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IN THE COURT OF APPEALS OF INDIANA

Lyndale R. Ivy,
Appellant-Plaintiff,

v.

Barry Privett,
Appellee-Defendant.

March 5, 2021

Court of Appeals Case No. 20A-CT-1463

Appeal from the Henry Circuit Court

The Honorable Max C. Ludy, Jr., Special Judge

Trial Court Cause No. 33C02-1810-CT-56

Sharpnack, Senior Judge.

Statement of the Case

[1] Lyndale Ivy appeals the trial court's grant of Barry Privett's motion for summary judgment. We affirm.

Issues

[2] Ivy raises two issues, which we restate as:

I. Whether the trial court committed reversible error in failing to rule on Ivy's two motions to strike.

II. Whether the trial court erred in granting Privett's motion for summary judgment.

Facts and Procedural History

[3] Ivy was incarcerated at the New Castle Correctional Facility ("the Facility"). Privett was an internal affairs investigator at the Facility, employed by GEO Group, Inc. Ivy was confined at the prison's hospital for several months and later filed a complaint stating that a hospital employee had touched him inappropriately while they were sitting at a table.

[4] Privett investigated Ivy's complaint. His investigation included interviewing Ivy and reviewing incident reports and other documents. Privett issued a preliminary report recommending a determination that there was no probable cause for a formal investigation against the hospital employee. Another prison employee, Administrator J. Pruis, reviewed Privett's report, concluded Ivy's complaint was unfounded, and ended the investigation. Next, the prison began disciplinary proceedings against Ivy, which ultimately resulted in punishments including loss of credit time.

[5] On December 20, 2018, Ivy filed suit against Privett, alleging negligence, "willful and wanton" negligence, Appellant's App. Vol. 2, p. 6, and intentional

infliction of emotional distress.[1] Privett filed a motion for summary judgment with supporting documents. Ivy filed a response to Privett's motion with supporting documents. Several months later, Ivy filed two motions, asking the trial court to strike: (1) portions of Privett's affidavit, which Privett had submitted as exhibit A in support of his motion for summary judgment; and (2) exhibits B and C to Privett's motion for summary judgment.

[6] The trial court did not rule upon Ivy's motions to strike. On July 16, 2020, the trial court granted Privett's motion for summary judgment. This appeal followed.

Discussion and Decision

I. Motions to Strike

[7] Ivy claims the trial court should have granted both of his motions to strike. In general, a trial court's ruling on a motion to strike is reviewed for an abuse of discretion. *Williams v. Tharp*, 914 N.E.2d 756, 769 (Ind. 2009). Failure to rule on a motion to strike is erroneous, but the error may be harmless. *See Palmer v. State*, 173 Ind. App. 208, 213, 363 N.E.2d 1245, 1248 (1977) (trial court should have specifically ruled on motion to strike affidavit, but impliedly overruled the motion by granting the opposing party's motion for summary judgment; any error was harmless).

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[1] Ivy also sued Facility employees Anita Williams and Dr. Ellen Keris, but the trial court subsequently dismissed all claims against those defendants.

[8] Ivy asked the trial court to strike certain paragraphs from Privett's affidavit, designated in Privett's summary judgment materials as exhibit A, and Privett's exhibits B (Privett's preliminary report) and C (the Facility's documents from the disciplinary case against Ivy that Facility staff began after the end of the investigation into Ivy's misconduct claim). But months before filing the motions to strike, Ivy had included Privett's affidavit and Privett's preliminary report in his designation of evidence in opposition to Privett's motion for summary judgment. In addition, Ivy discussed those documents extensively in his summary judgment brief. In the motion to strike, Ivy did not explain the reason for his change of position, and he did not seek to amend his previously filed summary judgment materials to omit those documents. Ivy's mixed messages to the trial court on the admissibility and utility of those documents establishes that the court would have been well within its discretion in choosing not to strike them from Privett's summary judgment materials. *See, e.g.*, *Miller v. Faulkner*, 506 N.E.2d 52, 54 (Ind. Ct. App. 1987) (no abuse of discretion in failing to strike portions of affidavit; Miller failed to challenge the same information that was admitted in a different affidavit).

[9] Regarding Privett's exhibit C, Ivy argues the trial court should have struck the documents contained in that exhibit because none of them were authenticated by Privett's affidavit or any other means. Unsworn statements and unverified exhibits do not qualify as proper Rule 56 evidence. *Ind. Univ. Med. Ctr. v. Logan*, 728 N.E.2d 855, 858 (Ind. 2000). In his affidavit, Privett identified the documents in exhibit C, stated they are true and accurate copies, and explained

that he creates and maintains such documents as part of his employment at the Facility. Even if these statements were insufficient to authenticate exhibit C, we conclude the trial court's failure to strike the exhibit was harmless error. A trial court is presumed to know and follow the applicable law, including its "duty to disregard any inadmissible information included in an affidavit." *Hamilton v. Hamilton*, 132 N.E.3d 428, 432 (Ind. Ct. App. 2019). Ivy has failed to demonstrate reversible error.

II. Motion for Summary Judgment

[10] Ivy claims the trial court should have denied Privett's motion for summary judgment because there are factual disputes that must be resolved at trial. Orders for summary judgment are reviewed de novo and require this Court to apply the same standard of review as the trial court. *AM Gen. LLC v. Armour*, 46 N.E.3d 436, 439 (Ind. 2015). A party moving for summary judgment must present a prima facie showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Tr. Rule 56(C). If the movant makes such a showing, the burden then shifts to the nonmoving party to show the existence of a genuine issue. *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020). Evidentiary ambiguities are considered in the light most favorable to the nonmoving party. *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019).

[11] Ivy first claims the trial court erred in granting summary judgment to Privett because Privett's designation of evidence was "insufficiently specific."

Appellant's Br. p. 17. Ivy explains that Privett did not identify the portions of designated documents upon which he relied, and that designating entire documents is inadequate. Indiana Trial Rule 56(C) requires a summary judgment litigant to designate "all parts" of materials it relies on in requesting or opposing summary judgment. The rule "requires sufficient specificity to identify the relevant portions of a document, and so, for example, the designation of an entire deposition is inadequate." *Filip v. Block*, 879 N.E.2d 1076, 1081 (Ind. 2008). "[P]age numbers are usually sufficient." *Id.*

[12] Privett designated only three exhibits in support of his summary judgment motion: a three-page exhibit, a six-page report, and a forty-four-page packet of disciplinary documents. Although it would have been a better practice for Privett to identify the pages of the packet upon which he relied, we also note that Ivy, in designating his materials in opposition to summary judgment, did not identify the pages of each exhibit upon which he relied. Under these circumstances, Privett's failure to be more specific with the packet does not render summary judgment inappropriate.

[13] We next turn to Ivy's claim of negligence. To succeed on a negligence claim, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) breach of that duty; and (3) an injury to the plaintiff proximately caused by the defendant's breach. *Schmidt v. Ind. Ins. Co.*, 45 N.E.3d 781, 785 (Ind. 2015). A defendant may obtain summary judgment in a negligence action when the undisputed facts negate at least one element of the plaintiff's claim. *Brown v. City of Indianapolis*, 113 N.E.3d 244, 249 (Ind. Ct. App. 2018).

[14] Ivy argues Privett included "lies and fabrications of evidence" in his report and falsely cleared the prison employee of wrongdoing, which led to disciplinary actions and punishments against Ivy. Appellant's Br. p. 15. As proof of Privett's lack of good faith, Ivy claims Privett misrepresented in his preliminary report the size of the table at which Ivy and the prison employee sat when the unwanted touching allegedly occurred. Ivy argues the size of the table is relevant to whether the employee could have reached him under the table.

[15] Assuming without deciding that Privett owed Ivy a private duty to conduct a diligent, good-faith investigation,[2] the designated evidentiary material fails to establish a dispute of material fact as to whether Privett breached that duty. In his preliminary report, Privett stated "IA," meaning Internal Affairs, "measured" the table, and it was "approximately" forty inches wide and eight feet long. Appellant's Br. p. 48. In a subsequent email, Privett stated he later measured the table, and it was eight feet and one and one-half inches long, and thirty-one and one-half inches wide. In Privett's summary judgment affidavit, he explained that his description of the table's size in the report was an estimate, and he subsequently measured the table, which allowed him to provide a more accurate description of the table's size in the email.

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[2] When a plaintiff sues a governmental agency for negligence, liability "will not be found unless the relationship between the parties is one that gives rise to a special or private duty owed to a particular individual." *Benthall v. City of Evansville*, 674 N.E.2d 580, 583 (Ind. Ct. App. 1996), *trans. denied*. It is unclear whether Privett, who works at a state correctional facility for a private corporation, is an agent of the government. Privett does not raise this issue, and we will not address it further.

[16] These facts, when viewed in the light most favorable to Ivy, fail to establish a dispute of material fact as to bad faith on Privett's part. At worst, Privett displayed a lack of specificity by merely estimating the size of the table for the report. We are obligated to consider all reasonable inferences in favor of Ivy, but "[a]n inference is not reasonable when it rests on no more than speculation or conjecture." *Brown*, 113 N.E.3d at 250. Further, in his summary judgment affidavit Privett stated he did not lie in his report and did his best to investigate Ivy's claim. Ivy points to no other evidence of bad faith or ill will by Privett during the investigation. Under these circumstances, Privett presented undisputed material facts sufficient to negate an element of Ivy's claim, specifically breach of a duty. The trial court did not err in granting summary judgment to Privett as to Ivy's claim of negligence.

[17] Next, Ivy claims Privett engaged in willful and wanton misconduct during his investigation, resulting in harm to Ivy. "The elements of willful or wanton misconduct are: '(1) the defendant must have knowledge of an impending danger or consciousness of a course of misconduct calculated to result in probable injury; and (2) the actor's conduct must have exhibited an indifference to the consequences of his conduct.'" *Ellis v. City of Martinsville*, 940 N.E.2d 1197, 1205 (Ind. Ct. App. 2011) (quoting *U.S. Auto Club, Inc. v. Smith*, 717 N.E.2d 919, 924 (Ind. Ct. App. 1999), *trans. denied*). Willfulness cannot exist without purpose or design. *Taylor v. Duke*, 713 N.E.2d 877, 882 (Ind. Ct. App. 1999).

[18] The claim of willful and wanton misconduct must fail because Ivy has not pointed to any material evidence that would establish Privett was aware of a danger to Ivy or purposely tried to cause harm to him. To the contrary, other than merely estimating the size of the table for his report when he could have measured it, there is no evidence that Privett engaged in any misconduct in investigating Ivy's complaint. The trial court did not err in granting summary judgment to Privett on Ivy's claim of willful and wanton misconduct.

[19] Finally, we turn to Ivy's claim of intentional infliction of emotional distress. The elements of the tort are that the defendant (1) engages in extreme and outrageous conduct (2) which intentionally or recklessly (3) causes (4) severe emotional distress to another. *Lachenman v. Stice*, 838 N.E.2d 451, 456 (Ind. Ct. App. 2005), *trans. denied*. "It is the intent to harm one emotionally that constitutes the basis for the tort of an intentional infliction of emotional distress." *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991). "'Liability has been found only where the conduct has been 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.'" *Bradley v. Hall*, 720 N.E.2d 747, 753 (Ind. Ct. App. 1999) (quoting Restatement (Second) of Torts § 46).

[20] Ivy claims Privett "fabricated evidence and made a false report in order to 'cover up' the sexual battery of Ivy with the intention or expectation that his report would result in disciplinary action being taken against Ivy." Appellant's Br. p. 19. But Privett presented evidence, in the form of an affidavit, stating

that he did not lie in his report and attempted to fully investigate Ivy's complaint. In response, Ivy pointed to evidence that Privett approximated the size of a table when he could have measured it more exactly. Such conduct is neither atrocious nor outrageous. Further, it is not reasonable to infer from Privett's approximation of the table's size that he must have intended to cause emotional injury to Ivy or was reckless as to that outcome. The trial court did not err in granting summary judgment to Privett on this claim. *See Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276, 1283 (Ind. Ct. App. 2002) (no error in granting summary judgment to private detective who secretly recorded Creel in church during an insurance fraud investigation; surreptitious recording was part of the investigative process and did not rise to level of outrageous conduct).

Conclusion

[21] For the reasons stated above, we affirm the judgment of the trial court.

[22] Affirmed.

Robb, J., and Brown, J., concur.