NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ROBERT P. LIST AND MELANIE R. LIST, HIS WIFE Appellant v. JAMESON MEMORIAL HOSPITAL, ITS AGENT AND EMPLOYEES Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1457 WDA 2012

Appeal from the Order Entered August 21, 2012
In the Court of Common Pleas of Lawrence County
Civil Division at No(s): 2006-10559

BEFORE: SHOGAN, J.,** LAZARUS, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J. FILED: August 27, 2013

Robert and Melanie List ("Lists"), a husband and wife, appeal from an order of the Court of Common Pleas of Lawrence County granting defendant Jameson Memorial Hospital's ("Jameson Memorial") motion for summary judgment. Upon review, we affirm.

On April 17, 2006, the Lists filed suit alleging invasion of privacy, intentional infliction of emotional distress (IIED), and negligent infliction of emotional distress (NIED) against Jameson Memorial Hospital. From April 17, 2005 to April 25, 2005, Robert List was a patient at Jameson Memorial, due to an involuntary mental health commitment following a standoff with

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* Retired Senior Judge assigned to the Superior Court.

** Did not participate in the consideration or decision of this case.

police. Trial Court Opinion, 8/21/2012, at 2-3. The Lists allege that at some point during his stay at Jameson Memorial, an employee of the hospital disclosed to Robert List's sister and brother-in-law that Robert List had tested positive for Hepatitis C. Appellant's Brief, at 5. Robert List had been an employee of his sister and brother-in-law shortly before his commitment. Melanie List also testified during her deposition that the hospital had confirmed this information to the local newspaper, which published it. Melanie List Dep. 26:18, 12/22/2008. However, the only newspaper article in the certified record recounts the standoff with police that precipitated Robert List's commitment and makes no mention of List's Hepatitis C. Brief in Support of Summary Judgment, 4/30/2012, Exhibit 5. Robert List testified at deposition that he suffered from embarrassment, frustration, and a loss of trust in other people due to the disclosure. Robert List Dep. 67-68, 12/22/2008.

After the Lists filed their complaint, the parties engaged in written discovery and several depositions were held. On April 27, 2012, almost six years after the Lists filed their complaint and after several extensions of discovery, Jameson Memorial moved for summary judgment pursuant to Pa.R.C.P. 1035. After a hearing, the trial court granted the motion on August 21, 2012, and on August 23, 2012, the Lists appealed to this Court. They raise the following issues for our review:

> 1. Whether the trial court erred in its determination that appellant[]s failed to establish a *prima facie* case for their

> claims of invasion of privacy and intentional and/or negligent infliction of emotional distress?
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> 2. Whether the trial court erred in its determination that appellant[]s failed to establish that they suffered from an injury caused by the breach of confidentiality.[1]

Appellant's Brief, at 4.

In an appeal from an order granting summary judgment, we have explained our standard of review as follows:

> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

Englert v. Fazio Mech. Servs., Inc., 932 A.2d 122, 124 (Pa. Super. 2007); ***see also*** Pa.R.C.P. 1035.2(1).

We turn first to the NIED claim. This cause of action "evolved almost exclusively in the context of those who observe injury to close family members and are as a consequence of the shock emotionally distressed." ***Armstrong v. Paoli Memorial Hospital***, 633 A.2d 605, 609 (Pa. Super. 1993). NIED does not require injury to family in all cases. In ***Toney v. Chester County Hosp.***, 36 A.3d 83 (Pa. 2011), an evenly dived Supreme Court affirmed a decision of this Court, and noted that certain relationships

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[1] Issues renumbered from Appellant's Brief.

that can give rise to a cause of action for NIED. Justice Baer, in the opinion in support of affirmance, concluded, "we would hold that some relationships, including some doctor-patient relationships, will involve an implied duty to care for the plaintiff's emotional well-being that, if breached, has the potential to cause emotional distress resulting in physical harm." ***Id*.** at 95.

Jameson Memorial was providing psychiatric care to Robert List during his involuntary commitment, and clearly owed List a duty to care for his emotional wellbeing. However, the inquiry does not end here. To state a cause of action for NIED in Pennsylvania, a plaintiff must allege and ultimately prove that he suffered physical injury as a result of the defendant's negligence. ***Armstrong*** 633 A.2d at 609; ***see Abadie v. Riddle Mem'l Hosp.***, 589 A.2d 1143, 1145 (1991) (defendant's demurrer sustained where plaintiff did not allege physical harm); ***see also Toney*** 36 A.3d at 95 (breach of implied duty to care "has the potential to cause emotional distress resulting in *physical harm*." (emphasis added)); ***see also*** Restatement (Second) of Torts § 313. If a complaint contains no averment of physical harm, then the party has failed to state a cause of action. ***Love v. Cramer***, 606 A.2d 1175, 1177 (Pa. Super. 1992).

In the instant case, the Lists do not allege, either in their Brief or their original complaint, that they suffered physical harm as a result of Jameson Memorial's actions. Robert List in his deposition testimony alleges feelings of embarrassment and frustration. Robert List Dep. 67-68, 12/22/2008. Melanie List in her deposition testimony mostly discusses the difficulty of

living with Hepatitis C, which is irrelevant to any injury resulting from the *disclosure* of that condition, and discusses feeling ostracized by old friends. Melanie List Dep. 38-46, 12/22/2008. This does not constitute physical harm as contemplated by our precedents. Accordingly, the Lists have failed to state a cause of action, and "there is no genuine issue of any material fact as to a necessary element of the cause of action" and we therefore affirm the trial court's decision. ***See*** Pa.R.C.P. 1035.2(1); ***see also Love***, 606 A.2d at 1177.

The Lists also assert an IIED claim. The traditional gravamen of IIED is conduct on the part of the tortfeasor "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." Restatement (Second) Torts, § 46, cmt. d (1977). Despite the longstanding Restatement definition, there is some confusion about this cause of action in the Commonwealth. Our Supreme Court declined to explicitly adopt Section 46 of the Restatement in ***Kazatsky v. King David Mem'l Park, Inc.***, 527 A.2d 988 (Pa. 1987). ***See also Hoy v. Angelone***, 720 A.2d 745, 753 n.10 (Pa. 1998) (IIED as described in Restatement never expressly adopted by Supreme Court). However, in ***Kazatsky***, the Court ruled that *should* such a cause of action exist, it would require medical evidence of the harm alleged to be successful. ***Kazatsky***, ***supra*** at 995.

Our Court has further explained that ***Kazatsky*** requires that the plaintiff allege *physical* harm that is supported by competent medical

evidence. In ***Reeves v. Middletown Athletic Association***, 866 A.2d 1115 (Pa. Super. 2004), this Court affirmed a summary judgment in favor of the defendant on the grounds that the plaintiff had failed to demonstrate "some type of resulting physical harm due to the defendant's outrageous conduct." ***Id.*** at 1122. Accordingly, the Lists IIED must also fail, because they have not made any assertion of physical harm suffered as a result of Jameson Memorial's alleged disclosure. ***Id.***

We now turn to the Lists' third claim. In their original complaint, this claim is titled "Action for Invasion of Privacy," and they allege that Jameson Memorial "intruded on Plaintiff's privacy interests and/or right of seclusion with respect to his Hepatitis C, without his consent, in a manner highly offensive to a reasonable person." Complaint in Civil Action, 8/16/2006, ¶ 15. This language is squarely within the purview of the tort of invasion of privacy. ***See*** Restatement (Second) of Torts § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

However, in the "statement of questions involved" included in their Appellant's Brief and quoted above, the Lists refer to this claim as one of "breach of confidentiality." Appellant's Brief, at 4. This tort has traditionally been applied to scenarios such as this, where confidential medical information is disclosed, and the cause of action is often referred to as

breach of physician-patient confidentiality. ***See e.g. Haddad v. Gopal***, 787 A.2d 975 (Pa. Super. 2001) (plaintiff stated cause of action for breach of confidentiality where doctor disclosed wife's venereal disease to husband).[2]

Our Supreme Court has held that invasion of privacy and breach of confidentiality are distinct causes of action. ***See Burger v. Blair Medical Associates, Inc.***, 964 A.2d 374 (Pa. 2009) (for purposes of statute of limitations, breach of confidentiality and invasion of privacy are distinct torts, governed by different limitations periods). As this Court has explained: "Pennsylvania is a fact-pleading state; a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but the complaint must also formulate the issues by summarizing those facts essential to support the claim." ***Lerner v. Lerner***, 954 A.2d 1229, 1235 (Pa. Super. 2008). While the cause of action for breach of physician-patient confidentially is well suited to the Lists' allegations, it is not what they raised in their original complaint, and therefore, the Lists may not raise breach of confidentiality for the first time

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[2] This cause of action has been applied to non-medical scenarios as well. ***See McGuire v. Shubert,*** 722 A.2d 1087 (Pa. Super. 1998) (applying breach of doctor-patient confidentiality case law to disclosure of confidential banking information).

on appeal.[3] ***Id*.** Accordingly, we will examine the Lists' claim of as one of invasion of privacy, not breach of confidentiality.

The Second Restatement of Torts, section 652, which has been adopted by this Court and quoted with approval by our Supreme Court, defines invasion of privacy. Restatement (Second) of Torts § 652A (1977); ***see Harris by Harris v. Easton Pub. Co.***, 483 A.2d 1377, 1383 (Pa. Super. 1984); ***see also Burger***, 964 A.2d at 376. According to the Restatement, invasion of privacy consists of four distinct theories: 1) intrusion upon seclusion, 2) appropriation of name or likeness, 3) publicity given to private life, and, 4) publicity placing the person in a false light. Restatement (Second) of Torts § 652A-E (1977); ***Doe v. Dyer-Goode***, 566 A.2d 889, 890 (Pa. Super. 1989). The Lists did not specify which of these theories they are invoking, although it is clear that appropriation of name or likeness is inapplicable and because the Lists do not contend that Robert List does not actually have Hepatitis C, publicity placing the person in a false light is also inapplicable.

This leaves intrusion upon seclusion and publicity given to private life, and we address each in turn. To state a cause of action under the intrusion upon seclusion theory

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[3] We further note that while the Lists label their claim as breach of confidentiality, in their Brief they only discuss evidence of injury, and not the other elements of the tort.

> a plaintiff . . . [must] aver that there was an intentional intrusion on the seclusion of their private concerns which was substantial and highly offensive to a reasonable person, and aver sufficient facts to establish that the information disclosed would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities.

Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 809 A.2d 243, 247 (Pa. 2002). The official comment to the Restatement states:

> The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.

Restatement (Second) of Torts § 652B, cmt. b (1977).

This describes a tort of spying or prying into the private lives of another. In the instant case, Jameson Memorial is not accused of improperly discovering Robert List's medical condition, but of disclosing it. Indeed, because the hospital was treating List, it had a legitimate reason for accessing his medical records. ***See Dyer-Goode***, 566 A.2d at 891 (no intrusion on seclusion where doctor tested patient's blood for HIV after routine blood test). Accordingly, the Lists have not set forth a claim for invasion of privacy under the intrusion upon seclusion theory.

The final possible theory is publicity given to private life, which is defined in the Restatement as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
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> (a) would be highly offensive to a reasonable person, and
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> (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D (1977). The comment to this section explains "'Publicity' . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." ***Id.***, cmt. a. While our Supreme Court has declined to set a minimum number of persons who must be notified for the suit to consist of publicity, it has opined that disclosure to four people was insufficient. ***Vogel v. W. T. Grant Co.***, 327 A.2d 133, 137 (Pa. 1974). This Court has further noted that:

> The 'publicity' which we here examine requires that the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. Where a communication involving private facts reaches, or is sure to reach, the public, then publicity has been given to that party's private life.

Harris by Harris v. Easton Pub. Co., 483 A.2d 1377, 1384 (Pa. Super. 1984).

In the instant case, if there were evidence that the local newspaper had published a story relating Robert List's condition, as Melanie List asserted during her deposition, this would certainly constitute "publicity" for the purposes of this tort. However, where the only evidence was Melanie List's bald assertion, and the Lists provided no other evidence that such a newspaper article even exists, the trial court did not abuse its discretion in finding no genuine issue of fact as to the newspaper article.

Absent evidence of a newspaper article, what remains is the allegation that an employee of Jameson Memorial divulged confidential information to Robert List's sister and brother-in-law. While there is deposition testimony that many more people now know about the Hepatitis C, our precedents make clear that the initial communication must be to a significant group of people, and at a minimum more than four. ***Harris by Harris***, 483 A.2d at 1384. Given that the Lists have only alleged disclosure to two people, we similarly find that the Lists have failed to state a cause of action on the grounds of publicity given to private life. ***Vogel***, 327 A.2d at 137.

Order affirmed.

Judgment Entered.

Nicholas V. Cosetti

Deputy Prothonotary

Date: 8/27/2013