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IN THE COURT OF APPEALS OF INDIANA

Z.D.,
Appellant-Plaintiff,

v.

Community Health Network, Inc.,
Appellee-Defendant

October 6, 2022

Court of Appeals Case No. 22A-CT-644

Appeal from the Marion Superior Court

The Honorable Marc T. Rothenberg, Judge

Trial Court Cause No. 49D07-2001-CT-3587

Crone, Judge.

Case Summary

[1] An employee of Community Health Network, Inc. (Community), put a letter with Z.D.'s medical diagnosis in an envelope addressed to another person. That person received the envelope in the mail, opened it, and posted the letter on

Facebook, where it was seen by multiple third parties. Z.D. filed a multi-count complaint against Community, seeking damages for pecuniary losses, emotional distress, and loss of privacy. Community filed a motion for summary judgment, which the trial court granted. With the exception of the ruling as to one count, Z.D. argues that the trial court erred. We hold that genuine issues of material fact exist regarding Z.D.'s claim for invasion of privacy and her claim for pecuniary damages resulting from Community's alleged negligence, and therefore we affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History

[2] On September 30, 2018, Z.D. underwent an examination and medical testing in the emergency department of a Community facility in Indianapolis. Afterward, Community was unable to contact Z.D. via telephone to notify her of her test results. So on October 5, the emergency department's patient resource coordinator wrote a letter to Z.D. that was printed on Community letterhead and included her diagnosis and suggested treatment. The letter was placed in an envelope bearing Community's preprinted return address and the handwritten mailing address of Jonae Kendrick, who was a classmate of Z.D.'s high-school-aged daughter. Kendrick received the envelope in the mail, opened it, and posted the letter on Facebook, where it was seen by multiple third parties, including Z.D.'s daughter.[1] Z.D. learned about her diagnosis from her

[1] In an answer to one of Community's interrogatories, Z.D. stated that her daughter and Kendrick were "just facebook friends. I don't think they ever hung out or anything." Appellant's App. Vol. 2 at 172.

daughter, and she paid Kendrick $100 in exchange for the letter, which was removed from Facebook.

[3] In January 2020, Z.D. filed a three-count complaint against Community alleging generally that Community's employee(s) "distributed [her] extremely sensitive and private health information to unauthorized person(s) and the general public" and that, as a result, she "suffered extensive injuries." Appellant's App. Vol. 2 at 25. Specifically, Count 1 alleged that Community was vicariously liable under the doctrine of respondeat superior for the distribution of Z.D.'s "extremely private and sensitive health records to unauthorized member(s) of the general public" and that, "[a]s a direct and proximate result" of those acts, Z.D. had suffered damages. *Id*. at 26. Count 2 alleged that Community was negligent in training, supervising, and retaining its employee(s). And Count 3 alleged that Community "owes a non-delegable duty to its patients to protect the privacy and confidentiality of their protected health information" and that Community "breached its statutory and common law duties of confidentiality and privacy to [Z.D.]" by having "no warning system, tracking software, or audit-trigger in place to alert it to or prevent its employee's unauthorized distribution of [Z.D.'s] protected health information before it was too late." *Id*. at 27, 28. Community filed a motion to dismiss Z.D.'s complaint for lack of subject matter jurisdiction, alleging that her claims fell under the Indiana Medical Malpractice Act. Z.D. filed a response disputing that allegation. The trial court denied Community's motion to dismiss, and Community did not appeal that ruling.

[4] Community then filed a motion for summary judgment asserting that Kendrick's posting of the letter on Facebook was an unforeseeable "criminal act" that broke "the chain of proximate causation[,]" that Z.D. could not recover emotional distress damages under a negligence theory, that Community could not be liable for negligent training and supervision if its employee was acting within the scope of employment, and that to the extent Z.D. sought to recover for an invasion of privacy, "her only potential tort claim would be the subtort of public disclosure of private facts, which Indiana does not recognize as valid." *Id*. at 101-02, 115. Z.D. filed a response, and Community filed a reply. In support of their filings, the parties designated the letter and the envelope, as well as excerpts from Z.D.'s medical records, deposition, and discovery responses.

[5] According to Z.D.'s medical records, shortly after the letter was posted to Facebook, Z.D. told her physician at Community that her fiancé "broke up with her after finding out" her diagnosis and "kicked her out of his house." Appellant's App. Vol. 3 at 63. She stated that she started suffering depression "after all of the events of [the] last week" and was "down all the time, feeling hopeless." *Id*. She was prescribed an antidepressant and started attending counseling sessions.

[6] In her deposition, Z.D. testified that her coworkers and supervisor at the warehouse where she worked "found out" about her diagnosis "through their kids[,]" who learned about it either on Facebook or by other means. *Id*. at 50. She received "unwanted attention" from men at work, and she left her job

because she "just wanted to be in an atmosphere that someone didn't know." *Id*. at 52. She also lost several clients of her hairdressing business whose children attended high school with her daughter. After Z.D.'s fiancé kicked her out of his house, she had to rent her own apartment. Z.D. testified that the diagnosis is "traumatizing to me because it's a loss of privacy. I'm walking around. I don't know what you're looking at me for or where you know me from and even if you've seen the post. I don't know." *Id*. at 48. When asked by Community's counsel whether she had "any reason to think that Community […] sent your letter to Ms. Kendrick on purpose or that Community did anything purposeful[,]" Z.D. replied, "No." *Id*. But later, when Z.D.'s counsel asked Z.D. whether she knew if "this incident was intentional by Community[,]"she replied, "I don't know." *Id*. at 59. She acknowledged that she did not "have any reason to believe that it was intentional[,]" but that it was "something that [was] still being investigated[.]" *Id*.

[7] In her answers to Community's interrogatories, Z.D. stated that her "reputation was ruined all around" and that her

> children got made fun of at school because their friends saw the facebook post. It's hard to describe where it starts and stops. The mental, psychological, and emotional problems were deep and painful. It continues to come up. People don't forget it and I can't forget that they know.

Appellant's App. Vol. 2 at 164. Z.D. further stated that she was "seeking damages for loss of privacy and lost income for [her] job[,]" as well as for rent expenses and "emotional and mental distress." *Id*. at 165.[2]

[8] In March 2022, after a hearing, the trial court issued an order granting Community's summary judgment motion. The court concluded that Count 2 of Z.D.'s complaint "fails as a matter of law" because Community had "acknowledged that its employee was acting within the scope of her employment." Appealed Order at 5. As for Counts 1 and 3, the court concluded that the modified impact rule and the bystander rule barred Z.D. from recovering emotional distress damages under a negligence theory; that Z.D. could not recover damages for loss of privacy because she did not specifically plead an invasion of privacy claim; and that Community was not the proximate cause of Z.D.'s alleged injuries as a matter of law. The order did not address pecuniary damages. Z.D. now appeals the trial court's order, but not as to Count 2, so we summarily affirm the ruling on that count. Additional facts will be provided below.

Discussion and Decision

[9] We review a trial court's summary judgment ruling de novo, taking care to ensure that no party is denied her day in court. *Schoettmer v. Wright*, 992 N.E.2d

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[2] Community's assertion that Z.D. is claiming damages for lost income and rental expenses for the first time on appeal is not well taken, as is its unsupported assertion that such damages are not recoverable for a negligence claim.

702, 706 (Ind. 2013). "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." *Strickholm v. Anonymous Nurse Prac.*, 136 N.E.3d 264, 267 (Ind. Ct. App. 2019). "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, or if the undisputed material facts support conflicting reasonable inferences[.]" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (citations omitted).

[10] "To prevail on a motion for summary judgment, a party must demonstrate that the undisputed material facts negate at least one element of the other party's claim." *Strickholm*, 136 N.E.3d at 267. "Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist." *Id*. (italics omitted). "Our review of a summary judgment ruling is limited to those materials designated to the trial court." *Millikan v. City of Noblesville*, 160 N.E.3d 231, 236 (Ind. Ct. App. 2020). "In determining whether there is a genuine issue of material fact precluding summary judgment, all doubts must be resolved against the moving party and the facts set forth by the party opposing the motion must be accepted as true." *Strickholm*, 136 N.E.3d at 267 (quoting *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 438-39 (Ind. Ct. App. 1990), *trans. denied* (1991)).

[11] "In negligence cases, summary judgment is rarely appropriate. This is because negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person—one best applied by a jury after hearing all of

the evidence." *Rhodes v. Wright*, 805 N.E.2d 382, 387 (Ind. 2004) (citations and quotation marks omitted). "The party appealing the summary judgment bears the burden of persuading us that the trial court erred." *Strickholm,* 136 N.E.3d at 267. "A trial court's findings on summary judgment are helpful in clarifying its rationale, but they are not binding on this court on review." *Brandell v. Secura Ins.*, 173 N.E.3d 279, 284 (Ind. Ct. App. 2021). "We are not constrained by the arguments made to the trial court and we may affirm a grant of summary judgment on any basis supported by the designated evidence." *Id*.

[12] On appeal, Z.D. raises the following issues: (1) whether her complaint pleads a claim for invasion of privacy based on public disclosure of private facts, and, if so, whether a genuine issue of material fact exists regarding publicity; (2) whether she may recover emotional distress damages under a negligence theory; and (3) whether she is entitled to a trial for pecuniary damages resulting from Community's alleged negligence.

Section 1 – Z.D.'s complaint pleads a claim for invasion of privacy based on public disclosure of private facts, and a genuine issue of material fact exists regarding the tort's publicity requirement.

[13] Shortly after Z.D. filed her initial appellate brief, the Indiana Supreme Court dispelled over two decades of judicial uncertainty and "confirm[ed] the viability of a tort claim" for invasion of privacy based on public disclosure of private facts. *Cmty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 380 (Ind. 2022). In doing so, the court acknowledged that

> [r]ecognition of this tort is especially important today, as private information is more easily accessed and disseminated—particularly in ways that can reach a large audience. In effect, the disclosure tort offers a meaningful way to deter unauthorized disclosures of private information. And when deterrence or other preventive measures fail, it can provide victims with meaningful redress.

Id. at 381-82.

[14] The court "explicitly adopt[ed] the disclosure tort as it is articulated in the Restatement (Second) of Torts § 652D," which establishes the following "four requirements: (1) the information disclosed must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be one that would be highly offensive to a reasonable person; and (4) the information disclosed is not of legitimate public concern." *Id*. at 382. The court "briefly detail[ed] the contours of each" as follows:

> The first requirement—private facts—means that the information is both factually true and privately held. [Restatement (Second) of Torts § 652D] cmt. b. Thus, if the information is left "open to public inspection" or if "the defendant merely gives further publicity to information about the plaintiff that is already public," this element is not satisfied. *Id*.
>
> The second requirement—publicity—means that the information must be communicated in a way that either reaches or is sure to reach the public in general or a large enough number of persons such that the matter is sure to become public knowledge. *Id*. cmt. a. Yet there is no threshold number that constitutes "a large number" of persons. *See id*. The facts and circumstances of each case must be taken into consideration in determining whether the

> communication gave sufficient "publicity" to support a public-disclosure claim. *See id*.
>
> The third requirement—highly offensive to a reasonable person—means the disclosure must be one that offends society's accepted, communal norms and social mores. *See id*. cmt. c. In recognition that complete privacy is illusory, this element is satisfied when publicity is given to private information "such that a reasonable person would feel justified in feeling seriously aggrieved by it." *Id*.
>
> The fourth requirement—lack of newsworthiness—means that the information disclosed is not of legitimate concern to the public. *Id*. cmt. d. Generally, the public is properly concerned with the lives of voluntary public figures, *id*. cmt. e, and matters "customarily regarded as 'news,'" *id*. cmt. g. When determining what is a matter of legitimate public concern, "account must be taken of the customs and conventions of the community." *Id*. cmt. h. Ultimately, the proper inquiry is whether "a reasonable member of the public … would say that he had no concern" with the information disclosed. *Id*. In this way, the newsworthiness element restricts liability "to the extreme case, thereby providing the breathing space needed by the press." *Gilbert v. Med. Econs. Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

Id.

[15] Community asserts that although Z.D.'s complaint includes allegations of negligent conduct, it contains "no allegations that Community, or its employee, acted intentionally, and there is no mention of a claim for public disclosure of private facts, let alone the word 'disclosure'." Appellee's Br. at 16. With respect to mens rea, we first observe that obviously Community intentionally addressed the envelope to Kendrick and mailed it to her, and obviously the contents

disclosed highly sensitive medical information regarding Z.D. Regardless, Z.D. correctly observes that the Indiana Supreme Court has stated that under Section 652D of the Restatement, "a plaintiff does not have to prove any mental element in a public disclosure action. He needs only to show that the disclosed matter was private and not of legitimate concern to the public, and that the disclosure would be highly offensive to a reasonable person." *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 691 (Ind. 1997) (citing Section 652D), *abrogated on other grounds by McKenzie*, 185 N.E.3d 368.[3]

[16] Moreover, Z.D. correctly observes that "[n]otice pleading merely requires pleading the operative facts so as to place the defendant on notice as to the evidence to be presented at trial." *Shields v. Taylor*, 976 N.E.2d 1237, 1245 (Ind. Ct. App. 2012); *see also Kapoor v. Dybwad*, 49 N.E.3d 108, 120 (Ind. Ct. App. 2015) (stating that plaintiff must "plead the operative facts necessary to set forth an actionable claim"), *trans. denied* (2016). "We treat pleadings according to their content rather than their caption." *Campbell v. Eckman/Freeman & Assoc.*, 670 N.E.2d 925, 929 (Ind. Ct. App. 1996), *trans. denied* (1997). The preamble of

[3] In *Doe*, despite over forty years of contrary precedent, the plurality declined to "endorse" the tort of public disclosure of private facts. 690 N.E.2d at 693. In *McKenzie*, the court disavowed this position but did not disagree with *Doe*'s Section 652D analysis. Community cites several cases for the proposition that public disclosure of private facts is an intentional tort, but none of those cases relied on the actual wording of Section 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."). *Cf.* Restatement (Second) of Torts § 652B (1977) ("One who *intentionally* 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.") (emphasis added). Community also asserts, "It is undisputed that Community did not *intend* to disclose the Letter to Ms. Kendrick." Appellee's Br. at 24. The fact that Community mailed the letter to Kendrick suggests otherwise.

Z.D.'s complaint, which is incorporated by reference into Counts 1 and 3, specifically alleges that one or more of Community's employees "distributed" her "extremely sensitive and private health information" to "unauthorized person(s) and the general public[.]" Appellant's App. Vol. 2 at 25. Contrary to Community's assertion (and the trial court's finding), Z.D.'s complaint pleads all of the facts necessary to support a claim for public disclosure of private facts, and we reiterate that Community even addressed such a claim in its summary judgment motion. *Id*. at 115. Whether Community did so simply out of an abundance of caution is irrelevant.[4]

[17] Community also asserts that its "alleged 'disclosure' or 'publication' was to one person only [i.e., Kendrick], which is not enough to satisfy the 'publicity' element of disclosure." Appellee's Br. at 27. Z.D. points out that courts in other jurisdictions have concluded that "publicity is defined by the **end result** of the disclosure – not merely the initial act." Reply Br. at 14 (citing *Pachowitz v. Ledoux*, 666 N.W.2d 88, 97 (Wis. Ct. App. 2003) (concluding that evidence supported inference that defendant "should have appreciated the risk that [third party] would further disclose [plaintiff's] private information"), and *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377 n.7 (Colo. 1997) (noting that "public

[4] For the first time in this proceeding, Community argues that a public disclosure claim should be subject to the same pleading specificity requirements as a defamation claim. "It is well settled that an argument presented for the first time on appeal is waived for purposes of appellate review." *Waller v. City of Madison*, 183 N.E.3d 324, 327 n.1 (Ind. Ct. App. 2022). We note that Community could have filed a motion for more definite statement pursuant to Indiana Trial Rule 12(E) if it believed that Z.D.'s complaint was too "vague or ambiguous" to respond to.

disclosure may occur where the defendant merely initiates the process whereby the information is eventually disclosed to a large number of persons") (citing *Beaumont v. Brown*, 257 N.W.2d 552, 530 (Mich. 1977)). If Community wishes to argue that the fact it sent this extremely sensitive information to a classmate of Z.D.'s daughter was merely a coincidence, it is free to do so in front of a jury.

[18] Furthermore, as discussed below, Community designated no evidence regarding the knowledge or intent of either Kendrick or its employee(s) with respect to the letter containing Z.D.'s diagnosis, so it has failed to establish as a matter of law that the disclosure was not "sure to reach the public in general or a large enough number of persons such that the matter is sure to become public knowledge." *McKenzie*, 185 N.E.3d at 382. Accordingly, we reverse and remand for further proceedings on Z.D.'s invasion of privacy claim, for which she may seek "damages for (a) the harm to [her] interest in privacy resulting from the invasion; (b) [her] mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (c) special damage of which the invasion is a legal cause." Restatement (Second) of Torts § 652H (1977).

Section 2 – Z.D. may not recover emotional distress damages under a negligence theory.

[19] A plaintiff must prove the following three elements to recover under a negligence theory: "(1) the defendant owed the plaintiff a duty to conform his or her conduct to a standard of care arising from a relationship with the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach of that duty proximately caused an injury to the plaintiff." *Brennan v. Hall*, 904

N.E.2d 383, 386 (Ind. Ct. App. 2009). "It is well settled that to avoid being negligent, an actor must conform his conduct to that of a reasonable person under like circumstances." *Denson v. Estate of Dillard*, 116 N.E.3d 535, 540 (Ind. Ct. App. 2018) (citing Restatement (Second) of Torts § 283 (1965)). In this case, there is no question that Community owed Z.D. a statutory, regulatory, and common law duty to keep her medical information private. *See, e.g.*, Ind. Code ch. 16-39-1 (governing release of health records); 844 Ind. Admin. Code 5-2-2 ("A practitioner shall maintain the confidentiality of all knowledge and information regarding a patient, including, but not limited to, the patient's diagnosis, treatment, and prognosis, and of all records relating thereto, about which the practitioner may learn or otherwise be informed during the course of, or as a result of, the patient-practitioner relationship."); *Henry v. Cmty. Healthcare Sys. Cmty. Hosp.*, 134 N.E.3d 435, 438 (Ind. Ct. App. 2019) ("[T]here is—and, in modern times, always has been—a common law duty of confidentiality owed by medical providers to their patients."). Community did not address the issue of breach in its summary judgment motion, and we address the issue of proximate cause below.

[20] As for the injuries themselves, Z.D. sought damages for pecuniary losses, i.e., lost income and rent expenses, which are not mentioned in the trial court's order, damages for loss of privacy (addressed in the previous section), and damages for "emotional and mental distress." Appellant's App. Vol. 2 at 164,

165.[5] Pecuniary damages are recoverable in negligence claims. *See generally Bader v. Johnson*, 732 N.E.2d 1212, 1220 (Ind. 2000) (stating that plaintiff in negligence action "is entitled to damages proximately caused by the tortfeasor's breach of duty"). And damages for emotional distress are recoverable in claims for invasion of privacy, Restatement (Second) of Torts § 652H (1977), as well as in claims for intentional torts such as defamation and intentional infliction of emotional distress. *Rambo v. Cohen*, 587 N.E.2d 140, 146 n.10 (Ind. Ct. App. 1992), *trans. denied*.

[21] But, as our supreme court recently reiterated in *McKenzie*, "emotional-distress damages are recoverable in negligence-based claims only when a party can satisfy (1) the modified-impact rule or (2) the bystander rule." 185 N.E.3d at 379 (citing *Spangler v. Bechtel*, 958 N.E.2d 458, 466, 471 (Ind. 2011)). "The modified-impact rule requires that 'the plaintiff personally sustained a physical impact.'" *Id*. (quoting *Spangler*, 958 N.E.2d at 467). "The bystander rule requires that the plaintiff contemporaneously perceived a loved one's negligently inflicted death or serious injury." *Id*. The undisputed facts establish that Z.D. did not sustain a physical impact or perceive a physical injury to a

[5] Z.D. notes that in its order, the trial court appears to have mischaracterized all of her alleged damages as "privacy damages." Appealed Order at 6.

loved one.[6] Accordingly, Z.D. may not recover emotional distress damages under a negligence theory, and we affirm the trial court's ruling on this issue.[7]

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[6] Citing *Keim v. Potter*, 783 N.E.2d 731 (Ind. Ct. App. 2003), Z.D. argues that she has suffered sufficient direct impact to satisfy the modified impact rule. *Keim*'s holding is limited to emotional damages suffered "as a result of alleged medical malpractice," *id*. at 735, and, as noted above, Z.D. herself has asserted that her situation is not governed by the Medical Malpractice Act. *See* Appellant's App. Vol. 2 at 48 (Z.D.'s response to Community's motion to dismiss).

[7] The modified impact rule and the bystander rule are the product of ad hoc ameliorations of the traditional impact rule, which decreed that "damages for mental anguish are recoverable only when accompanied by and resulting from a physical injury." *Cullison v. Medley*, 570 N.E.2d 27, 29 (Ind. 1991) (quoting *Cullison v. Medley*, 559 N.E.2d 619, 621 (Ind. Ct. App. 1990), *trans. granted*). The rationale for that rule was that "absent physical injury, mental anguish is speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there is no rational basis for awarding damages." *Id*. (quoting *Cullison*, 559 N.E.2d at 621). In *Cullison*, our supreme court declared that this rationale was "no longer valid" for the intentional tort of trespass, noting that

> the experience in this state is that juries are equally qualified to judge someone's emotional injury as they are to judge someone's pain and suffering or future pain and suffering, and the presence or absence of some physical injury does nothing to alleviate the jury's burden in deciding whether the elements of mental suffering are present. We note there are those who argue that allowing recovery for mental damages will result in an inundation of the court system with such claims, but we do not believe that the workload occasioned by some possible increase in legitimate claims is any reason to deny or prohibit such claims.

Id. at 30. In the three decades since *Cullison*, several additional exceptions to the impact rule have been created, and the dreaded "inundation of the court system" has not come to pass.

Z.D. points out that as of 2012, when the Supreme Court of Kentucky abandoned the rule entirely, Indiana was "one of only six states that still use[d] the impact rule in some form." *Osborne v. Keeney*, 399 S.W.3d 1, 14 n.39 (Ky. 2012). Z.D. further observes that one of those states, Florida, has carved out an exception to the rule in cases involving breach of a duty of health-care-related privacy/confidentiality. In *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002), the married plaintiffs brought a negligence action against their psychotherapist, who "unlawfully divulged to each of [them] individual, confidential information which the other spouse had told him in their private sessions." *Id*. at 351 (quotation marks omitted). The Supreme Court of Florida found the impact rule "inapplicable" under those facts, acknowledging that the emotional distress that the plaintiffs allegedly "suffered [was] at least equal to that typically suffered by the victim of a defamation or an invasion of privacy. Indeed, we can envision few occurrences more likely to result in emotional distress than having one's psychotherapist reveal without authorization or justification the most confidential details of one's life." *Id*. at 356; *see also Fla. Dep't of Corr. v. Abril*, 969 So. 2d 201, 208 (Fla. 2007) (relying on *Gracey* to hold "that an exception to the impact rule should be made when a laboratory or other health care provider is negligent in failing to keep confidential the results of an HIV test.").

Similarly, in this case, we can imagine few situations (aside from witnessing the death or severe injury of a loved one) that would be more emotionally distressing than having one's stigmatizing medical diagnosis posted on Facebook. In Indiana, a false imputation of a "loathsome disease" gives rise to a claim of defamation per se, for which "[t]he plaintiff is entitled to presumed damages" because the words imputing

Section 3 – Z.D. is entitled to a trial on her claims for pecuniary damages resulting from Community's alleged negligence.

[22] Z.D. also seeks pecuniary damages for lost income and rent expenses resulting from Community's alleged negligence. Whether Community was actually negligent in failing to maintain Z.D.'s medical privacy and whether Z.D. actually suffered pecuniary damages were not litigated on summary judgment. The trial court ruled that Community was not a proximate cause of Z.D.'s alleged injuries as a matter of law. Z.D. argues that this ruling is erroneous, and we agree.

[23] "Proximate cause is the limitation which courts have placed on the actor's responsibility for the consequences of his act or failure to act." *Basicker ex rel. Johnson v. Denny's, Inc.*, 704 N.E.2d 1077, 1080 (Ind. Ct. App. 1999), *trans. denied*. "At a minimum, proximate cause requires that the injury would not have occurred but for the defendant's conduct." *Pope v. Hancock Cnty. Rural Elec. Membership Corp.*, 937 N.E.2d 1242, 1247 (Ind. Ct. App. 2010) (quoting *Paragon*

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that condition "are so naturally and obviously harmful that one need not prove their injurious character." *Town of W. Terre Haute v. Roach*, 52 N.E.3d 4, 10 (Ind. Ct. App. 2016). And yet, even though a plaintiff asserting such a defamation claim may recover emotional distress damages, we must affirm the trial court's ruling that Z.D. may not recover those damages under a negligence theory because, "[a]s Indiana's intermediate appellate court, we are bound by Indiana Supreme Court precedent and are not at liberty to 'reconsider' that precedent." *Hill v. State*, 122 N.E.3d 979, 982 (Ind. Ct. App. 2019), *trans. denied*. We respectfully urge our supreme court to revisit the modified impact rule and the bystander rule and the rationale for their continued existence. If we trust jurors to determine whether criminal defendants should live or die in death penalty cases, and to fairly assess plaintiffs' emotional distress damages in defamation cases, then surely we may trust them to fairly assess plaintiffs' emotional distress damages in cases involving breaches of medical privacy.

Fam. Rest. v. Bartolini, 799 N.E.2d 1048, 1054 (Ind. 2003)). "In general, a defendant's act is a proximate cause of an injury if the injury 'is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated in light of the circumstances.'" *Scott v. Retz*, 916 N.E.2d 252, 257 (Ind. Ct. App. 2009) (quoting *Hassan v. Begley*, 836 N.E.2d 303, 307 (Ind. Ct. App. 2005)). "There may be more than one proximate cause of an event. The underlying policy is that society only assigns legal responsibility to those whose acts are closely connected to the resulting injuries, such that the imposition of liability is justified." *City of Indpls. Housing Auth. v. Pippin*, 726 N.E.2d 341, 346-47 (Ind. Ct. App. 2000) (citation omitted); *see also City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1244 (Ind. 2003) ("Under comparative fault, the trier of fact can allocate fault to multiple contributing factors based on their relative factual causation, relative culpability, or some combination of both.").[8] "When assessing foreseeability in the context of proximate cause, courts '[evaluate] the particular circumstances of an incident after the incident occurs.'" *Scott*, 916 N.E.2d at 257 (quoting *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996), *trans. denied* (1999)).

[24] "[U]nder the doctrine of superseding causation, 'a chain of causation may be broken if an independent agency intervenes between the defendant's negligence and the resulting injury.'" *Id*. (quoting *Hassan*, 836 N.E.2d at 308). "The key to

[8] We note that Community asserted as an affirmative defense that Z.D.'s alleged damages "may have been proximately caused in full or in part by the fault, carelessness, negligence, or criminal acts of nonparties[,]" including Kendrick. Appellant's App. Vol. 2 at 96.

determining whether an intervening agency has broken the original chain of causation is to determine whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury." *Id*. (quoting *Hassan*, 836 N.E.2d at 308). "[I]t is well established that, when between an alleged act of negligence and the occurrence of an injury, there intervenes the wilful, malicious and criminal act of a third party which causes the injury *and which could not reasonably have been foreseen by the allegedly negligent party,* the causal chain between the negligence and the injury is broken." *Estate of Mathes v. Ireland*, 419 N.E.2d 782, 785 (Ind. Ct. App. 1981) (emphasis added) (citing Restatement (Second) of Torts § 448 (1965)).[9] "[T]he question concerning the foreseeability of intervening third party misconduct is most often held to be a question of fact for the jury's determination." *Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 15 (Ind. 1982). "Only in plain and indisputable cases, where only a single inference or

[9] Subsequent cases have truncated this proposition using the following (or similar) language: "[A] willful, malicious criminal act of a third party is an intervening act which breaks the causal chain between the alleged negligence and the resulting harm." *Fast Eddie's v. Hall*, 688 N.E.2d 1270, 1274 (Ind. Ct. App. 1997) (citing *Welch v. R.R. Crossing, Inc.*, 488 N.E.2d 383, 390 (Ind. Ct. App. 1986), which excerpted above quote from *Estate of Mathes*); *see also Basicker*, 704 N.E.2d at 1080 (citing *Fast Eddie's*); *Merch. Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 389 (Ind. Ct. App. 2000) (citing *Basicker*, and quoted in trial court's order and Community's brief in this case); *Johnson v. Jacobs*, 970 N.E.2d 666, 671 (Ind. Ct. App. 2011) (citing *Merch. Nat'l Bank*), *trans. denied* (2012); *Marlow v. Better Bars, Inc.*, 45 N.E.3d 1266, 1275 (Ind. Ct. App. 2015) (citing *Fast Eddie's*), *trans. denied* (2016). We think that this formulation, which omits any mention of foreseeability, is an incomplete and misleading statement of the law. *See Frankenmuth Mut. Ins. Co. v. Williams*, 690 N.E.2d 675, 678 (Ind. 1997) ("Where a person's negligence creates a situation in which a third party might commit an intentional tort or criminal act, the negligence is not a proximate cause of any resulting injuries unless the negligent person 'realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.'") (quoting Restatement (Second) of Torts § 448 (1965)).

conclusion can be drawn, are the questions of proximate cause and intervening cause matters of law to be determined by the court." *Peters*, 804 N.E.2d at 743.

[25] In its order, the trial court concluded, "as a matter of law, that imposing liability on Community for *Ms. Kendrick's* alleged actions would not be justified." Appealed Order at 8. The court found that the designated evidence "demonstrates that Ms. Kendrick, after opening the Letter, *knew* she was not the intended recipient[,]" and that once she "knew that the Letter was intended for [Z.D.] (i.e., that she was an unintended recipient of the Letter), she had no business possessing it—let alone posting it to social media." *Id*. The court further found that Kendrick's "actions stand in direct violation of federal law, specifically 18 U.S.C. §§ 1702 (obstruction of correspondence) & 1708 (theft or receipt of stolen mail)." *Id*. Ultimately, the court determined that "Community cannot be liable for Ms. Kendrick's intentional, criminal action. Ms. Kendrick's actions in posting the Letter (which are distinct from Community's actions in mailing the Letter) broke the causal chain." *Id*.

[26] The fatal flaw in this analysis is the uncontested fact that Kendrick was the intended recipient of the letter because the envelope was addressed to her. Obviously, she did not know the contents of the letter until she opened the envelope. The mere circumstance that a letter containing Z.D.'s diagnosis was placed in an envelope that was addressed and delivered to Kendrick is wholly insufficient, standing alone, to establish the knowledge and intent of Kendrick,

much less whether she violated any mail-related laws. [10] As the party moving for summary judgment, Community had the burden of establishing that only a single inference or conclusion regarding proximate cause and intervening cause could be drawn based on the designated evidence. Community failed to meet this burden, and therefore we conclude that the trial court erred in granting summary judgment on Z.D.'s direct and vicarious negligence claims on the issue of proximate cause. Accordingly, we reverse and remand for further proceedings on Counts 1 and 3 only with respect to Z.D. potentially recovering pecuniary damages.

[27] Affirmed in part, reversed in part, and remanded.

Altice, J., concurs.

Vaidik, J., concurs in result without opinion.

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[10] The record obviously does not support a claim that Kendrick stole the mail addressed to her, and we note that Community does not specifically allege which laws, if any, Kendrick may have violated by posting the letter on Facebook.