STATE OF MICHIGAN

COURT OF APPEALS

AMIRA ABOUHASSAN, Plaintiff-Appellant,	UNPUBLISHED October 7, 2010
v	No. 291294 Wayne Circuit Court
DETROIT BIOMEDICAL LABORATORIES, INC., Defendant-Appellee.	LC No. 08-125921-CZ

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. Because there was no evidence establishing the existence of any genuine issue of material fact, we affirm.

This matter finds its origin in incorrect test results. Plaintiff presented herself to her physician, Dr. Jouhaina Maleh, after discovering she was pregnant. Dr. Maleh drew a blood sample from plaintiff and sent the blood sample to defendant for several tests, including HIV and Hepatitis B. The blood sample tested by defendant came back with positive results for both HIV and Hepatitis B. Defendant advised Dr. Maleh of the results and, consistent with its statutory duty, reported the test results to the State of Michigan for confirming tests. Upon learning of the test results, plaintiff had her blood re-tested at another facility. The results of those tests were negative for HIV and Hepatitis B. Plaintiff contacted defendant to advise that it had made an error in her blood tests, but according to plaintiff, defendant took no action. Plaintiff thus initiated the instant lawsuit against defendant claiming defamation, intentional infliction of emotional distress, and negligence.

Defendant moved for summary disposition, asserting that not only did it have immunity with respect to plaintiff's claims, but that all of plaintiff's claims were untenable because defendant in no way mislabeled or otherwise erred with respect to the blood sample it received from plaintiff's physician. Defendant also asserted that our Supreme Court does not recognize intentional infliction of emotional distress as a cause of action, and that plaintiff's lawsuit is actually an improperly pled medical malpractice suit, such that dismissal was appropriate. The trial court granted defendant's motion, finding that while defendant supported its position through documentary evidence, plaintiff failed to provide any documentary evidence countering

defendant's assertions. Plaintiff moved for reconsideration, which the trial court denied, and this appeal followed.

Defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10). Both parties, in their briefs, relied on evidence outside of the pleadings, such as documents and affidavits. As a result, this Court reviews the record as if the motion for summary disposition was brought under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). A motion for summary disposition is reviewed de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005).

A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition where there existed numerous material questions of fact. We disagree.

Plaintiff made three claims in her complaint against defendant. The first claim was that defendant engaged in defamation. The second claim was that defendant engaged in the intentional infliction of emotional distress. Finally, plaintiff claimed that defendant was negligent. We analyze each claim to determine whether a genuine issue of material fact existed or whether the motion for summary disposition was properly granted.

The elements of a defamation action are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). As indicated above, the communication to a third party must be unprivileged. Whether a privilege exists is a question of law for the court. *Stablein v Schuster,* 183 Mich App 477, 480; 455 NW2d 315 (1990).

Under MCL 333.5123, a physician is required to test a pregnant patient for both Hepatitis B and HIV during his or her initial examination of the patient. If a blood test comes back positive for Hepatitis B or HIV, the physician is required to inform the Michigan Department of

Public Health. MCL 333.5114; 1993 AC, R. 325.172; 1993 AC, R. 325.173(1). In addition, clinical laboratories are required to inform the Michigan Department of Public Health when it discovers a case of Hepatitis B or HIV. MCL 333.5114[1]; AC, R. 325.173(5). Under MCL 333.5131(6), an individual who releases the results of an HIV test as provided for in that statute is immune from civil or criminal liability. No such immunity exists for the disclosure of Hepatitis B.

In this case, defendant prevails as a matter of law because the statements he made to the state and to Dr. Maleh were privileged. A qualified privilege requires: "(1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to this purpose; (4) a proper occasion; and, (5) publication in a proper manner and to proper parties only." *Prysak v RL Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). Defendant disclosed plaintiff's blood test results to Dr. Maleh, who requested the results, and to the state, pursuant to state law. Defendant did not disclose the statements to anyone else. Therefore, the publication was in good faith, for a proper interest – to protect the public health of the community, limited in scope, and published in a proper manner.

There were also no questions of material fact with respect to plaintiff's claim of intentional infliction of emotional distress. To establish a prima facie claim of intentional infliction of emotional distress, a plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296; ___ NW2d ___ (2010). Only when a plaintiff can demonstrate that the defendant's conduct was so outrageous in character and so extreme as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community will liability attach. *Dalley*, ___ Mich App ___. Mere insults, indignities, threats, annoyances, or other trivialities do not give rise to liability for intentional infliction of emotional distress. *Dalley*, ___ Mich App ___.

In this case, there is no evidence that defendant engaged in extreme and outrageous conduct. As explained below, the evidence presented to the trial court at the time of the motion for summary disposition was that defendant did not mislabel or mishandle plaintiff's blood sample, and acted in accordance with its obligations under Michigan law. Plaintiff presented no evidence that defendant's conduct was extreme or outrageous. Summary disposition was thus appropriate as to this cause of action.

In addition, there was no genuine issue of material fact regarding whether defendant engaged in negligence. In this case, plaintiff argued that defendant owed plaintiff a duty of due care when it undertook to conduct her blood test, defendant breached that duty by failing to properly test the blood samples, to handle the blood samples, to train its personnel, and to correct

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[1] Prior to the 2004 amendments of MCL 333.5114, clinical laboratories were excepted from reporting HIV positive test results to the Department of Public Health. In 2004, the language was changed to explicitly require clinical laboratories to disclose positive test results to the department of public health. MCLA 333.5114.

its errors, the breach of which caused plaintiff emotional distress. Plaintiff has provided no evidence, however, that defendant breached any duties owed to her.

To establish a prima facie case of negligence, a plaintiff must show duty, breach of that duty, causation and damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). At the time that the trial court decided the motion for summary disposition, the evidence in the record, particularly the affidavit of defendant's general manager, Richard Zakaria, showed that defendant did not breach a duty to plaintiff by mishandling and mislabeling her blood sample. Zakaria's affidavit indicated that defendant did not label the blood sample but that the office of plaintiff's physician, Dr. Maleh, labeled the blood sample. According to Zakaria, defendant tested plaintiff's already labeled blood sample and found it positive for HIV and Hepatitis B. It crosschecked the label on the blood sample with a requisition form, both of which were labeled with plaintiff's name. Then it acted in accordance with Michigan law and reported the positive test results to the Department of Public Health. Plaintiff presented no evidence that defendant acted negligently or mislabeled the sample.

Plaintiff did provide a requisition form completed by Dr. Maleh's office, for plaintiff's blood sample, which had "A+" marked in the lower right hand corner of the page. The blood sample tested by defendant was apparently B positive. The form is evidence, then, that defendant might have been aware that plaintiff had type A positive blood. Nevertheless, this form and the knowledge that plaintiff had type A positive blood does not contradict the statements of Zakaria in his affidavit that defendant did not label plaintiff's blood sample because it has a policy of only accepting pre-labeled specimens from physicians' offices and, thus, could not be held liable for mislabeling the sample.

Other evidence submitted to the trial court demonstrated that plaintiff erroneously tested positive for HIV and Hepatitis B when, in fact, she was HIV and Hepatitis B negative. However, plaintiff did not demonstrate that the positive tests were a result of negligence committed by defendant. The only evidence about the process for obtaining a blood sample and submitting it to defendant was Zakaria's affidavit, which was not contradicted.[2] Based on the evidence available at the time of the motion for summary disposition, there was no genuine issue of material fact regarding defendant's negligence and defendant should prevail as a matter of law.[3]

In her brief on appeal, plaintiff relies on her affidavit and on the affidavit of Martina Abrams-Alderman, the office manager for Dr. Maleh, to argue that there were genuine issues of material fact that precluded granting defendant's motion for summary disposition. However, both of those affidavits were not available when the trial court decided the motion for summary

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[2] Plaintiff challenges, in her appellate brief, the sufficiency of Zakaria's affidavit as required by MCR 2.119 (B)(1). This issue was not raised below or addressed by the trial court and, thus, is not preserved for our review.

[3] Defendant argues that plaintiff's negligence claim is barred because plaintiff failed to meet the procedural requirements of a medical malpractice claim. We need not address this issue as plaintiff has not demonstrated ordinary negligence.

disposition. This Court should review a trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(10) based on the evidence available to the trial court at the time of its decision. MCR 2.116(G)(5); *Ritchie-Gamester*, 461 Mich at 76. Therefore, we may not consider the affidavits in deciding whether granting summary disposition in favor of defendant was proper.

Notably, even if we were not satisfied that summary disposition were proper on plaintiff's negligence claim pursuant to MCR 2.116(C)(10), summary disposition would also have been proper pursuant to MCR 2.116(C)(7), and we would thus still affirm the trial court's dismissal of plaintiff's negligence claim.

MCL 333.5131(1) provides that reports, records and data pertaining to testing that are associated with serious communicable diseases or infections of HIV and acquired immunodeficiency syndrome are confidential. MCL 333.5131(5) further provides, however, that subsection (1) does not apply to the following:

> (a) Information pertaining to an individual who is HIV infected or has been diagnosed as having acquired immunodeficiency syndrome, if the information is disclosed to the department, a local health department, or other health care provider for 1 or more of the following purposes:
> (*i*) To protect the health of an individual.
> (*ii*) To prevent further transmission of HIV.
> (*iii*) To diagnose and care for a patient.

MCL 333.5131(6) provides that:

> A person who releases the results of an HIV test or other information described in subsection (1) in compliance with subsection (5) is immune from civil or criminal liability . . .for the release of that information.

Here, defendant disclosed the test results to plaintiff's physician—the health care provider requesting the tests. Because defendant released the test results to a health care provider for the purpose of diagnosing and caring for his pregnant patient, defendant released the results of testing described in subsection (1) in compliance with subsection (5). Defendant is thus immune from civil liability pursuant to MCL 333.5131(6). Plaintiff's claim that defendant's negligence led to the reporting of inaccurate test result does not alter this conclusion. The statute clearly provides immunity for the release of test results. Defendant released the results of the tests it conducted on a blood sample bearing plaintiff's name. That the tested sample apparently did not belong to plaintiff was addressed above when we indicated that there was no evidence presented to the trial court that it was the fault of defendant that the test results were incorrect as to plaintiff's blood. As such, it cannot be argued that defendant's entitlement to immunity for the reporting of the test results for the blood sample was somehow negated.

Plaintiff additionally argues that the trial court granted defendant's motion for summary disposition prematurely because discovery had not been completed. We disagree.

Generally, a motion for summary disposition is premature if granted before the completion of discovery regarding a disputed issue, but a party opposing a motion for summary

disposition on the ground that discovery is incomplete must assert that a dispute does exist and support that allegation by some independent evidence. *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006). Mere conjecture does not entitle a party to discovery, "because such discovery would be no more than a fishing expedition." *Davis*, 269 Mich App at 380.

Plaintiff is correct that defendant filed its motion for summary disposition prior to the completion of discovery in this case. However, at the time of the motion for summary disposition, plaintiff failed to offer sufficient independent evidence that defendant had engaged in defamation, intentional infliction of emotional distress or negligence. The only evidence proffered by plaintiff in response to defendant's motion for summary disposition that potentially indicates a genuine issue of material fact regarding defendant's liability was the requisition form showing an "A+" marked in the lower right hand corner of the page. Again, however, this evidence does not contradict Zakaria's affidavit indicating that defendant did not and does not label blood samples, but simply tests those samples already labeled and sent to it. As a result, plaintiff did not meet its burden of proffering independent evidence that a dispute does exist. Therefore, the trial court did not err in granting summary disposition prior to the completion of discovery.

Finally, plaintiff argues that the trial court abused its discretion in denying her motion for reconsideration. We disagree.

A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Corporan*, 282 Mich App at 605-606.

"Generally. . . a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." *Woods v SLB Property Management, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008), quoting MCR 2.119(F)(3). "The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Woods*, 277 Mich App at 629, quoting MCR 2.119(F)(3). A motion for reconsideration, which rests on evidence which could have been presented earlier, may properly be denied. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Plaintiff's motion for reconsideration merely restated arguments already presented by plaintiff in response to defendant's motion for summary disposition. In addition, the new evidence obtained by plaintiff, particularly the affidavits of plaintiff and of Abrams-Alderman, could have been presented earlier in response to defendant's motion for summary disposition, but were not.

Plaintiff's affidavit indicated that she saw staff at Dr. Maleh's office place her blood sample in a bag labeled with her name. However, plaintiff did not indicate if she saw her blood being placed in a tube with her name on it as required by defendant and, therefore, her evidence does not contradict Zakaria's affidavit. Abrams-Alderman's affidavit indicated that according to records, Dr. Maleh's office sent plaintiff's blood to defendant and did not send a type B positive blood sample to defendant. Nevertheless, the affidavit did not indicate the processes followed by

Dr. Maleh's office when it sends a blood sample to be tested by defendant and does not indicate whether someone in the office labels those blood samples. Her affidavit did not contradict Zakaria's affidavit by indicating that Dr. Maleh's office does not label the blood samples as indicated by Zakaria. Based on these two affidavits, plaintiff has failed to demonstrate a palpable error requiring the trial court to grant the motion for reconsideration. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Henry William Saad
/s/ Deborah A. Servitto

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SHAPIRO, P.J. (*concurring in part and dissenting in part*).

I concur with the majority that plaintiff's defamation claim was properly dismissed under MCR 2.116(C)(7) given the statutory immunity from civil liability enjoyed by entities that make such reports to the health department as mandated by MCL 333.5114. I also agree with the majority that summary disposition as to plaintiff's claim for intentional infliction of emotional injury was properly granted under MCR 2.116(C)(10), as plaintiff failed to provide evidence to support a claim for intentional infliction of emotional injury. However, I respectfully dissent from the majority opinion's affirmance of the dismissal of plaintiff's negligence claim set forth in Count III of her complaint.

It is uncontested that plaintiff was not infected with either the AIDS virus nor the Hepatitis B virus and that, despite this fact, on October 30, 2007, defendant, a licensed clinical laboratory, advised plaintiff's physician, who in turn advised plaintiff, that the blood sample obtained from plaintiff was positive for both of these viruses. In addition, pursuant to the mandatory requirements of MCL 333.5114, defendant reported the positive findings and plaintiff's name to the Michigan Department of Public Health (MDPH). The blood sample identified as plaintiff's by the laboratory was also sent to MDPH where the positive findings were confirmed. It is uncontested that the blood sample tested was Type B and that plaintiff's actual blood type is A positive. Thus, there appears to be no question but that the reports to plaintiff's physician and the MDPH that she was positive for HIV and Hepatitis B were based upon readings of a blood sample that did not in fact belong to plaintiff. It is also undisputed that the only persons who handled the subject sample were agents of plaintiff's physician and agents of defendant laboratory. According to an affidavit from the manager of the physician's office who personally reviewed the relevant office records, no Type B blood samples were sent by that office to defendant lab on the relevant date, suggesting that the sample identified by the lab as

plaintiff's could not even have come from the office of plaintiff's doctor. Accordingly, plaintiff asserts that defendant misattributed findings concerning the blood of another patient to her and that since her doctor did not draw any Type B blood on the day in question, the mislabeling or mishandling must have occurred at defendant laboratory.

Contrary to defendant's assertion, MCL 333.5131(6) immunity does not shield defendant from plaintiff's claim that it negligently reported the wrong blood sample results to plaintiff or her doctor and that plaintiff suffered emotional injury as a result. I agree that MCL 333.5131(6) provides immunity "for the release of th[e] information," providing defendant with immunity for its release of the results of the testing. The statute is silent, however, on immunity for *inaccurate* testing and results. There is nothing in the language of the statute that provides or even implies immunity for a defendant that has negligently handled, labeled or tested samples resulting in inaccurate results. The distinction is simple to understand. The statute was designed to allow the disclosure of test results without fear of prosecution for a confidentiality violation based on a lack of patient permission to disclose. This is evident given that the Legislature gave the immunity to the "person who releases the results." MCL 333.5131(6). The statute provides no immunity to the testing company for negligent actions that result in inaccurate results being reported. Thus, although the act of actually releasing test results is protected, negligence that results in inaccurate test results being reported is not. Because plaintiff's claim arises from defendant's negligent labeling, handling, or testing, which resulted in inaccurate test results, there was no statutory immunity and summary disposition of plaintiff's negligence claim under MCR 2.116(C)(7) was improper.

Summary disposition as to Count III was also improper under MCR 2.116(C)(10) as defendant did not submit any evidence in support of its motion as required by MCR 2.116(G)(3)(b). The only "affidavits, depositions, admissions, or other documentary evidence in support" of its (C)(10) motion was an affidavit signed by the general manager of defendant lab. However, that affidavit does not pass muster under MCR 2.116(G)(6) which requires that such affidavits "shall only be considered to the extent that the content or substance would be admissible as evidence." The affidavit submitted by the defense and relied upon by the trial court amounts to nothing more than a recitation of defendant's version of the facts signed by a person who had no personal knowledge of these facts and whose entire affidavit consists of unsupported hearsay.

The affiant does not indicate that he personally labeled, handled or tested the subject specimen or that he has personal knowledge of same. He does not even assert that he spoke with any person who labeled, handled or tested the specimen, or what documents he reviewed, which would at least provide some basis for his hearsay statements. Despite this, he makes assertions as to what blood specimens were received by his laboratory, how plaintiff's sample was labeled, and what the test results were. In sum, he recites why in his opinion he thinks that his laboratory did not make a mistake and that the mistake must have happened at the doctor's office. He does nothing more than state what he believes, or hopes, the evidence will ultimately show. He does not assert that he possesses that evidence or even how that evidence will be shown at trial. This is plainly an inadequate basis upon which to grant summary disposition.

For these reasons, I would reverse and remand for further proceedings as to Count III.

/s/ Douglas B. Shapiro