[Cite as *DelleCurti v. Fetty*, 2017-Ohio-7965.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CHRISTINA DELLECURTI,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2017-T-0001**
- vs -	:	
ROBERT FETTY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2015 CV 01704.

Judgment: Affirmed.

Irene K. Makridis, 155 South Park Avenue, Suite 160, Warren, OH 44481 (For Plaintiff-Appellant).

Shawn W. Maestle, Weston Hurd LLP, The Tower at Erieview, 1301 East Ninth St., Suite 1900, Cleveland, OH 44114-1862 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Christina DelleCurti, appeals from the December 2, 2016 judgment of the Trumbull County Court of Common Pleas. The trial court granted appellee, Robert Fetty's, motion for summary judgment. The trial court's judgment is affirmed.

{¶2} On November 14, 2013, appellant filed a complaint against The Walgreen Company ("Walgreen"). According to the complaint, a Walgreen pharmacy failed to fill Ms. DelleCurti's valid prescription after verifying its legitimacy with her doctor.

DelleCurti v. Walgreen Co., 11th Dist. Trumbull No. 2015-T-0097, 2016-Ohio-4741, ¶2 ("*DelleCurti I*"). Appellant subsequently took the prescription to a CVS pharmacy, where it was filled. *Id.* The complaint further alleged the CVS pharmacist informed appellant that the Walgreen pharmacist, Robert Fetty (appellee herein), had contacted CVS, disclosed appellant's personal information, and stated that CVS should not fill appellant's prescription. *Id.* "The Complaint claimed that there was a breach of privacy, DelleCurti's HIPAA rights were violated, and that she was 'unlawfully defamed by Walgreen with regard to her attempts to obtain so called 'mental health medication' as previously prescribed and filled on numerous occasions pursuant to her primary physicians." *Id.* at ¶3. Appellee testified as a defense witness in appellant's case against Walgreen. *Id.* at ¶11. However, the trial court denied appellant's request to amend her complaint to add appellee as a defendant. *Id.* at ¶15-16.

{¶3} The trial court granted summary judgment in favor of Walgreen on appellant's invasion of privacy claim. *Id.* at ¶17. On appeal, this court affirmed the trial court's judgment. *Id.* at ¶38.

{¶4} On September 17, 2015, appellant filed a complaint against appellee. That complaint alleged the same underlying facts as appellant's November 14, 2013 complaint against Walgreen. The complaint claimed that appellee "owed a duty of care, confidentiality and privacy to [appellant], as established by [HIPAA], and related federal and state law"; that appellee negligently breached the duty of care he owed appellant pursuant to the Health Insurance Portability and Accountability Act ("HIPAA") when he contacted the CVS pharmacy; and that appellant suffered embarrassment, loss of self-esteem, humiliation, and other psychological injuries as a result of appellee's conduct.

The complaint also claimed appellee's conduct was wanton, reckless, and disregarded appellant's rights and privileges, causing her to suffer damages.

{¶5} Appellee filed an answer on October 15, 2015. As part of his affirmative defenses, appellee asserted appellant's claims were barred by res judicata and collateral estoppel because they had been previously litigated in *DelleCurti I*.

{¶6} On June 29, 2016, appellee filed a motion for summary judgment. Appellee maintained appellant could not prevail on her claim for invasion of privacy. Appellee argued he was entitled to judgment as a matter of law because (1) the undisputed evidence established appellee did not publicize facts concerning appellant's private life; (2) appellee's communication to CVS was entitled to a qualified privilege; and (3) appellant failed to produce expert testimony establishing the standard of care and failed to establish a causal link between any breach of the standard of care and her damages. In support of the motion, appellee attached documents from appellant's previous case against Walgreen, to wit: deposition transcripts, an expert report, and the trial court's entry granting summary judgment on appellant's invasion of privacy claim in favor of Walgreen.

{¶7} On July 8, 2016, appellee filed a notice of supplemental authority in support of his motion for summary judgment and attached this court's opinion in *DelleCurti I.*

{¶8} Appellant filed a motion for an extension of time to respond to appellee's motion for summary judgment, which the trial court denied. Appellant did not file a brief or any evidentiary material in opposition. In addition, appellant did not object to any of the submissions appellee used in support of his motion for summary judgment.

{¶9} On December 2, 2016, the trial court granted appellee's motion for summary judgment. The trial court stated it had "reviewed the motion, memoranda, pleadings, exhibits and other relevant applicable law." The trial court found appellant had filed a similar action, based on "the exact same facts," against appellee's employer, and the issues alleged in appellant's complaint pertaining to her claim for invasion of privacy had previously been litigated in *DelleCurti I*. In its judgment, the trial court referenced this court's decision in *DelleCurti I* but did not cite to the deposition transcripts, the expert report, or the trial court's previous judgment that were attached as exhibits to appellee's motion for summary judgment. The trial court found there were no genuine issues of material fact remaining for dispute, stating: "Clearly, [*DelleCurti I*] specifically addressed the actions of Fetty both in his capacity as an employee of Walgreen and as an individual pharmacist." The judgment entry contained Civ.R. 54(B) language.

{¶10} Appellant filed a timely notice of appeal. Appellant's sole assignment of error states:

{¶11} "The trial court committed error in granting appellee's motion for summary judgment since there are no facts whatsoever in the record of this case to support appellee's motion."

{¶12} Pursuant to Civ.R. 56(C), summary judgment is proper when

> (1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court [e.g., pleadings, depositions, answers to interrogatories, etc.] which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293 (1996), citing Civ.R. 56(C) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). If the moving party satisfies this burden, the nonmoving party has the burden to provide evidence demonstrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Id.* at 293.

{¶13} On appeal, we review a trial court's entry of summary judgment de novo, i.e., "independently and without deference to the trial court's determination." *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993) (citation omitted); *see also Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶14} Appellant's sole argument on appeal is that the exhibits referenced by appellee in his motion for summary judgment do not comply with Civ.R. 56(C) & (E), because they are not part of the record in the present case. Appellant specifically takes issue with the deposition transcripts and trial court judgment entry. In response, appellee contends that because appellant failed to object or otherwise move to strike the evidentiary materials, the trial court was permitted to consider documents other than those listed in Civ.R. 56.

{¶15} Civ.R. 56(C) details the evidentiary materials a party may rely on in a motion for summary judgment. The rule provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if

> any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

Pursuant to Civ.R. 56(E), the correct procedure for introducing evidentiary materials that are not specifically authorized by Civ.R. 56(C) is to incorporate them by reference in an affidavit and to include sworn or certified copies of the evidentiary materials.

{¶16} The opposing party may object to or move to strike evidentiary materials that are not submitted in accordance with Civ.R. 56. *See Discover Bank v. Damico*, 11th Dist. Lake No. 2011-L-108, 2012-Ohio-3022, ¶15. "It is well founded that 'a party's failure to object to the propriety of evidence submitted in support of a motion for summary judgment constitutes waiver of any alleged error in the consideration of such evidence.'" *Id.*, quoting *Abbott v. Sears, Roebuck & Co.*, 11th Dist. Trumbull No. 2003-T-0085, 2004-Ohio-5106, ¶15; *see also Nationstar Mtge LLC v. Payne*, 10th Dist. Franklin No. 16AP-185, 2017-Ohio-513, ¶21 (citations omitted) ("failure to timely move to strike or otherwise object to non-Civ.R. 56(C) evidence waives any error arising from the trial court's consideration of that evidence"). Without an objection, it is within the trial court's discretion to consider such evidence. *Discover Bank, supra,* at ¶15 (citation omitted).

{¶17} The *DelleCurti I* deposition transcripts submitted as exhibits with appellee's motion for summary judgment were not certified or incorporated by affidavit. As a result, they were not proper under Civ.R. 56(E). However, the depositions were sworn testimony, addressing the exact same facts and issues from the prior case, and both parties were represented by the same counsel as the case sub judice. If appellant had filed a motion to strike or otherwise objected to those evidentiary materials,

appellee could have requested leave of court to consider them or could have properly incorporated them with a certification or affidavit. Appellant further failed to file a brief or evidence of any kind in opposition to appellee's motion for summary judgment. Based on the fact the deposition testimony was sworn, the same issue was addressed in the previous case, and counsel was the same in both cases, it was within the trial court's discretion to consider the materials submitted by appellee.

{¶18} Moreover, the trial court's judgment entry does not indicate it considered the deposition transcripts, expert report, or trial court judgment entry in granting summary judgment. Although the entry states the trial court reviewed the "exhibits and relevant applicable law," the trial court apparently granted appellee's motion for summary judgment on res judicata and collateral estoppel grounds. The trial court did not specifically reference the deposition transcripts, expert report, or trial court judgment entry in explaining its reasoning for granting summary judgment. Therefore, we presume the regularity of the proceedings and assume the trial court did not consider any improper evidence in granting appellee's motion for summary judgment. *See Chambers v. St. Mary's School*, 11th Dist. Geauga No. 96-G-2013, 1997 WL 401555, *2 (citation omitted). However, as we have noted, it would not have been error for the trial court to consider this evidence absent objection.

{¶19} Appellant's sole assignment of error is without merit.

{¶20} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.