

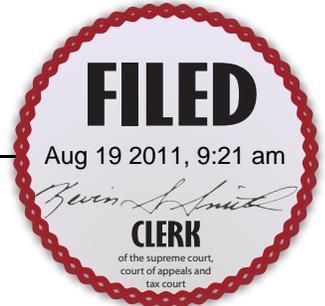
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**IN THE
COURT OF APPEALS OF INDIANA**

CRYSTAL A. RIDGEWAY,)

Appellant-Plaintiff,)

vs.)

No. 53A01-1012-CT-624)

KINSER GROUP II, LLC d/b/a HOLIDAY INN)
EXPRESS & SUITES, KAITLYNN STURGIS,)
by her mother and natural guardian, Tammy Mullis,)
and TAMMY MULLIS, individually,)

Appellees-Defendants.)

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Frances G. Hill, Judge
Cause No. 53C06-0906-CT-1634

August 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Crystal Ridgeway appeals the trial court's entry of summary judgment in favor of Kaitlynn Sturgis on Ridgeway's complaint alleging false imprisonment, malicious prosecution, and defamation. Ridgeway presents three issues for our review, which we consolidate and restate as whether the trial court erred when it concluded that there are no genuine issues of material fact precluding summary judgment in favor of Sturgis.

We reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

On July 26, 2008, Ridgeway and her family¹ checked into two rooms in a Holiday Inn Express & Suites in Bloomington after their home in Martinsville had been damaged in a flood. Sturgis, who was sixteen years old at the time, was employed as a housekeeper at the Holiday Inn. On July 28, Sturgis was assigned to clean the two hotel rooms occupied by Ridgeway and her family, so she had an access key to the rooms on that date. Ridgeway and two of her children regularly took Adderall, which had been prescribed for them, and Ridgeway kept that and other medications in a lockbox in her hotel room.

On July 30, Sturgis, who was working in a reception area of the hotel, met Ridgeway, and the two struck up a conversation. Ridgeway asked Sturgis "what kept [her] going all day," and Sturgis replied "nothing." Appellant's App. at 50. Ridgeway then stated that Adderall "is what kept her going with her kids." *Id.* A short time later, Ridgeway and Sturgis ended up walking to Ridgeway's room together.

¹ At the time, Ridgeway's family consisted of her live-in boyfriend, Pat Kenworthy, and her four minor children.

On August 3, Sturgis' mother, Tammy Mullis, learned that Sturgis was keeping unprescribed Adderall in her locker at the Holiday Inn. When Mullis first confronted Sturgis about it, Sturgis would not tell Mullis who had given her the pills. But Sturgis ultimately told Mullis that Ridgeway had given her the Adderall. Mullis, who also worked at the Holiday Inn, contacted a manager there about the incident, and then Mullis called the Bloomington police.

Sturgis and Mullis provided written sworn statements to the police. Sturgis' statement read as follows:

On Wensday [sic] August 30th [Ridgeway] aproached [sic] me while I was doing the manager['s] reception an[d] ask[ed] me what kept me going all day. I replied nothing. She then said adiral [sic] is what kept her going with her kids. She then walked off. A few minutes later she approached me again an[d] ask[ed] me if I wanted her to sneak up to her room and get some adiral [sic]. I replied no. We then began talking about something else while walking an[d] [Ridgeway] and I then ended up walking to her room. [Ridgeway] started talking about all the pre[s]criptions her [sic] and her kids are pre[s]cribed to an[d] got them out. She started looking through them. She then peeled the label off [of] one of her medicine bottles and put 3 blue adirals [sic] in it and handed it to me. We stood there and talked for a minute and both walked out of the room back down to the lobby an[d] began talking to my mom. I then left work with my mom.

Id. at 50-51. And Mullis gave the following statement to police:

On Sunday Aug. 3, 2008, I was informed that my 16 yr. old daughter Kaitlynn Sturgis had a controlled substance in her work locker. I went to the Holiday Inn Express and had her open her locker. In it I found an unmarked pill bottle. I asked her what it was and who gave it to her. Kaitlynn would only tell me that it was adiral [sic]. We left the building. While sitting in the car Kaitlynn told me that Crystal Ridgeway the guest in room 416 gave them to her. I notified Paula the manager on duty. I left the hotel. Paula called and said I could report it to the police or she would. I let her know that I would be back and I would report it. The police were called.

Id. at 52.

Two police officers arrived at Ridgeway's hotel room and began questioning her about whether she had given Sturgis the Adderall. After Ridgeway denied any such transaction, one of the officers threatened to call the Department of Child Services and have her children taken from her if she did not "start speaking up." Id. at 150. The officer then told Ridgeway that she "better be telling [him] something." Id. Then Ridgeway said, "Okay, I gave her five or six Adderall pills. . . and I g[a]ve them to [Sturgis] to dispose of." Id. Ridgeway then prepared a sworn written statement, which read as follows:

I asked [Sturgis] what keeps them going and how do they work so many hrs. and she leaned over and said she takes an Adderall and 1/2 Lortab everyday. I said, "Adderall, why Adderall? I take Adderall for a nerve thing and to keep from being hyper. Then she started asking me for it and I said no and slightly shook my head no then I hung out down there talking to her mom and her and some other guy named Chris. Later I came back up to [my] room and she followed begging me for them and I gave her 5 or 6 of them. She offered to buy and pay for them and I told her "no." Then she left.

Id. at 63.

The State charged Ridgeway with dealing in a schedule II controlled substance, as a Class A felony, but subsequently dismissed the charge. On June 26, 2009, Ridgeway filed a complaint against Kinser Group II, LLC d/b/a Holiday Inn Express & Suites ("Holiday Inn"), Sturgis, and Mullis alleging false imprisonment, malicious prosecution, defamation, intentional infliction of emotional distress, negligent hiring, gross negligence, and conversion. In essence, Ridgeway alleged that Sturgis had lied about how she had obtained the Adderall, that Ridgeway had not given it to her, and that

because of Sturgis' false accusation, Ridgeway was arrested and charged with a Class A felony.

Holiday Inn, Mullis, and Sturgis each moved for summary judgment, and the trial court entered summary judgment on all claims against all parties except for one claim, namely, Ridgeway's conversion claim against Holiday Inn.² The trial court expressly ruled that there was no just cause for delay and entered "final judgment on all counts as to Defendants Mullis and Sturgis." Appellant's App. at 16. Ridgeway does not appeal the entry of summary judgment in favor of Holiday Inn³ or Mullis. In this case, she appeals only the entry of summary judgment in favor of Sturgis.

DISCUSSION AND DECISION

We review a summary judgment order de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. Shelter Ins. Co. v. Woolems, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), trans. denied. We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); Bules, 920 N.E.2d at 250. We construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250.

² That claim involves a dispute over \$50 Ridgeway alleges Holiday Inn owes her as a result of an error in the billing and payment for her two hotel rooms. The claim is unrelated to Sturgis' alleged false accusation against Ridgeway.

³ Ridgeway attempted to appeal the entry of summary judgment in favor of Holiday Inn, but this court dismissed that appeal as untimely on March 15, 2011. Nevertheless, Ridgeway served a copy of her brief in this appeal on counsel for Holiday Inn.

Again, Ridgeway only appeals the entry of summary judgment in favor of Sturgis.⁴ In support of her summary judgment motion, Sturgis argued that she is not liable to Ridgeway under any of the alleged theories of liability in her complaint because Sturgis' statement to the police was protected by a qualified privilege. But Ridgeway maintains that Sturgis abused that privilege by lying to the police. And without the qualified privilege to protect Sturgis from liability, Ridgeway contends that there is a genuine issue of material fact whether Sturgis is liable to Ridgeway.

A qualified privilege protects communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty. Kelley v. Tanoos, 865 N.E.2d 593, 597 (Ind. 2007). To enhance public safety by facilitating the investigation of suspected criminal activity, communications to law enforcement officers are protected by this qualified privilege. Id. A statement otherwise protected by the doctrine of qualified privilege may lose its privileged character upon a showing of abuse wherein: (1) the communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory statements; or (3) the statement was made

⁴ On page two of her brief, Ridgeway declares that her appeal "is limited to challenging the trial court's entry of summary judgment in favor of Sturgis, only." Brief of Appellant at 2, n.1. However, in section IV of her brief, Ridgeway argues that Holiday Inn is liable for the tortious conduct of Sturgis under the theory of respondeat superior. This inconsistency is impossible to reconcile. Regardless, on October 12, 2010, the trial court entered summary judgment in favor of Holiday Inn on all counts other than the conversion count, and on October 15, the trial court issued an order stating the "magic language" under Indiana Trial Rule 54(B), that "there was no just cause for delay and expressly direct[ed] entry of judgment." Appellant's App. at 16. Thus, those counts in Ridgeway's complaint pertaining to Holiday Inn's liability under respondeat superior were disposed of by summary judgment, and that was rendered a final judgment on October 15, 2010. Again, Ridgeway attempted to appeal that judgment, but this court dismissed her appeal as untimely. Accordingly, Ridgeway is barred from raising the issue of Holiday Inn's liability under respondeat superior in this appeal.

without belief or grounds for belief in its truth. Bals v. Verduzco, 600 N.E.2d 1353, 1356 (Ind. 1992).

As explained by Dean William Prosser in Law of Torts § 115, at 796 (4th ed. 1971):

The burden is upon the defendant in the first instance to establish the existence of a privileged occasion for the publication, by proof of a recognized public or private interest which would justify the utterance of the words. When the occasion was a privileged one, it is a question to be determined by the court as an issue of law, unless of course the facts are in dispute, in which case the jury will be instructed as to the proper rules to apply. Once the existence of the privilege is established, the burden is upon the plaintiff to prove that it has been abused by excessive publication, by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what is said. Unless only one conclusion can be drawn from the evidence, the determination of the question whether the privilege has been abused is for the jury.

(Emphasis added).

Here, Sturgis designated evidence in support of her summary judgment motion that she made her statement alleging Ridgeway's criminal activity to a law enforcement officer, so she satisfied her burden to prove that the qualified privilege applies. That shifted the burden to prove that Sturgis abused the privilege to Ridgeway. In her designation of evidence in opposition to summary judgment, Ridgeway cited to her initial statements to police that she had not given the Adderall to Sturgis and to the fact that she only admitted to the crime after police threatened to take her children from her. Ridgeway also cited to her deposition testimony wherein she denied having given the Adderall to Sturgis.

On appeal, Sturgis contends that the evidence cited by Ridgeway does not create a genuine issue of material fact whether Sturgis abused the qualified privilege. A fact is

“material” if its resolution would affect the outcome of the case, and an issue is “genuine” if a trier of fact is required to resolve the parties’ differing accounts of the truth, Gaboury v. Ireland Road Grace Brethren, Inc., 446 N.E.2d 1310, 1313 (Ind. 1983), or if the undisputed material facts support conflicting reasonable inferences, Bochnowski v. Peoples Fed. Sav. & Loan Ass’n, 571 N.E.2d 282, 285 (Ind. 1991). In support of that contention, Sturgis maintains that Ridgeway is not permitted to create a genuine issue of material fact by contradicting her prior sworn statement to police, wherein she admitted to having given Adderall to Sturgis, with her deposition testimony, wherein she denied having given her the Adderall.

Sturgis cites Chance v. State Auto Insurance Companies, 684 N.E.2d 569, 571 (Ind. Ct. App. 1997), trans. denied, where this court stated that a party cannot create an issue of material fact for summary judgment purposes by contradicting a prior sworn statement. But that rule is not without exception. The seminal case on this issue is our Supreme Court’s opinion in Gaboury. In that case, our Supreme Court noted its disagreement with this court’s holding that “the trial court could not grant summary judgment when the [nonmovant’s] affidavit contradicted statements made in the [nonmovant’s] deposition.” Id. at 1314. And our Supreme Court observed that “[t]his decision was reached by holding that the trial court may not assess the witness’ credibility on a motion for summary judgment.” Id.

Our Supreme Court went on to state that in addressing this issue of first impression, it looked to the well-reasoned cases from other jurisdictions, which generally held that: “If a party who has been examined at length on deposition could raise an issue

of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” Id. (citations omitted). Further, our Supreme Court noted that the plaintiff’s/nonmovant’s affidavit contradicted sworn statements in his deposition but that he had failed to offer “any explanation for the discrepancies.” Id. Finally, the court held that “issues of fact should [not] be created in this manner” and that “contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant.” Id. (citation omitted).

Here, Ridgeway’s contradictory statements are distinguishable from those in Gaboury in several significant ways. First, Ridgeway was not “examined at length” when she gave a sworn statement to police. Second, Ridgeway, who initially denied having given the Adderall to Sturgis, has provided an explanation for the contradictory statements, namely, that she only confessed to police after an officer threatened to have her four children taken from her if she did not “start speaking up.” Appellant’s App. at 150. Third, Ridgeway’s credibility is not the only issue of fact raised by her contradictory deposition testimony. Sturgis’ credibility is also at issue, since she may have lied about how she obtained the unprescribed Adderall in her possession. Indeed, in her sworn statement, Mullis stated that Sturgis was not immediately forthcoming about the source of the pills. In Gaboury, summary judgment turned only on the plaintiff’s/nonmovant’s credibility. For all of these reasons, we hold that the rule set out in Gaboury does not apply here.

Again, unless only one conclusion can be drawn from the evidence, the determination of the question whether the privilege has been abused is for the trier of fact. Prosser in Law of Torts § 115 at 796. Here, the designated evidence shows that Sturgis was in possession of Adderall without a prescription. Sturgis also had access to Ridgeway's hotel room, where Ridgeway kept Adderall prescribed for Ridgeway and her children. Sturgis did not immediately tell Mullis where she had obtained the pills when Mullis confronted her. Ridgeway initially denied having given the pills to Sturgis, but admitted to giving them to her only after the police officer threatened to take her four children from her if she did not "start speaking up." Appellant's App. at 150. Later, during her deposition, Ridgeway explained that she only made that admission to police out of fear that they would take her children. And Ridgeway denied having given the Adderall to Sturgis. We cannot say that the designated evidence supports only one reasonable conclusion. We hold that the question of whether Sturgis abused the qualified privilege presents a genuine issue of material fact for a trier of fact to decide, precluding summary judgment on that issue.

Reversed and remanded for further proceedings.

RILEY, J., and MAY, J., concur.