STATE OF MICHIGAN

COURT OF APPEALS

JESSICA STRATTON,

Plaintiff-Appellant/Cross-Appellee,

v

DIANN KRYWKO, M.D., a/k/a DIANN M. GREENFIELD, M.D. and JAMES WEBER, D.O.,

Defendants-Appellees/Cross-Appellants,

and

CITY OF FLINT, CITY OF FLINT BOARD OF HOSPITAL MANAGERS, d/b/a HURLEY MEDICAL CENTER, STEPHANIE MOTSCHENBACHER, MARGARET MURRAY-WRIGHT, R.N., WJRT, INC., BILL HARRIS, JASON CARR, and MARK MCGLASHEN,

Defendants-Appellees.

UNPUBLISHED
January 6, 2005

No. 248669
Genesee Circuit Court
LC No. 01-071909-NZ

JESSICA STRATTON,

Plaintiff-Appellant,

v

CITY OF FLINT BOARD OF HOSPITAL MANAGERS, d/b/a HURLEY MEDICAL CENTER, STEPHANIE MOTSCHENBACHER, MARGARET MURRAY-WRIGHT, R.N., DIANN KRYWKO, M.D., a/k/a DIANN M. GREENFIELD, M.D. and JAMES WEBER, D.O.,

Defendants-Appellees.

No. 248676
Genesee Circuit Court
LC No. 02-074982-NH

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting summary judgment in favor of defendants. In docket no. 248669, we affirm in part, reverse in part, and remand. In docket no. 248676, we affirm.

I. Background

The underlying facts of these suits are largely undisputed. Plaintiff's claims arose as the result of the filming and subsequent broadcast of plaintiff's treatment at defendant Hurley Medical Center (Hospital) by defendant WJRT, Inc. On the evening of November 17, 2000, plaintiff was involved in a serious automobile accident. She had been at a local bar, Shenanigan's Tavern, in Flint with a friend Scott Smith. While at the bar, plaintiff consumed alcohol and marijuana. It was also established that plaintiff was taking Prozac at the time. Concerned that plaintiff was intoxicated, Smith offered to drive plaintiff home; however, she refused his offer. Instead, Smith followed plaintiff as she drove herself home. On route, plaintiff's car crossed a patch of black ice. She applied her brakes and Smith's car hit the back of plaintiff's car. Both cars spun out of control. Plaintiff's car collided with a telephone pole, leaving her bloody and dazed. Smith's car rolled over and he had to be extricated from it using the "jaws of life." Open alcohol containers were found in Smith's car and marijuana was found in plaintiff's car.

The Genesee Township Police and Fire Departments and the Genesee County Sheriff Department's Paramedic Unit were dispatched to the scene. A film crew from WJRT was riding with the paramedic unit that evening in order to film front-line trauma care for a documentary entitled "A Brush With Death, A Night in the E.R." Defendant Jason Carr, a reporter for WJRT, accompanied plaintiff in the ambulance to the Hospital and filmed the events both at the accident scene and in the ambulance. Plaintiff had not been approached at this point regarding consent to the filming.

WJRT had previously obtained approval for filming from both the Genesee County Sheriff Department and the Hospital. WJRT's anchor, defendant Bill Harris, obtained approval from the Sheriff's Department. And WJRT's special projects coordinator, defendant Mark McGlashen, obtained approval from the Hospital via defendant Stephanie Motschenbacher, the Hospital's public relations manager. Harris and McGlashen were at the Hospital on the night of the accident and filmed plaintiff's and Smith's arrival and subsequent treatment. Both patients were presented with consent to film forms. Smith signed the form, but plaintiff refused. Plaintiff's medical treatment was nonetheless documented on film and parts were included in the broadcasted documentary.

The documentary was broadcast in two parts on WJRT on November 27 and 28, 2000, and again in its entirety on January 7, 2001. Plaintiff also makes note of a January 13, 2001 live interview with defendant Margaret Murray-Wright, RN, the Hospital's emergency department administrator, in which plaintiff's image on a stretcher from November 17, 2000, was seen. It appears undisputed that WJRT had complete control over the contents of the documentary including all editing decisions. Because plaintiff did not consent to her image being broadcast, her face was obscured by "digitization." Plaintiff alleged, however, that her face was still

recognizable. Defendant Dr. Diann Krywko referred to plaintiff as "Jessie" on the video and could be heard saying, "No allergies, on Prozac." Defendant Dr. Weber was seen on the video discussing her x-rays and cat scans, and her name and address could be seen on the paramedic's report that was shown on the video.

II. Procedural History

On November 15, 2001, plaintiff filed her initial complaint alleging invasion of privacy, defamation, and general negligence. Plaintiff twice amended her complaint and her third-amended complaint, filed on October 7, 2002, alleged: count I- governmental liability/gross negligence, count II- defamation, count III- intentional infliction of emotional distress, count IV- invasion of privacy, count V- intrusion upon seclusion, count VI- disclosure of embarrassing private facts, count VII- false light, count VIII- general negligence, count IX- concert of action, count X-civil conspiracy, and count XV [sic count XI]- violation of statutes. Plaintiff's suit represented by her third-amended complaint [LC No. 01-071909-NZ] will be referenced in this opinion as the "2001 suit."

A. Docket No. 248669

On March 4, 2003, defendants WJRT, Harris, McGlashen, and Carr [collectively referred to as "WJRT defendants"] moved for summary disposition as to the claims against them, counts II-X and XV[sic], pursuant to MCR 2.116(C)(10). Defendants Krywko and Weber filed their motion for summary disposition regarding the 2001 suit on March 21, 2003, pursuant to MCR 2.116(C)(7), (8), and (10), and concurred with WJRT defendants' motion for summary disposition. It appears that counts I, III, VIII-X, and XV were applicable to defendants Krywko and Weber. On March 27, 2003, defendants City of Flint, Hurley Medical Center, Margaret Murray-Wright, and Stephanie Motschenbacher [collectively referred to as "Hospital defendants"] filed their concurrence with WJRT defendants' and Krywko's and Weber's motions for summary disposition. Hospital defendants filed their own motion for summary disposition the next day, March 28, 2003, as to all claims against them—counts I, III, V, VI, VIII-X, and XV. Defendants' motions were collectively heard over the course of two days, April 14 and May 12, 2003, with the end result being that summary disposition was granted as to all claims against all defendants. Plaintiff now appeals these rulings in docket no. 248669.

B. Docket No. 248676

In November 2002, plaintiff filed a separate action [LC No. 02-074982-NH] against Hospital defendants and Drs. Krywko and Weber alleging medical malpractice. Drs. Krywko and Weber moved for summary disposition pursuant to MCR 2.116(C)(6) arguing that the case was substantially the same as the general negligence claim alleged in plaintiff's 2001 suit. They contended that any allegations of professional negligence should have been included in the 2001 suit because the parties and facts were the same. The trial court agreed, dismissed the malpractice suit and fined plaintiff's counsel. But the court did leave open the option for plaintiff to amend her 2001 suit to include a medical malpractice claim. Plaintiff did move to amend her third-amended complaint, but the trial court denied plaintiff's request as futile. The court had already granted summary disposition as to all parties on all claims brought in the 2001 suit. Plaintiff's motion for reconsideration was denied and this appeal, docket no. 248696, followed.

III. Standards of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 508-509; 667 NW2d 379 (2003).

Under MCR 2.116(C)(10), when reviewing a motion for summary disposition based on the lack of a material factual dispute, an appellate court considers all documentary evidence available in the light most favorable to the nonmoving party to determine whether there is a genuine issue of any material fact. *Id.* at 509. We review de novo a trial court's decision to grant summary disposition. *Id*. at 508.

IV. WJRT Defendants

WJRT defendants brought their motion for summary disposition under MCR 2.116(C)(10). Plaintiff argues that the trial court erred in dismissing her claims of defamation, invasion of privacy, and general negligence. We agree with plaintiff in regards to her claims of invasion of privacy- intrusion upon seclusion (count V) and invasion of privacy- disclosure of private facts (count VI).

A. Defamation

On appeal, plaintiff takes issue with the statement made by Sergeant Swanson to Dr. Weber that plaintiff and Smith were "both drunk." "A defamatory communication is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing with him." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000).

> The elements of a cause of action for defamation are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Id*.]

At the motion hearing, plaintiff's counsel continually categorized this claim as one of defamation by implication; the implication being that plaintiff was driving while drunk, committing a criminal offense. In order to prove such a claim, the burden is on the plaintiff to prove that the statement's implication was materially false. *Id*. Plaintiff presented no such evidence save for the fact that more than three hours after the accident her blood alcohol content (BAC) was .05.

Additionally, that a statement is "substantially true" is a defense to a charge of defamation by implication. *Hawkins v Mercy Health Services*, 230 Mich App 315, 333; 583 NW2d 725 (1998). Plaintiff admitted to drinking alcohol that evening at a bar, her friend offered to drive her home because he thought she was inebriated, the accident occurred on plaintiff's

way home from the bar, plaintiff was cited for operating under the influence of liquor (OUIL), an officer on the scene stated in his police report that plaintiff "had a strong smell of intoxicants" and her eyes were "bloodshot and glassy," and, at the time she arrived at the emergency room, plaintiff's BAC was .12. Therefore, we find that the trial court properly granted summary disposition of this claim as there was no issue of material fact to be decided at trial.

Under this analysis, whether the information was protected speech is irrelevant. Communication of unprivileged speech is only one element of defamation. *American Transmission, supra* at 702. Also, the fact that plaintiff's OUIL charge was subsequently dismissed pursuant to her plea bargain cannot be a basis for finding that the statement's implication was materially false. Simply because a charge is dismissed under a plea agreement does not mean that the charge could not be substantiated.

B. Invasion of Privacy

An invasion of privacy claim actually encompasses four distinct torts:

> (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. [*Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296, 300; 680 NW2d 915 (2004).]

There is no actionable general tort for invasion of privacy. In her complaint, plaintiff alleged invasion of privacy (count IV), intrusion upon seclusion (count V), disclosure of embarrassing private facts (count VI) and false light (count VII). Based on the specific allegations made, counts IV and VI are essentially the same. Accordingly, we do not address the court's dismissal of count IV because it is merely a restatement of count VI and not a recognized independent tort.

1. Disclosure of Embarrassing Facts

A claim for public disclosure of private facts requires the disclosure of information which would be highly offensive to a reasonable person and is of no legitimate concern to the public. The information disclosed must be of a private nature and not already of public record or otherwise open to the public eye. *Duran v The Detroit News, Inc*, 200 Mich App 622, 631; 504 NW2d 715 (1993). Matters concerning a person's medical history or condition are generally considered private. *Doe v Mills*, 212 Mich App 73, 82-83; 536 NW2d 824 (1995).

Plaintiff first argues that the trial court erred in concluding that the released information was already public and contends that none of the information released was from public sources; it all came from medical personnel and plaintiff had a right to expect that her information would be kept private. Plaintiff objects to the dissemination of her identity (name, address, face, and voice) and medical information (allergy status, Prozac prescription, x-ray/cat scan findings, and prognosis). With regards to the public nature of the information, the trial court stated:

> But the problem in this case is, is that so much of what she claims to be highly offensive to a reasonable person was already public. The accident itself is out on a public roadway in Genesee Township, Genesee County, Michigan. And

> anybody who walked by or drove by would stop and would look at her condition. And somebody did stop and look at her condition and they called the police and they called the paramedics. . . . And the information concerning her lacerations, her blood alcohol, her name and address, that's a matter of police record. That's in the public court file which is open to anybody who walks in the front door of the 67th District Court. It's true that her x-ray or MRIs, if those were hers—they were identified as Jane Doe and I suspect that they were not—but if they were hers, there's nothing really intimate about that. It's not—I mean, we look at those things and they are shadows and marks on a screen.

Plaintiff tries to capitalize on this Court's statement in *Mullin v Detroit Police Dep't*, 133 Mich App 46, 55; 348 NW2d 708 (1984), that "the very fact of having been involved in an automobile accident" is an embarrassing fact and release of the information would constitute an invasion of privacy. However, *Mullin* involved a person who sought accident information pertaining to approximately 140,000 people from the Detroit Police Department under the Freedom of Information Act (FOIA) in order to conduct a statistical study. *Id*. at 51-52. Here, WJRT defendants were not requesting information subsequent to the accident's occurrence. They were present at the time it occurred on a public roadway and filmed the scene contemporaneously. It is no different that a news station reporting an accident and showing footage on the six o'clock news. The accident itself and plaintiff's condition on the scene were "exposed to the public eye." *Duran, supra* at 631.

Plaintiff also contends that although her identity and physical condition were in the police report, such personal information would be exempt from release under the FOIA and thus, not part of the public record available to the public. However, the FOIA cases cited by plaintiff are inapplicable. The police reports in Genesee Township are part of the court files which do not require an FOIA request for review. Because of the criminal charges against plaintiff, the police reports regarding the accident were in her public court file.

With respect to the x-rays and cat scan shown on the broadcast, we agree with the trial court that this information was not of a private nature as it pertained to plaintiff. Plaintiff offers no proof that these were in fact her films and they were specifically identified on the broadcast as belonging to Jane Doe. Concerning the fact that plaintiff was on Prozac, the court found that the information was public because she had already told some members of her family and friends, i.e., "the cat was out of the bag." Plaintiff countered that such information should not be considered public where plaintiff chose to tell only a select number of close friends and family. Plaintiff's argument has merit. Disclosing a fact to a small number of confidants does not equate to making the information public. The trial court determined that where the information was known by a "substantial group" of persons, it is public fact. The court relied on Scott Smith's testimony that "everybody" in school knew that plaintiff was on Prozac, a point plaintiff vigorously denies. At a minimum, this would be an issue for the trier of fact.

But even if private information is disclosed, it may be protected speech under the First Amendment if it is "newsworthy." *Winstead v Sweeney*, 205 Mich App 664, 668; 517 NW2d 874 (1994). This privilege is not absolute. It only applies where the published information is of legitimate public concern. *Id*.

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal. [*Id.* at 669, quoting 3 Restatement Torts, 2d, § 652D, comment g, pp 390-391.]

Additionally, matters related to education and information are also within the scope of legitimate public concern.

> The scope of a matter of legitimate concern to the public is not limited to "news," in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published. [*Id.* at 670, quoting 3 Restatement Torts, *supra*, comment j, p 393.]

Plaintiff's argument as to whether the information was privileged is two-fold. First, plaintiff argues that the court erred in not submitting the question to the jury because it is one of law and fact, citing *Winstead, supra*. Plaintiff's reliance is misplaced to the extent that *Winstead* simply recognizes that "in certain rare cases, it is necessary to defer to the fact-finding process" to determine what a legitimate public interest is in a particular community. The role of the court, therefore, is "to ascertain whether a jury question is presented." *Id*. at 672, quoting *Virgil v Time, Inc*, 527 F2d 1122, 1130 (CA 9, 1975). Thus, we must consider the released information in the context of the broadcast to determine if the court erred in deciding this issue as a matter of law and, in doing so, address plaintiff's second argument.

Plaintiff contends that the specific information released was not of public interest given its highly personal nature and the fact that the focus of the documentary was on the health care professionals, not the patients. Therefore, plaintiff asserts that her personal information was not related to a public interest story and did not need to be disclosed, particularly when WJRT had a willing participant who consented to filming, Scott Smith.

Here, the focus of the documentary was on the activities of a level one trauma center in Genesee County, the Hurley Medical Center, including the response team's interaction with the Hospital both before and at the time of the patient's arrival. Part and parcel of this is the treatment of patients presented to the emergency room. In order to understand the medical professionals' actions, a synopsis of the type of patient they were dealing with was important. WJRT did not know what types of injuries it would encounter on the night its staff member rode along with the Genesee County Sheriff Department's Paramedic Unit. As it turned out, the unit responded to an auto accident involving drivers who had been drinking.

Again, *Winstead, supra*, is instructive.

> The ambit of protection offered by the . . . privilege often encompasses information relating to individuals who either have not sought or have attempted to avoid publicity . . . . The privacy of such individuals is protected, however, by requiring that a logical nexus exist between the complaining individual and the matter of legitimate public interest. [*Id*. at 670, quoting *Campbell v Seaberry Press*, 614 F2d 395, 397 (CA 5, 1980).

The trial court focused on this nexus between the information about plaintiff that was released, its context in the documentary, and the public interest in the documentary's subject-matter.

> [T]his Court does not find that the TV station had picked out Jessica Stratton and decided to get information about her and then publicize it. What happened was, they went to a public event, she was unfortunately injured and bloodied and hysterical and, as argued by Sergeant Swanson, under the influence of alcohol. And then they followed her to the hospital where in their covering of hospital medical treatment, which is a legitimate concern to the public because it's a public hospital, they happened to overhear the words, no allergies on Prozac, and it was a very small part of the general story. It was obviously not something they were focused on. As a matter of fact, they didn't even talk about it; he only overheard it once. And there was not an invasion of privacy to the extent where there was—where it meets the conditions of public disclosure of embarrassing private facts. That part of the motion is granted.

Winstead, however, cautioned that not only must the overall subject-matter be newsworthy, but also the particular facts revealed. *Id*. at 674. Thus, the trial court must determine whether "reasonable minds could differ concerning whether the information published about plaintiff was of legitimate public interest." If reasonable minds could differ, then the question is one for the jury. *Id*. at 674-675. Although *Winstead* remanded the issue for the trial court's consideration, *id*. at 675, in this case, we believe that there is no question that reasonable minds could differ as to whether the facts particular to plaintiff were of a legitimate public interest. Thus, summary disposition was improper.

2. Intrusion Upon Seclusion

To establish a claim of intrusion upon seclusion, a plaintiff must show: (1) an intrusion by the defendant, (2) into a matter which the plaintiff has a right to keep private, (3) by the use of a method which is objectionable to a reasonable person. *Duran, supra* at 631. The mere objection to the publication of a private fact is irrelevant if the method by which the information was obtained was not objectionable to a reasonable person. *Doe, supra* at 88-89.

Plaintiff argues that the means used to obtain her private information was objectionable because although WJRT had authority to be in close proximity to patients, it agreed to abide by the Hospital's confidentiality policies and state and federal privacy laws. When it obtained information in violation of that agreement, WJRT's presence was no longer authorized and its agents were, in effect, trespassers. The trial court initially agreed with plaintiff, stating:

> Now, I was ready to deny this motion because I think WJRT effectively duped Hurley Hospital, induced them into giving permission to allow them to film with the promise that they would digitalize, make anonymous and not violate a patient's confidential information. And the plaintiff argues that they failed in that. And I'd say that because WJRT didn't live up to their end of the agreement that they used a method that's objectionable to the reasonable person.

But the court ultimately granted summary disposition as to this claim, curiously reasoning that because the Hospital did not object to how WJRT violated the agreement, the method of intrusion was not objectionable to a reasonable person. "So I guess to that reasonable person, Hurley, the method was not objectionable. I think it was, but Hurley said it wasn't, and they should control here, so I grant the motion."

Liability for this tort focuses on the manner in which the information is obtained. *Doe, supra* at 88. And the method used must be objectionable to "a reasonable man." *Id*.; *Duran, supra* at 631. It is clear from the elements of the tort, that the trial court erred in focusing on the Hospital's opinion of WJRT defendants' actions. It is also clear from the record that save for this erroneous consideration, the court would have denied WJRT defendants' motion for summary disposition as to this claim. Moreover, WJRT defendants filmed plaintiff in the emergency room after she was presented with and explicitly *refused* to sign the informed consent release. Thus, the trial court erred in dismissing count V as to WJRT defendants.

3. False Light

To maintain an action for false light invasion of privacy, a plaintiff must show that the defendant broadcasted to the public in general or to a large number of people publicity that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct or beliefs that were false and placed him in a false position. *Duran, supra* at 631-632. Plaintiff complains of the statement on the broadcast that she was driving at speeds of seventy to eighty miles per hour. Given the information available to WJRT defendants, we do not find that the reporting of this statement was either unreasonable or highly objectionable to the average person sufficient to sustain a claim for false light. Also, plaintiff's objection to her being referred to as "drunk" fails to be actionable for the same reasoning as under the defamation analysis. A claim for false light invasion of privacy cannot succeed if the contested statements are true. *Porter v Royal Oak*, 214 Mich App 478, 487; 542 NW2d 905 (1995). The trial court properly granted summary disposition as to this issue.

C. General Negligence

The crux of plaintiff's argument is that as a result of the agreement effectuated between WJRT and the Hospital, WJRT defendants agreed to be bound by the Hospital's and federal and state privacy laws in order to gain access to the Hospital's trauma center. The unsaid assertion is that if WJRT had not agreed to these terms, it would not have been granted the "All Access Pass" to the Hospital's facility. The pertinent parts of this letter agreement are as follows:

> WJRT-TV agrees that it will not show or will digitally obscure the face of any emergency room patient and agrees that it will not reveal the name of any such patient unless it has first obtained the informed consent of the patient or the

> patient's authorized agent, parent or guardian. If circumstances permit, WJRT-TV will endeavor to obtain consent prior to taping. If consent cannot be obtained until after the recordings are made, WJRT-TV will retain the recording while it attempts to secure the appropriate consent.
>
> WJRT-TV acknowledges the state and federal laws regarding patient confidentiality and we intend to abide by these laws and Hurley's privacy standards to secure patient consent where possible. [November 16, 2000 letter agreement.]

Parsing the language of the agreement, WJRT defendants' agreed that: (1) any patient's face will either not be shown or will be digitally obscured; (2) no patient name will be revealed unless consent is given; and (3) it would abide by federal, state, and the Hospital's patient confidentiality laws and rules "to secure patient consent where possible."[1]

Plaintiff is correct that a duty can arise, where one would not otherwise exist, by virtue of a contract. *Antoon v Community Emergency Medical Service, Inc,* 190 Mich App 592, 595; 476 NW2d 479 (1991). The problem with plaintiff's argument is that she is trying to enforce a contract through a general negligence theory. Plaintiff did not plead breach of contract and thus cannot enforce the terms of the contract on a third-party beneficiary theory. This is not necessarily fatal to plaintiff's claim because Michigan does recognize the tort of negligent performance of a contract; "the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). However, a claim by a third party premised on misfeasance[2] in the performance of a contract must be based on a duty separate from the contract. *Fultz, supra* at 467. Here, plaintiff asserts that by agreeing to the terms of the letter agreement, WJRT defendants agreed to be bound by state and federal confidentiality laws, as well as the Hospital's privacy rules and professional standards applicable to it. What is fatal to plaintiff's claim is that none of these laws or regulations are directly applicable to the media or general public. They are applicable to health care organizations and workers who are in control of patient records. Therefore, plaintiff is unable to show that WJRT defendants owed plaintiff a duty separate and distinct from the contract. "If no independent duty exists, no tort action based on a contract will lie." *Fultz, supra* at 467. Accordingly, the trial court properly granted summary disposition on this claim as to WJRT defendants.

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[1] We note that the agreement does not state what action/non-action WJRT would be required to take if a patient did not consent.

[2] No tort action can be sustained for nonperformance of a contract. *Fultz, supra* at 466. Although plaintiff argues that WJRT defendants failed to abide by the agreement, her argument is essentially one for misfeasance, rather than nonfeasance.

Plaintiff relies heavily on *Cohen v Cowles Media Co*, 501 US 663; 111 S Ct 2513; 115 L Ed 2d 586 (1991), for the proposition that a media defendant can waive its First Amendment rights per an agreement and can be held liable for damages for violating that agreement. In *Cohen*, the United States Supreme Court addressed the question of "whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information." *Id*. at 665. During the final days of the 1982 Minnesota governor's race, the plaintiff had given reporters from two newspapers two public records adverse to the democratic candidate for lieutenant governor. Despite an agreement not to disclose the plaintiff's name, the two newspapers identified the plaintiff as the source of the public records and his connection to the republican candidate's campaign. The plaintiff was fired by his employer the same day. *Id*. at 665-666.

Plaintiff's reliance on this case is misplaced for several reasons. First, unlike the plaintiff in *Cohen*, plaintiff is not a party to the letter agreement between the Hospital and WJRT and is not seeking to enforce the contract. Second, the plaintiff in *Cohen* was permitted recovery because Minnesota's doctrine of promissory estoppel was a law of general applicability and the Court noted that the First Amendment does not allow the media to break such laws with impunity. *Id*. at 669-670. In this case, plaintiff has not presented any law that is directly applicable to defendant independent of the contract.

Though not argued by plaintiff, the real question the *Cohen* case raises is the applicability of the tort of invasion of privacy- disclosure of private facts to plaintiff's negligence claim. The tort of invasion of privacy is a law of general applicability; it does not single out any particular group. The duty owed to another pursuant to one's general right to privacy is a means by which to impose a duty separate and distinct from the contract, as required by *Fultz, supra*, in order for a third-party to sustain a cause of action for the tort of negligent performance of a contract. The trial court essentially rejected this argument reasoning that the negligence action was simply an impermissible re-labeling of plaintiff's invasion of privacy claim.

Unfortunately for plaintiff, the majority's opinion in *Fultz* supports the trial court's conclusion. In her concurring opinion, Justice Kelly felt that the majority's interpretation of a "duty separate and distinct from the contractual obligation" was overly expansive as it applied to third-parties to the contract. *Fultz, supra* at 471 (Kelly, J.). Justice Kelly wrote that the use of a "separate and distinct" test to determine whether a tort arises independent of the contract fails "where the contract itself outlines a specific duty to protect third persons." *Id*. at 472. To demonstrate her point, Justice Kelly presented a hypothetical example:

> [A]ssume that a building owner hires a contractor to patch the building's crumbling façade to avoid injury to those passing near it. The contract explicitly states that the purpose of the contract is to protect the public from harm and that the contractor undertakes this duty. Nevertheless, the contractor misjudges the extent of the building's deterioration and uses inadequate repair methods that, although not increasing the risk of falling materials, do not make the façade safe. Assume, moreover, that a member of the public sues the contractor, claiming harm from a failure to protect after being injured when a portion of the façade falls on him. To satisfy the majority's test, the contractor must owe a duty to the plaintiff that is separate and distinct from his contractual obligations. In this

> hypothetical case, application of the majority's test would result in a finding of no cause of action for the member of the general public. This is incongruous because it is the general public that the contract was designed to protect. [*Id*. at 472-473.]

The majority responded and stated:

> The hypothetical plaintiff described in the concurrence would have no need to pursue a cause of action on a third-party beneficiary theory because that plaintiff would have a direct cause of action against the premises owner who owed a duty to maintain a safe premises. The premises owner could then seek indemnification from the contractor for breach of a contractual duty. Thus, the concurrence's concern regarding this hypothetical plaintiff is unwarranted. [*Id*. at 467 n 2 (Corrigan, CJ).]

V. Medical Malpractice Suit (Docket No. 248676)

On May 31, 2002, five months before the medical malpractice suit was filed, defendants Krywko and Weber brought a motion for summary disposition in the 2001 suit to dismiss any counts which related to professional negligence because plaintiff had not followed the pleading requirements for a malpractice action. Plaintiff agreed that the claims in the 2001 suit were not pled as medical malpractice and the trial court granted the motion as to all medical defendants (Hospital defendants and the doctors) to the extent that it requested dismissal of any medical malpractice claims.

Plaintiff's medical malpractice claim was brought against Hospital defendants and defendants Krywko and Weber on November 18, 2002, alleging governmental liability/gross negligence (count I), intentional infliction of emotional distress (count II), invasion of privacy (count III), intrusion upon seclusion (count IV), disclosure of embarrassing private facts (count V), and violation of statutes (count VI). Counts II-VI are exactly the same as those of the same name in the 2001 suit. The only difference in count I is that plaintiff alleged professional negligence, rather than general negligence. Defendants Krywko and Weber brought a motion to dismiss the malpractice suit in its entirety as to all defendants pursuant to MCR 2.116(C)(6), arguing that MCR 2.303(A) required plaintiff to bring these claims in her 2001 suit; therefore, both suits could not be separately maintained. The trial court agreed with this reasoning and dismissed the malpractice action, but did leave open the option of plaintiff amending her 2001 suit to include any medical malpractice claims as long as she satisfied the statutory requirements for a medical malpractice pleading.

Summary disposition is proper under MCR 2.116(C)(6) where "[a]nother action has been initiated between the same parties involving the same claim. A trial court's decision to dismiss an action under this court rule is reviewed de novo. *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999). The question of whether a claim is one of ordinary negligence or medical malpractice is also a question we review de novo. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

Plaintiff argues that summary disposition under subrule (C)(6) was improper because the two actions did not involve the "same claim" as one was medical malpractice and the other involved ordinary negligence. As an initial matter, we note that plaintiff's counts II-VI of her

medical malpractice action are the exact same claims alleged as in the 2001 suit, and thus, there is no question that summary disposition was appropriate as to those counts under MCR 2.116(C)(6).

The main question is whether plaintiff's negligence claims are the same.[3] It is undisputed that the parties in the two actions are the same and that the claims arose of out the same transaction; that is, the filming of plaintiff and the subsequent broadcast. For purposes of MCR 2.116(C)(6), the issues do not have to be identical, only substantially similar and be based on the same or substantially the same cause of action. *Fast Air, supra* at 545 n 1, citing *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). Based on plaintiff's own admission, the only difference in the negligence claims is that one is based on professional negligence and the other on ordinary negligence. On this basis alone, the trial court properly dismissed the malpractice suit.

In addition, we do not find that the trial court abused its discretion in refusing to allow plaintiff to amend her 2001 suit to include allegations of professional negligence. The court held that the negligence claims were essentially the same, save for their labels. Having already dismissed plaintiff's general negligence claim, the court reasoned that the amendment was futile. Generally, leave to amend a complaint should be freely granted. But denial of such a motion is proper where the amendment would be futile. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

This raises the question whether separate claims can be asserted for a breach of confidentiality under both ordinary and professional negligence. We believe that they cannot. Plaintiff's claims are identical save for the assertion of a professional relationship in the professional negligence claim. Just as the same claims cannot survive individually by merely attaching different names to them, two separate claims for breach of confidentiality, which involve the exact same parties and circumstances, should not be allowed to be maintained by merely couching one in the context of a professional relationship. The crux of this issue is whether an action for breach of confidentiality sounds in ordinary or professional negligence.[4]

The tort of unauthorized disclosure of privileged communications was originally recognized in *Saur v Probes*, 190 Mich App 636; 476 NW2d 496 (1991). Plaintiff erroneously refers to this tort as "breach of confidentiality." In *Saur*, the Court held that, in light of a physician's "ethical obligation to maintain patient confidences, as well as the state's interest in preserving its public policy of protecting physician-patient confidences," a physician has a legal duty not to disclose privileged communications. *Id*. at 639. This tort was again given recognition in *Alar v Mercy Mem Hosp*, 208 Mich App 518, 534; 529 NW2d 318 (1995) (Jansen, J., concurring in part, dissenting in part). Although *Saur* and *Alar* were both medical malpractice

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[3] We address this issue as to Drs. Weber and Krywko only because plaintiff makes no argument on appeal as to Hospital defendants.

[4] There is no dispute that Hospital defendants and defendants Krywko and Weber can be held liable for malpractice. *Bryant, supra* at 420.

actions, there is no indication in either of these cases that the panels believed the tort had to sound in malpractice. It just so happened to be that the cases before the panels were ones of malpractice. Simply because a person was engaging in medical care at the time of the alleged negligence only means that the claim may sound in negligence, not that it must. *Bryant, supra* at 421.

Other courts around the country have decided this issue differently based on state law.[5] We turn to Michigan's state law to determine when an action sounds in malpractice versus ordinary negligence. In *Bryant, supra* at 422, our Supreme Court outlined the necessary considerations for determining whether an action sounds in ordinary or professional negligence:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only "'within the course of a professional relationship.'" *Dorris [v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (citation omitted). Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id*. at 46. Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id.* Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and

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[5] See anno: *Physician's tort liability for unauthorized disclosure of confidential information about patient*, 48 ALR4th 668. This compilation is particularly helpful in understanding why plaintiff asserted certain claims against Hospital defendants and defendant doctors. In dealing with unauthorized disclosures, courts have allowed recovery based on four main theories: (1) breach of duty of confidentiality, (2) invasion of the right to privacy, (3) violation of statutes concerning physician conduct, and (4) breach of implied contract. *Morris v Consolidation Coal Co*, 446 SE2d 648, 656 (W Va, 1994).

In this case, plaintiff seeks to recover on the first three theories listed. Plaintiff does not explicitly argue on appeal the theory of invasion of privacy as it pertains to Hospital defendants and defendants Krywko and Weber. Thus, we deem those claims against the medical defendants to be abandoned on appeal. It is not up to this Court to decipher plaintiff's arguments. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). None of plaintiff's appeal issues specifically involve the invasion of privacy claims as to the medical defendants and plaintiff's statement of the questions presented gives no indication that plaintiff even intended to argue as such.

For informational purposes, however, we reference *Vassiliades v Garfinckel's, Brooks Bros*, 492 A2d 580 (DC Ct App, 1985), and *Doe v Roe*, 400 NYS2d 668 (1977), as examples of claims of unauthorized disclosure of confidential information brought under an invasion of privacy theory. And at least one court has found that where a patient alleges unauthorized disclosure of confidential information, such a claim should be treated as a malpractice claim, regardless of the theory under which it is brought. *Jones v Asheville Radiological Group, PA*, 500 SE2d 740 (NC App, 1998).

> experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

In understanding what constitutes "medical judgment," the *Bryant* Court said:

> [M]edical malpractice . . . has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science. [*Bryant, supra* at 424, quoting *Adkins v Annapolis Hosp*, 116 Mich App 558; 323 NW2d 482 (1982).]

Analyzing plaintiff's claim, we believe that expert testimony is not needed to assist the trier of fact in determining the reasonableness of Weber's and Krywko's alleged disclosure of confidential information or failure to prevent such disclosure. "If the reasonableness of the health professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence." *Id*. at 423.

Indeed, in *Alar, supra*, Judge Jansen agreed:

> Such a cause of action is more akin to an action for a breach of a fiduciary duty or breach of confidentiality rather than an action for negligence or breach of the standard of care. In the absence of any authorization provided by law for the disclosure of the privileged communication, a waiver of the privilege by the patient, or if the disclosure is justified by the supervening interests of society, a third party, or the patient, the breach of the privilege by a physician is rather straightforward. Because an action based on a breach of the physician-patient privilege does not involve the type of complex medical terms that are involved in a medical malpractice case, there is no need for expert testimony to establish the standard of care and breach thereof. [*Id*. at 534-535.]

Accordingly, we find that the trial court properly dismissed plaintiff's medical malpractice suit and prohibited plaintiff from amending her 2001 complaint. As plaintiff argues in certain portions of her appellate brief, the tort of "breach of confidentiality," i.e., unauthorized disclosure of privileged communications, is akin to ordinary negligence, in essence providing the duty element of a negligence cause of action. Because plaintiff has already pled gross and general negligence in the 2001 suit, an amendment to the complaint would be futile.

VI. Gross and General Negligence Claims as to All Medical Defendants

Drs. Weber and Krywko and Hospital defendants moved for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity), (8) (failure to state a claim), and (10) (no issue of material fact) as to plaintiff's gross and general negligence counts. The court determined that none of the medical defendants were entitled to governmental immunity.

A. Dr. Krywko

The court dismissed the negligence counts as to Dr. Krywko pursuant to MCR 2.116(C)(10) because plaintiff failed to show that Dr. Krywko breached her duty of confidentiality where the doctor instructed WJRT defendants not to film her, she was not aware that the cameras were filming at the time she was treating plaintiff, and when she stated, "No allergies, on Prozac" the camera was not pointed at her; the reasonable inference being that Dr. Krywko did not know that WJRT defendants were filming.

In Dr. Krywko's case, we believe that the trial court correctly determined that there was no issue of material fact as to whether Dr. Krywko breached her duty not to disclose privileged communications. Dr. Krywko discovered the cameras at the beginning of her shift. And she specifically told WJRT defendants not to film her. Whether this instruction was for her or plaintiff's benefit remains open to speculation. However, the end result of Dr. Krywko's request was that her interaction with plaintiff was not to be filmed. At the time that Dr. Krywko made the statement, "No allergies, on Prozac" to the medical personnel in the trauma room, she was unaware that WJRT defendants' cameras were on and her belief is supported by the video footage that shows the camera is not pointed at her when she made the statement. Had WJRT defendants' honored the doctor's initial instruction not to film, the issue would be moot.

But plaintiff faults Dr. Krywko for not ensuring that WJRT defendants did not film plaintiff. Plaintiff erroneously places the burden of controlling WJRT defendants' actions on Dr. Krywko. According to the evidence presented, it was Hospital defendants who were responsible for permitting WJRT defendants to film in the trauma center and thus, should be the ones responsible for the footage that was ultimately filmed by them. Dr. Krywko requested that she not be filmed, WJRT defendants knew that plaintiff had refused to consent to filming, and yet WJRT defendants did so anyway. We believe that Dr. Krywko fulfilled her duty to maintain her patient's confidentiality when she told WJRT defendants not to film her. Had she noticed that they were ignoring her request, then a case could be made for breach for failing to take additional action. However, under the circumstances, we find that reasonable minds could not differ—Dr. Krywko had no reason to believe that her request was not being heeded. Accordingly, the trial court properly dismissed the negligence counts (counts I and VIII) as to Dr. Krywko.

B. Dr. Weber

Initially, the court denied Dr. Weber's motion as to the negligence claims, rejecting his lack of proximate cause argument. However, the claims were eventually dismissed as the court reasoned:

> The general negligence claim for Doctor Weber must fail as it was premised on the Patient's Bill of Rights of Hurley which [plaintiff's attorney] points out were posted in Hurley. But if Doctor Weber has not invaded any privacy, there wasn't privacy to be invaded, then he could not have violated her privacy negligently.

Essentially, the court concluded that Dr. Weber had not breached his duty because he only spoke on film about a generic set of x-rays/cat scans, identified as Jane Doe. That a person could infer that these were plaintiff's medical films because WJRT showed plaintiff's personal information directly before the segment with Dr. Weber is not a nexus attributable to Dr. Weber.

We conclude that the trial court was correct in finding that Dr. Weber breached no duty to plaintiff. The medical films he discussed were identified as Jane Doe, Dr. Weber never made any identifying comments, and plaintiff did not present sufficient evidence to create a question of fact as to whether the films were actually of plaintiff. Plaintiff tries to attach liability to Dr. Weber because in the broadcast, just before Dr. Weber is shown, an upside down shot of plaintiff's name and address from a paramedic's report was shown. However, Dr. Weber knew nothing about the other footage that WJRT defendants filmed and cannot be held responsible for the manner in which WJRT defendants edited that footage. Accordingly, the trial court properly dismissed the negligence counts (count I and VIII) as to Dr. Weber. Because we have determined that the negligence claims against Drs. Krywko and Weber cannot be sustained, we decline to address the issue raised on cross-appeal regarding the trial court's determination that Drs. Krywko and Weber were not entitled to governmental immunity.

C. Hospital Defendants

With regard to the negligence claims, Hospital defendants argued that because none of the information released was actually private and the broadcast was the crux of plaintiff's complaint, they could not be held liable. The trial court acknowledged that Hospital defendants "have a separate confidentiality requirement that WJRT has not." Nevertheless, it dismissed the negligence counts as to Hospital defendants, stating:

> You can have a patient who is treated by six different specialists and just because the patient consents to a release to two specialists doesn't mean the hospital can automatically release the other four. And just because a TV station made public information that was already not confidential to it, doesn't mean that a hospital can later on make public information which it controls.
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> But the Court has been looking at the facts and the Court already declared that so many of the facts that plaintiff complains about were already public, the bloody face, the accident scene, the Prozac, the alcohol, the MRI's, the x-rays, those things either didn't name the plaintiff or they were already disclosed by her prior to her entry into the hospital. The thought dawns on me that—it really was compelling when I read Hurley's brief. I learned for the first time that the picture which the camera showed of the chart, well, I thought it was a hospital chart with plaintiff's name and address on it. Come to find out it was a paramedic's report which goes into the sheriff's record. I don't know what they do with it, but it was not a hospital record. I don't even know whether a picture of that chart was even taken in the hospital or at the accident scene or somewhere in between or out in the hallway. But I do know that it was not the hospital that disclosed the plaintiff's name or address. And while I've been giving [Hospital defendants' attorney] a hard time about the hospital inviting the cameras into the emergency room, if I begin to look factually more carefully, I expand my list of what it is that was allowable to be made public and I don't see where the hospital could control what a TV station photographs when it's not a medical record. I mean, they can't show up three days later and say you can't photograph a sheriff's report. They can't show up three days later and say you cannot link a sheriff's report with a filming done in our emergency room. And this is not the way I walked in here

> this morning thinking, but since I now know the hospital never named the woman, never gave her address, there are not, in general, negligence [sic].

The court also dismissed the gross negligence count. Again, the trial court based its decision to dismiss the negligence counts pursuant to MCR 2.116(C)(10) on its finding that Hospital defendants committed no breach.

In order to resolve this issue, it is necessary to explore the tort of unauthorized disclosure of privileged communications as recognized in *Saur, supra,* and discussed in Judge Jansen's concurring opinion in *Alar, supra*. In *Saur*, this Court recognized that several statutes which addressed the use of privileged communications did not create an independent cause of action,[6] but the statutes did exhibit this state's policy of protecting physician-patient confidences. Thus, the *Saur* Court held that a cause of action does exist for a physician's disclosure of privileged communications. *Id*. at 638-639. Based on this logic, plaintiff ineloquently tries to argue that Hospital defendants owed plaintiff a duty not to disclose her patient information, i.e., that the duty element of her negligence claims was provided by the duty not to disclose privilege communications. *Saur* and *Alar* both dealt with disclosures by physicians and to date the cause of action has not been extended to other medical professionals. The courts based their decisions on public policy and the Legislature's implied recognition of a physician's duty of confidentiality.[7]

MCL 333.20201(1) provides that a health facility shall adopt a policy describing a patient's right and responsibilities, which includes the patient's right to confidential treatment of personal and medical records, MCL 333.20201(2)(c).[8] Thus, it would appear that the *Saur* Court's reasoning would be equally applicable to hospitals and their employees. However, MCL 333.20203(1) provides that the rights outlined in § 20201 are guidelines and that "[a]n individual shall not be civilly or criminally liable for failure to comply" with that section. Thus, the Legislature has spoken in regards to its policy pertaining to a breach of confidentiality by a health facility or its employees. No civil action will lie. Accordingly, we hold that the reasoning in *Saur* cannot be extended beyond the physician-patient relationship under any of the theories plaintiff presents. As such, plaintiff has exhausted her avenues for imposing a legal duty on Hospital defendants for allegedly disclosing confidential personal and medical information. We

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[6] Specifically, the Court mentioned MCL 330.1750, MCL 600.2157, and MCL 333.16221.

[7] See *Brandt v Medical Defense Assoc*, 856 SW2d 667, 670-671 (Mo, 1993) (explaining source of duty of confidentiality).

[8] One of the statutes which addresses patient records, MCL 333.20175(1), provides that a health facility "shall keep and maintain a record for each patient . . . ." And MCL 333.20175(4) further provides, "Departmental officers and employees shall respect the confidentiality of patient clinical records and shall not divulge or disclose the contents of records in a manner that identifies an individual except pursuant to court order." While § 20175 speaks to patient record confidentiality, by its own terms it only applies to "departmental officers and employees," i.e., the department of consumer and industry services, and thus, is not applicable to hospitals and their employees.

find that the trial court properly dismissed the negligence claims against Hospital defendants, but for a different reason. Wickings v Artic Enterprises, Inc, 244 Mich App 125, 150; 624 NW2d 197 (2000). Plaintiff can not establish that Hospital defendants owed plaintiff a legal duty under the circumstances to sustain a general negligence claim.

Plaintiff places significant reliance on the Hospital's policies and by-laws, and on the procedures delineated by the Joint Commission on Accreditation of Healthcare Organizations. These guidelines do not establish an independent cause of action, but may be evidence of professional negligence based on allegations that Hospital defendants breached the standard of care regarding a patient's right to confidentiality. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002). Because expert testimony would be needed to establish the standard of care required by a hospital and its employees, the claim is one of medical malpractice. *Bryant, supra* at 423-424.

However, such a cause of action can not be maintained because an amendment to the complaint is prohibited by Michigan's court rule pertaining to compulsory joinder of claims. MCR 2.203(A) provides:

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

Thus, plaintiff was required to bring all claims it had against Hospital defendants in her 2001 suit.

VII. Remaining Claims Applicable to All Defendants

A. Civil Conspiracy and Concert of Action

The trial court dismissed the conspiracy and concerted action claims because there was no sustainable underlying tort. A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. It must be based on an underlying tort. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). Similarly, a concert of action claim requires that there be an underlying tort. To prove such a claim, plaintiff must establish that all the defendants acted tortiously pursuant to a common design. *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985).

In this case, plaintiff contends that WJRT defendants and other defendants, specifically defendants Motschenbacher and Murray-Wright, hospital employees, comprised the conspiracy and the underlying tort that plaintiff asserts is negligence.[9] Plaintiff also argued below that

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[9] Although plaintiff appeared to assert before the trial court that all of her pleaded torts could be
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concert of action claim related to the negligence claims. Because we have concluded that no negligence claim can be sustained against any of these parties, plaintiff's civil conspiracy and concerted action claims fail as well. *Admiral Ins Co, supra*. The trial court properly granted summary disposition of counts IX (civil conspiracy) and X (concert of action) as to all defendants.

B. Violation of Statutes

Plaintiff appears to make two separate arguments in this issue. First, plaintiff contends that the trial court erred in determining that the statutes she cites[10] do not create an independent cause of action, i.e., negligence. We disagree. After reviewing these statutes, we find that none of them contemplate a private cause of action for a violation. Moreover, most are inapplicable to this case because their subject matter either does not involve a hospital patient's right to confidentiality or are particular to certain circumstances not at issue here, such as substance abuse treatment. Notably, the statutes most on point, MCL 333.20201 and MCL 333.20202, are part of the state's patient bill of rights and the legislature specifically provided that no civil or criminal liability shall be imposed for failing to comply with these sections. MCL 333.20203. Accordingly, the trial court properly dismissed plaintiff's count XV as to all defendants.

Second, plaintiff continues her argument of this issue asserting that because she is within the class of persons sought to be protected by the statutes she cites, evidence of violations of those statutes constitutes the establishment of a prima facie case of negligence. This argument is a more accurate depiction of what plaintiff is trying to accomplish by asserting this claim. In support of her position plaintiff cites *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761; 431 NW2d 90 (1988), and *Kakligian v Henry Ford Hosp*, 48 Mich App 325; 210 NW2d 463 (1973). Plaintiff's reliance is without merit. *Gallagher* held that a hospital's internal or administrative rules were not admissible in a medical malpractice case to establish the standard of care, while *Kakligian* held that a violation of a regulation promulgated pursuant to a statutory authority was admissible in a medical malpractice action as evidence of negligence and that the jury was entitled to an instruction to that effect. Neither of these cases held that an independent cause of action was created.

Essentially, plaintiff desires to introduce certain statutory regulations and internal bylaws and procedures as evidence of general negligence. However, this is not asserting an independent cause of action. As discussed above, such evidence would be admissible in relation to a general professional negligence action if plaintiff was allowed to assert such a claim.

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the basis for the conspiracy claim, on appeal plaintiff specifically limits the underlying tort to negligence.

[10] Specifically, plaintiff cites MCL 330.1748, MCL 331.533, MCL 333.6111, MCL 333.6112, MCL 333.6113, MCL 333.6508, MCL 333.6523, MCL 333.20175, MCL 333.20201, MCL 333.20918, MCL 333.20965, MCL 333.21511, MCL 333.21515, MCL 333.21521, MCL 333.21523, MCL 600.2157, 42 CFR 482.11, and 42 CFR 482.13.

VIII. Conclusion

In docket no. 248669, we affirm the trial court's order granting summary disposition of all claims in favor of defendants City of Flint, Hurley Medical Center, Motschenbacher, Murray-Wright, Krywko and Weber. We reverse the trial court's decision to grant summary disposition in favor of defendants WJRT, Inc, Bill Harris, Jason Carr, and Mark McGlashen as to counts V and VI only. We affirm the court's decision on all other counts with respect to WJRT defendants. In docket no. 248676, we affirm the trial court's order granting summary disposition in favor of all defendants party to that suit.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael R. Smolenski