STATE OF INDIANA	)	MARION SUPERIOR COURT
	)ss:	CIVIL DIVISION 10
COUNTY OF MARION	)	CAUSE NO. 49D10-1108-CT-029165

ABIGAIL HINCHY,

Plaintiff,

vs.

WALGREEN CO., et.al.,

Defendants.

FILED

214 NOV 26 2012

CLERK OF THE MARION CIRCUIT COURT

ORDER GRANTING WALGREEN'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IN PART

Statement of Case

Plaintiff Abigail Hinchy ("Hinchy") seeks damages for purported negligence and invasion of privacy regarding access to Hinchy's confidential medical information by Defendant/employee Audra Peterson within claimed scope of employment with Defendant Walgreen Company ("Walgreen"). Walgreen moves for summary judgment largely arguing Peterson acted outside the scope of her employment.

After hearing and extensive briefing, the Court finds Walgreen fails to show the lack of genuine disputes of material fact regarding scope of employment and alleged disclosures of confidential information. The Court further finds Walgreen is entitled to summary judgment on Hinchy's claims of negligent training, and invasion of privacy by intrusion.

Facts and Procedural History

The parties agree that:

- Hinchy maintained an exclusive medical prescription account with Walgreen during all relevant times.

NOV 27 2012

- Peterson is a licensed pharmacist at Walgreen and has access to Hinchy's confidential prescription information.
- Walgreen forbids access to patient information for personal reasons. Peterson was aware of this rule.
- Peterson was informed by her husband of past sexual conduct with Hinchy and raised the possibility of sexually transmitted disease.
- Peterson next intentionally accessed Hinchy's confidential prescription information during her regular work shift at Walgreen on Walgreen's computer.
- Hinchy received a text message within the same day, from a source she recognizes as belonging to Peterson's husband, upon which she believed her confidential Walgreen information had been accessed and disclosed.
- Hinchy immediately phoned Walgreen to report the incident and discuss it.
- Subsequently, Peterson again accessed Hinchy's confidential information.

Applicable Law and Discussion

Summary Judgment Standard

Summary judgment is proper if the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56 (C). The moving party must establish the "absence of any genuine issue of fact as to a determinative issue." Jarboe v. Landmark Community Newspaper, Inc. (1994), Ind., 664 N.E.2d 118, 123. If there is sufficient evidence to establish the elements of a determinative defense, the burden shifts to the non-movant to make sufficient showing to establish the existence of a genuine issue for trial. Shell Oil Co. v. Lovold Co. (1998), Ind., 705 N.E.2d 981; Dreaded, Inc. v. St. Paul

Guardian Ins. Co. (2009), Ind., 904 N.E.2d 1267. On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning Fiberglass Corp. v. Cobb (2001), Ind., 754 N.E.2d 905, 909.

Lenhardt Tool & Dye v. Lumpe, supra., presents circumstances in which a defective mold exploded causing injury to plaintiff, but no party could prove who made the mold. The moving defendant, like Northwest, argued a lack of Plaintiff's evidence. The court explains how Indiana summary judgment law applies to cases where the record shows no evidence directly proving or negating causation –

> It is clear that under the *Jarboe* analysis, Lenhardt would have had to designate some evidence that the mold was not manufactured by Lenhardt in order to require Lumpe to come forward with evidence that the mold was manufactured by Lenhardt. **Simply demonstrating that Lumpe does not have sufficient evidence to prove the mold was manufactured by Lenhardt is not enough.** The practical consequences of this analysis could be that in some cases summary judgment would be denied to a defendant where at the conclusion of the plaintiff's evidence, if it is no better at trial than shown to be by the defendant at summary judgment, the defendant would be granted a motion for judgment on the evidence under T.R. 50 by reason of the plaintiff's failure to prove an essential element of his case. However, the dictate of *Jarboe* is consistent with the recognition that summary judgment terminates the right to trial and that summary judgment will be denied even though it appears that the plaintiff may not succeed at trial.
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> 703 N.E.2d at 1083-1084 (emphasis supplied)[1]

Most importantly here, a court may not weigh evidence during summary judgment proceedings, but only determine whether there is an issue of fact. Matter of Belanger's Estate (1982), Ind.App., 433 N.E.2d 39, 42.

[1] This excerpt is not directed to the merits of Plaintiff's case, but is shown here to illustrate the high burden for movants under Indiana summary judgment law.

Scope of Employment-
Dispute of Material Fact Regarding Whether Peterson's Acts are "Sufficiently Associated"

Under Indiana law, an employee's negligence or other liable acts can be imputed to the employer if:

1) The act in question is "incidental" to other authorized conduct; or

2) The act "further[s] the employer's business."

Barnett v. Clark (2008), Ind., 889 N.E.2d 281, 283. If an act is "sufficiently associated" with authorized duties, then an issue of fact may arise regarding whether it is within the scope of employment, and summary judgment may be inappropriate. Stropes v. Heritage House Childrens Center (1989), Ind., 547 N.E.2d 244, 249-50.

The nature of Peterson's conduct involved training and duties only derived from her Walgreen employment. On the other hand, her subjective motivation may be interpreted as independent from any authorized action.[2] A jury could weigh the facts and find either way. But as a matter of summary judgment, a fact is "material" if its resolution would affect the outcome of the case, and an issue is "genuine" if a trier of fact is required to resolve the parties' differing accounts of the truth, Gaboury v. Ireland Road Grace Brethren. Inc. (1983), Ind., 446 N.E.2d 1310, 1313 **or if the undisputed material facts support conflicting reasonable inferences,** Bochnowski v. Peoples Fed. Say. & Loan Ass'n (1991), Ind., 571 N.E.2d 282, 285; Stropes v. Heritage House Childrens Center, supra. at 247. (emphasis supplied) These facts are material, the issues are genuine, and the conflicting inferences are in dispute. Accordingly, summary judgment should be denied regarding respondeat superior – a jury will have to resolve the weight of the relevant facts to make that determination.[3]

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[2] Under Stropes, the nature of the conduct might be only one consideration in determining whether it falls within the scope of employment. Id. at 249.

[3] This ruling also necessarily applies to Hinchy's claim of "professional malpractice."

Negligent Supervision and Retention – Mixed Question of Law and Fact

Hinchy's claim of Walgreen's negligence involves, of course, the existence and breach of a duty. Webb v. Jarvis (1991), Ind., 575 N.E.2d 992.[4] It is currently undisputed that Hinchy contacted Walgreen to inform it about Peterson's misconduct as well as rectify the purported breach of confidentiality and claimed disclosure. The record indicates that Peterson subsequently accessed Hinchy's confidential information again. But the sufficiency, effectiveness, and nature of the contact are disputed.

Generally, whether a duty exists is a question of law for the court to decide. Hooks SuperX, Inc. v. McLaughlin (1994), Ind., 642 N.E.2d 514, 517. Sometimes, however, the existence of a duty depends upon underlying facts that require resolution by the trier of fact, thus making the ultimate existence of a duty a mixed question of law and fact. Rhodes v. Wright (2004), Ind., 805 N.E.2d 382. Indiana law recognizes that a factual question may be interwoven with the determination of the existence of a relationship between the parties. In other words, a duty may exist if a certain set of facts is found, notwithstanding that the law does not recognize a general direct duty based upon the parties' legal relationship. Helmchen v. White Hen Pantry (1997), Ind.App., 685 N.E.2d 180.

The facts and inferences regarding Hinchy's contact and Peterson's second access will have to be weighed and determined by a jury to determine whether a duty arose or was breached. So, summary judgment should be denied regarding Hinchy's claims of negligent supervision and retention.

[4] Restatement (Second), Torts §317 controls the determination of the duty here.

Negligent Training - Not Supported by Indiana Law or the Record

The facts and inferences are undisputed regarding Peterson's training. She was aware that Walgreen prohibits access to a customer's confidential information for personal reasons. She twice intentionally accessed Hinchy's confidential information. When an employee knowingly acts in violation of company policy, any claim for negligent training should be disposed by summary judgment. *See* Moore v. Hosier, 43 F.Supp2d 978 (N.D. Ind. 1998).

Therefore, summary judgment should be granted on Hinchy's negligent training claim.

Invasion of Privacy for Public Disclosure of Private Facts – Claim Is Allowed As a Matter of Law and Disputed Fact

Hinchy seeks damages for the alleged access/disclosure as an invasion of privacy for "public disclosure of private facts," that is, publishing information about the private life of another. *See* Vargas v. Shepherd (2009), Ind.App., 903 N.E.2d 1206; Restatement (Second), Torts, §652D. Indiana law is unclear whether such a tort should be recognized. Doe v. Methodist Hospital (1997), Ind., 690 N.E.2d 681. In addition, it is problematic whether the "publicity" of such private information occurs when disclosure only involves one person. Id. at 692-3; Doe v. Methodist Hospital (1994), Ind.App., 639 N.E.2d 683.

Regardless, remedies for such alleged conduct are not disallowed under Indiana law and have enough precedent to preclude summary judgment. Vargas v. Shepherd, supra.; Munsell v. Hambright (2002), Ind.App., 776 N.E.2d 1272; Dietz v. Finlay Fine Jewelry Corp. (2001), Ind.App., 754 N.E.2d 958; Near Eastside Community Org. v. Hair (1990), Ind.App., 555 N.E.2d 1324. In addition, the "publicity" element in Hinchy's circumstances is sufficiently substantiated under currently stated tort holdings among Indiana authorities and elsewhere:

> . . . a few courts, including Indiana's neighbors, have adopted a looser definition of "publicity." In the seminal *Beaumont*[5] case, the Supreme Court of Michigan held that even if a disclosure were not made to the general public, it could still be actionable if made to a "particular public" with a special relationship to the plaintiff . . . the court sought to identify a nexus between the information disclosed and the relationship between the plaintiff and the class to whom the disclosure was made. The question was whether a particular disclosure would be embarrassing given the plaintiff's relationship with the "particular public" at issue.
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> Doe v. Methodist Hospital, supra., 690 N.E.2d at 692-3

So, the "particular public" standard for the "publicity" element of this tort has enough support and precedent under Indiana law to also preclude summary judgment as a matter of law and as a disputed issue of fact. Vargas v. Shepherd, supra. at 1031; *see also* Judge Najam's dissent in Doe v. Methodist Hospital, supra., 639 N.E.2d 683 at 686.

Invasion of Privacy By Intrusion Is Not Shown As a Matter of Indiana Law

Hinchy also seeks damages under a claim of invasion of privacy by "intrusion," that is, into her "emotional solace." Munsell v. Hambright, supra. at 1283. However, Indiana law requires an invasion of *physical* solitude or seclusion to constitute invasion of privacy by "intrusion." Cullison v. Medley (1991), Ind., 570 N.E.2d 27; Ledbetter v. Ross (2000), Ind.App., 725 N.E.2d 120, 123. Summary judgment should be granted upon this claim.

Order

Walgreen's Motion for Summary Judgment is granted with respect to Hinchy's claims of negligent training in Count II and invasion of privacy by intrusion in Count III.

Walgreen's Motion for Summary Judgment is denied in all other respects.

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[5] Beaumont v. Brown, (1977) Mich., 257 N.W.2d 522, 531.

Dated this 26th day of November 2012.

David J. Dreyer, Judge