STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA M. LINDSEY,

Plaintiff-Appellant,

V

ST. JOHN HEALTH SYSTEM, INC. – DETROIT MACOMB CAMPUS, d/b/a ST. JOHN DETROIT RIVERVIEW HOSPITAL, ST. JOHN HEALTH SYSTEM, INC., ST. JOHN HOSPITAL & MEDICAL CENTER, and ST. JOHN RIVERVIEW HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
February 6, 2007

Nos. 268296; 270042
Wayne Circuit Court
LC No. 03-314865-NO

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting defendants summary disposition on plaintiff's claim of intentional infliction of emotional distress, and awarding defendants attorney fees and costs. Because the trial court did not err: in granting summary disposition in favor of defendants on plaintiff's claim of intentional infliction of emotional distress, in refusing to consider various expert affidavits submitted by plaintiff, in dismissing the additional defendants and refusing to add additional defendants, in granting defendant's request for discovery of plaintiff's psychiatric records, in denying disclosure of the occurrence report to plaintiff, and in awarding costs and attorney fees to defendants as the prevailing party based on plaintiff's rejection of the case evaluation, we affirm.

I

This action arises from plaintiff's hospitalization at St. John Riverview Hospital. Plaintiff alleged that during her post-surgical recovery at the hospital, unidentified members of defendants' nursing staff treated her in a rude, disrespectful, and unprofessional manner. Plaintiff alleged that members of defendants' nursing staff made derogatory references to her, were rough on one occasion when taking plaintiff's vital signs, threatened to hurt plaintiff, injected an unknown substance into plaintiff's intravenous medications resulting in severe gastrointestinal distress, and failed to respond to plaintiff's requests for assistance, resulting in her falling and incurring injuries. The trial court originally dismissed plaintiff's complaint after determining that her causes of action sounded in medical malpractice and the action was barred

by the applicable two-year statute of limitations, MCL 600.5805(6). In the prior appeal, this Court affirmed the trial court's dismissal of plaintiff's negligence and breach of warranty claims because the substance of those claims sounded in malpractice, but determined that plaintiff's claim of intentional infliction of emotional distress was not a malpractice claim and reversed the dismissal of that claim. *Lindsey v St John Health Sys, Inc,* unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No. 251898). On remand and after completion of discovery, the trial court granted defendants' motion for summary disposition and dismissed plaintiff's remaining claim of intentional infliction of emotional distress. This appeal followed.

II

Plaintiff first asserts that the trial court erred in granting summary disposition in favor of defendants. Plaintiff contends that she established a prima facie case of intentional infliction of emotional distress, and argues that both collateral estoppel and the law of the case doctrine precluded the trial court from dismissing her claim. She further asserts the trial court erred in failing to consider evidence she provided in opposition to defendants' motion for summary disposition. We review de novo a trial court's decision regarding a motion for summary disposition. *Sotelo v Grant Twp,* 470 Mich 95, 101; 680 NW2d 381 (2004). Whether the law of the case doctrine applies is a question of law for this Court. *Ashker v Ford Motor Co,* 245 Mich App 9, 13; 627 NW2d 1 (2001).

Intentional infliction of emotional distress is recognized as a separate theory of recovery. *Heckmann v Detroit Chief of Police,* 267 Mich App 480, 498; 705 NW2d 689 (2005). The elements of this tort include:

> (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. [*Lewis v LeGrow,* 258 Mich App 175, 196; 670 NW2d 675 (2003).]

For a plaintiff to establish a prima facie case of intentional infliction of emotional distress, "[i]t has not been enough that the defendant has acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Rosenberg v Rosenberg Bros Special Account,* 134 Mich App 342, 350; 351 NW2d 563 (1984) (citation omitted). Rather, a defendant can be determined to be liable "'only where the [defendant's] conduct 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. Generally, the case is 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!'" *Roberts v Auto-Owners Ins Co,* 422 Mich 594, 603; 374 NW2d 905 (1985) (citation omitted). "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to impose liability. *Id.*

As a matter of law, the trial court must initially determine if a defendant's conduct could be reasonably regarded as so outrageous and extreme as to permit recovery. *Teadt v Lutheran Church Missouri Synod,* 237 Mich App 567, 582; 603 NW2d 816 (2000). The trial court noted that many of plaintiff's complaints pertaining to the behavior of defendants' staff toward her may

be characterized as facial expressions of displeasure or disgust. Plaintiff also identified two derogatory comments or epithets used in reference to her. While the alleged conduct may be properly considered rude and unprofessional, such conduct amounts to mere "insults" and "indignities" and do not rise to the level necessary to sustain plaintiff's claim.

Plaintiff's final two fact assertions pertain to her intervenous therapy. The first is a statement overheard by plaintiff suggesting that an inappropriate substance could be placed into her IV tube. Again, while the alleged conduct would be considered unprofessional and inappropriate, the comment standing alone is insufficient to meet the minimum threshold to be deemed extreme and outrageous conduct of such severity that it could be construed as "utterly intolerable in a civilized community." *Roberts, supra,* p 603. The second assertion concerns plaintiff's subsequently altered allegation that defendants' staff had placed poison in her IV tube to an assertion that a physician-ordered medication had been improperly administered, resulting in a negative physical reaction. Rather than extreme and outrageous conduct, the revised allegation suggests nothing more than malpractice.

Plaintiff alternatively argues that this Court's prior decision in *Lindsey*, *supra*, slip op p 4, precludes the trial court's grant of summary disposition. Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *City of Kalamazoo v Dep't of Corrections (After Remand),* 229 Mich App 132, 135; 580 NW2d 475 (1998), quoting *CAF Investment Co v Saginaw Twp,* 410 Mich 428, 454; 302 NW2d 164 (1981). "Likewise, a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court." *City of Kalamazoo, supra,* p 135. Hence, "a ruling on a legal question in the first appeal is binding on all lower tribunals and in subsequent appeals." *Id.* "The primary purpose of the rule is to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit." *Id.*

Plaintiff's interpretation of this Court's prior decision regarding her claim for intentional infliction of emotional distress is overly broad. This Court determined that plaintiff had alleged a claim for intentional infliction of emotional distress that did not sound in medical malpractice but did not make any determination whether plaintiff could factually support her claim. On remand, after conducting additional discovery, defendants filed a second motion for summary disposition, asserting that plaintiff could not establish a genuine issue of material fact regarding her claim. The trial court was required to determine whether plaintiff had demonstrated a prima facie case of intentional infliction of emotional distress. The trial court found, and we agree, that the evidence submitted by plaintiff fell short of the threshold requirements. Plaintiff's argument ignores the distinction between the sufficiency of a pleading to proceed with a claim and the ability to factually substantiate a claim. Plaintiff failed to demonstrate the latter and the trial court's dismissal was not inconsistent with this Court's prior decision.

Plaintiff's reliance on collateral estoppel is also misplaced. "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *McMichael v McMichael,* 217 Mich App 723, 727; 552 NW2d 688 (1996). Plaintiff misinterprets this Court's prior decision as "a valid final judgment," with the issue of intentional infliction of emotional distress as having been

"actually and necessarily determined." *Id.* Because neither of these requirements was satisfied in this case, the trial court was not precluded from granting summary disposition in favor of defendants.

Finally, plaintiff argues that the trial court erred in failing to consider various affidavits of experts and treating professionals that she provided in opposition to defendants' motion for summary disposition. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co,* 472 Mich 408, 419; 697 NW2d 851 (2005).

Plaintiff submitted four affidavits in response to defendants' motion for summary disposition, one authored by her treating psychiatrist; another authored by her treating physician; and two others pertaining to breaches of nursing standards. The psychiatric affiant merely confirms his treatment history with plaintiff and opines that his treatment records ought to be redacted and precluded from discovery on matters not directly involving plaintiff's experiences with defendants. The affidavit does not provide any factual assertions pertaining to the events alleged by plaintiff in support of her legal claim. Similarly, the physician affiant provides standard of care averments and opinions regarding the events alleged by plaintiff. He additionally provides that upon plaintiff's complaint, he requested an internal investigation by the hospital. At the hearing on defendants' motion, plaintiff acknowledged that none of these individuals witnessed the events that comprised the substance of plaintiff's claim and that plaintiff had been the source of the information attained by the affiants regarding the alleged events.

The trial court correctly noted its role was to determine "whether . . . there's a prima facie case of the intentional infliction of emotional distress." The trial court observed that the affidavits provided little more than a "repeating, regurgitating what the plaintiff said that the defendants did," and "do nothing more than give their opinion about the ultimate facts of this case, without having any personal knowledge about the behavior of the defendants with regard to the plaintiff

MCR 2.119(B) governs the requirements for an affidavit submitted in support or opposition to a motion, and the requirements are reiterated in *SSC Assoc Ltd Partnership v Gen Retirement Sys,* 192 Mich App 360, 364; 480 NW2d 275 (1992). In addition, "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *Id.* As the trial court recognized, the purpose or use of the affidavits submitted by plaintiff were "not to be used to resolve a question of fact," but rather only "considered to determine whether an issue of fact exists." *Id.*, p 366. Because the affidavits did not meet the "personal knowledge" criteria delineated in MCR 2.119(B), their content being factually deficient and primarily comprised of hearsay, the trial court properly discounted the affidavits.

III

Plaintiff also argues that the trial court erred in dismissing all defendants, with the exception of St. John Health System – Detroit Macomb Campus, d/b/a St. John Detroit Riverview Hospital, as a defendant and in denying her request to amend her complaint to add Ascension Health as a defendant. This Court reviews a trial court's decision regarding the

amendment of pleadings for an abuse of discretion. *Doyle v Hutzel Hosp,* 241 Mich App 206, 211-212; 615 NW2d 759 (2000). "[A] grant or denial of a motion to add a party . . . is governed by the same standard applicable to a motion to amend pleadings." *Waldorf v Zinberg,* 106 Mich App 159, 166; 307 NW2d 749 (1981).

Plaintiff asserts that Ascension Health and the various other defendants are integrally intertwined corporate entities, all of which sent her billings on their individual mastheads, following her hospitalization at St. John Detroit Riverview Hospital. Although plaintiff only contends a right to amend her complaint to add or retain the various referenced defendants pursuant to MCR 2.118, she fails to specify or elucidate the basis for this claim. It appears from plaintiff's motion in the trial court that plaintiff views Ascension Health and the other named defendants as necessary parties, requiring joinder under MCR 2.205. Defendants acknowledge that the various entities are related, but insist that only St. John Health System – Detroit Macomb Campus, d/b/a St. John Detroit Riverview Hospital, is the only appropriate defendant because it is the only entity that provided care to plaintiff. Defendants submitted an affidavit explaining the relationships between the corporate entities and asserting that none of the disputed entities provided care to plaintiff and did not have any additional insurance coverage available to address plaintiff's claims should she recover damages.

Generally, a court should freely grant leave to amend when justice so requires. *Knauff v Oscoda Co Drain Comm'r,* 240 Mich App 485, 493; 618 NW2d 1 (2000). However, amendment is not justified if it would be futile. *Ormsby v Capital Welding, Inc,* 471 Mich 45, 53; 684 NW2d 320 (2004). MCR 2.205(A) requires the joinder of all parties "having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief." When a party's presence in an action is not found to be essential to the court rendering complete relief, factors such as avoidance of multiple litigation and judicial economy are insufficient to compel joinder. *Troutman v Ollis,* 134 Mich App 332, 339-340; 351 NW2d 301 (1984). In this case, the rights and legal obligations that plaintiff seeks to determine are solely related to, and arise from, her relationship with the direct medical care provider and its actual, governing corporate entity – St. John Health System – Detroit Macomb Campus, d/b/a St. John Detroit Riverview Hospital. Notwithstanding any common interest the precluded defendants may have in the subject matter of this action, their joinder is not essential to a determination of the rights and obligations existent between plaintiff and the remaining defendant, nor are they necessary to permit the trial court to render complete relief. We conclude that the additional defendants are extraneous to the litigation and plaintiff has not demonstrated that they are essential to her attainment of relief. The trial court did not err in denying plaintiff's request to add Ascension Health and in dismissing the other named defendants in this action.

IV

Next, plaintiff contends that the trial court erred in permitting defendants to obtain discovery of plaintiff's entire psychiatric records and denying her request for discovery of an "occurrence report" completed by defendants. This Court reviews de novo questions of law, including whether a statute precludes production of documents and statutory interpretation. *Dye v St John Hosp & Medical Ctr,* 230 Mich App 661, 665; 584 NW2d 747 (1998); *Rose Hill Ctr, Inc v Holly Twp,* 224 Mich App 28, 32; 568 NW2d 332 (1997). A trial court's order is reviewed for an abuse of discretion if it is determined that a privilege is applicable. *Baker v Oakwood Hosp Corp,* 239 Mich App 461, 468; 608 NW2d 823 (2000). Further, whether a party

voluntarily disclosed a document and thereby waived the document's privileged status is a mixed question of fact and law. *Leibel v Gen Motors Corp,* 250 Mich App 229, 232; 646 NW2d 179 (2002).

Plaintiff argues that the trial court erred in requiring her to disclose the entirety of her psychiatric records, rather than only those records that pertained directly to her claims involving St. John Riverview Hospital. After plaintiff asserted the physician-patient privilege to bar disclosure of a portion of her psychiatric records, the trial court indicated that it would be required to dismiss plaintiff's claims for mental distress damages. Plaintiff thereafter agreed to release her treating psychiatrist's "complete file."

Plaintiff cannot assert error on appeal, having waived the physician-patient privilege. The privilege belongs to the patient and, once asserted, can be waived only by the patient. *Herald Co, Inc v Ann Arbor Pub Schools,* 224 Mich App 266, 276; 568 NW2d 411 (1997). A true waiver is an intentional, voluntary act, which has been defined as the "voluntary relinquishment of a known right." *Kelly v Allegan Circuit Judge,* 382 Mich 425, 427; 169 NW2d 916 (1969).

Rather than risk dismissal of her claim for mental distress damages by the trial court, plaintiff agreed to release the disputed records. Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence. *Phinney v Perlmutter,* 222 Mich App 513, 537; 564 NW2d 532 (1997). "A party waives an issue by affirmatively approving of a trial court's action." *Muci v State Farm Mut Auto Ins Co,* 267 Mich App 431, 443; 705 NW2d 151 (2005), lv pending 475 Mich 877 (2006). Given plaintiff's waiver of the physician-patient privilege, she is precluded from now alleging error before this Court.

Plaintiff also contends that the trial court erred in denying disclosure of defendants' occurrence report. "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co,* 227 Mich App 614, 616; 576 NW2d 709 (1998); MCR 2.302(B)(1). The issue in this case is whether the requested document was privileged.

MCL 333.21515 provides:

> The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for purposes provided in this article, shall not be public records, and shall not be available for court subpoena.

This statutory language clearly and unambiguous indicates that "records, data, and knowledge collected by the peer review committee 'shall be used only for the purposes provided in this article.'" *Attorney Gen v Bruce,* 422 Mich 157, 165; 369 NW2d 826 (1985).

Plaintiff sought discovery of an occurrence report developed by defendants. This request for discovery necessarily related to a document that concerned the review of professional practices and the quality of care provided by the hospital. MCL 333.21513(d). Defendants established the purpose of the document and verified its use for peer review through an affidavit.

As such, the trial court did not err in denying plaintiff's motion to compel production of the document.

V

Plaintiff asserts that the trial court erred in awarding defendants attorney fees and costs. "Taxation of costs under MCR 2.625(A) is within the discretion of the trial court." *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp,* 221 Mich App 301, 308; 561 NW2d 488 (1997). Questions regarding the interpretation of the court rules, including "[t]he determination whether a party is a 'prevailing party' under MCR 2.625 is a question of law," which is reviewed de novo. *Klinke v Mitsubishi Motors Corp,* 219 Mich App 500, 521; 556 NW2d 528 (1996). A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen,* 242 Mich App 374, 376-377; 619 NW2d 1 (2000).

While plaintiff contends that the trial court erred in awarding defendants costs and attorney fees based on a determination that her claim was frivolous, she misconstrues the basis for the trial court's award. Although the trial court opined that plaintiff's claim was deserving of sanctions, it awarded costs and attorney fees under MCR 2.403(O), based on plaintiff's rejection of the case evaluation, and MCR 2.625(A)(1), based on defendants' status as prevailing parties. Contrary to plaintiff's argument, defendants never asserted entitlement to costs and attorney fees based on plaintiff's claim being frivolous.

MCR 2.403(O)(1) provides, in relevant part:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.

For purposes of this court rule, a "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). Plaintiff does not dispute that the case evaluation resulted in the assignment of a value of zero in favor of plaintiff against defendants. Plaintiff rejected the valuation and defendants accepted the award. Based on this rejection, the trial court was required to award defendants "actual costs" in accordance with the mandatory language of the court rule. MCR 2.403(O)(1). A determination of frivolousness by the case evaluation panel is not a requirement for an award of costs under the rule.

Taxation of costs is also permitted by MCR 2.625(A)(1), which states:

> *In General.* Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

While plaintiff correctly observes that this language is permissive, the trial court justified its decision, remarking "that everybody should have known from the beginning, including the Plaintiff, that she didn't have anything approaching a viable cause of action." We agree with plaintiff that the trial court could not award costs for depositions that were not filed with the clerk's office. MCL 600.2549. But plaintiff fails to acknowledge that the trial court specifically excluded those costs in its determination of an appropriate award. Although plaintiff asserts that

she should not be responsible for those discovery costs incurred by defendants after the case evaluation, but which could have been conducted prior to the case evaluation, she provides no authority in support of her position. Because this Court will not search for authority to support a party's position, *Schadewald v Brulé,* 225 Mich App 26, 34; 570 NW2d 788 (1997), we deem this claim abandoned. *Etefia v Credit Technologies, Inc,* 245 Mich App 466, 471; 628 NW2d 577 (2001).

Plaintiff also takes issue with the award of $1,875 in "expert" witness fees paid by defendants to her treating psychiatrist in post case evaluation defense. Expert witness fees are fees incurred by defendants as part of their "actual costs" under MCR 2.403(O). Hence, the trial court is without discretion to refuse expert witness fees. Because plaintiff fails to cite any legal authority that would serve to preclude an award of this cost to defendants, this claim is deemed abandoned. *Etefia, supra,* p 471. Plaintiff contends that the trial court erred in determining the "reasonableness" of the attorney fees sought. Notably, the trial court did specifically rule on the reasonableness of the hourly fee charged by defendants' counsel, but, indicated that it would conduct an evidentiary hearing on plaintiff's request. Plaintiff failed to request such a hearing. A party's failure to request an evidentiary hearing on the issue of attorney fees constitutes a forfeiture of the issue. *Kernen v Homestead Dev Co,* 252 Mich App 689, 692; 653 NW2d 634 (2002).

VI

In conclusion, the trial court did not err in granting summary disposition in favor of defendants on plaintiff's claim of intentional infliction of emotional distress. The trial court did not err in refusing to consider various expert affidavits submitted by plaintiff. The trial court did not abuse its discretion when it dismissed the additional defendants and refused to add additional defendants. The trial court did not err in granting defendant's request for discovery of plaintiff's psychiatric records and in denying disclosure of the occurrence report to plaintiff. Finally, the trial court did not err in awarding costs and attorney fees to defendants as the prevailing party and based on plaintiff's rejection of the case evaluation.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra