

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA NELSKI, a/k/a PATRICIA
PELLAND,

UNPUBLISHED
February 17, 2005

Plaintiff-Appellee,

v

No. 249868
Wayne Circuit Court
LC No. 01-102755-NO

TRANS UNION, LLC,

Defendant-Appellant.

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals by leave from the trial court's denial of its motion for summary disposition. We reverse and remand.

Plaintiff brought suit against defendant, Equifax, and Ameritech, alleging defamation and violations of the Fair Credit Reporting Act, 15 USC 1681 *et seq.*, ("FCRA"). The suit was removed to federal court, and, upon defendant's motion, the federal district court dismissed the claims under the FCRA and declined to exercise supplemental jurisdiction on the state law defamation claims. Plaintiff again brought suit in Wayne County Circuit Court against defendant alleging defamation. Defendant moved for summary disposition, arguing that the claim was precluded by collateral estoppel and that the FCRA preempted the state law defamation claim. The trial court denied defendant's motion, and this appeal followed.

Defendant argues that it was entitled to summary disposition on two bases. We agree. A trial court's decision on a motion for summary disposition is reviewed *de novo*. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion made under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Spiek v Michigan Dept of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id.* The facts must be viewed in the light most favorable to the nonmoving party. *Dressel, supra* at 561. "[W]hen such a motion is properly brought, the nonmovant must, under MCR 2.116(G)(3)(b) and 2.116(G)(4), produce admissible support for its opposition in order to defeat the motion." *Adair v State*, 470 Mich 105, 120; 680 NW2d 386 (2004).

Defendant first argues that it was entitled to summary disposition because collateral estoppel applies to bar plaintiff's defamation claim. We agree. To establish her defamation

claim, plaintiff must show fault by defendant amounting to at least negligence. *Postill v Booth Newspapers, Inc*, 118 Mich App 608, 618; 325 NW2d 511 (1982). In plaintiff's federal action, the court determined that there was no negligence by defendant. Accordingly, plaintiff is collaterally estopped from relitigating this issue in the state court action and defendant was entitled to summary disposition on this basis. *VanVorous v Burmeister*, 262 Mich App 467, 479-481; 687 NW2d 132 (2004).

Furthermore, we also agree with defendant that plaintiff's claim is preempted by 15 USC 1681h(e). "Statutory interpretation and the issue of federal preemption are both questions of law reviewed de novo on appeal." *Nelson v Associates Financial Services Co of Indiana, Inc*, 253 Mich App 580, 587; 659 NW2d 635 (2002).

15 USC 1681h(e) provides as follows:

(e) Limitation of liability

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer. 15 USC 1681h(e).

Thus, under the plain language of the statute, defamation claims against consumer credit reporting agencies are preempted unless plaintiff can prove malice or willful intent to injure. Michigan courts have not yet decided this issue. However, a majority of other courts has held that section 1681h(e) preempts defamation claims that do not involve malice or intentional wrongdoing. See, e.g., *Moore v Equifax Information Services LLC*, 333 F Supp 2d 1360 (ND Ga, 2004); *McKeown v Sears Roebuck & Co*, 335 F Supp 2d 917 (WD Wis, 2004). Still other courts have held that the sweeping language of 15 USC 1681t(b)(1)(F) preempts all state law claims, including allegations of defamation involving willful conduct or malice. See *Hasvold v First USA Bank, NA*, 194 F Supp 2d 1228, 1239 (D Wyo, 2002); *Jaramillo v Experian Info Solutions, Inc*, 155 F Supp 2d 356, 362 (ED Pa 2001).

In any event, plaintiff has presented no proof that the wrongful reporting of her credit information came as the result of malice or intentional conduct on the part of defendant. Therefore, defendant's motion for summary disposition under MCR 2.116(C)(10) should have been granted because her claim was clearly preempted by 15 USC 1681h(e).

Reversed and remanded to the trial court for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White