

STATE OF MICHIGAN
COURT OF APPEALS

BLAINE SALLIER,

Plaintiff-Appellant,

v

SAINT JOSEPH MERCY HOSPITAL,

Defendant-Appellee.

UNPUBLISHED

April 10, 1998

No. 201040

Oakland Circuit Court

LC No. 95-510058 CZ

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition for defendant. We affirm

This lawsuit grew out of the aftermath of a single car automobile accident in which the other passenger riding in a car driven by plaintiff was killed.¹ Plaintiff was taken from the accident scene to defendant hospital where he was treated. During the course of that treatment, defendant performed a blood alcohol analysis on plaintiff. Plaintiff subsequently brought suit against defendant claiming that defendant's handling of the blood alcohol analysis and analysis results constituted invasion of privacy, negligence and intentional infliction of emotional distress.

Plaintiff argues that the trial court erred in granting summary disposition for defendant. We disagree. We review motions for summary disposition de novo in order to determine "whether the moving party was entitled to judgment as a matter of law." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). The trial court's grant of summary disposition was based both on MCR 2.116(C)(8) and (C)(10).

MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. . . . The court must accept as true all well-pleaded facts. . . . A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

Plaintiff argues that the trial court's grant of summary disposition was improper because it did not consider his motion for leave to amend his complaint and his motion to dismiss the assigned trial judge before ruling on defendant's motion for summary disposition. We disagree. First, we can find no evidence in the record that plaintiff ever filed a motion for leave to amend his complaint. Further, plaintiff has failed to persuade us that he actually did file this motion, but that somehow it was misplaced by the clerk's office. As for plaintiff's motion to disqualify Oakland Circuit Judge Richard D. Kuhn from presiding over this case, we observe that the motion was both untimely, and did not include the requisite affidavit. MCR 2.003(C)(1), (2). We also conclude that plaintiff has failed to substantiate his allegation that Judge Kuhn could not remain impartial given the judge's limited involvement in plaintiff's criminal trial stemming from the automobile accident.²

Plaintiff also alleges that the trial court erred by not holding an evidentiary hearing on its allegation that defendant had committed fraud on the court. Again, we disagree. Although we can find no evidence in the record that plaintiff ever filed a motion to hold such an evidentiary hearing, we note that the issue of fraud was raised by plaintiff in a wide-ranging response to defendant's motion for summary disposition. In that response, plaintiff alleged that several of the affirmative defenses raised by defendant were fraudulent. After examining the record, we believe that plaintiff has misunderstood the significant difference that exists between a fraudulent misrepresentation and a difference of opinion on the facts of a given case. Each of the instances cited by plaintiff as evidence of defendant's fraud are actually disputes concerning the facts of the case. It is not enough to say an opposing party's alleged fraud is evidenced by my disagreement with the position they are taking. Fraud is not the assertion of a contrary position, but rather "[a]n intentional perversion of the truth." Blacks' Law Dictionary (6th ed), 660. An evidentiary hearing is not required simply because a party labels an action as fraudulent. Therefore, because we conclude that plaintiff has failed to establish with particularity the circumstances amounting to fraud, MCR 2.112(B)(1), the trial court's failure to address the matter was not erroneous.

We further conclude that the trial court acted properly when granting summary disposition to defendant on all of plaintiff's claims. Plaintiff's invasion of privacy claim was based on three grounds: (1) lack of consent for the blood alcohol analysis; (2) the improper dissemination of the results of the blood alcohol analysis; and (3) a violation of MCL 750.539a; MSA 28.807(1). As for the question of consent, one of the emergency room physicians who attended to plaintiff following his accident stated in a sworn deposition that the blood alcohol analysis "needed to be done on an emergent basis." The doctor further states that the analysis "was needed to determine [plaintiff's] . . . blood alcohol level to prevent potentially harmful and possibly fatal interactions" with medications that were needed for treating plaintiff's injuries. Because plaintiff's general denials of the truth of the doctor's statements is not sufficient to overcome a motion for summary disposition, MCR 2.116(G)(4), we conclude that summary disposition was proper given that no genuine issue of fact existed on the question of consent.

Regarding the dissemination of the analysis results, MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e) provides:

If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical analysis. The medical facility or person performing the chemical analysis *shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution* as provided in this subdivision. *A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure.* [Emphasis added.]

Plaintiff alleged that the results of the blood alcohol analysis were directly and improperly given to a Michigan State trooper by defendant. Conversely, the trooper averred in his affidavit that neither he nor his partner received the results of plaintiff's blood alcohol analysis from defendant. Instead, the trooper stated "[t]hat upon information and belief, the blood alcohol test results were obtained . . . through the Oakland County prosecutor's office." Again, because plaintiff has not produced anything beyond mere speculation to show that defendant did not follow the procedure outlined in MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e), we conclude that the trial court did not err when finding that no genuine issue of fact existed on the question of the dissemination of the analysis results. We further conclude that plaintiff's allegation that defendant violated MCL 750.539a; MSA 28.807(1) fails to state a claim upon which relief can be granted. MCL 750.539a; MSA 28.807(1) is a definitional section applicable to Michigan's eavesdropping statutes. MCL 750.539 *et seq.*; MSA 28.807(1) *et seq.* Neither the definition statute in particular, nor the eavesdropping statutes in general are in any way applicable to this case.

Plaintiff's claim of negligence is also predicated upon the issues of consent and dissemination. Accordingly, we agree with the trial court that plaintiff's negligence claim fails in light of the fact that the record establishes that defendant both properly performed the blood alcohol analysis and properly relayed the results to the Oakland County prosecutor. Plaintiff's conspiracy and intentional infliction of emotional distress claims fail for the same reasons. Because the performance of the analysis was proper, and because there is no substantiated evidence that the results were improperly relayed to the police, there is no evidence of a conspiracy to make such an improper disclosure. Likewise, defendant's legitimate actions necessarily cannot be characterized as extreme and outrageous. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald

¹ Criminal charges stemming from this accident brought against plaintiff. A jury convicted plaintiff of manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, operating a motor vehicle under the influence of intoxicating liquor causing death (OUIL causing death), MCL 257.625(4); MSA 9.2325(5), OUIL, MCL 257.625(1)(a); MSA 9.2324(1)(a), and operating a motor vehicle with a blood alcohol content of .10 or more (UBAL), MCL 257.625(1)(b); MSA 9.2325(1)(b). Defendant later pleaded guilty to driving while license suspended . . . , MCL 257.904; MSA 9.2604, and habitual offender, second offense, MCL 769.10; MSA 28.1082. [*People v Sallier*, unpublished per curiam opinion of the Court of Appeals, issued November 1, 1996 (Docket No. 167788) at 1.]

On appeal, this Court vacated plaintiff's UBAL conviction because it concluded that convictions or OUIL causing death and UBAL violated the constitutional protections against double jeopardy. *Id.* at 2. All of plaintiff's other convictions and sentences we affirmed. *Id.* at 3.

² In his capacity as Chief Judge, Judge Kuhn presided over a motion to disqualify Oakland Circuit Judge Deborah G. Tyner from presiding at plaintiff's criminal trial. That motion was denied by Judge Kuhn.