STATE OF MICHIGAN

COURT OF APPEALS

MARCIA DUMA, Plaintiff-Appellant,	UNPUBLISHED January 21, 2016
v	No. 324484 Montcalm Circuit Court
CARSON CITY HOSPITAL, JOANNE R. DIAZ, NANCY WEAVER, and GEORGETTE RUSSELL, Defendants-Appellees.	LC No. 14-018305-NO

Before: BECKERING, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Carson City Hospital terminated Marcia Duma based on allegations that she violated various hospital procedures in order to misappropriate prescription pain killers. Duma vehemently denied her guilt. Duma alleged that following her termination, three supervisory employees—Joanne Diaz, Nancy Weaver, and Georgette Russell—informed every staff member in the emergency room, and some employees beyond that department, that Duma was terminated for stealing medication, there was "mounds of evidence" to prove the allegations, and that Duma did not defend herself. Duma filed suit against the hospital and the three supervisors for slander (defamation), invasion of privacy-false light, and intentional interference with a business relationship. The circuit court dismissed the suit before any discovery could be obtained.

Duma sufficiently pleaded that Diaz defamed her to a large number of hospital employees with no interest in the matter. Accordingly, we reverse the circuit court's ruling in that regard. Duma's remaining claims were not sufficiently pleaded to overcome defendants' MCL 2.116(C)(8) motions, and we affirm the remainder of the lower court's judgment. On remand, we direct the circuit court to allow Duma an opportunity to amend her complaint as required by MCR 2.116(I)(5).

I. BACKGROUND

Marcia Duma worked as a registered nurse at Carson City Hospital (CCH) for a decade. She had undergone two back surgeries before she began her employment and sometimes used the prescription painkiller Norco to control ongoing pain issues. Defendants allegedly noticed discrepancies with certain patient files from the CCH emergency room and suspected that Duma was altering patient files to redirect Norco for her personal use. On February 4, 2013, Diaz, the

manager/director of the hospital's emergency room, arranged a meeting with Duma and Weaver, CCH's Director of Nursing, and Russell, the Human Resources Director. Defendants questioned Duma about ER procedures for managing medications and including addenda in files, and allegedly were shocked and surprised to learn that a doctor had to approve all file changes. Duma further asserted that defendants inquired about old patient files without offering her the opportunity to review the documents. Following this meeting, defendants terminated Duma's employment.

Duma alleged that Diaz immediately notified every employee in the CCH emergency room and even a former ER supervisor that defendants had terminated Duma's employment for misappropriating Norco, that Duma had altered patient charts, that defendants had "mounds" of evidence, and that Duma had not defended herself against the allegations. In her complaint, Duma listed numerous employees who received this information directly from Diaz, and claimed that she learned through the grapevine that Weaver had passed the information around to other hospital departments. Duma described an ER staff meeting where an announcement was made to the group and identified individuals who were notified by private meeting, telephone, and through other employees. Diaz purportedly told the employees that they could share the information with others, because all employees needed to be aware of the situation.

Duma filed suit, raising claims of defamation, invasion of privacy-false light, and intentional interference with a business relationship. Duma contended that defendants had no privilege to defame her to her coworkers. She further stated her belief that the reasons cited for her termination were mere pretext as the hospital had made a large staff reduction at that time and was searching for cause to terminate employees and reduce costs.

Before any discovery could be obtained, CCH and the individual defendants filed motions for summary disposition under MCR 2.116(C)(8). The individual defendants challenged the sufficiency of the allegations raised against Weaver and Russell. Despite the detailed allegations regarding conversations between Diaz and specifically identified hospital employees, defendants contended that Duma's allegations against Diaz were too vague to form any claim. In relation to Duma's slander claim in particular, defendants argued that there was no way to tell from the complaint's vague descriptions whether the statements were protected free speech, or protected speech made in the course of an investigation of employee wrongdoing. The statements could have been made in "good-faith" to "people they believed needed to know," defendants asserted, and Duma therefore failed to plead that defendants acted with "malice or even negligence."

CCH concurred in the points raised by the individual defendants and therefore urged the dismissal of the vicarious liability claim asserted against it. CCH further argued that it could not be held vicariously liable because an employer is not responsible for the intentional torts of its employees. CCH provided more detail regarding the malice element defendants thought underpinned the defamation count. CCH contended that defendants reasonably believed they had a duty to disclose information about Duma's termination to certain individuals. Therefore, defendants enjoyed a qualified privilege to share that information and Duma had to establish malice to overcome the privilege. In CCH's estimation, Duma failed to meet this burden.

The circuit court agreed with the positions taken by defendants and summarily dismissed Duma's complaint in its entirety. Relying on *Smith v Fergan*, 181 Mich App 594; 450 NW2d 3 (1989), the court found that defendants had a qualified privilege to defame Duma to her coworkers as the statements were made in the course of an investigation. The court determined that Duma had to allege that defendants acted with malice to plead her case. In relation to Duma's false light claim, the court also opined that Duma had not alleged dissemination to a broad enough array to support her claim. In relation to CCH, the court noted that dismissal was appropriate because 1) no vicarious liability could be found where the claims against the individual defendants were dismissed and 2) the employer could not be held vicariously liable for its employees' intentional torts in any event. The circuit court subsequently rejected Duma's bid for reconsideration and this appeal followed.

II. STANDARD OF REVIEW

> We review a trial court's decision on a motion for summary disposition de novo. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 591; 773 NW2d 271 (2009). We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if no factual development could possibly justify recovery. *Id.* [*Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).]

III. DEFAMATION

The First Amendment guarantees the right to free speech. That right is not completely unfettered, however. One limitation is that a speaker may be held civilly liable for making defamatory statements about another. *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998). "A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *Id.* at 614. To establish liability for defamation, the plaintiff must prove:

> (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.*]

Statements implying that the plaintiff committed a criminal act, such as theft, are defamatory per se. MCL 600.2911(1); *Sias v Gen Motors Corp*, 372 Mich 542, 547; 127 NW2d 357 (1964).

A plaintiff raising a claim of defamation, must plead with "specificity." The plaintiff "must plead with specificity who published the defamatory statement, when it was published, and, most importantly, a plaintiff must identify the precise materially false statement published." *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 272; 487 NW2d 205 (1992).

Even if a statement is deemed defamatory per se, the speaker may be protected by an absolute or qualified privilege. See generally *Kefgen v Davidson*, 241 Mich App 611, 618-625; 617 NW2d 351 (2000). One such qualified privilege applies to employers. See *Sias*, 372 Mich 542. "The elements of qualified privilege are: (1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to this purpose; (4) a proper occasion; and (5) publication in a proper manner and to proper parties only." *Smith*, 181 Mich App at 596-597. "The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty. . . ." *Bufalino v Maxon Bros, Inc*, 368 Mich 140, 153; 117 NW2d 150 (1962) (quotation marks and citation omitted). Stated differently, "An employer has a qualified privilege to defame an employee by making statements to other employees whose duties interest them in the subject matter." *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 454; 502 NW2d 696 (1992). "[P]rivilege varies with the situation; it is not a constant." *Shannon v Taylor AMC/Jeep, Inc*, 168 Mich App 415, 419; 425 NW2d 165 (1988).

Here, Duma pleaded sufficient facts to survive defendants' motions for summary disposition, at least with respect to Diaz. Duma asserted that Diaz made "a false and defamatory statement." Duma denied in the complaint that she had wrongfully diverted medication from the hospital, thereby alleging that defendants made a false statement. Duma described that defendants broadcast that she "had wrongfully diverted medications including Norco," "had stolen narcotics," "was fired for altering charts and stealing narcotics," and that there was "mounds of evidence" against her. Duma thereby alleged that defendants made statements that were defamatory per se, i.e., statements that Duma had committed a theft crime.

Contrary to defendants' contentions, these allegations were pleaded with sufficient specificity. Duma alleged that the statements were made on February 4 and 5, 2013. She indicated that Diaz was the individual who made the statements. Duma named several specific individuals who received the communications. Duma described that certain named individuals heard the information through text and telephone call, and named others who received the information in group and private meetings with Diaz in the CCH ER. Duma also repeatedly quoted and paraphrased the content of these communications throughout her complaint.

Contrary to the circuit court's conclusion, Duma also alleged her claims in avoidance of defendants' qualified privilege. Therefore, she was not required to allege or prove malice on defendants' parts. The focus of the parties' disagreement is whether defendants shared the statement in a proper manner with proper parties. In her complaint, Duma alleged that defendants claimed to have shared the statement with so many individuals to stop rumors. The circuit court incorrectly accepted this as a proper excuse.

In *Sias*, 372 Mich at 546, the plaintiff was terminated by the defendant corporation for theft based on the alleged mishandling of a part that the plaintiff security officer intended to purchase as a "salvage item." After the plaintiff's termination "a marked lowering in the morale of the plant protection department took place" and "there were rumors circulating which were damaging to that morale." *Id.* The defendant "chose to explain the situation" to "fellow employees in the same status as plaintiff before discharge," specifically informing them that the "plaintiff was released for 'misappropriation of company property.' " *Id.* at 546-547.

The Supreme Court held that the defendant in *Sias* was not protected by a qualified privilege. *Id.* at 548. The defendant "was serving its own particular interest . . . to restore morale . . . and to quiet rumors" that were "adversely affecting the company." *Id.* The Court further held that the recipients were not a proper audience to trigger the privilege: "These men were not supervisors, personnel department representatives, or company officials. They were simply fellow employees in the identical work." *Id.*

In *Shannon*, 168 Mich App at 421, this Court relied on *Sias* to hold that the defendant informed customers of the plaintiff part manager's alleged misdeeds not because the customers needed to know, but based on the customers' "general interest or curiosity in finding out why a former employee was fired." Therefore, no qualified privilege existed.

In *Merritt v Detroit Mem Hosp*, 81 Mich App 279, 285; 265 NW2d 124 (1978), the defamatory statements were made to the "plaintiff's supervisor, the head of the hospital personnel office and his immediate subordinate." These were "[e]mployees responsible for hiring and firing" and therefore were "entitled to hear accusations of employee misconduct which warrant dismissal and preclude rehiring." *Id.*

In *Fulghum v United Parcel Serv, Inc*, 424 Mich 89, 93-94; 378 NW2d 472 (1985), the two plaintiffs were fired for stealing a package of sausage being shipped by a customer. Of relevance here, the plaintiffs accused the employer of defaming them to their former coworkers. *Id.* at 105. The Court ultimately held that regardless of whether the privilege applied, the truth of the statement was an absolute bar to recovery in that case. *Id.* at 108. Even so, the Court noted, "[a]n employer is not privileged to communicate needlessly to the world at large, including fellow employees, the reason for discharge if it is of a character that would hold the discharged employee up to opprobrium." *Id.* at 106.

In *Patillo*, 199 Mich App at 454, the plaintiff accused the defendant of broadcasting to his former fellow agents that he was terminated for insubordination, a ground with which he disagreed. This Court discerned no qualified privilege in *Patillo* because "fellow agents may have had an interest in the corporation's standard of conduct and grounds for termination, but they did not have a duty that would interest them in knowing the reason for plaintiff's termination." *Id.* at 455. Had the defendant wanted to reinforce its policy following the plaintiff's termination, it "could have simply communicated to these agents the company's policy regarding proper conduct and grounds for termination without indicating the reason for plaintiff's release." *Id.*

This plethora of caselaw is contrary to the circuit court's conclusion that defendants had a qualified privilege to defame Duma to the entire ER staff, other hospital employees, and a former CCH employee. These employees were not supervisors and had no role in hiring or firing. Defendants could have reinforced its policies by providing a more general communication about procedures and grounds for termination. Stopping the rumor mill was decried as an improper ground for making defamatory statements in *Sias* and *Shannon*.

Smith, as cited by the circuit court, does not support a different result. In *Smith*, the defendant employer enjoyed a qualified privilege to make a defamatory statement because he did not broadcast the statement farther than necessary. The defendant made the defamatory

statement in front of the plaintiff and only one other employee. Both were suspected of theft and the employer spoke to them together in the course of the investigation. *Smith*, 181 Mich App at 596-597.

Defendants' reliance on *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74; 480 NW2d 297 (1991), is also unavailing. In *Gonyea*, the defendant bank terminated the plaintiff teller based on allegations of theft. *Id.* at 76. In her complaint, the plaintiff generally alleged that her supervisor told "credit union employees that plaintiff was a thief and should not be trusted." *Id.* at 78. This Court did *not* hold that the defendant had a qualified privilege to defame the plaintiff to her coworkers or that her coworkers had an interest in knowing that she was terminated for theft. Rather, this Court noted that the plaintiff's only specific allegation was that her supervisor defamed her to the defendant's bookkeeper. *Id.* at 79. The bookkeeper was involved in the internal investigation into the theft, *id.* at 76, and her "position obviously gave her an interest in the allegations against plaintiff." *Id.* at 79.

Because the circuit court incorrectly determined that a qualified privilege existed, the court incorrectly held Duma to the burden of pleading malice. In general, to prove defamation, a plaintiff must establish "fault amounting at least to negligence." *Ireland*, 230 Mich App at 614. Proof of malice is necessary only to "overcome a qualified privilege." *Smith*, 181 Mich App at 597.

A review of the complaint reveals that Duma did plead that defendants acted with at least negligence. Duma alleged that Weaver, Russell, and Diaz "looked shocked and surprised" when Duma explained the procedure for including addenda in charts. Duma asserted that a fellow nurse reviewed the subject charts when offered the opportunity by defendants and "there was nothing in what she saw that could not be explained." Duma specifically alleged that defendants "had knowledge or should have had knowledge that the accusations were not true and/or acted in reckless disregard of the falsity of the publicized fact." She contended that defendants "acted negligently and with malice in failing to follow-up to determine if their allegations were true before divulging this information en masse." Duma further cited that Diaz "intentionally and recklessly misstated" that a doctor had confirmed her suspicions regarding Duma's actions, when that doctor later indicated that Diaz never contacted him during the investigation. Because "malice" exists when a statement is published with knowledge of its falsity or reckless disregard for its truth, *Ireland*, 230 Mich App at 615, Duma's allegations against Diaz would survive summary disposition even if defendants could properly claim a qualified privilege.

However, Duma's allegations against Weaver and Russell lacked specificity. Duma made absolutely no allegation that Russell made any defamatory statements and made only a vague allegation against Weaver. In her appellate brief, Duma states that the "human resource information" that was shared with the hospital staff "would go through" Russell. Perhaps Duma is alleging that Russell conspired to defame her, rather than directly defaming her.[1] On remand,

[1] "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." *Admiral Ins Co v Brochert*, 194 Mich App 300, 314; 486 NW2d 351 (1992).

the circuit court should grant Duma the opportunity to amend her complaint to raise actionable allegations/claims against Russell and Weaver before again determining whether to dismiss the claims against them. See MCR 2.116(I)(5) (when summary disposition is based on (C)(8), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118 unless the evidence then before the court shows that amendment would not be justified").

Accordingly, we reverse in part the circuit court's dismissal of Duma's defamation claim. On remand, however, the circuit court must permit Duma the opportunity to amend her complaint.

IV. FALSE LIGHT

We discern no error in the circuit court's dismissal of Duma's invasion of privacy claim based on "false light." A defendant can invade a plaintiff's privacy through "publicity that places someone in a false light in the public eye." *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 306; 788 NW2d 679 (2010).

> "In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Porter v City of Royal Oak*, 214 Mich App 478, 486-487; 542 NW2d 905 (1995), quoting *Duran v Detroit News*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993).]

The audience who allegedly heard defendants' broadcast information was insufficient to support a false light claim. Duma alleged that defendants portrayed her as a narcotics thief to the hospital staff and one former hospital supervisor. This does not equate to a "broadcast to the public in general, or to a large number of people" as contemplated for a false light action.

In *Dzierwa v Mich Oil Co*, 152 Mich App 281, 288; 393 NW2d 610 (1986), this Court affirmed the summary dismissal of the plaintiff's false light claim because the "complaint alleges [an] incident which occurred only in the presence of other employees or at most, a handful of office visitors within hearing range. . . ." In *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 387; 689 NW2d 145 (2004), the plaintiff's false light claim was based in part on the defendant hospital's "permitting their employees to refer to [him] as 'Dr. Death.' " In that case, a witness listed 25 nurses, doctors, and staff who used this nickname. *Id.* As the incidents " 'occurred only in the presence of other employees,' " this Court held that the plaintiff could not support his claim. *Id.* at 387-388, quoting *Dzierwa*, 152 Mich App at 288.

Although Duma claims that defendants notified people in other departments about the reasons for her termination, she specifically named only 19 individuals in her complaint. It appears that 18 were employed in the CCH ER and one was a former ER supervisor. Just as in *Dzierwa* and *Derderian*, this was an insufficiently broad audience to support a false light claim. Accordingly, the circuit court properly dismissed this count. As Duma does not contend, even on appeal, that the audience was any broader than described, amendment of her complaint would be futile in this regard.

V. INTENTIONAL INTERFERENCE WITH A BUSINESS RELATIONSHIP

> The elements of tortious interference with a business relationship or expectancy are " 'the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.' " [*Dalley*, 287 Mich App at 323], quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand)*, 217 Mich App 687, 698-699, 552 NW2d 919 (1996). [*Cedroni Assocs, Inc v Tomblinson, Harburn Assocs, Architects & Planners, Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012).]

In pleading "the existence of a valid business expectancy," the plaintiff must allege an expectancy that is "a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). The plaintiff must also show that the defendant's interference was improper, *Patillo*, 199 Mich App at 457, i.e., that "the intentional act that defendants committed must lack justification and purposely interfere with plaintiffs' contractual rights or plaintiffs' business relationship or expectancy." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003).

With regard to this count, Duma alleged that with her experience and education, she possessed "valuable and marketable" skills. She therefore had "an expectancy that she could obtain employment at a variety of hospitals, or other institutions." Because of defendants' unjustified statements, Duma asserted that "other Hospitals and Institutions in the area . . . refuse[d] to hire or engage in any type of business relationship" with her.

Duma's allegations are insufficient to establish any probable or reasonably likely business expectancies. In *PT Today, Inc v Comm'r of the Office of Financial & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006), the plaintiffs "state[d] in a conclusory fashion that BCBSM has a significant effect on the physical therapy market and on federal funds available for health care, but they fail to plead that BCBSM's alleged schemes damaged any business relationship or expectancy that had a reasonable likelihood of fruition." Similarly, here, Duma alleges that no local healthcare facility would hire her. However, she does not identify any potential employer with which she filed an application. Accordingly, the circuit court properly dismissed her claim on (C)(8) grounds. On remand, if Duma has more detailed information regarding the business opportunities she lost, the circuit court must permit her to amend her complaint to include those allegations.

VI. VICARIOUS LIABILITY

Finally, we conclude that the circuit court erred in summarily dismissing the vicarious liability claim based on Diaz's defamation of Duma.

> The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment. It follows that "an employer is not liable for the torts . . .

> committed by an employee when those torts are beyond the scope of the employer's business." This Court has defined "within the scope of employment" to mean " 'engaged in the service of his master, or while about his master's business.' " Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment. Although an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business. [*Hamed v Wayne Co*, 490 Mich 1, 10-11; 803 NW2d 237 (2011) (citations omitted, alteration in original).]

An employer cannot be found liable simply because the employee "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority" or where the employee merely "was aided in accomplishing the tort by the existence of the agency relation." Such vicarious liability is not recognized in Michigan. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 223, 226; 716 NW2d 220 (2006). Of course, the principal can only be held liable if the agent would have been liable, regardless of whether a judgment is actually entered against the agent. Accordingly, if a court determines that an agent is not liable, the court must dismiss the vicarious liability action as a matter of law. See *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294-295; 731 NW2d 29 (2007).

The individual defendants' conduct was definitely within the scope of their employment. The reasons given for telling other employees the reasons for Duma's termination were to quell rumors, which would promote efficiency and morale, and to ensure other employees followed the hospital's medication procedures. Those cases in which an employer has been excused from liability for the intentional torts (or criminal acts) of its employees reflect acts that the employer could not reasonably foresee. See *Hamed*, 490 Mich at 13. For example, in *Brown v Brown*, 478 Mich 545; 739 NW2d 313 (2007), the employer could not reasonably foresee that its employee would commit rape, and the commission of that offense was clearly outside the scope of employment. In *Hamed*, 490 Mich 1, the employer was held harmless because it could not reasonably foresee that its employee deputy would sexually harass and proposition detainees.

Accordingly, to the extent that Duma's claims against the individual defendants remain intact, CCH can be held vicariously liable. At this time, CCH can be held vicariously liable for Diaz's defamation of Duma. If Duma can amend her complaint in a way to resurrect her claims against the individual defendants for intentional interference with a business relationship or against Russell and Weaver for defamation, CCH can be held vicariously liable for these actions too.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly