STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY HAWTHORNE-BURDINE, also known as DOROTHY HAWTHORNE and DOROTHY BURDINE, Plaintiff-Appellant,	UNPUBLISHED March 15, 2018
v	No. 336756 Oakland Circuit Court
HERMANN BANKS, ELLIOTT WOLF, and WALTER JOHN BAKER, Defendants-Appellees.	LC No. 2016-155217-CZ

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

PER CURIAM.

In this case involving a claim of invasion of privacy, plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim). We affirm.

Plaintiff's employer, Oakland University (Oakland), contracted with Medicolegal Services, LLC (Medicolegal), a third-party service provider that arranges independent medical examinations (IMEs) of employees for employers, to conduct IMEs of plaintiff. Defendants Elliott Wolf, M.D., Hermann Banks, M.D., and Walter John Baker, M.D., subsequently performed IMEs of plaintiff. Plaintiff claims that these defendants invaded her privacy by not obtaining releases from her before receiving medical information from her employer and before disclosing the unredacted, full reports of the IMEs to Medicolegal and Oakland. In dismissing the lawsuit, the trial court appears to have concluded that plaintiff failed to plead that the information had been widely disseminated.

This Court reviews a grant of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden*, 461 Mich at 119. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. "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." *Id*. (quotation marks

and citation omitted). When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

Michigan courts recognize four kinds of invasion of privacy: (1) intrusion upon a plaintiff's seclusion or solitude or into her private affairs, (2) public disclosure of embarrassing private facts, (3) publicity that places the plaintiff in a false light in the public eye, and (4) appropriation of the plaintiff's name or likeness for the defendant's advantage. *Doe v Mills*, 212 Mich App 73, 79-80; 536 NW2d 824 (1995). Plaintiff does not allege that defendants intruded upon her solitude, portrayed her in a false light in the public eye, or appropriated her name or likeness for their advantage. Her allegation is that defendants wrongfully received medical information from Oakland without her consent and disclosed protected health information to Medicolegal and Oakland. This allegation most resembles a claim for invasion of privacy based on the public disclosure of embarrassing private facts.

A claim for public disclosure of private facts requires the plaintiff to establish the disclosure of information that would be highly offensive to a reasonable person and that is of no legitimate concern to the public. *Duran v Detroit News*, 200 Mich App 622, 631; 504 NW2d 715 (1993). For the claim to be viable, the disclosure must have involved a communication "to so many persons that the matter is substantially certain to become public knowledge." *Lansing Ass'n of Sch Administrators v Lansing Sch Dist Bd of Ed*, 216 Mich App 79, 89; 549 NW2d 15 (1996) (*LASA*), 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), mod *Michigan Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657; 753 NW2d 28 (2008).[1] "[I]t is not an invasion of the right to privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." *LASA*, 216 Mich App at 89 (quotation marks and citations omitted).

Plaintiff alleges that defendants are liable for invasion of privacy because they received medical information from Oakland and gave medical reports with certain private information to Medicolegal and to those at Oakland who had contracted with Medicolegal, all without her having signed a release. Again, however, a successful claim requires disclosure to "so many persons that the matter is almost certain to become public knowledge." *Id*. It cannot be said that the doctors disseminated private facts almost certain to become public by obtaining initial information from Oakland or by giving the results of the IMEs to Medicolegal and its contracting partner. Plaintiff alleged in the complaint that defendants, by obtaining the initial information

[1] The Supreme Court in *Bradley*, 455 Mich at 301-302, stated that the Court of Appeals in *LASA* had improperly analyzed the case under common-law principles of invasion of privacy instead of under principles governing the Freedom of Information Act, MCL 15.231 *et seq*., but the *Bradley* Court did not disavow the common-law principles discussed by the Court of Appeals. In *LASA*, this Court relied in part on *Beaumont v Brown*, 401 Mich 80, 104-105; 257 NW2d 522 (1977), see *LASA*, 216 Mich App at 89, but the *Bradley* Court overruled *Beaumont* only "to the extent that it conflicts with the FOIA." *Bradley*, 455 Mich at 302. The FOIA is not at issue in the present case.

from Oakland and then submitting the IME reports, "allowed their client and their IME vendor to give global access to [plaintiff's] full IME reports by uploading them on the Internet without her authorization." But the complaint does not allege how defendants were in any way involved in the decision to disseminate information beyond handing over the IME reports as they had been hired to do. The complaint, in fact, states that Medicolegal's attorney, Daniel J. Bernard, disseminated the IME reports.

In an attempt to get around this obstacle, plaintiff argues that because defendants are doctors, they are not subject to the "wide-dissemination" standard mentioned above for "regular" people, but are bound by a strict doctor-patient confidentiality that holds them civilly liable for the distribution of any protected health information without a patient's authorization. Plaintiff cites MCL 600.2157 in support of her argument; that statute provides, in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

Plaintiff does not adequately support her conclusory argument that this statute imposes invasion-of-privacy liability[2] upon defendants. At any rate, the argument is misguided because the statute in question is a regulatory statute under the "Evidence" chapter of the Revised Judicature Act of 1961 and does not impose civil liability on doctors for invasion of privacy based on an alleged violation.[3] Nor does an EEOC[4] manual cited by plaintiff establish a cause of action for common-law invasion of privacy.[5]

Because plaintiff failed to allege a disclosure of personal facts to so many people that the matter was substantially certain to become public knowledge, her claim fails as a matter of law and dismissal was proper under MCR 2.116(C)(8). We need not address the additional arguments raised on appeal.

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[2] The complaint alleged common-law invasion of privacy as generally discussed in the Restatement of Torts, § 652A.

[3] We note that a person's relationship with an IME physician who examines her differs in some respects from the traditional relationship between a doctor and a patient. The Supreme Court has noted that certain duties that arise in a regular physician-patient relationship, such as the "general duty of diagnosis and treatment," are not imposed on an IME physician. *Dyer v Trachtman*, 470 Mich 45, 51-52; 679 NW2d 311 (2004).

[4] Equal Opportunity Employment Commission

[5] We decline to rely on a nonbinding California case that plaintiff discusses extensively in her appellate brief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Patrick M. Meter