All of the available evidence, including affidavits, depositions, and pleadings are reviewed in the light most favorable to the nonmoving party. *Id.* at 67-68. Summary disposition is proper if the documentary evidence fails to establish a genuine issue of material fact. *Id.* at 68. In the case at bar, plaintiff is unable to show the existence of evidence to support the conclusion that defendant's statement to Stewart was false (or her statements to anyone else, for that matter). Therefore, she did not establish the existence of a genuine issue of material fact and summary disposition in favor of defendant was appropriate on the defamation claim.

Next, plaintiff challenges the grant of summary disposition on the tortious interference with contract claim. To establish tortious interference with a contract, three elements must be shown: (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant. *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). We agree with the trial court that plaintiff's inability to establish the falsity of defendant's statement to Stewart also prevents her from establishing a tortious interference with a contract. That is, defendant engaged in an unjustified instigation of the breach of contract only if she knowingly made a false statement to Stewart regarding her concern that her medical privacy was violated. That is, if defendant's daughter did make the statement that she had seen defendant's medical records at plaintiff's house, then defendant was justified in contacting Stewart and expressing her concern that her privacy had been violated. Defendant's actions in contacting Stewart and expressing her concern would be unjustified only if defendant had no basis for believing that her daughter had, in fact, seen any medical records at plaintiff's house. Because plaintiff can make no such factual showing, she has not established a genuine issue of material fact regarding whether defendant unjustifiably instigated the breach.

Plaintiff next argues that the trial court erred in concluding that plaintiff had failed to provide substantiation for her claim because the trial court was "instrumental in precluding opportunities for the plaintiff to gain substantiation." Plaintiff fails, however, to demonstrate a factual basis for this statement. She claims that she attempted to obtain multiple unspecified depositions from individuals at Baker College, a continued deposition of defendant, and a transcript of Stewart's testimony at a referee hearing, as well as defendant's attorney's comments at that hearing. Plaintiff does not establish that she actually served subpoenas on those individuals to obtain those depositions, much less that the trial court refused to enforce the subpoenas and compel the submission to those depositions. With respect to the transcript of the referee hearing, plaintiff does not show that the transcript would have been admissible evidence or that she could not have obtained the same evidence by deposition.

Finally, plaintiff argues that the trial court erred in categorizing defendant's statements as an opinion. We need not address this issue because, even if defendant's statements are

categorized as statements of fact and not opinion, as analyzed above we conclude that plaintiff cannot establish the falsity of those statements.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer

/s/ Hilda R. Gage

/s/ Donald S. Owens