[Cite as *Templeton v. Fred W. Albrecht Grocery Co.*, 2017-Ohio-282.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

GUY TEMPLETON, SR. Appellant v. THE FRED W. ALBRECHT GROCERY CO. Appellee	C.A. No. 27744 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2014-02-0666

DECISION AND JOURNAL ENTRY

Dated: January 25, 2017

WHITMORE, Judge.

{¶1} Appellant, Guy Templeton, Sr., appeals judgments in favor of the appellee, Fred W. Albrecht Grocery Co. This Court affirms.

I

{¶2} Mr. Templeton pursued a workers compensation claim in connection with his employment by Fred W. Albrecht Grocery Co. ("Albrecht"). During the course of the workers compensation proceedings, Albrecht obtained a psychological report prepared by Dr. Robert Kaplan. The report was provided to the individual responsible for managing workers compensation claims and she, in turn, decided to forward the report to Albrecht's attorney. Unfortunately, the employee accidentally misdirected her email with the attached psychological report to other employees instead of the attorney.

{¶3} Although Albrecht took action to mitigate the error, Templeton sued the company for unauthorized disclosure of medical information to a third party, negligence on the same basis,

and invasion of privacy. The trial court dismissed Templeton's claims for unauthorized disclosure and negligence and, ultimately, granted summary judgment to Albrecht on the claim for invasion of privacy. Templeton appealed. His three assignments of error are rearranged for ease of discussion.

II.

Assignment of Error Number Two

> THE TRIAL COURT ERRED IN DETERMINING THAT [MR. TEMPLETON] WAS REQUIRED TO DEMONSTRATE INTENTIONAL CONDUCT TO SUPPORT A CLAIM OF INVASION OF PRIVACY.

{¶4} Mr. Templeton's second assignment of error argues that the trial court erred in granting summary judgment to Albrecht on his invasion of privacy claim on the basis that intentional conduct is required. Specifically, he urges us to conclude that a claim for public disclosure of private facts may be based on publicity that is merely reckless or negligent.

{¶5} This Court reviews an order granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Under Civ.R. 56(C), "[s]ummary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10. The substantive law underlying the claims provides the framework for reviewing motions for summary judgment, both with respect to whether there are genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Burkes v. Stidham*, 107 Ohio App.3d 363, 371 (8th Dist.1995).

{¶6} Ohio law recognizes the tort of invasion of privacy, which may consist of unwarranted appropriation or exploitation of someone's personality, publicizing the private affairs of another that are not the legitimate concern of the public, wrongful intrusion into the private activities of another in a manner that causes outrage or causes mental suffering, shame, or humiliation, and giving publicity to a matter concerning someone else that places that individual before the public in a false light. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, syllabus, ¶ 15, citing *Housh v. Peth*, 165 Ohio St. 35 (1956), paragraph two of the syllabus.

{¶7} This Court has previously concluded that in order to establish a claim for public disclosure of private facts, a plaintiff must prove:

> (1) that there has been a public disclosure; (2) that the disclosure was of facts concerning the private life of an individual; (3) that the matter disclosed would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) that the disclosure was intentional; and (5) that the matter publicized is not of legitimate concern to the public.

Irvine v. Akron Beacon Journal, 9th Dist. Summit No. 20804, 2002-Ohio-3191, ¶ 23, citing *Kililea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166-167 (10th Dist.1985). *See also Strussion v. Akron Beacon Journal Pub. Co.*, 9th Dist. Summit No. 20833, 2002-Ohio-3200, ¶ 32. Many other districts also require that the publicity is made intentionally. *See Curry v. Blanchester*, 12th Dist. Clinton Nos. CA2009-08-010, CA2009-08-012, 2010-Ohio-3368, ¶ 59; *Peterman v. Stewart*, 5th Dist. Delaware No. 05-CAE-12-0082, 2006-Ohio-4671, ¶ 54; *Wilson v. Harvey*, 164 Ohio App.3d 278, 2005-Ohio-5722, ¶ 37 (8th Dist.); *Scroggins v. Bill Furst Florist and Greenhouse, Inc.*, 2nd Dist. Montgomery No. 19519, 2004-Ohio-79, ¶ 37; *Huntington Ctr. Assocs. v. Schwartz, Warren & Ramirez*, 10th Dist. Franklin No. 00AP-35, 2000 WL 1376524, *4 (Sept. 26, 2000); *Patrolman "X" v. Toledo*, 132 Ohio App.3d 374, 396 (6th Dist.1999). The

First District Court of Appeals, however, consistently omits this element from its analysis. *See, e.g., Greenwood v. Taft, Stettinius & Hollister*, 105 Ohio App.3d 295, 303, fn. 8 (1st Dist.1995).

{¶8} This Court's precedent requires that a plaintiff alleging a claim for public disclosure of private facts demonstrate that the publicity was intentional. Although, as Mr. Templeton points out, the First District disagrees on this point, we are compelled to follow our precedent. *See generally Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. Mr. Templeton's second assignment of error is overruled on that basis.

Assignment of Error Number One

> THE TRIAL COURT ERRED IN DETERMINING THAT THE ACT OF FORWARDING THE EMAIL WITH ATTACHED CONFIDENTIAL MEDICAL INFORMATION DID NOT CONSTITUTE PUBLICATION FOR PURPOSES OF A CLAIM OF INVASION OF PRIVACY.

{¶9} Templeton's first assignment of error is that the trial court erred by determining that the element of publication had not been established for purpose of the invasion of privacy tort. In light of our resolution of Templeton's second assignment of error, the first is moot. *See* App.R. 12(A)(1)(c).

Assignment of Error Number Three

> THE TRIAL COURT ERRED IN DISMISSING [MR. TEMPLETON'S] CLAIM FOR BREACH OF MEDICAL CONFIDENCE.

{¶10} Mr. Templeton's third assignment of error is that the trial court erred by dismissing his claim for unauthorized disclosure of medical information under Civ.R. 12(B)(6). We disagree.

{¶11} A motion to dismiss under Civ.R. 12(B)(6) tests the sufficiency of a complaint and may only be granted if, taking the material allegations as true, it appears beyond doubt that the plaintiffs can prove no facts that entitle them to recovery. *State ex rel. Hanson v. Guernsey*

Cty. Bd. of Commrs., 65 Ohio St.3d 545, 548 (1992). This Court reviews the denial of such a motion to dismiss de novo. *Thomas v. Bauschlinger*, 9th Dist. Summit No. 26485, 2013-Ohio-1164, ¶ 12.

{¶12} In *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, the Ohio Supreme Court recognized that a physician or hospital can be liable for the tort of unauthorized, unprivileged disclosure of medical information to a third party when the medical information is gained in the course of the physician-patient relationship. *Id*. at paragraph one of the syllabus. *Biddle* is narrowly framed, providing liability can be established against only two parties: a physician or hospital that commits an unauthorized and unprivileged disclosure and a third-party that induces the disclosure to be made. *Id*. at paragraphs one and three of the syllabus. The Ohio Supreme Court has only extended the scope of the *Biddle* tort on one occasion. In *Hageman v. Southwest General Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, a plurality of the Court agreed that an attorney who has legitimately received medical information during the course of litigation can be liable for the unauthorized disclosure of the information outside the context of that case. *Id*. at syllabus, ¶ 17.

{¶13} *Biddle* has not been extended to impose liability upon employers nor, indeed, has it been expanded beyond the plurality opinion in *Hageman*. This Court declines to extend the reach of *Biddle* in this case.

{¶14} The trial court did not err by concluding that Mr. Templeton's claims that purported to arise under *Biddle* were not claims upon which relief could be granted, and Albrecht's motion to dismiss was properly denied. Mr. Templeton's third assignment of error is overruled.

III

{¶15} Mr. Templeton's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
CONCURS.

MOORE, J.
DISSENTING.

{¶16} The Ohio Supreme Court has recognized that "it is for the patient – not some medical practitioner, lawyer, or court – to determine what the patient's interests are with regard to personal confidential medical information." *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 408 (1999). If that right is to mean anything at all, "an individual must be able to direct the disclosure of his or her own private information." *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, ¶ 14. Because an individual's ability to control the flow of his or her own private medical information is increasingly crucial in the context of electronic medical records, I respectfully dissent.

{¶17} I would sustain Mr. Templeton's second assignment of error because I believe that it is incorrect to require intent as an element of the privacy tort for public disclosure of private facts. Although I acknowledge that this Court has, on other occasions, required intentional conduct to establish a claim, I find the First District's articulation of the elements of the tort persuasive. *See Greenwood v. Taft, Stettinius & Hollister*, 105 Ohio App.3d 295, 297 fn.7 (1st Dist.1995). *See also Hall v. Jewish Hosp. of Cincinnati*, 1st Dist. Hamilton No. C-990571, 2000 WL 707073, *6 (June 2, 2000), citing Restatement of the Law 2d, Torts (1965), Section 652D, Publicity Given to Private Life. I would overrule our precedent on that basis and sustain Mr. Templeton's second assignment of error so that the trial court could consider the motion for summary judgment on this claim under this standard.

{¶18} I would also sustain Mr. Templeton's third assignment of error because I believe that the breach of confidentiality tort recognized in *Biddle* should be extended to cover an employer's responsibility to safeguard the confidentiality of medical records that it receives from health care providers. I acknowledge, as a plurality of the Ohio Supreme Court recognized in

Hageman, that this situation does not fall squarely within the rule set forth in *Biddle*. *Id*. at ¶ 13. Nonetheless, given the proliferation of electronic medical records in the years since *Biddle* was decided and the ever-mounting challenges to individual privacy in a digital age, I believe that the rationale of *Biddle* should be expanded to encompass the facts of this case. I would, therefore, sustain Mr. Templeton's third assignment of error and reverse the trial court's order that dismissed his claim premised on *Biddle*.

{¶19} I respectfully dissent.

APPEARANCES:

JOHN F. MYERS, Attorney at Law, for Appellant.

BONITA L. KRISTAN, Attorney at Law, for Appellee.