[Cite as *DelleCurti v. Walgreen Co.*, 2016-Ohio-4741.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CHRISTINA DELLECURTI,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2015-T-0097**
- vs -	:	
THE WALGREEN COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2013 CV 02253.

Judgment: Affirmed.

Irene K. Makridis, 155 South Park Avenue, Suite 160, Warren, OH 44481 (For Plaintiff-Appellant).

Victor T. DiMarco and *Shawn W. Maestle,* Weston Hurd LLP, The Tower at Erieview, 1301 East Ninth Street, Suite 1900, Cleveland, OH 44114 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Christina DelleCurti, appeals from the Judgment Entry of the Trumbull County Court of Common Pleas, granting the defendant-appellee, The Walgreen Company's, Motion for Summary Judgment and dismissing DelleCurti's Complaint. The issues to be determined by this court are whether an error raised regarding the trial court's failure to allow a party to be added to a lawsuit is moot when a separate complaint has been filed against that party and whether a claim for negligent

invasion of the right to privacy for the unauthorized disclosure of medical information is properly dismissed when the pharmacist discloses information to another pharmacy to protect the patient and her unborn child. For the following reasons, we affirm the judgment of the lower court.

{¶2} On November 14, 2013, DelleCurti filed a Complaint against The Walgreen Company ("Walgreen"). According to the Complaint, a Walgreens pharmacy failed to fill her valid Adderall prescription after verifying its legitimacy with her doctor. The pharmacy returned the prescription to DelleCurti, who took it to a CVS, where the pharmacy filled it. That pharmacist informed DelleCurti that the Walgreens pharmacist, Robert Fetty, had contacted her and revealed DelleCurti's personal information, opining that CVS should not fill the prescription and stating that an obstetrician/gynecologist should not be prescribing "mental health care medication."

{¶3} The Complaint claimed that there was a breach of privacy, DelleCurti's HIPAA rights were violated, and that she was "unlawfully defamed by Walgreen with regard to her attempts to obtain so called 'mental health medication' as previously prescribed and filled on numerous occasions pursuant to her primary physicians."

{¶4} Walgreen filed its answer on December 9, 2013.

{¶5} Walgreen filed a Motion for Summary Judgment on November 3, 2014, arguing that there is no private cause of action for a HIPAA violation and it was not violated since pharmacies can communicate about "patient safety activities."

{¶6} DelleCurti filed a Response in Opposition on December 3, 2014, to which Walgreen replied.

{¶7} The following deposition testimony was presented on summary judgment:

{¶8} On September 17, 2013, DelleCurti tried to have her prescription for Adderall filled at a Walgreens pharmacy but was told that it was necessary to check with her doctor since prescribing Adderall is beyond the scope of an obstetrician/gynecologist's practice.

{¶9} DelleCurti's OB/GYN, Dr. Anthony DeSalvo, testified that he spoke with a Walgreens pharmacist, who questioned the medical use of Adderall in a pregnant woman. Dr. DeSalvo explained that the prescription was valid and for a legitimate medical reason. Dr. DeSalvo requested that if they would not fill the prescription to return it to DelleCurti. Dr. DeSalvo testified that he prescribed the Adderall, which she had been taking prior to the pregnancy, to her during her pregnancy and that he was permitted to do so.

{¶10} When DelleCurti returned to the Walgreens pharmacy the next day, she was told that they would not fill the prescription and it was returned to her. DelleCurti then dropped off the prescription at a CVS. She was called by pharmacist Lyndsey Clemens who said she could not fill the prescription because it was "beyond the normal scope of practice" of an OB/GYN. After DelleCurti became very upset, Clemens agreed to fill it. DelleCurti said Clements told her someone from Walgreens had called CVS and told a technician not to fill the prescription, stating DelleCurti's name and information and "that it's wrong to give a pregnant woman Adderall." DelleCurti testified that Robert Fetty, the Walgreens pharmacist, admitted to her in a telephone conversation that he told CVS her name and other information about her prescription.

{¶11} Robert Fetty, the pharmacist at Walgreens, explained that when he received DelleCurti's prescription, he had a pharmacy technician call Dr. DeSalvo

because he believed it was outside of his scope of practice. Fetty decided not to fill it, since he did not know the reason why it was prescribed and felt uncomfortable filling it. Fetty called CVS and told the technician he spoke with that "you might have gotten a prescription for Adderall from Dr. DeSalvo, and the only reason I didn't fill it is because I felt it was out of * * * his scope of practice."

{¶12} On December 22, 2014, the trial court granted the Motion for Summary Judgment in part as to the cause of action related to HIPAA, noting that such claims cannot be brought by an individual. Summary judgment was denied in relation to the claim for negligent invasion of the right of privacy.

{¶13} DelleCurti filed an Expert's Report of Dr. Allen Nichol on May 29, 2015. Dr. Nichol opined that Fetty "engaged in conduct that exhibited a lack of professionalism as well as violating patient confidentiality" and that he violated DelleCurti's right to privacy. An affidavit of Dr. Nichol was submitted on July 21, 2015.

{¶14} On June 11, 2015, Walgreen filed a Motion for Summary Judgment for the remaining claim of negligent invasion of the right of privacy. It noted that DelleCurti had not presented expert reports that supported her claim.

{¶15} On July 21, 2015, DelleCurti filed a Motion for Leave to Amend Complaint to Add a New Party Defendant, requesting to add claims against Robert Fetty.

{¶16} The trial court filed a Judgment Entry on July 31, 2015, denying DelleCurti's Motion for Leave to Amend the Complaint.

{¶17} On the same date, the trial court granted summary judgment as to negligent invasion of the right of privacy/disclosure of medical information in favor of Walgreen. The court found that the communication in question was permissible under

HIPAA as a patient safety activity to protect the health and safety of DelleCurti's unborn child and Walgreen was entitled to qualified privilege.

{¶18} DelleCurti timely appeals and raises the following assignments of error:

{¶19} "[1.] The trial court erred to the prejudice of the appellant by overruling her motion for leave to file her amended complaint to include Walgreen pharmacist Robert Fetty as defendant.

{¶20} "[2.] The trial court erred to the prejudice of the appellant by granting Walgreen's Motions for Summary Judgment."

{¶21} In her first assignment of error, DelleCurti contends that the trial court should have permitted her to amend her complaint to include Robert Fetty as a defendant, since it would have caused no hardship and "would have resulted in judicial economy."

{¶22} Walgreen argues that this assignment of error is moot, since DelleCurti initiated a separate action against Fetty.

{¶23} Pursuant to Civ.R. 15, a party may amend his pleadings with the leave of court "when justice so requires," including amending the pleadings to add additional parties. "A trial court's ruling on a motion to amend a complaint is reviewed under an abuse of discretion standard." *Karnofel v. Kmart Corp*., 11th Dist. Trumbull Nos. 2007-T-0036 and 2007-T-0064, 2007-Ohio-6939, ¶ 38.

{¶24} On September 17, 2015, DelleCurti filed a Complaint against Fetty in Trumbull County Court of Common Pleas Case No. 2015 CV 1704, a fact of which this court may take judicial notice. *State ex rel. Nelson v. Russo*, 89 Ohio St.3d 227, 729 N.E.2d 1181 (2000). Thus, we find no basis for addressing the merits of this

assignment of error, since DelleCurti has chosen to pursue the claims in a separate case and the assignment of error is moot. *Deluca v. Aurora*, 144 Ohio App.3d 501, 508, 760 N.E.2d 880 (11th Dist.2001) ("courts do not have jurisdiction to consider moot issues; rather, courts decide actual cases in controversy").

{¶25} The first assignment of error is without merit, since it is moot.

{¶26} In her second assignment of error, DelleCurti argues that summary judgment should not have been granted on the invasion of privacy claim, since Walgreen disclosed private information about DelleCurti relating to her medical condition and prescription. She contends that reliance on the qualified privilege doctrine should not apply and that Walgreen acted in bad faith.

{¶27} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor."

{¶28} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision." (Citation omitted.) *Peer v. Sayers*, 11th Dist. Trumbull No. 2011-T-0014, 2011-Ohio-5439, ¶ 27.

{¶29} "In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship." *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 715 N.E.2d 518 (1999), paragraph one of the syllabus; *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153, ¶ 11 (*Biddle* "recognized a separate tort for breach of confidentiality related to medical information").

{¶30} While such a tort claim does exist, we initially emphasize that Walgreen's actions were in accordance with HIPAA. Pursuant to 45 C.F.R. 164.506(a), "a covered entity may use or disclose protected health information for treatment, payment, or health care operations as set forth in paragraph (c) of this section, provided that such use or disclosure is consistent with other applicable requirements of this subpart." 164.506(c)(4) provides that "[a] covered entity may disclose protected health information to another covered entity for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship, and the disclosure is" related to items such as "patient safety activities." *See* 45 C.F.R 164.50.

{¶31} It has been held that "[p]harmacists are health care providers covered by the act." *Texas v. Organon USA Inc.*, N.J. Nos. 02-2007 and 04-5126, 2005 U.S. Dist. LEXIS 27011, 42, fn. 4 (Sept. 13, 2005). Given the foregoing, Walgreen acted in accordance with the standard for use of private medical information under HIPAA and it is difficult to say Walgreen's conduct rose to the level of improper disclosure of medical

information under *Biddle*. Fetty's conduct was described as based on concerns that a pregnant woman may be at risk when prescribed certain types of medications. Contacting another pharmacy which would be providing medication to her would address these concerns relating to the patient's safety.

{¶32} While DelleCurti believes that *Biddle* should be applied regardless of the foregoing, it must be emphasized that *Biddle*'s creation of a separate tort does not preclude a finding that disclosure of medical information is necessary or warranted in some circumstances. *Biddle* recognizes a privilege to disclose information "for the safety of individuals or [when] important to the public in matters of public interest" and that information may be disclosed "where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality." (Citation omitted.) 86 Ohio St.3d at 402, 715 N.E.2d 518.

{¶33} To the extent that DelleCurti argues a cause of action for invasion of privacy in addition to/in conjunction with the claim of disclosure of health information addressed above, no such claim can be sustained. Pursuant to *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), an invasion of privacy claim can be sought when there is a "publicizing of one's private affairs with which the public has no legitimate concern." *Id.* at paragraph two of the syllabus. To prevail on such a claim, there must be "public disclosure of [a] private fact." *Greenwood v. Taft*, 105 Ohio App.3d 295, 303, 663 N.E.2d 1030 (1st Dist.1995). That did not occur here because only a few individuals, working at the CVS pharmacy, became aware of the information referenced by DelleCurti. "Publicity" for these purposes means "communicating the matter 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." (Citation omitted.) *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166, 499 N.E.2d 1291 (10th Dist.1985). No public disclosure occurred here.

{¶34} DelleCurti points out in her brief that Fetty had bad "true motives and intent." The evidence presented fails to show that Fetty had any reason or intent to harm DelleCurti. His explanation that he was concerned about the prescription being appropriate under the circumstances was entirely reasonable. Again, the record does not indicate that Fetty's phone call to CVS was "reprehensible" or entirely uncommon within the profession.

{¶35} DelleCurti also emphasizes statements made by Fetty to CVS, including that it would be illegal to fill her prescription. Presuming Fetty made these statements, they do not give rise to the causes of actions raised by DelleCurti but simply misconstrued the ability of Dr. DeSalvo to prescribe medicine or were possible misstatements. They were not invasions of privacy nor did they amount to unauthorized, unprivileged disclosure of her medical information. They also were clearly not taken seriously by CVS, which chose to fill DelleCurti's prescription.

{¶36} Finally, DelleCurti contends that Walgreen was no longer involved in her care at the time Fetty contacted CVS. As described above, however, for the purposes of HIPAA, disclosure is permitted when the disclosing party either "has or had a relationship" with the individual whose information is disclosed. *See* 45 C.F.R. 164.506(c).

{¶37} The second assignment of error is without merit.

{¶38} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, granting Walgreen's Motion for Summary Judgment and dismissing DelleCurti's Complaint, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part with a Dissenting Opinion.

{¶39} I concur with the majority's well reasoned position that the appellant's first assignment of error is moot. However, I dissent regarding the second assignment of error due to the actions of the trial court that need to be corrected.

{¶40} Ms. Dellecurti filed a motion for reconsideration with the trial court, attaching a letter from Dr. Allen Nichol, Pharm.D. Dr. Nichol opined that Mr. Fetty and Walgreen lost any qualified privilege regarding Ms. Dellecurti when he refused to fill her prescription, and returned it to her. The trial court construed it as a Civ.R. 60(B) motion, and rejected it on the basis that Ms. Dellecurti had not met either the first or second prongs of the test set forth at *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, paragraph two of the syllabus (1976). The trial court filed its judgment September 23, 2015, after this appeal had commenced. Ms. Dellecurti never sought a remand from this court so the trial court could rule on her motion.

{¶41} In this case, the trial court found Mr. Fetty and Walgreen to be privileged,

since the alleged disclosures were made to protect the safety of Ms. Dellecurti and her unborn child. A quandary is presented by Dr. Nichol's letter, which clearly states any privilege evaporated since Mr. Fetty and Walgreen returned the prescription to Ms. Dellecurti without filling it, thus ending the pharmacist-patient relationship. However, this letter was presented to the trial court via a nullity – a motion for reconsideration – rather than as a supplement to the summary judgment or as a Civ.R. 60(B) motion. The trial court generously treated it as a Civ.R. 60(B) motion – but rejected it. It did so after the notice of appeal was filed, when it lacked jurisdiction to make any ruling, thus rendering its judgment a nullity itself. Ms. Dellecurti has never sought a remand to the trial court, so it could enter a proper ruling, and has never sought to appeal the rejection of her motion for reconsideration, construed as a Civ.R. 60(B) motion.

{¶42} Based upon these facts, this writer concludes that the proper procedure is to reverse the trial court's grant of summary judgment, and remand this matter so the parties can properly argue the issues raised by Dr. Nichol's letter to that court, and it may issue a proper judgment.

{¶43} Therefore, I concur in part and dissent in part.