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IN THE
COURT OF APPEALS OF INDIANA

Amanda Henry,
Appellant-Plaintiff,

v.

Community Healthcare System Community Hospital,
Appellee-Defendant.

February 15, 2022

Court of Appeals Case No. 21A-CT-2150

Appeal from the Lake Superior Court

The Honorable John M. Sedia, Judge

Trial Court Cause No. 45D01-1811-CT-803

Baker, Senior Judge.

Statement of the Case[1]

[1] Amanda Henry (Henry) appeals from the trial court's order granting summary judgment in favor of Community Healthcare System Community Hospital (Community) on her complaint alleging general negligence, but more specifically pursuing claims of invasion of privacy by intrusion into emotional seclusion, invasion of privacy by public disclosure of private facts (PDPF), and negligent retention. We hold the court correctly granted summary judgment in favor of Community on Henry's negligent retention claim. The remaining issues Henry raises on appeal highlight the mixed signals the bench and bar have received from our appellate courts regarding Indiana's recognition (or not) of the sub-torts of invasion of privacy by intrusion on emotional seclusion and PDPF. Under the facts of this case, we conclude that the court navigated the caselaw appropriately here; therefore, we must affirm in all respects.

Issues

[2] Henry presents the following restated issues for our review:

> I. Does Indiana recognize the tort of invasion of privacy by intrusion on emotional seclusion, and if so, did the court err by granting summary judgment in favor of Community?
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> II. Does Indiana recognize the tort of invasion of privacy by PDPF, and if so, did the court err by granting summary judgment in favor of Community?

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[1] We held oral argument on December 14, 2021, in the Indiana Court of Appeals Courtroom. We commend counsel on their excellent oral and written advocacy which greatly aided our appellate review.

III. Did the court err by finding that Community's employee's disciplinary record did not put Community on notice such that it is liable for negligent retention?

IV. Does Henry's claim fail because there is no evidence of damages?

Facts and Procedural History

[3] The record as developed thus far reveals the following facts. Henry injured the tip of her ring finger on her right hand while closing a sliding glass door. Despite the pain, she went to work the following day at Lynn's Doggie Spa where she was a dog groomer. Henry showed her swollen finger to Linda Piljak-Laski, her employer, who then openly took a picture of Henry's finger with her cell phone. Henry shared with Linda that she planned to go to the emergency room to have her finger examined after work that day.

[4] Henry had already finished with her shift that day, at around 1:00 p.m. March 1, 2018, when she received a text message from Linda. The text message was a screen shot of a text exchange between Linda and her husband, Ken Laski. Ken was employed as a radiologic technician with Community Hospital-Munster (the Hospital). The exchange contained the photo of Henry's swollen finger and Ken's assessment of and suggestions for treatment of Henry's injury.

[5] At nearly 8:00 p.m. that evening, Henry reported to the emergency room at the Hospital. X-rays were taken of Henry's finger which showed that she had an "acute, comminuted, non-displaced fracture" of her ring finger. Appellant's App. Vol. III, p. 77. The emergency room physician did not show Henry her x-rays even though she requested to see them. The doctor told her that she had

broken the tip of her finger. Ken was not a part of Henry's care team and did not perform the x-ray.

[6] While Henry was still at the hospital, she texted an image of her hand in a splint to Linda. Henry also sent a text message to Linda, informing her that the tip of Henry's finger was fractured and that she was instructed not to work until March 4th. The next day, Linda texted Henry, inquiring about her availability to work. Henry told her that "[i]f I bump it or it bends naturally from me[sic] using my other fingers it shoots pain." *Id.* at 54-55. A few hours later that day, on March 2nd, Linda texted the following messages to Henry,

> I'm sorry that happened to you. And I'm sorry you're going to go all weekend without income. But maybe it's God's way of telling you to sit back and relax and take a deep breath.
>
> Although I'm sure you're not feeling lucky right now. Ken told me if your break was just a little different you would have had to have surgery and put a pin in your finger. Ken said to tell you you seriously dodged a bullet.

Henry replied,

> I had a pin in my pinky before. . it really hurt. . it's just hard to relax right now[.]

Linda responded on March 3rd,

> Oh girl did we miss you today. . . .

Appellant's App. Vol. III Conf., p. 55.

[7] When Henry returned to work on March 4th, she offered to show Linda her medical note excusing her from work due to her injury. Linda replied, "Oh, I don't need that. I already know." *Id.* at 42. Henry asked Linda how her husband had learned the details of her fracture. Linda explained that Ken had accessed the images at the Hospital. She then pulled up the x-ray images on her phone and showed them to Henry in the presence of another co-worker, who also saw the x-ray images. Linda said to Henry, "You got really lucky it didn't break on the joint." *Id.* Linda declined Henry's request to forward the images to her because, "I don't want to get my husband in trouble." *Id.* at 42.

[8] Henry continued to work at Lynn's Doggie Spa, despite feeling uncomfortable there, until she found other employment approximately six to eight weeks later. Henry did not pursue psychological counseling following the incident purportedly due to the cost. She also alleged that she felt uncomfortable about obtaining follow-up care for her broken finger at the Hospital. In her deposition, Henry described the feelings she had about the access of her medical records, her issues with trust, and feeling that her privacy had been breached. *See id.* at 48-49.

[9] Henry made both oral and written requests with Community Hospital's Privacy Officer for an investigation into the confidentiality breach. On September 8, 2018, Community performed an audit of accesses to Henry's electronic health record. The audit revealed that at 3:11 p.m. on March 2nd Ken accessed and viewed Henry's x-ray images.

[10] On October 23, 2018, Henry filed her complaint against Community Health Network, Inc., alleging negligence in its failure to protect the "privacy, security, and confidentiality of health records generated or maintained by providers within its network." Appellant's App. Vol. II, p. 22. Community filed a motion to dismiss under Indiana Trial Rule 12(B)(6), which the trial court granted. After hearing oral argument in the appeal from that order, we reversed the trial court's decision and remanded the matter for further proceedings. *See Henry v. Cmty. Healthcare Sys. Cmty. Hosp.*, 134 N.E.3d 435 (Ind. Ct. App. 2019). On remand, Community filed a motion for summary judgment. After a hearing on the motion and response, the trial court entered its order granting Community's motion. This appeal ensued.

Discussion and Decision

Standard of Review

[11] On appeal, the standard of review of a summary judgment motion is the same standard used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Shell Oil Co. v. Lovold Co.*, 705 N.E.2d 981, 983-84 (Ind. 1998). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Shell Oil*, 705 N.E.2d at 984. The moving party bears the burden of proving the absence of a genuine issue of material fact. *Id.* If the movant sustains this burden, the opponent must set forth specific facts showing that there is a genuine issue of material fact. T.R. 56(E); *Shell Oil*, 705 N.E.2d at

984. "And we give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016) (internal quotations omitted). "To that end, Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant to demonstrate the absence of any genuine issue of material fact on at least one element of the claim." *Id.*

The Trial Court's Ruling

[12] Here, the trial court found that: (1) "Henry's claims for invasion of privacy by means of intrusion upon emotional seclusion and public disclosure of private facts are not recognized in Indiana;" (2) "there is no provision for recovery for emotional damages without satisfying the modified impact rule, which Henry, on the facts set forth above, does not satisfy;" and (3) "Any negligent retention claim fails because the designated materials reveal nothing in the spouse's background that would raise a red flag or prevent him from being hired . . . there is nothing in the spouse's employment disciplinary record, consisting mainly of parking violations and tardiness, that would suggest that he had a disciplinary history of conduct dangerous to others or would disclose confidential patient information." Appellant's App. Vol. II, pp. 19-20.

Invasion of Privacy

[13] The Restatement (First) of Torts § 867 (1939) acknowledged the tort of interference with privacy, finding a cause of action where "[a] person who unreasonably and seriously interferes with another's interest in not having his

affairs known to others or his likeness exhibited to the public is liable to the other."

[14] Three early Indiana cases acknowledged the existence of the right of privacy, the invasion of which gave rise to an independent cause of action. *See Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946) (right is substantial enough to warrant equitable relief for its threatened invasion by use by police in a gallery book of booking photos and fingerprints of the convicted and the exonerated); *Patton v. Jacobs*, 78 N.E.2d 789 (Ind. Ct. App. 1948) (damages could be recovered for a violation of the right, though not in that case, for giving the general public private information in which it had no legitimate interest e.g. creditor giving employer information about employee's debt*); Continental Optical Co. v. Reed*, 86 N.E.2d 306 (Ind. Ct. App. 1949) (use of wartime photo taken of soldier by Army used by optical company for its own commercial purpose without soldier's permission).

[15] "By 1960, Professor Prosser had concluded that invasion of privacy was 'not one tort, but a complex of four.'" *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 684 (Ind. 1997) (quoting William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 383 (1960)). As noted in *Doe*,

> The Second Restatement adopted this view, describing four distinct injuries: (1) intrusion upon seclusion, (2) appropriation of likeness, (3) public disclosure of private facts, and (4) false-light publicity. Restatement (Second) of Torts § 652A (1977). The Second Restatement also candidly acknowledged that these four separate wrongs were only tenuously related. They were

> united only in their common focus on some abstract notion of being left alone. *Id.* § 652A cmt b.

690 N.E.2d at 684. Here, we are concerned with (1) intrusion upon seclusion and (3) public disclosure of private facts (PDPF).

I. Invasion of Privacy–Intrusion

[16] The Restatement Second of Torts § 652B (1977) defines the tort of intrusion as,

> One who intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

[17] The tort was further described in the commentary as follows:

> a. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.
>
> b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal

> documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

See also Prosser and Keeton on Torts § 117 (5th ed. 1984).

[18] Henry acknowledges that Indiana does not recognize intrusions that occur anywhere outside one's home. *See* Appellant's Br. p. 22; *but see*, *Terrell v. Rowsey*, 647 N.E.2d 662, 667 (Ind. Ct. App. 1995) (no wrongful intrusion of worker's car because legitimate interest existed and invasion not unreasonable in light of rule against drinking on company property). However, Henry urges this Court to recognize intrusion into emotional seclusion or solace. Community argues that the court correctly applied precedent to the facts of this case. *See* Appellee's Br. p. 20.

[19] Our Supreme Court's opinion in *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991), explicitly set out the tort of invasion of privacy's four sub-torts set forth in the Restatement Second's section 652(B). One of those sub-torts, invasion of privacy by intrusion, including physically or otherwise, was at issue in that case. The *Cullison* Court found, under the facts of that case, an intrusion only as to the plaintiff's physical space. Next, in *Ledbetter v. Ross*, 725 N.E.2d 120, 123 (Ind. Ct. App. 2000), we cited section 117 of Prosser and Keeton on Torts to hold that the intrusion on the plaintiff's physical solitude or seclusion occurs by invasion into one's home or other quarters, with the intrusion being such that "would be offensive or objectionable to a reasonable person." Many cases have addressed the issue of invasion of privacy by intrusion during that period as it seemed unclear, and still does, whether Indiana had adopted the Restatement

Second of Torts section 652(B) in full, despite our Supreme Court's recitation of all sub-torts in *Cullison*.[2]

[20] However, most importantly during that time, *Doe v. Methodist Hosp.*, 690 N.E.2d 681 (Ind. 1997), was decided. In *Doe*, a plurality of our Supreme Court said, "we have recited the Second Restatement's four-part definition of the privacy tort," but "in [*Mavity*]we generally recognized breach of privacy as tortious." *Id.* at 685. The *Doe* Court held that because *Mavity* pre-dated the Second Restatement, it did not consider the different forms of invasion delineated since it was written and the holding should be read as recognizing nothing more than false light invasion of privacy. *Id.*

[21] Next, the *Doe* Court observed, seemingly with approval, that this Court's decision in *Continental* defined the tort of invasion of privacy in these forms:

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[2] *See e.g.*, *Westminster Presbyterian Church of Muncie v. Yonghong Cheng*, 992 N.E.2d 859, 868-69 (Ind. Ct. App. 2013) (press release of personal information did not intrude because did not invade physical space); *Curry v. Whitaker*, 943 N.E2d 354 (Ind. Ct. App. 2011) (surveillance cameras were aimed solely at exterior portions of the Currys' house; no physical intrusion upon their physical seclusion); *Munsell v. Hambright*, 776 N.E.2d 1272 (Ind. Ct. App. 2002) (series of non-threatening telephone calls over a period of a few weeks to plaintiff's home not intrusion), *trans. denied*; *Creel v I.C.E, Assocs., Inc.*, 771 N.E.2d 1276, 1280 (Ind. Ct. App. 2002) (intrusion requires intrusion into the plaintiff's private 'physical' space.); *Branham v, Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 524 (Ind. Ct. App. 2001) (there must be an "intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters."); *Watters v. Dinn*, 633 N.E.2d 280, 290 (Ind. Ct. App. 1994) (intrusion into medical records not intrusion because Hospital complied with seemingly valid subpoena and Dinn had a legitimate interest), *trans. denied*. Federal courts have also weighed in on the issue. *See e.g., Van Jelgerhuis v. Mercury Fin. Co.,* 940 F. Supp. 1344, 1368 (S.D. Ind. 1996) ("highly personal questions or demands by a person in authority may be regarded as an intrusion on psychological solitude or integrity and hence an invasion of privacy."); *Garus v. Rose Acre Farms, Inc.*, 839 F. Supp. 563, 570 (N.D. Ind. 1993) (sexual harassment at work was actionable intrusion); *Moffett v. Gene B. Glick, Co., Inc.*, 604 F. Supp. 229, 236 (N.D. Ind. 1984) (no Indiana cases defining parameters of "wrongful intrusion into one's private activities," finding race-based comments in the workplace survived 12(B)(6)).

> The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilit[ies].

Id. at 685-86 (quoting *Continental*, 85 N.E.2d 306, 308 (1949), quoting Annotation, *Right of Privacy*, 138 A.L.R. 22, 25 (1942)). Though the *Doe* Court recognized "mental suffering, shame, or humiliation," i.e., an emotional component, the decision observed that as far as emotional health was concerned, "Indiana law [] already provides protection for emotional injuries with a civil action for intentional infliction of emotional distress, also known as 'outrage.'" *Doe*, 690 N.E.2d at 691 (citing *Cullison*, 570 N.E.2d at 31).

[22] Henry's claims here are ones for emotional injuries related to her intrusion claim, which are not recognized in Indiana appellate decisions involving invasion of privacy by intrusion into emotional seclusion or solace. We acknowledge that certain health information is meant to remain private and that there are laws protecting against the disclosure of same, most notably the Health Insurance Portability and Accountability Act of 1996. Henry makes a good argument as to why intrusion into emotional solace in general should be recognized, especially in terms of medical breaches. Yet, in her particular case, we cannot grant her the relief she seeks. Invasion of privacy by intrusion into emotional seclusion or solace is not recognized. The court did not err.

II. Invasion of Privacy–PDPF

[23] "Public disclosure of private facts occurs when a person gives 'publicity' to a matter that concerns the 'private life' of another, a matter that would be 'highly offensive' to a reasonable person and that is not of legitimate public concern." *Munsell v. Hambright*, 776 N.E.2d 1272, 1282 (Ind. Ct. App. 2002), *trans. denied*; *see also*, Restatement (Second) of Torts § 652(D); Abby DeMare, THE DISCLOSURE TORT IN INDIANA: HOW A CONTEMPORARY TWIST COULD REVIVE A DORMANT REMEDY, 54 Ind. L.Rev. 661, 664 (2021). Further, "A communication to a single person or to a small group of persons is not actionable because the publicity element requires communication to the public at large or to so many persons that the matter is substantially certain to become one of public knowledge." *Munsell*, 776 N.E.2d at 1282. "[T]he release of the information to even two co-workers does not satisfy the publicity requirement articulated in the Restatement." *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 966 (Ind. Ct. App. 2001).

[24] Henry says that Indiana's appellate courts have been slower to accept this sub-tort than other states and urges this Court to join the courts in thirty-plus states that explicitly do.[3] DeMare, in her recent note, observes that Indiana is one of just five states that do not explicitly or implicitly recognize the tort but argues that its viability at the time of the *Doe* decision "was far from an open

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[3] Henry includes a list of states and cases from each of the states discussing PDPF. *See* Appellant's Br. p. 40 n. 17.

question." DeMare, 54 Ind. L.Rev. at 670-71. DeMare, like Henry, points to Indiana's earliest discussions and definitions of the tort in *Continental* and *Cullison*. Henry asks this Court to explicitly state that it is a cognizable cause of action, particularly as respects medical privacy breaches, and DeMare, in her note, "calls for a simple revival" of this sub-tort, as it already exists in Indiana. *Id.* at 690. DeMare highlighted points made by Judge Bailey and Chief Justice Rush that the "ubiquity of digital data and the access it affords to unknown third parties," calls for the deterrence of "disseminating private information without authorization," through recognition of the PDPF sub-tort. *Id.* at 679 (quoting Judge Bailey's dissent in *F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834 (Ind. Ct. App. 2019), and Chief Justice Rush's dissent to the denial of transfer in *F.B.C. v. MDwise, Inc.*, 131 N.E.3d 143 (Ind. 2019)).

[25] However, we are constrained to turn to our Supreme Court's plurality decision in *Doe* for guidance. In its analysis of the *Patton* decision, the *Doe* Court said that *Patton* should be read as recognizing the PDPF sub-tort but holding it inapplicable in that case because the disclosure was for a legitimate purpose. *Doe*, 690 N.E.2d at 685. The *Doe* Court also noted that three of the four defendants in PDPF cases to date had been exonerated, while the claim against the defendant in a fourth merely survived summary judgment. *See id.* at 686.

[26] As Community notes in its brief, our Supreme Court in *Felsher v. University of Evansville*, 755 N.E.2d 589, 595 (Ind. 2001), when discussing its prior decision in *Doe*, explained that "[o]ur discussion of this history and the Second Restatement served as a prelude to our decision not to recognize a branch of the

tort involving the public disclosure of private facts." Following that "precedent,"[4] this Court, in *F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834 (Ind. Ct. App. 2019), held that because PDPF had not been recognized in Indiana, the trial court did not erroneously dismiss that plaintiff's PDPF claim.

[27] Judge Bailey dissented, arguing that "given the opportunity, the Indiana Supreme Court would recognize the torts of public disclosure of private facts and intrusion into emotional solace." *F.B.C.*, 122N.E.3d at 838. Judge Bailey noted that in cases after *Doe* and *Felsher*, there was some uncertainty about the status of PDPF in Indiana. *Id.* Most notably, in *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1056-57 (Ind. 2001), our Supreme Court observed that, "The extent to which the tort of invasion of privacy is recognized in Indiana is not yet settled." (citing and summarizing *Doe*, 690 N.E.2d 681 (disagreement whether to recognize claim for "public disclosure of private facts.")). Additionally, he pointed to Judge Crone's concurrence in part in *Robbins v. Trustees of Indiana University*, 45 N.E.3d 1, 13, (Ind. Ct. App. 2015), in which Judge Crone said that "[w]hether Indiana recognizes this tort is technically an open question, but for all practical purposes the answer is currently no." Judge Crone explained that "our state's highest court has acted as if public disclosure of private facts is not a valid cause of action in Indiana, even though a majority of the court has

[4] We recognize Henry's argument that "A plurality opinion is said not to be a binding precedent . . . ." 29 Am.Jur.2d COURTS §138 (1995). However, our Supreme Court has at least twice treated the *Doe* decision as binding precedent; thus, we are constrained to do the same. *See Felsher*, 755 N.E.2d 589, and the denial of transfer in *F.B.C. v. Mdwise, Inc.*, 131 N.E.3d 143 (Ind. 2019).

not so held." *Id.* He went on to say that "[a]lthough neither *Doe* nor *Felsher* is binding precedent on this point, I am not inclined to rock this particular boat." *Id.*

[28] On transfer, a majority of the *F.B.C.* Court voted to deny transfer. However, Chief Justice Rush dissented, writing an opinion in which Justice Goff joined. Chief Justice Rush said that "[t]oday, this Court passes up an important opportunity—to clear up uncertainty and declare that Indiana recognizes a claim of public disclosure of private facts. Because our guidance on this issue is necessary, I respectfully dissent from the denial of transfer." *F.B.C. v. MDwise, Inc.*, 131 N.E.3d.143, 143 (Ind. 2019). In support of her argument that transfer should have been granted, Chief Justice Rush noted that after the opinions in *Doe*, *Felsher*, and *Allstate*, appellate decisions "have reasonably adopted disparate, and sometimes ambivalent, positions on whether the sub-tort of public disclosure of private facts exists in Indiana." *Id.* at 144. She observed that "[t]his recent history of public-disclosure decisions serves as a backdrop to the current controversy, which unsurprisingly generated a split opinion below." *Id.* She concluded, saying,

> In sum, while I would likewise affirm the trial court's dismissal of F.B.C.'s public-disclosure claim, I would grant transfer to dispel any confusion surrounding the sub-tort. The sub-tort of public disclosure of private facts is cognizable, and we should say so.

Id. at 145.

[29] Assuming, as we must, that PDPF is not yet recognized in Indiana, we affirm the court's order granting summary judgment in favor of Community on this issue and invite our Supreme Court to do as Chief Justice Rush and Justice Goff argued and "dispel any confusion surrounding the sub-tort." *Id.*[5]

[30] Additionally, assuming for the sake of argument that Henry's PDPF claim was viable, the court would nonetheless be correct in granting summary judgment in favor of Community under the facts before us. One of the legs of publication is missing.

[31] Here, Henry shared the fact that she had injured her finger and was going to seek treatment at the Hospital. She texted a photograph of her injured finger in a splint to Linda from the Hospital. Therefore, the fact of Henry's particular injury was not private as to Linda. The information that Ken shared with Linda was merely cumulative of the information Henry had already shared with her. And unlike the defendant in *Walgreen v. Hinchy*, 21 N.E.3d 99 (Ind. Ct. App. 2014), where a personal prescription profile was accessed for personal and malicious reasons, such is not the case here. The record reveals that Ken and Linda's intent was to be helpful. We have held that release of information to even two co-workers does not satisfy the publicity requirement. *See Dietz*,

[5] For a thorough discussion addressing how this sub-tort could be both revived and refreshed, we invite you to read DeMare's note cited in this opinion.

754 N.E.2d at 966.[6] Also, unlike in *Dietz*, the information that was disclosed–confirmation of a broken finger tip–was not an embarrassing fact. For these additional reasons, the court did not err.

III. Negligent Retention

[32] Henry argues that the court erred by granting summary judgment in favor of Community on her negligent retention claim. She argues that the court grafted a new requirement onto the elements of such a claim; namely, that the misconduct be the same or similar. *See* Appellant's Br. p. 51. Community argues that an employment disciplinary history consisting largely of tardiness and parking violations would not have presaged that Ken would access Henry's medical records without being involved in her care and share the x-rays with Linda. We agree with Community.

[33] Negligent hiring and retention claims consist of the traditional elements found in negligence actions: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) an injury proximately caused by the breach of that duty. *See Clark v. Aris, Inc.*, 890 N.E.2d 760, 763 (Ind. Ct. App. 2008), *trans. denied*. As for the duty element, Indiana courts begin with the test set out in the Restatement Second of Torts section 317. *Id.* Section 317 provides,

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[6] We acknowledge that "a few courts, including Indiana's neighbors," have adopted a looser definition of "publicity," finding a disclosure actionable if made to a "particular public" with a special relationship to the plaintiff." *See Dietz*, 754 N.E.2d at 966. However, to get to that analysis, Indiana would first have to recognize PDPF as a viable cause of action. Therefore, we do not address arguments along those lines.

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Id. However, our analysis does not end there. The determination whether a duty of care is to be imposed also involves a consideration of three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns. *Id.*

[34] Here, the court favorably cited *Hayden v. Franciscan Alliance, Inc.*, 131 N.E.3d 685 (Ind. Ct. App. 2019), holding that,

> Any negligent retention claim fails because the designated materials reveal nothing in [Ken's] background that would raise a red flag or prevent him from being hired. . . there is nothing in [Ken's] employment disciplinary record, consisting mainly of parking violations and tardiness, that would suggest that he had a disciplinary history of conduct dangerous to others or would disclose confidential patient information.

Appellant's App. Vol. II, pp. 19-20.

[35] In *Clark v. Aris, Inc.*, 890 N.E.2d 760 (Ind. Ct. App. 2008), we distinguished between foreseeability in terms of duty and foreseeability in terms of proximate cause. We explained that,

> *[i]mposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm. Thus, part of the inquiry into the existence of a duty is concerned with exactly the same factors as is the inquiry into proximate cause.* Both seek to find what consequences of the challenged conduct should have been foreseen by the actor who engaged in it. We examine what forces and human conduct should have appeared likely to come on the scene, and we weigh the dangers likely to flow from the challenged conduct in light of these forces and conduct.

Id. at 764 (emphasis added).

[36] Consequently, the court's analysis correctly involved an examination of the types of misconduct that were evident in Ken's disciplinary record to determine if a duty should be imposed on Community. Whether the acts were the same or similar was pertinent to whether Community reasonably could have foreseen that Ken would access Henry's medical records and share them such that a duty was imposed on Community. The court did not graft a new requirement onto the elements of the claim as Henry suggests. Instead, it properly concluded that no duty could be imposed based on an examination of Ken's prior instances of misconducting himself by receiving notice of parking violations and by repeatedly being tardy. Had Henry argued that her damages were caused by Ken's tardiness or by an incident in the parking lot, and that Community was aware of Ken's conduct in that regard, that might have been a different story. However, that is not the case here.

[37] Additionally, Henry claims that *Hayden* and the cases cited in *Hayden* should be limited to the *negligent hiring* context and the court erred by applying it to her *negligent retention* claim. She asserts that the holdings in *Hayden*, *Frye v. American Painting, Co.,* 642 N.E.2d 995 (Ind. Ct. App. 1995), and others cited in *Hayden*, which are unfavorable to her position, are only applicable to negligent hiring and her case alleges negligent retention. We disagree.

[38] Evidence of prior similar actions or misconduct committed by an employee is pertinent to consideration of the employer's actual or constructive knowledge of the employee's propensity to commit a later act, i.e., foreseeability in the duty context. Even Ken's worst offense as reported in his disciplinary history reveals that he performed an x-ray on the wrong patient. This misconduct would not have alerted Community to the behavior at issue here, nor would his history of tardiness and parking violations. We conclude that the court correctly entered summary judgment in favor of Community on this claim.

IV. Damages

[39] The court held, "there is no provision for recovery for emotional damages without satisfying the modified impact rule, which Henry, on the facts set forth above, does not satisfy[.]" Appellant's App. Vol. II, pp. 19-20. Henry urges us to hold that "the modified impact rule does not apply to claims arising from medical privacy breaches[.]" Appellant's Br. p. 59. Henry's damages are purely emotional. She did not seek psychological counseling and did not receive further medical treatment resulting from the intrusion into her medical

records or the disclosure of images of her injured finger. Further, she has alleged negligence.

[40] We note at the outset that "independent stand-alone actions for negligent infliction of emotional distress are not cognizable in Indiana." *See Spangler v. Bechtel*, 958 N.E.2d 458, 466 (Ind. 2011). Because we conclude that Indiana does not recognize (1) invasion of privacy by intrusion into emotional seclusion or solace, or (2) PDPF, Henry's claim for emotional damages cannot survive. Consequently, we need not address the parties' arguments about the applicability of the modified impact rule here.

Conclusion

[41] In light of the foregoing, we affirm the decision of the trial court in all respects.

[42] Affirmed.

Altice, J., and Tavitas, J., concur.