

STATE OF MICHIGAN
COURT OF APPEALS

AMY LYNCH,

Plaintiff-Appellant,

v

COUNTY OF ARENAC, GARY RAPP,
individually and in his official capacity, ROBERT
J. LESNESKI, individually and in his official
capacity, a/k/a BRONCO, and JOHN/JANE DOE,

Defendants,

and

JOHN CURCIO,

Defendant-Appellee.

UNPUBLISHED

July 12, 2011

No. 296775

Arenac Circuit Court

LC No. 09-010966-NZ

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

Because I conclude that plaintiff has either a viable false light claim, or a private right of action under the statute, I respectfully dissent.

I agree with the majority that the general rule, as set forth in *Pompey v Gen Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971), “is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by statute for its violation and nonperformance is exclusive.” The majority also properly recognizes the caveat to the rule: “In the absence of a pre-existent common-law remedy, the statutory remedy is not deemed exclusive if such remedy is plainly inadequate, or unless a contrary intent clearly appears.” *Id.* at 552 n 14 (citations omitted).

The majority concludes that plaintiff has no statutory remedy under MCL 338.1728(3), in part, based on their conclusion that she has common-law remedies available and the general rule that where common law remedies already exist, a private cause of action is not created by a statute barring certain conduct. However, the majority then goes on to explain why all such common law remedies, i.e. defamation, invasion of privacy and intentional infliction of emotional injury, do not lie where the polygraph results are accurately described. The majority

cannot have it both ways. Either persons in plaintiff's position have a viable common-law cause of action, or we must imply a private right of action under the statute.

If the polygraph results showed that plaintiff was truthful and defendant had reported that the polygraph showed that she had lied, this would be a different case. Obviously, in such a circumstance, plaintiff could bring a defamation claim as defendant's statement would be untrue and damaging. That is not the situation in this case. Here, the polygraph results were accurately reported, but plaintiff asserts that the polygraph results were inaccurate and the unlawful dissemination of these inaccurate results damaged her reputation. Given this presentation, I agree with the majority that no defamation suit can arise since defendant did not make a false statement.

Similarly, because I agree with the majority's conclusion that the dissemination of true information cannot be said to rise to the level of being "utterly intolerable in a civilized community," the illegal but accurate dissemination of polygraph results also can never give rise to a claim for intentional infliction of emotional distress.

I disagree with the majority's conclusion as to plaintiff's false light invasion of privacy claim. The majority concludes, as in the defamation claim, that because the information disseminated was accurate, no such claim can arise. It relies on *Duran v Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993) for this conclusion. However, this is a misreading of *Duran*. The elements of *Duran* only require that a person disseminate information "that was unreasonable and highly objectionable *by attributing to the plaintiff characteristics, conduct, or beliefs that were false . . .*" *Id.* Thus, under *Duran*, the information *itself* need not be false. Rather, it is the characteristic, conduct, or belief that the information attributes to plaintiff by the information that must be false. Here, the false conduct attributed to plaintiff by the information was that she was a liar, a characteristic that she maintains is false. Therefore, *Duran* does not prohibit plaintiff's claim.¹ I would, accordingly, hold that plaintiff has stated a viable false light claim.

Assuming, however, that my view of the false light claim is incorrect, then plaintiff, and other plaintiffs in her position, have no potential common law claim. This would mean that, even though dissemination of polygraph results is unlawful, a person damaged as a result of that unlawful conduct would be left without any remedy. In such a situation, we must find that there is a private right of action created by the statute. *Pompey*, 385 Mich at 522 n 14.

¹ I am aware that *Duran* was cited for such a view in *Porter v City of Royal Oak*, 214 Mich App 478, 487; 542 NW2d 905 (1995). In *Porter*, plaintiff police officer sued in defamation and false light where the department released to the press an internal memorandum regarding alleged misconduct. *Id.* at 481-482. However, in *Porter*, this Court concluded that the plaintiff was collaterally estopped from disputing the assertions about him made in the report. *Id.* at 485. Here, plaintiff is free to claim that the polygraph examiner's conclusion about her was false or flawed.

The majority concludes that plaintiff does not fall within the *Pompey* rule because the explicit statutory remedies of injunction and criminal prosecution are adequate. In actuality, the statute itself implies that criminal prosecution is insufficient based on the very language the majority cites. The majority contends that the statute limits remedies to “all other remedies and penalties provided by this act,” but ignores the statute’s explicit provision that “[p]roceedings under this section shall be in addition to, and not in lieu of, all other remedies and penalties provided by this act.” (Emphasis added). Thus, the language of statute itself suggests a recognition that criminal prosecution is insufficient to remedy the illegal release of polygraph results. Moreover, injunction is necessarily an inadequate remedy for the illegal dissemination of polygraph results because, by its very nature, once a person has discovered that the statute has been violated, the information has already been released. An injunction cannot put the cat back into the bag.

Finally, the majority concludes that plaintiff is not entitled to a private cause of action because she cannot show, under *Gardner v Wood*, 429 Mich 290, 302; 414 NW2d 706 (1987), that she is in a class of persons the statutory scheme was intended to protect beyond providing the remedies in the statute. In my view, plaintiff falls squarely within the confines of *Gardner*. MCL 338.1728(3) provides:

Any recipient of information, report, or results from a polygraph examiner, except for the person tested, shall not provide, disclose or convey such information, report or results to a third party except as may be required by law and the rules promulgated by the board in accordance with section 7 of this act.

This statutory language could not make clearer that it is the person tested who is in control of the dissemination of the polygraph results and, therefore, the person whose interest (the privacy of polygraph results) is being protected. In addition, the complete prohibition on its disclosure (shall not), except by the person whose results they are, by requirement of law, or under rules promulgated by the board, is clearly designed to prevent examined persons from being improperly painted as liars or criminals on the basis of unreliable polygraph results being released. Thus, the statute is clearly designed to protect plaintiff from the dissemination of unreliable polygraph results which can create precisely the type of harm which occurred in this case—the polygraph results indicated that plaintiff was untruthful, whereas she was acquitted at trial. See *Gardner*, 429 Mich at 302.

Thus, I conclude that, if the majority is correct that plaintiff may not bring a false light claim, a private cause of action must be implied under the statute given the lack of an adequate remedy and the fact that plaintiff is intended to be protected by the statute from precisely the type of harm that is alleged to have occurred in this case. Accordingly, I would reverse the trial court’s grant of summary disposition in favor of defendant John Curcio and remand for additional proceedings.

/s/ Douglas B. Shapiro