STATE OF MICHIGAN

COURT OF APPEALS

PATRICK ALAN SOURANDER,

Plaintiff-Appellant,

v

COUNTY OF OGEMAW, OGEMAW COUNTY CORRECTIONAL FACILITY, BRIAN OSIER, and KYLE ALLEN,

Defendants-Appellees.

UNPUBLISHED
October 29, 2020

No. 350632
Ogemaw Circuit Court
LC No. 19-651051-CZ

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition and sanctions for frivolity in favor of defendants. Defendant the Ogemaw County Correctional Facility (OCCF) is defendant Ogemaw County's jail. Defendant Brian Osier is the jail administrator, and defendant Kyle Allen is a corrections officer. Plaintiff was arrested in connection with an underlying criminal matter, and Allen booked plaintiff into OCCF after plaintiff's arrest. Pursuant to a health screening procedure, Allen asked plaintiff some basic health questions during the booking procedure. Allen then testified at plaintiff's criminal trial. Plaintiff contends that Allen's testimony constituted, among other things, damaging and emotionally traumatic disclosure of privileged information. We affirm.

I. BACKGROUND

Plaintiff was arrested on November 15, 2014, for the shooting death of Brett Ritter outside a bar. This Court, in an appeal from the ensuing criminal proceeding, summarized the underlying facts as follows:

> Defendant claimed that he was outside a bar when he saw a man, Justin Ritter, hitting a woman and that he tried to intervene. He claimed that Brett (Justin's brother) pushed him, that he (defendant) pulled out a gun and pointed it in the air, and that, after he had started walking away from the scene, Brett tried to grab the gun and it accidentally discharged. The prosecution, by contrast, presented

> evidence that defendant pointed the gun at Justin, Brett told him not to do so and "walked him backward," and defendant raised the gun and shot Brett in the chest after Brett released him. [*People v Sourander* (*Sourander I*), unpublished per curiam opinion of the Court of Appeals, Docket No. 332091, released January 25, 2018, unpub at p 1.]

During his trial, plaintiff testified in his own defense, advancing a self-defense theory and asserting that he had been beaten and had taken a large dose of drugs shortly before his booking. Allen had conducted plaintiff's booking, and during that booking, he performed a "health screening" pursuant to Administrative Rule R 791.731.[1] Allen testified as a rebuttal witness, with no objections, that he had not observed plaintiff to be injured, and that in response to health screening questions, defendant had denied sustaining any recent injuries or being under the influence of drugs or alcohol. The jury convicted plaintiff "of second-degree murder, MCL 750.317; felon in possession of a firearm, MCL 750.224f; two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1); and felonious assault, MCL 750.82." *Sourander I*, unpub at p 1. On appeal, this Court reversed defendant's second-degree murder and associated felony-firearm convictions due to instructional error, and it remanded for the prosecutor to choose between retrying defendant on those counts or having the trial court enter convictions for involuntary manslaughter and felony-firearm. *Sourander I*, unpub at pp 12-13

Plaintiff contends that he suffered shock and severe emotional distress as a consequence of Allen's testimony. Plaintiff filed two complaints in this matter and has proceeded *in propria persona*. The gravamen of plaintiff's case is that the medical screening during his booking was the kind of medical procedure, or involved communication of the kind of information, that was confidential and privileged under various laws; including MCL 600.2157 (physician-patient privilege); MCL 330.1750 (privileged communications under the Mental Health Code, MCL 330.1001 *et seq.*); MCL 750.410 (solicitation of personal injury claims); and, seemingly, 42 USC § 1320d-6 (the wrongful disclosure provision under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)). Plaintiff contends that Allen's testimony violated his rights under the preceding laws; and also constituted intentional or negligent infliction of emotional distress, breach of implied contract, and invasion of privacy. Plaintiff claims to have suffered (in addition to being convicted) severe and permanent emotional distress, and damage to his reputation and relationships.

Defendants moved for summary disposition under MCR 2.116(C)(6),[2] (7), (8), and (10), asserting numerous arguments why plaintiff's various claims and theories were neither legally nor factually viable. Defendants also sought attorney fees and costs, seemingly based on plaintiff's second complaint. Defendants contended that by the time plaintiff filed his second complaint, he

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[1] R 791.731 requires facilities to establish a policy for "medical, dental, and mental health screening[s] to be performed on all inmates by a trained staff member." The screenings must, among other things, include an inquiry into drug or alcohol use, an inquiry into current illnesses or health problems, and an observation of the inmate's behavior and skin condition.

[2] The parties mention, but do not meaningfully argue, MCR 2.116(C)(6) on appeal. We will not address MCR 2.116(C)(6) because, as will be discussed, doing so is unnecessary.

had been put on notice that his claims were frivolous. Plaintiff, among other responses, filed a motion seeking discovery, even though at least one of the items plaintiff sought had already been disclosed. Plaintiff also withdrew his claim for negligent infliction of emotional distress; and he argued that he was not actually bringing "a HIPAA claim," but rather arguing that HIPAA was relevant only to show the existence of an applicable privilege. Plaintiff also provided a "declaration" of asserted facts that, pursuant to the leniency to which parties *in propria persona* are entitled, we will treat as if it had been a proper affidavit.

After holding a hearing, the trial court granted summary disposition in favor of defendants. The trial court recognized that plaintiff disclaimed bringing a HIPAA claim, but it found plaintiff's amended complaint "confusing at best with regard to what he is trying to argue and allege regarding HIPAA," so it nonetheless held that plaintiff had no cause of action under HIPAA. The trial court found that plaintiff had authorized disclosure of the information by putting his injuries or lack thereof at issue by his testimony. The trial court also concluded that at least some of plaintiff's claims had been devoid of arguable legal merit, especially in plaintiff's amended complaint, so it granted defendants' request for attorney fees and costs. Finally, the trial court denied plaintiff's motion for discovery as moot and dismissed the case. The trial court subsequently denied plaintiff's motion for reconsideration, and this appeal followed.

II. STANDARDS OF REVIEW

Parties appearing *in propria persona* are not excused from providing support for their claims, but they are entitled to more generosity and lenity in construing their pleadings than would be lawyers. *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976).

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Courts reviewing motions for summary disposition must resolve all reasonable inferences and reasonable doubts in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). This Court will generally uphold a correct outcome even if it was arrived at on the basis of flawed reasoning. *Mulholland v DEC Internat'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989). "Where summary disposition is granted under the wrong rule, Michigan appellate courts, according to longstanding practice, will review the order under the correct rule." *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). If a trial court considers matters outside the pleadings, this Court will generally construe the motion as if it had been granted under MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. The nonmoving party responding to a motion under MCR 2.116(C)(10) must demonstrate more than a mere possibility or promise that a claim could be supported by evidence at a trial. *Id*. at 121. Summary disposition "under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position."

Liparoto Constr, Inc v General Shale Brick, Inc, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). "However, summary disposition is not premature if the party's argument fails as a matter of law." *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 263 n 2; 660 NW2d 97 (2003).

A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119.

"The interpretation and application of a privilege constitute legal questions that are subject to review de novo." *People v Carrier*, 309 Mich App 92, 104; 867 NW2d 463 (2015). In addition, what constitutes a waiver of a privilege is a question of law that this Court reviews de novo. See *Leibel v Gen Motors Corp*, 250 Mich App 229, 240-241; 646 NW2d 179 (2002). The purpose of a privilege is to foster relationships by excluding certain potentially reliable and relevant evidence, so they are defined narrowly and their exceptions are construed broadly. *Carrier*, 309 Mich App at 105. The applicability of immunity is also a question of law reviewed de novo. *Denhof v Challa*, 311 Mich App 499, 510; 876 NW2d 266 (2015). Likewise, whether a party owes a duty to another party is a question of law that this Court reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

This Court reviews for an abuse of discretion a trial court's decision whether to award attorney fees and determination of the reasonableness of those fees; reviews for clear error the trial court's underlying factual findings; and reviews de novo any underlying questions of law. *Teran v Rittley*, 313 Mich App 197, 208; 882 NW2d 181 (2015). A trial court does not abuse its discretion if its outcome is "reasonable and principled." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (quotation omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016). To the extent a trial court's factual findings depend on its assessment of the parties' credibilities, this Court gives great deference to the trial court's superior position to make such assessments. *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881); *Anderson v City of Bessemer City, NC*, 470 US 564, 574-575; 105 S Ct 1504, 1511-1512; 84 L Ed 2d 518 (1985).

III. APPLICABILITY OF PRIVILEGES

The majority of plaintiff's claims turn, directly or indirectly, on his contention that Allen's testimony at his criminal trial consisted of privileged information. We disagree.

As an initial matter, although plaintiff characterizes the health-related questions Allen asked during the booking procedure as a "medical examination," it was not. Administrative Rule R 791.731 requires a *screening* by a "trained staff member." In contrast, Administrative Rule R 791.732 requires a subsequent health *appraisal* by a "trained health care person." In any event, there is no evidence to suggest that Allen did anything more invasive than make a superficial observation of plaintiff's outward appearance and record plaintiff's self-reported responses to a

series of form questions. Furthermore, plaintiff concedes that another corrections officer could have testified to that officer's observations of plaintiff outside of the alleged "medical examination." By the same logic, no possible privilege could apply to Allen's observations of plaintiff before and after the alleged "examination." Finally, plaintiff's own statement that he observed officers conducting other medical screenings of jail inmates clearly shows that neither the booking nor the screening are conducted in privacy or seclusion. This seriously undermines any expectation plaintiff could reasonably have held that any portion of the health screening would be confidential.

A. PHYSICIAN-PATIENT PRIVILEGE, MCL 600.217

Plaintiff first asserts the physician-patient privilege. In relevant part, MCL 600.2157 provides:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

Plaintiff recognizes that none of the defendants are authorized to practice medicine or surgery. Rather, plaintiff asserts an agency theory. In *People v Bland*, 52 Mich App 649, 651-652; 218 NW2d 56 (1974[3]), a criminal defendant became ill while in jail and wrote letters requesting hospital care (which was not directly available at the jail) to a jail officer. This Court concluded that the officer was, under the circumstances, acting as the defendant's agent as an "intermediary between the defendant and the hospital doctors." *Id*. at 653. This Court extended the scope of the physician-patient privilege on an agency theory only because the defendant had no other way to communicate with a doctor other than through the officer, who must be deemed a confidential agent for transmission. *Id*. at 653-654. Here, in stark contrast, plaintiff never sought any kind of medical care and never intended to use Allen as an intermediary of any kind.

Plaintiff points out that pursuant to Administrative Rule R 791.732, a nurse eventually reviewed plaintiff's answers that he gave during his booking medical screening. Nevertheless, plaintiff never sought to use Allen (or the screening form) as a conduit for communicating with a medical professional. Plaintiff appears to believe that just because he told Allen things that could be considered medical in nature, Allen was therefore necessarily plaintiff's agent. However, *Bland* includes no such holding, and in fact indicated that its extension of the physician-patient privilege was a very limited one. Plaintiff argues that it does not matter whether he sought treatment, relying on *Bassil v Ford Motor Co*, 278 Mich 173, 178-179; 270 NW 258 (1936). However, although *Bassil* held that the physician-patient privilege can arise even if a patient's condition is not treatable, the patient in that case sought consultation with an actual physician, and the issue was whether the physician could testify. *Id*. Simply put, no privilege under MCL 600.2157 can arise

[3] Because *Bland* was decided before November 2, 1990, it is not binding under the "first-out rule," MCR 7.215(J)(1), but as a published opinion it "has precedential effect under the rule of stare decisis," MCR 7.215(C)(2).

where plaintiff never sought any kind of medical treatment from, or medical communications with, a person authorized to practice medicine or surgery. The extremely limited circumstances under which plaintiff could assert an agency theory never arose.

B. MENTAL HEALTH CODE, MCL 330.1750(1)

Plaintiff also claims a privilege under MCL 330.1750(1), part of the Mental Health Code, 330.1001 *et seq.*, which states that:

> Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.

Because the word "patient" is not defined in the Mental Health Code, the word refers to a person suffering from an illness or condition and receiving care or treatment for that illness or condition. *McLean v McElhaney*, 289 Mich App 592, 601-602; 798 NW2d 29 (2010). Thus, plaintiff cannot possibly have been a "patient" under the Mental Health Code because, pursuant to his own answers, he was neither suffering from any apparent mental health illness or condition, nor was he receiving treatment for that any such illness or condition.

Nevertheless, plaintiff argues that the privilege applies because of MCL 330.1700(h), which defines "privileged communication" for purposes of the above privilege as follows:

> a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law.

Plaintiff accurately points out that "a communication made privileged under other applicable state or federal law" is a standalone, catch-all category. See *Carrier*, 309 Mich App at 108. Furthermore, it does not necessarily matter whether defendants were "mental health professionals" or whether plaintiff was a "patient" under that provision. *Id.* at 106-108. Nevertheless, by the plain language of the statute, there must be *applicable* law rendering his communication privileged.

Plaintiff relies on "MCL 600.2157, MCL 767.5a(2), HIPAA and other sections of the mental health code, possibly even the public health code" for establishing a privilege. To the extent plaintiff relies on MCL 600.2157, plaintiff is wrong for the reasons discussed above. Although plaintiff is entitled to lenity in construing his brief, he is not excused from supporting his arguments. *Estelle*, 429 US at 106-108. To the extent plaintiff vaguely refers to "other sections of the mental health code, possibly even the public health code," his briefing is so lacking that this Court will not seek out or invent arguments in possible support. See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Plaintiff's reliance on HIPAA and MCL 767.5a(2) also clearly fail, as discussed below.

Plaintiff disclaims that he is asserting "a HIPAA claim," but argues that HIPAA is nevertheless relevant because it establishes a privilege. However, the case upon which plaintiff

relies explicitly states that HIPAA does *not* create a privilege. *Carrier*, 309 Mich App at 109. Furthermore, HIPAA's wrongful-disclosure provision applies only to information "maintained by a covered entity." 42 USC § 1320d-6(a). "Covered entities" are defined by 45 CFR § 160.103 as:

> (1) A health plan.
>
> (2) A health care clearinghouse.
>
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

See *Holman v Rasak*, 486 Mich 429, 435; 785 NW2d 98 (2010). None of the defendants are a health plan or health care clearing house, and none of the defendants could be considered a health care provider. Even if defendants could be construed as a health care provider, HIPAA applies only to health care providers who transmit "health information in electronic form in connection with a transaction." There is no evidence that defendants ever made any kind of transmission of health information. Consequently, HIPAA is plainly inapplicable, so it could not be a basis for establishing a privilege, even if *Carrier* had not already explained that it does not establish any privilege.

Finally, plaintiff relies on MCL 767.5a(2), which provides:

> Any communications between attorneys and their clients, between members of the clergy and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys, members of the clergy, or physicians to serve as such attorney, member of the clergy, or physician.

This privilege is clearly inapplicable, even aside from the doubtful relevance of a criminal statute. As discussed, plaintiff's "agency" theory fails in part because plaintiff never said anything to Allen in the pursuit of medical treatment. Consequently, plaintiff never said anything that was necessary for a physician to serve as a physician. Thus, no precondition to the privilege in MCL 767.5a(2) occurred.

Plaintiff has not established that he was entitled to any privilege that he could assert as to Allen's observations of plaintiff during the medical screening, or as to anything plaintiff told Allen during the medical screening. Plaintiff has also not established that he was entitled to assert any agency theory. All of plaintiff's claims that depend, directly or indirectly, upon plaintiff's enjoyment of any such privilege necessarily fail as a matter of law. Thus, summary disposition was properly granted. Because plaintiff had no privilege to waive, we therefore also need not consider whether plaintiff's own testimony would have constituted a waiver of any privilege.

IV. IMMUNITY AND PRIVILEGE

As we will discuss, plaintiff has not established that the individual defendants, Allen and Osier, committed any tort. Even if plaintiff had successfully pleaded tort claims, Allen and Osier would still be immune to the instant suit.

The test for governmental immunity for lower-ranking governmental employees was set forth by our Supreme Court in *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008), as follows:

> (3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:
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> (a) the individual was acting or reasonably believed that he was acting within the scope of his authority,
>
> (b) the governmental agency was engaged in the exercise or discharge of a governmental function, and
>
> (c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.
>
> (4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross*[*v Consumers Power Co (On Reh)*, 420 Mich 567; 363 NW2d 641 (1984)] test by showing the following:
>
> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, or were not undertaken with malice, and
>
> (c) the acts were discretionary, as opposed to ministerial. [(Additional formatting added.)]

Malice and the absence of good faith are essentially synonymous; generally connoting dishonesty, an improper intention to cause harm, an intentional abuse of power, or reckless indifference to the rights of (or consequences to) others. *Odom*, 482 Mich at 474-475. We note that the definition of gross negligence, meaning "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(8)(a), is conceptually similar to bad faith.

As discussed, to the extent plaintiff's arguments rely on Allen having disclosed privileged information, those arguments necessarily fail. The outrageousness of allegedly-tortious conduct may depend on context: "what may be extreme and outrageous under one set of circumstances may be justifiable under different circumstances." See *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 351-352; 351 NW2d 563 (1984). No reasonable person would regard it as particularly offensive to disclose that the person reported no injuries or drug use. It is also a matter of common experience that law enforcement officers regularly testify as to their observations of and interactions with defendants. The fact that an officer testifies on behalf of the prosecution, and thus ostensibly for the purpose of seeking a conviction, might conceivably be perceived as an intention to cause harm, but certainly not an *improper* intention to cause harm

unless the officer commits perjury. Plaintiff has not asserted that Allen lied during his testimony. We conclude that plaintiff cannot establish gross negligence or malice, so he cannot avoid Allen's and Osier's individual immunity.

Additionally, Allen would independently enjoy absolute immunity for his testimony as a witness. *Maiden*, 461 Mich at 134-135. It is unnecessary to consider whether witness immunity could be avoided if Allen had disclosed privileged information, because he did not. Plaintiff argues that witness immunity does not protect witnesses from professional liability. Plaintiff is correct, but his argument is irrelevant because he has no professional malpractice claim against Allen. See *Estate of Voutsaras by Gaydos v Bender*, 326 Mich App 667, 669-670, 681-683; 929 NW2d 809 (2019). In summary, plaintiff cannot establish that either of the individual defendants are not immune to liability, either as governmental employees or as a witness, even if they had committed a tort.

Finally, a governmental entity may be vicariously liable "only when its officer, employee or agent, acting during the course of his employment and within the scope of his authority, commits a tort while engaged in an activity which is non-governmental or proprietary, or which falls within a statutory exception." *Ross v Consumers Power Co*, 420 Mich 567, 592; 363 NW2d 641 (1984). As discussed, the individual defendants did not disclose any privileged information. As we will discuss below, in any event, the individual defendants did not commit any tort. As a consequence, it is impossible for the institutional defendants to have any vicarious liability.

V. DISCOVERY REQUEST

To the extent the trial court granted, or effectively granted, summary disposition pursuant to MCR 2.116(C)(10), plaintiff argues that summary disposition was premature in the absence of further discovery. We disagree.

Defendant has enumerated several particular items of discovery that he argues should have been disclosed. In the trial court, he sought a copy of Allen's affidavit, which was already attached to defendants' motion for summary disposition. On appeal, he argues that he should have been able to discover "the actual form from which medical questions were asked." His motion in the trial court sought a copy of the Medical Assessment Information Sheet, which, again, was attached to defendants' motion for summary disposition. Thus, both of these requests are moot. Defendant also seeks his "medical file," but he has not explained how his "medical file" could be of any possible relevance.

Plaintiff also sought the name of the medical provider with which OCCF contracts, and possibly certain "contracts [that] have confidentiality provisions that correctional officers must adhere to." Plaintiff cites HIPAA, which, as discussed, is inapplicable. Plaintiff does not otherwise explain how a confidentiality provision in a contract between OCCF and a medical provider has any relevance to the instant matter. Finally, plaintiff expressed a desire to "depose correctional officers concerning the handling of medical information and their training" or "to determine how healthcare used the initial health screening." Michigan favors broad and far-reaching discovery, but it does not permit "fishing expeditions." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420; 807 NW2d 77 (2011). Plaintiff has not articulated why he wants any of

these things, or what he hopes doing so will achieve. Thus, this discovery request consists of conjecture at best and is impermissible.

Even if the trial court had not denied plaintiff's discovery request as moot on the basis of its grant of summary disposition, the trial court should have nevertheless denied plaintiff's discovery request. The contents of the request were already granted, inquiries into irrelevant matters, or seeking an impermissible fishing expedition.

VI. TORT CLAIMS

Plaintiff has advanced a novel theory under which the nature of the medical screening allegedly gave him a reasonable expectation of privacy. He contends that defendants must have recognized that expectation, so defendants had a duty to keep plaintiff's answers private. Plaintiff therefore concludes that there was an implicit "meeting of the minds" sufficient to imply a contract at law. See *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). Plaintiff then bootstraps this implied contractual duty for purposes of asserting a negligence claim. Defendants reasonably argue that plaintiff has not actually articulated either an implied contract or a negligence claim. We agree. However, in deference to plaintiff's status *in propria persona*, we choose to overlook the names plaintiff applies to his theories and instead analyze his substantive argument. *Estelle*, 429 US 106-108; *Hartford v Holmes*, 3 Mich 460, 463 (1855); *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011).

Substantively, plaintiff has articulated a claim more in the nature of promissory estoppel.

> The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. [*Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).]

Promissory estoppel is a valid cause of action. *Hoye v Westfield Ins Co*, 194 Mich App 696, 705-706; 487 NW2d 838 (1992). However, "the promise must be definite and clear, and the reliance on it must be reasonable." *Zaremba*, 280 Mich App at 41. Here, plaintiff has only articulated his own subjective belief that he had an expectation of privacy, not that he was ever told that his responses would be kept confidential.

Furthermore, as discussed, plaintiff would have known he was answering form questions posed by a corrections officer rather than a medical professional, and as discussed, plaintiff's statements reveal that the screenings were unambiguously not conducted in the kind of private setting that would imply any confidentiality. To the extent plaintiff subjectively believed his responses were confidential, that belief could not possibly be reasonable. Plaintiff cannot establish any implicit "meeting of the minds" for an implied contract or any kind of promise for promissory estoppel. Plaintiff has therefore also not established the "duty" element of his asserted negligence claim.

In the trial court, plaintiff withdrew his claim for negligent infliction of emotional distress. On appeal, plaintiff further abandons his invasion of privacy claim. Plaintiff is unclear regarding his "personal injury and intentional infliction of emotional distress" claims.

We are unable to discern anything in plaintiff's complaints that looks like a personal injury claim, no matter how generously construed. However, plaintiff cited MCL 750.410, which is a criminal statute, the title to which includes a reference to solicitation of personal injury claims. We presume this is what plaintiff means, and, presumably, plaintiff seeks to rely on MCL 70.410(2), which prohibits certain uses of "the identity of [a] patient or any information concerning the treatment of the patient." As discussed, plaintiff cannot possibly be considered a "patient" because he was not suffering from a medical condition and receiving care or treatment for such a condition. See *McLean*, 289 Mich App at 601-602. Furthermore, a violation is plainly conditioned upon doing so "for any consideration *and* without the prior written permission of" the patient (emphasis added). Plaintiff has not alleged that any of the defendants were paid or compensated. Finally, MCL 750.410 is a criminal statute with no relevance to any civil remedy or beyond the context of solicitation of personal injury claims for the purpose of pecuniary gain. See *Richardson v Allstate Ins Co*, 328 Mich App 468, 473-474; 938 NW2d 749 (2019). Any claim premised upon MCL 750.410 necessarily fails.

Finally, "[t]o establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (quotation and citation omitted). Plaintiff alleged that Allen's testimony caused him to suffer severe emotional distress. However, the courts make the initial determination of law whether the alleged conduct could reasonably be deemed "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." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). This is therefore an objective test, independent of plaintiff's personal feelings on the matter. Plaintiff would have to establish that Allen's testimony—that plaintiff denied any injuries or drug use during a clearly not-private booking procedure—was the kind of conduct that would horrify the overwhelming majority of civilized beings. Plaintiff has not done so.

In summary, plaintiff's tort claims premised on any privilege fail as a matter of law, and the remainder of plaintiff's claims are either voluntarily withdrawn or otherwise legally and factually untenable. Summary disposition was properly granted as to the entirety of plaintiff's case in favor of defendants.

VII. SANCTIONS

Finally, plaintiff argues that the trial court erred in awarding sanctions in favor of defendants, because his claims are not devoid of arguable legal merit and the trial court failed to determine his ability to pay.[4] We disagree.

The imposition of costs in this matter was for frivolity under Michigan law; specifically, MCR 2.625(A)(2) and MCL 600.2591. MCR 2.625(A)(2) states, in relevant part, that "if the court finds on motion of a party that an action or defense was frivolous, costs *shall* be awarded as provided by MCL 600.2591" (emphasis added). In turn, MCL 600.2591 provides in full:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action *shall* award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section *shall* include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record. [(emphases added).]

The word "shall" has long been understood to impose an unambiguous mandate with no allowance for discretion. *People v De La Mater*, 213 Mich 167, 171; 182 NW 57 (1921); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65-66; 642 NW2d 663 (2002). This Court has applied the word "shall" in MCR 2.625 and MCL 600.2591 as similarly depriving the trial court of any choice

[4] Plaintiff also argues that defendants impermissibly submitted to this Court an exhibit not contained in the lower court record. Although we disagree with the authority upon which plaintiff relies, we were also unable to locate a copy of the exhibit in the lower court record, so we have not considered that exhibit on appeal. MCR 7.210(A); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

whether to impose sanctions. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996); *Village Green of Lansing v Bd of Water and Light*, 145 Mich App 379, 395; 377 NW2d 401 (1985).

We therefore reject plaintiff's argument regarding his ability to pay. Neither the statute nor the court rule contains any reference to a party's ability to pay. This Court has held that in the context of *criminal* proceedings, due process might entitle a criminal defendant *in propria persona* to a determination of the defendant's ability to pay before imposing sanctions. *People v Herrera*, 204 Mich App 333, 338-339; 514 NW2d 543 (1994). This Court in *Herrera* was specifically concerned by the unique constitutional issues attendant to a *criminal defendant*'s right of access to the courts when proceeding *in propria persona*. *Id*. at 337-341. No such liberty interests appear to be at issue in this matter, nor has plaintiff advanced any. Under the circumstances, we have been made aware of no reason why the unambiguous mandatory language in MCR 2.625(A)(2) and MCL 600.2591 should not be applied as written.

Plaintiff cites a federal circuit court case that stands for the proposition that costs may not be assessed against indigent persons under certain United States statutes without first determining whether the indigent person can pay. *Sales v Marshall*, 873 F2d 115, 120 (CA 6, 1989). Decisions of lower federal courts are not binding on this Court, even as to questions of federal law, although they may be considered persuasive. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Any persuasive value depends on the extent to which an issue is analogous to an issue at bar. See *Chmielewski v Xermac, Inc*, 457 Mich 593, 601-602; 580 NW2d 817 (1998); *Barrett v Kirtland Community College*, 245 Mich App 306, 314-315; 628 NW2d 63 (2001).[5] This Court is, conversely, bound by the intent of our Legislature and precedent from our Supreme Court, notwithstanding any views expressed by a federal court on similar topics. *Barrett*, 24 Mich App at 314-315; *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 352-354; 785 NW2d 45 (2010). There is no obvious value in a lower federal court's determination that an indigent party's ability to pay must be considered before imposing costs under a federal statute. Notably, *Sales* did not appear to cite any concerns under the United States Constitution that would be applicable to the states. We therefore find plaintiff's ability to pay irrelevant to the imposition of sanctions for frivolity under MCR 2.625(A)(2) and MCL 600.2591.

The trial court based its finding of frivolity only on plaintiff's legal position being devoid of arguable legal merit. MCL 600.2591(3)(a)(iii). Plaintiff advances a conclusory disagreement with the trial court's finding, and he reiterates that he never tried to bring "a HIPAA claim." The trial court's finding of frivolity was based on the complete lack of any applicable privilege, defendants' complete immunity, and the lack of foundation for at least some of plaintiff's tort claims. The trial court recognized that plaintiff disclaimed bringing a HIPAA claim, but observed that plaintiff nevertheless argued that HIPAA was relevant even though it was not. The trial court also relied on the fact that plaintiff's second, amended complaint asserted frivolous claims.

[5] *Barrett* has been implicitly overruled in part on irrelevant other grounds by *Maldonado*, 476 Mich at 388, because *Barrett* cited the now mostly-obsolete "palpably and grossly violative of fact and logic" standard for an abuse of discretion. See *Barrett*, 24 Mich App at 325.

Thus, the trial court did not sanction plaintiff for having brought a HIPAA claim, but rather for arguing that anything Allen disclosed in his testimony had been privileged and arguing that HIPAA was relevant. Plaintiff's pleadings are unclear whether he intended to bring "a HIPAA claim," but plaintiff plainly did argue that HIPAA was nevertheless applicable.

Plaintiff correctly argues that a claim is not frivolous merely because it is ultimately found to be unsupported, erroneous, or unsuccessful; and frivolity must be assessed as of the time the claim was advanced. *Jericho Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). Furthermore, although not directly applicable, MCR 1.109(E)(5)(b) suggests that a party should not be sanctioned for making "a good-faith argument for the extension, modification, or reversal of existing law." However, plaintiff's case hinges almost entirely (directly or indirectly) on the proposition that Allen disclosed confidential information. The privileges plaintiff asserts are blatantly inapplicable, as any trivial research at the outset would have revealed. Plaintiff argued that the privileges actually applied; he never advanced an argument in support of extending them. Plaintiff's "agency" theory turns entirely on completely misreading case law. Finally, plaintiff's claims of emotional harm are not plausible.

The trial court properly found that plaintiff's case was frivolous, and it properly imposed sanctions without consideration of plaintiff's ability to pay.

Affirmed.

/s/ Michael F. Gadola
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien