

STATE OF MICHIGAN
COURT OF APPEALS

AMY LYNCH,

Plaintiff-Appellant,

v

COUNTY OF ARENAC, GARY RAPP,
individually and in his official capacity, ROBERT
J. LESNESKI, individually and in his official
capacity, a/k/a BRONCO, and JOHN/JANE DOE,

Defendants,

and

JOHN CURCIO,

Defendant-Appellee.

UNPUBLISHED

July 12, 2011

No. 296775

Arenac Circuit Court

LC No. 09-010966-NZ

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right from that part of the trial court's order granting summary disposition in favor of defendant-Appellee John Curcio. For the reasons stated below, we affirm.

According to plaintiff's complaint, she was at a meeting of the Arenac County Board of Commissioners when Curcio entered with a video camera and assaulted her with it. Allegedly, the camera lens was covered but the audio recording was on. Curcio was tried in district court on a misdemeanor assault charge. Plaintiff testified against him during that trial, and part of the proofs against him included the audio tape that (according to plaintiff) indicated he called her "slut" during the assault. Curcio was found guilty but the conviction was reversed, apparently because he had inadequate counsel. Defendant Gary Rapp was assigned as special prosecutor to handle the retrial of the assault charge against Curcio. Because the original could not be located for use in a second trial, Rapp requested a copy of the audio tape from Curcio. Rapp thereafter

decided to drop the charges against Curcio and instead brought perjury charges against plaintiff and others who had testified in the first assault trial.¹

In January 2006, defendant Detective Robert Lesneski administered a polygraph examination to plaintiff in connection with the perjury charge. According to plaintiff's complaint in the present case, Detective Lesneski admitted in his police report that he had disclosed to Curcio the results of that examination. Rapp also disclosed the results of her polygraph examination to Curcio. Curcio distributed the results of the polygraph examination to the public at township and county board of commissioner meetings in October 2007. The results also appeared in the January 2008 edition of the newsletter "Arenac County Town Crier," which was distributed to Arenac County voters. Plaintiff claimed that she suffered "mortification, humiliation, embarrassment, disruption of lifestyle and severe emotional distress" as a result of the dissemination of the results of the polygraph examination.

Plaintiff's complaint contained counts for violation of public policy, specifically the Forensic Polygraph Examiner's Act (FPEA), MCL 338.1701 *et seq.*, intentional infliction of emotional distress, false light invasion of privacy; defamation,² and gross negligence. The government defendants³ brought motions for summary disposition in which Curcio concurred.

Following a hearing on the motions, the court found that the FPEA did not provide for a private cause of action. Regarding the false light count, the court found that the alleged information Curcio disseminated—that appellant failed her polygraph examination—"is not false and did not place the plaintiff in a false light; rather, it reflects truthfully her actual polygraph performance." Regarding the claim for intentional infliction of emotional distress, the court concluded that Curcio's conduct "may well be petty, it may well be despicable, but there is no cause of action in this state for despicable conduct, at least not under intentional infliction of emotional distress." Finally, the court found that there was no cause of action for gross negligence against Curcio because all the allegations under that count related to either Rapp or Lesneski. The court entered orders dismissing all of plaintiff's claims.

Plaintiff appeals only the trial court's dismissal of her claims against Curcio. She first argues that the trial court erred in ruling that the FPEA does not provide a private cause of action for violation of the act. We review *de novo* a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Statutory interpretation is a question of law that we also consider *de novo* on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

¹ Plaintiff was ultimately acquitted of perjury by a jury on April 13, 2007.

² Plaintiff conceded that the expiration of limitations barred her defamation count.

³ The government defendants included Arenac County, Rapp, Detective Lesneski, and John/Jane Doe.

The trial court did not err in concluding that the FPEA does not provide a private cause of action. MCL 338.1728(3) provides:

Any recipient of information, report or results from a polygraph examiner, except for the person tested, shall not provide, disclose or convey such information, report or results to a third party except as may be required by law and the rules promulgated by the board in accordance with section 7 of this act.

The act's purpose is:

[T]o license and regulate persons who purport to be able to detect deception, verify truthfulness, or provide a diagnostic opinion of either through the use of any device or instrumentation as lie detectors, forensic polygraphs, deceptographs, emotional stress meters or similar or related devices and instruments; to create a state board of forensic polygraph examiners with licensing and regulatory powers over all such persons and instruments; to provide for administrative proceedings and court review; to establish minimum standards and requirements for all such instrumentation or devices and to prohibit the use of instruments or devices which do not meet minimum standards and requirements; and to provide for injunctions and penalties. [1972 PA 295.]

The act includes two penal provisions. MCL 338.1727 provides:

If any person violates the provisions of this act, the board, in the name of the people of the state, through the attorney general, may apply to a court of competent jurisdiction for an order enjoining the violation or for an order enforcing compliance with this act. Upon the filing of a verified petition in the court, the court or any judge thereof, if satisfied by affidavit or otherwise that such person has violated or is violating this act may issue a temporary injunction, without notice or bond, enjoining the continued violation. If it is established that the person has violated or is violating the injunction, the court or any judge thereof may summarily try and punish the offender for contempt of court. Proceedings under this section shall be in addition to, and not in lieu of, all other remedies and penalties provided by this act.

In addition, the act provides that “a person violating this act or falsely stating or representing that he or she is or has been an examiner or intern is guilty of a misdemeanor.” MCL 338.1729(1).

As can be seen, the FPEA does not expressly create a private cause of action for violations of its provisions. Thus, the question becomes whether the trial court correctly found that public policy did not require a finding that the statutory scheme implies a private cause of action. While a cause of action for money damages will not be implied against a governmental entity, when a private defendant is involved, a cause of action may be found under certain circumstances. *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007); *Gardner v Wood*, 429 Mich 290, 302; 414 NW2d 706 (1987); *Pompey v Gen Motors Corp*, 385 Mich 537, 552-553; 189 NW2d 243 (1971).

In *Gardner*, the Michigan Supreme Court held that a cause of action could be created to redress a statutory violation where the purpose of the statute at issue was:

“... found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.” [Gardner, 429 Mich at 302, quoting *Longstreth v Gensel*, 423 Mich 675, 692-693; 377 NW2d 804 (1985), quoting 2 Restatement Torts, 2d, § 286, p 25.]

Pompey explained, “The general rule, in which Michigan is aligned with a strong majority of jurisdictions, is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive.” *Pompey*, 385 Mich at 552. However, the Court added in a footnote, “There are two important qualifications to this rule of statutory construction: In the absence of a pre-existent common-law remedy, the statutory remedy is not deemed exclusive if such remedy is plainly inadequate, or unless a contrary intent clearly appears.” *Id.* at 552 n 14 (citations omitted).

In *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 695-696; 588 NW2d 715 (1998), this Court held that the child care organizations act, MCL 722.111 *et seq.*, did not expressly allow a private cause of action and one was not implied because “the act adequately provides for enforcement of its provisions through proceedings instituted by the Attorney General” and “also provides criminal penalties for the violation of its provisions.”

The FPEA prohibits “any recipient” from disclosing results of a polygraph examination. MCL 338.1728(3). The act also allows a court to enforce compliance against “any person” violating the act. MCL 338.1727. This latter provision is not limited to examiners only given the definition of “person” in MCL 338.1703(a) which provides that “‘Person’ means any natural person, firm, association, partnership, or corporation.” Thus, Curcio is within the scope of the statute’s prohibitions and, therefore, he can be enjoined or required to comply under MCL 338.1727, and can be criminally prosecuted for a misdemeanor under MCL 338.1729(1). Under *Lane*, therefore, plaintiff’s private cause of action is precluded because the act provides for enforcement of its provisions through injunctive proceedings as well as providing criminal penalties for the violation of its provisions.

Regarding the factors set forth in *Pompey* and *Garnder*, the latter may allow plaintiff’s suit to proceed, although the act is more intended to regulate the examiners and examinations, rather than the improper disclosure of actual results. However, *Pompey* would preclude plaintiff’s because the statute specifically allows only “all other remedies and penalties *provided by this act.*” MCL 338.1727 (emphasis added). Even if resort to common law remedies is allowed, plaintiff does not explain why traditional causes of action such as defamation or

invasion of privacy are not adequate to prevent wrongful dissemination of information. Instead, she prefers that this Court craft a per se rule regarding violations of the anti-disclosure statute because any common law claim fails as a matter of law because the information Curcio disseminated was not false.

In sum, under *Lane*, plaintiff cannot bring a private cause of action against Curcio for violating the FPEA. Moreover, plaintiff does not meet the test set forth in *Pompey* because the statute does not permit imposition of common law remedies and plaintiff has not shown that the statutory remedies of injunction and criminal prosecution are inadequate. Finally, even under *Gardner*, plaintiff cannot show that she is in a class of persons the statutory scheme was intended to protect beyond providing the remedies enacted expressly into the statute.

Plaintiff next argues that the trial court erred in finding that her claim against Curcio for intentional infliction of emotional distress failed as a matter of law. We disagree. To prove a claim for intentional infliction of emotional distress, the plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). *Doe* provides the classic description of the tort:

Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. It has been said that the case is generally one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" [*Id.* (citations omitted).]

The trial court determines initially whether the conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, but where reasonable minds could differ, the matter is one for the trier of fact. *Id.* at 92.

Plaintiff argues that Curcio engaged in extreme and outrageous acts when he distributed at county and municipal board meetings the information that she had not passed her polygraph examination. She contends that this information "improperly portrayed Plaintiff as a liar during a criminal investigation which resulted in unfounded perjury charges being levied against the Plaintiff." However, the alleged distribution of this information occurred *after* the perjury charges had been made. Moreover, the information was not "insults, indignities, threats, annoyances, petty oppressions or other trivialities," but, rather, was the truth. The information did not convince the jury to convict plaintiff of perjury, and her acquittal countered any impression of her being a liar that her unfavorable polygraph results might have given. While plaintiff might have liked to keep the results of the polygraph examination secret, Curcio's dissemination of this true information cannot be said to rise to the level of being "utterly intolerable in a civilized community."

Third, plaintiff asserts that the trial court erred in dismissing her claim for false light invasion of privacy. Again, we disagree. To maintain such a claim, “a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.” *Duran v Detroit News, Inc.*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993).

Plaintiff objected to the alleged dissemination of the fact that she failed her polygraph examination, and contends that the information led people to believe that she lied at trial. Yet, the information reflected the truth of appellant’s polygraph results. Plaintiff presented no evidence that this true information caused people to believe other things that were not true about her and that put her in a false position. The elements as given in *Duran* are in the conjunctive: the information must be false *and* place the appellant in a false position. Because the information allegedly disseminated by Curcio was not false, plaintiff’s allegations failed to satisfy the elements of the claim.

Plaintiff’s final point of contention is that the trial court judge, Judge Evans, should have been disqualified from her civil case because he was the trial judge for her criminal perjury trial. Where a challenged judge denies a motion for disqualification, the chief judge shall decide the motion de novo. MCR 2.003(D)(3)(a). An order denying a party’s motion for disqualification will be reversed only where the court abused its discretion. *People v Bero*, 168 Mich App 545, 549; 425 NW2d 138 (1988). The party moving for disqualification bears the burden of proving actual bias or prejudice. *Id.*

We find the trial court did not err in declining to recuse himself from the case. In her motion, appellant asserted as grounds for disqualification those currently identified as MCR 2.003(C)(1)(g)(iv) (that the judge was likely to be a material witness in the proceeding) and (C)(1)(c) (that the judge had personal knowledge of disputed evidentiary facts concerning the proceeding). At the hearing before Judge Evans, plaintiff first identified as “disputed” those facts that were part of the transcribed record as well as extra-record facts, noting that the judge “was in a position to have interactions with Defendant Rapp regarding his conduct during the course of the trial, the propriety of how he was proceeding, and things that will—may not necessarily reflect on the written record.” Counsel stressed, “The only issue we are dealing with revolves around the alleged disclosure of [the] . . . polygraph examination results. That’s what this case is about.”

This emphasis on now-dismissed defendants became even more pronounced at the de novo hearing before Judge Schmidt. Plaintiff’s counsel asserted that “the state of mind, as an example, of defendant Rapp is critical.” And again, later, he stated, “First off, we’re not limiting just to facial expression. We’re talking about comments and statements made by defendant Rapp. That’s—that’s basically it, your Honor.”

In this Court, plaintiff now shifts the focus to Curcio and the question of whether the audio tape played in the perjury trial supported plaintiff’s version of what happened during the original assault. Plaintiff does not explain how Judge Evans’s presence at the perjury trial would make him any more of a material witness than anyone else present at the trial, or what extra-judicial personal knowledge he has about the matter. Facts learned during the course of a

judicial proceeding do not form a basis for disqualification pursuant to MCR 2.003(B)(2). *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 729; 591 NW2d 676 (1998). According to the complaint, there were witnesses who testified at the perjury trial that the tape supported plaintiff's assertion that Curcio used the word "slut" during the assault. Thus, there is little Judge Evans could add were he to testify. Plaintiff points to no extra-judicial knowledge he might have.

Affirmed.

/s/ Jane E. Markey

/s/ E. Thomas Fitzgerald