STATE OF MICHIGAN

COURT OF APPEALS

SUSAN SHIPMAN and WESLEY SHIPMAN

Plaintiffs-Appellants,

v

LORI GREENAMEYER, MAUREEN HUTCHINSON, JOHN BOLTON, NORMA WOJEK, LOLA RIGGS, B. J. BURR, LOU BONNIN, BRUCE SWEET, LARRY TODAC, DON CROSS, COLLEEN FITCH, BONNIE SMITH, THOMAS KRAMER, KATHY DEPUE, LYNDA VANDEWALKER-IVES, GLORIA RICKER, BRANCH COUNTY COMMUNITY MENTAL HEALTH, and ADAPT, INC.,

Defendants-Appellees.

UNPUBLISHED
January 31, 1997

No. 186917
LC No. 94-010568-NZ

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order that granted defendants summary disposition under MCR 2.116(C)(8) for plaintiffs' failure to state a claim, and that dismissed plaintiffs' complaint. We affirm.

This defamation and conspiracy case arises from plaintiffs Susan and Wesley Shipman's contentions that defendants conspired to defame plaintiffs when defendants used a technique known as "facilitated communication" with Mrs. Shipman's brother and ward, Charles George. George is a middle-aged, developmentally disabled man with profound mental handicaps who cannot communicate verbally and who resides in a group home that is operated and staffed by certain defendants. Some of the "facilitated communication" resulted in allegations that Mr. Shipman sexually assaulted George, that Mrs. Shipman "hurt" George, and that Mrs. Shipman did not protect George from sexual assault.

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* Circuit judge, sitting on the Court of Appeals by assignment.

"Facilitated communication" was a technique developed in the late 1970s which became widely used until late in 1993 when its validity was seriously questioned. A person, referred to as the facilitator, provides physical support to the handicapper's hand, wrist, or arm to enable the handicapper to spell out words by pointing to letters on a chart or by pressing typewriter or computer keys. In May 1993, defendant VanDeWalker-Ives instructed George in facilitated communication methods, and for a time, Mrs. Shipman did not know that George used facilitated communication.

On July 30, 1993, Mrs. Shipman told defendant Greenameyer that she objected to staffers using facilitated communication with George, and Greenameyer related Mrs. Shipman's objection to defendant Hutchinson, who asked defendant Burr to evaluate George's facilitated communications to determine whether his communications resulted from his independent actions and thoughts. Burr conducted the evaluation August 2, 1993, and he concluded that George expressed his own thoughts without interference from the facilitator.

Hutchinson had been communicating with Mrs. Shipman concerning her earlier request to transfer George to another home, and Hutchinson told Mrs. Shipman on August 2, 1993, that George claimed during a facilitated communication that Mrs. Shipman had hurt him. Mrs. Shipman expressed her disapproval of facilitated communication as "some kind of an 'ouija board' idea," and Hutchinson explained that George had made the same claim during two separate facilitated communication sessions that were held on separate days and that used different facilitators. Mrs. Shipman asked that all facilitated communications with George stop unless she was present and a licensed facilitator was used, and Hutchinson explained that facilitators were not licensed and that defendant Branch County Community Health [BCCMH] could not deny a client, like George, an opportunity to communicate by the only means available to that client.

Hutchinson called a staff meeting later that same day during which the participants decided not to halt George's facilitated communications. On August 16, 1993, a second staff meeting addressed Mrs. Shipman's transfer request, which was denied.

During an October 13, 1993 facilitated communication session, George told defendant Riggs about a sexual assault that George claimed had occurred during the previous weekend's stay at the Shipman household. That same day, defendant Kramer notified the Department of Social Services about the suspected assault. The next day Kramer notified the Michigan State Police, which conducted an investigation into the suspected assault, and Kramer also petitioned the probate court to limit Mrs. Shipman's guardianship. On October 15, 1993, Riggs and Greenameyer took George to a physician for an examination, but the physician could not find any evidence of a sexual assault.

On January 31, 1994, the probate court removed Mrs. Shipman as George's guardian, appointed a successor guardian, and required court approval before any further facilitated communications took place.

Plaintiffs filed a five-count complaint, and in lieu of answering, defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The circuit court dismissed two counts on the ground that no cause of action existed, dismissed defendants VanDeWalker-Ives and Ricker, and ordered plaintiffs to file a more definite statement as to the remaining defendants. After plaintiffs filed their more definite statement, defendants moved to strike on the ground that each of the eighty-seven general allegations was attributed to each defendant for each of the three remaining counts. The circuit court ordered plaintiffs to file another more definite statement and awarded defendants $500 in costs.

On April 24, 1995, plaintiffs filed a second more definite statement consisting of 1811 paragraphs on 353 pages supported by an additional ninety-two pages of exhibits. Defendants again moved for summary disposition under MCR 2.116(C)(8), and on June 13, 1995, the circuit court struck plaintiffs' pleading, granted defendants summary disposition on each of the three remaining counts, and sanctioned plaintiffs' counsel $1,000 for vexatious filing of a pleading.

Plaintiffs present a single issue for appellate review: whether plaintiffs pleaded defamation with sufficient specificity to state a cause of action.[1] Turning first to that question as it relates to VanDeWalker-Ives' and Ricker's dismissals, plaintiffs contend that summary disposition was premature because they were entitled to some discovery so they could acquire the information necessary to amend their complaint. The circuit court dismissed VanDeWalker-Ives and Ricker for plaintiffs' failure to raise a genuine issue of material fact that tended to show that these two defendants defamed plaintiffs.

A summary disposition motion under MCR 2.116(C)(10) requires the moving party to specifically identify the issues on which there are no disputed facts and to support that assertion with documentary evidence, such as affidavits. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The nonmoving party must come forward with admissible evidence to demonstrate that a genuine material factual issue exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The court gives the benefit of reasonable doubt to the nonmoving party when determining whether a record might be developed that would leave open an issue over which reasonable minds could differ. *Bertrand v Alan Ford Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). An appellate court reviews the summary disposition grant to verify that the prevailing party was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993).

A complaint alleging defamation must be pleaded with specificity, and the failure to allege a required element is fatal to the complaint. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 51-53; 495 NW2d 392 (1992). To successfully plead a cause of action for defamation, the plaintiff must plead: (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 publisher's part; (4) either actionability of the statement without showing special harm or the existence of special harm caused by the publication. *Id.*, 51.

Here, VanDeWalker-Ives is listed in the complaint's caption and never mentioned in the complaint, so plaintiffs totally failed to plead a cause of action against her. *Royal Palace, supra*, 51-53. Turning to Ricker, plaintiffs' complaint does not include an allegation that Ricker ever published an allegedly defamatory statement to an unprivileged third party, and the missing publication element is fatal to stating a cause of action against her. *Id*. Consequently, plaintiffs' complaint did not have the requisite specificity as to these two defendants to survive summary disposition. *Borman, supra*, 678; *Royal Palace, supra*, 51-53. Nor are plaintiffs entitled to discovery in the hopes of acquiring information necessary to amend their complaint when defamation claims must be specifically pleaded. *Royal Palace, supra*, 51-53. Therefore, the circuit court correctly granted summary disposition and dismissed these two defendants. *Borman, supra*, 678.

Next, plaintiffs assert that summary disposition is inappropriately granted on the basis of self-serving affidavits, citing *Durant v Stahlin*, 374 Mich 82, 86-87 (1964), as support for their argument. *Durant*, however, does not control in this case because VanDeWalker-Ives' and Ricker's affidavits aver facts tending to show that no defamation occurred. Under *Skinner*, the burden then shifted to plaintiffs to controvert those facts with admissible evidence; however, plaintiffs submitted an affidavit from Mrs. Shipman that failed to comport with MCR 2.119(B)(1)(a)'s personal knowledge requirement. As a result, Mrs. Shipman's affidavit is incapable of raising a genuine issue of material fact. *Regualos v Community Hospital*, 140 Mich App 455, 465-466; 364 NW2d 723 (1985). Accordingly, the circuit court correctly determined that plaintiffs failed to carry their burden under *Skinner, supra*, 160, and the court properly granted summary disposition as to VanDeWalker-Ives and Ricker. *Borman, supra*, 678; *Regualos, supra*, 465-466.

As to the remaining sixteen defendants, the circuit court granted summary disposition to them under MCR 2.116(C)(8). Plaintiffs now contend that the court failed to recognize that plaintiffs pleaded their defamation claim with sufficient specificity to escape summary disposition.

A summary disposition motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim by the pleadings alone, and the motion may not be supported by documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The court accepts as true the complaint's factual allegations and draws all reasonable inferences or conclusions in the nonmoving party's favor. *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). A pleader may not rest on conclusions that are not supported by factual allegations in an attempt to state a cause of action. *ETT Ambulance Service v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). A court grants the motion when a claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

The law of defamation protects a person from the damage done by false attacks on that person's reputation. A communication is defamatory if it harms a person's reputation by lowering the community's estimation of that person or by deterring third persons from association with that person. *Glazer v Lamkin*, 201 Mich App 432, 438; 506 NW2d 570 (1993).

Libel is a statement about and concerning a person that is false in some material respect, that is communicated to a third party by written or printed words, and that has a tendency to harm the person's reputation. *Stablein v Schuster*, 183 Mich App 477, 480; 455 NW2d 315 (1990). Slander is similar to libel, except that slander occurs when the statement is spoken rather than written. *Pursell v Wolverine-Pentronix, Inc*, 44 Mich App 416, 422; 205 NW2d 504 (1973). Defamation per se exists if the communication is false, malicious, and injures a person in that person's profession or employment. *Glazer*, *supra*, 438. In addition, defamation per se also exists if the publication imputes a criminal offense, a loathsome disease, or serious sexual misconduct. See, e.g., *Bufalino v Maxon Bros, Inc*, 368 Mich 140, 152; 117 NW2d 150 (1962) (defining defamation per se); *Newman v Stein*, 75 Mich 402, 407; 42 NW 956 (1889) (defining defamation per se to include statement alleging serious sexual misconduct).

The complainant must specifically identify the defamatory statements and must expressly state how the publisher was negligent or reckless. *Royal Palace*, *supra*, 52-53. Specifically identifying the defamatory statements includes setting out the very words that the plaintiff contends are libelous. *DeGuvera v Sure Fit Products*, 14 Mich App 201, 206; 165 NW2d 418 (1968). Furthermore, the plaintiff must plead specific facts to avoid immunity or privilege. *MacGriff v Van Antwerp*, 327 Mich 200, 204; 41 NW2d 524 (1950). An absolutely privileged statement is not actionable and defeats any defamation claim. *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992). A qualified privilege, however, may be defeated by pleading specific facts showing actual malice, which is defined as making the statement with the knowledge of its falsity or with reckless disregard for its truth or falsity. *Lins v Evening News Ass'n*, 129 Mich App 419, 435; 342 NW2d 573 (1983).

The plaintiff must satisfy the specificity requirements, and the defendant is not obligated to detect potential liability from transcripts or copies of the allegedly defamatory statements. *Royal Palace*, *supra*, 56-57. If the plaintiff fails to satisfy the specificity requirement, then summary disposition under MCR 2.116(C)(8) is appropriate for failing to state a claim. *Id*., 57.

We have reviewed each of eighty-seven paragraphs of general allegations and the twenty paragraphs of specific allegations that comprise the original defamation count against the sixteen remaining defendants. Further, we are required to construe the complaint's allegations in the light most favorable to plaintiffs. *Bertrand*, *supra*, 617-618. The individual defendants are addressed in two groups as follows: As to defendants Bolton, Wojek, Burr, Todac, Cross, Fitch, Smith, and DePue, the original complaint simply fails to allege facts showing that these defendants made false statements that harmed plaintiffs' reputations either because these defendants never made any false statement about plaintiffs, or any possibly false statement that a defendant may have made cannot be reasonably understood as being harmful to plaintiffs' reputations. Many of these defendants attended staff meetings where issues pertaining to George's care and treatment were discussed and resolved. Others offered advice or opinions on specific issues that cannot be reasonably understood as harmful to plaintiffs' reputations. Plaintiffs failed to plead the required elements for a defamation claim as to these eight defendants. *Royal Palace, supra*, 51. Accordingly, the circuit court correctly determined that these

eight defendants were entitled to summary disposition as a matter of law. *Wade*, *supra*, 163; *ETT Ambulance*, *supra*, 395; *Royal Palace*, *supra*, 51, 57.

Turning now to consider defendants Greenameyer, Hutchinson, Riggs, Bonnin, Sweet, and Kramer and viewing the complaint's allegations in the light most favorable to plaintiffs, we assume, but do not hold, that each made a false statement that harmed plaintiffs' reputations. Each of these six defendants are mental health employees who are required by MCL 400.11a(1); MSA 16.411(1)(1) to report any suspected abuse of a mental health services recipient, like George, and who are given absolute immunity from civil liability in MCL 400.11c(1); MSA 16.411(3)(1), for making a report.[2] To the extent that these defendants made allegedly defamatory statements, those statements made during the course of the investigation into the suspected abuse of George are protected by absolute immunity and preclude any defamation claim. *Couch*, *supra*, 294.

In addition to statutory immunity as mental health employees, any statement that these defendants made during the course of judicial proceedings, such as the probate court guardianship proceedings involved in this case, are also absolutely privileged and preclude any defamation claim. *Couch*, *supra*, 294.

Furthermore, any statements made by one of these defendants to a physician for the purpose of obtaining medical treatment for George entitled that defendant to a qualified privilege, which may be overcome only by pleading specific facts that show actual malice. *Lins*, *supra*, 129 Mich 434. Plaintiffs have failed to plead specific facts showing that these defendants made statements to the physician knowing that those statements were false or with reckless disregard for their truth or falsity. *Id*. We further note that the physician is barred from repeating these statements by the physician-patient privilege and that only the guardian could waive that privilege. MCL 600.2157; MSA 27A.2157; *Gaertner v Michigan*, 385 Mich 49, 54; 187 NW2d 429 (1971) (holding that guardian may waive physician-patient privilege on ward's behalf); *Porter v Osteopathic Hospital Ass'n, Inc*, 170 Mich App 619, 623; 428 NW2d 719 (1988). Consequently, any statements made to the physician cannot reasonably be understood as harming plaintiffs' reputation in the community or as deterring third persons from associating with plaintiffs, even though the statements allege that plaintiffs committed serious sexual misconduct. *Bufalino*, *supra*, 152; *Glazer*, *supra*, 438; *Newman*, *supra*, 407. Moreover, any statement that these defendants made to law enforcement personnel conducting the criminal investigation of suspected criminal sexual abuse are absolutely privileged. *Flynn v Boglarsky*, 164 Mich 513, 517; 129 NW 674 (1911); *Shinglemeyer v Wright*, 124 Mich 230, 239; 82 NW 887 (1900). As we have noted previously, an absolute privilege precludes any defamation claim. *Couch*, *supra*, 294.

As to each of these six defendants, plaintiffs are required to, but did not, plead specific facts in avoidance of immunity or qualified privilege in their complaint. *MacGriff*, *supra*, 204; *Royal Palace*, *supra*, 51. As a result, plaintiffs fail to satisfy the unprivileged publication requirement necessary to successfully state a cause of action for defamation. *MacGriff*, *supra*, 204; *Royal Palace*, *supra*, 51. Therefore, plaintiffs failed to plead a defamation claim against defendants Greenameyer, Hutchinson, Riggs, Bonnin, Sweet, and Kramer. *Wade*, *supra*, 163; *MacGriff*, *supra*, 204; *Royal Palace*, *supra*,

51; *Couch*, *supra*, 294. Accordingly, the circuit court correctly granted summary disposition and dismissed each of these six defendants. *Wade*, *supra*, 163; *Royal Palace*, *supra*, 57.

Turning now to defendants Adapt and BCCMH, since plaintiffs' complaint fails to successfully plead defamation against any of the fourteen individual employees and agents of these defendants as demonstrated above, plaintiffs' claim against the employers fails. *Grist v Upjohn Co*, 368 Mich 578, 583, 584; 118 NW2d 985 (1962). Furthermore, plaintiffs' complaint does not allege that any of the individual defendants defamed plaintiffs while acting as either Adapt's or BCCMH's agents and within the scope of or during the course of discharging their respective duties. *Grebner v Runyon*, 132 Mich App 327, 333; 347 NW2d 741 (1984). Consequently, plaintiffs failed to state a defamation claim against these employers. *Poledna v Bendix Aviation Corp*, 360 Mich 129, 139-140; 103 NW2d 789 (1960). Accordingly, the circuit court correctly granted summary disposition and dismissed the employers. *Wade*, *supra*, 163; *Grist*, *supra*, 583-584; *Poledna*, *supra*, 139-140.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot

[1] In posing a single appellate issue as to the defamation claim, plaintiffs failed to properly present their arguments challenging dismissal of their conspiracy count, challenging sanctions, and challenging VanDeWalker-Ives' and Ricker's dismissals on the intentional infliction of emotional distress and conspiracy counts. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 7; 535 NW2d 215 (1995); *Williams v City of Cadillac*, 148 Mich App 786, 790; 384 NW2d 792 (1985).

Furthermore, plaintiffs also abandoned any claim of error as to the summary disposition grant to the remaining sixteen defendants on the intentional infliction of emotional distress count when they failed to include in this appeal a question alleging error on that count. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995).

[2] We also note that a second statute requires mental health employees to report suspected criminal sexual abuse, requires those employees to cooperate in the prosecution of the suspected sexual abuse, and grants those employees immunity from civil liability. MCL 330.1723(1) [requires report], (3) [grants immunity], and (7) [requires cooperation]; MSA 14.800(723)(1), (3), and (7).