

14-0788

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA **FILED**

L. LINDA MAYS,
Plaintiff,

2014 MAY 23 P 3: 26

v.

CIVIL ACTION NO.: 13-C-124
JUDGE F. JANE HUSTEAD

J.E. HOOD
CIRCUIT CLERK
CABELL CO., WV

THE MARSHALL UNIVERSITY
BOARD OF GOVERNORS,
Defendant.

ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

RECEIVED
MAY 29 2014
BY: _____

On March 14 and April 10, 2014, the motion of Defendant, The Marshall University Board of Governors, for partial summary judgment came before the Court for hearing regarding Plaintiff's claims for outrage, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff responded in opposition to the motion. Present were the Plaintiff, by counsel, Jeffrey V. Mehalic; and Defendant, by counsel, W. Nicholas Reynolds and Cheryl L. Connelly. Having considered the pleadings, the arguments of counsel, appropriate legal authority, and for the reasons more fully set forth below, Defendant's motion for partial summary judgment is GRANTED.

The Court heard argument on the Motion for Partial Summary Judgment on March 14, 2014 and at that time granted the motion as to the claims for outrage and intentional infliction of emotional distress. The Court took under advisement its ruling as to the claim for negligent infliction of emotional distress. At the April 10 hearing, the Court indicated initially that it would deny Defendant's motion as to the claim for negligent infliction of emotional distress,

then reconsidered its decision during the course of the hearing and ultimately granted the motion as to that claim as well.

Standards Applicable to the Motion

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Painter v. Peavy*, 192 W. Va. 189, syl. pts. 2-4 (1994); accord *Marcus v. Staubs*, 230 W. Va. 127, syl. pts. 2 & 3 (2012).

Pursuant to W. Va. R. Civ. P. 12, 52 and 56, the Court enters the following findings of fact and conclusions of law.

Findings of Fact

1. About twelve years ago, Plaintiff underwent a mastectomy and reconstructive surgery on her left breast, with the insertion of an implant. Some years later, she grew concerned about the appearance of the reconstruction and the possibility that the implant had ruptured or

shifted. In October 2010, Plaintiff consulted with Adel A. Faltaous, M.D., a plastic surgeon employed by Defendant MUBOG about corrective surgery. During the course of Plaintiff's examination, the surgeon directed his nurse to take photographs of Plaintiff's naked torso, including her breasts. The photos were taken for the purpose of obtaining authorization for the proposed surgery, although Plaintiff maintains that Dr. Faltaous told her that the photographs were only for use by his office. Throughout, Dr. Faltaous and his staff treated her in a friendly and professional manner.

2. Plaintiff understood that the proposed surgery would have to be preauthorized by her insurance company Mountain State Blue Cross Blue Shield.

3. Plaintiff is employed by St. Mary's Medical Center as an administrative assistant. A few days after Plaintiff's appointment, an employee of MUBOG's plastic surgery department sent a letter to St. Mary's seeking pre-authorization of Plaintiff's surgery. The letter included photographs of Plaintiff's chest. The letter went to St. Mary's human resources department where it was opened by human resources assistant Patty Russell; she read the letter and saw the photographs. Uncertain what to do, Russell took them to her supervisor, Teresa Caserta. After Caserta saw the letter and photographs, she told her supervisor, Dan Weaver, about them, but did not show them to him. Caserta asked what she should do with them; Weaver directed her to give them to Plaintiff. Caserta placed the original envelope, letter and photographs in another envelope, sealed it, marked it "confidential" and gave it to Russell with instructions to deliver it to Plaintiff; Russell did. Plaintiff recalls Russell handing her the original envelope sealed with a piece of tape. When Plaintiff removed the tape, the photographs fell face down on Plaintiff's desk.

4. Caserta called the surgeon's office and spoke to an employee. Caserta said that they had received photographs of one of St. Mary's employees and that these were not to come to their office; that they never receive them. The MUBOG employee said that "I believed that they did."

5. While Plaintiff contends that the preauthorization should not have been sent to St. Mary's, she believes sending the photographs was an honest mistake. She does not believe anyone intended to do her harm. Neither does she contend that anyone at MUBOG was rude, dismissive or insensitive to her concerns.

6. Plaintiff testified that she is an extremely modest person. She contends that she suffered emotional distress as a result of this incident. Specifically, she asserts that it has humiliated and embarrassed her. Mays testified as follows in her deposition:

Q. ... Anything else you'd like to say about this at all?

A. Yes. I'm a little introverted, so it's very intimidating for me to be here in front of all of you-all today, so it's hard for me to remember everything that has happened and the dates and all of that.

But I know you probably are having trouble understanding why this has stopped me kind of in my tracks, as far as getting more treatment, as far as getting more surgery. But one of the aspects of depression is things seem to be—it's hard to get motivated.

Things seem insurmountable to you when have some depression going on, and anxiety. And for me to know that I'll have to take off work and try to find a doctor, maybe in Charleston, and research and make sure he's a good doctor, and then go there for the appointment.

And it's just—there's going to be some anxiety associated with that, too, because, of course, things did not go well here. But that's one of the things that has stopped me from being further along and getting past this to go ahead and have the surgery that you were talking about today.

In his report, Bobby A. Miller II, M.D., the forensic psychiatrist who evaluated Plaintiff explained that:

As an aspect of her report of her emotionally traumatic work experience, Ms. Mays related that it is her perception that some persons view her experience as not being a 'big deal.' After all, she survived an abusive childhood, three abusive romantic relationships and cancer. Why would a photo of a topless (faceless) woman falling out of envelope [sic] onto the floor result in any emotional reaction, much less one that was detected on psychological testing as a PTSD-like reaction? It was precisely her previous negative life experiences and their unhealed emotional wounds that predisposed Ms. Mays to her unique psychological response. Indeed, the clinical interview indicated that Ms. Mays is a person whose personality did not develop in a healthy manner. Her worldview is that of a person who lives awash in shame while attempting to hide her low self-esteem and guilt from others. However, it was in that moment when the image of her disfigured naked body laid exposed on the floor, that her strained psychological defense mechanisms failed, causing her to be emotionally harmed by the event. She continues to be unable to cope with the event and remains troubled on a daily basis by her PTSD-like and depression symptoms.

In addition, Dr. Miller made the following diagnoses:

1. Dysthymic Disorder (pre-existing but exacerbated)
2. Subthreshold Posttraumatic Stress Disorder (DSM-IV Anxiety Disorder NOS)
3. Borderline Personality (traits)

In a letter of January 6, 2014 in which Dr. Miller's supplemented his opinion based on his review of records received after he examined Plaintiff, he opined that:

1. Ms. Mays' previous psychiatric illness predisposed her to emotional trauma.
2. Her character structure was such that she was reactive to emotions of shame.
3. In the past, with treatment she was stable and able to work.

4. These records support my explanation of her emotional injury and subsequent psychiatric condition, defined as subthreshold Posttraumatic Stress Disorder, consequent to her emotionally traumatic event at the workplace on November 1, 2010.

In the discussion section of his report, Plaintiff's forensic psychiatrist, Bobbie A. Miller

II, M.D., states:

As an aspect of her report of her emotionally traumatic work experience, Ms. Mays related that it is her perception that some persons view her experience as not being a "big deal." After all, she survived an abusive childhood, three abusive romantic relationships and cancer. Why would a photo of a topless (faceless) woman falling out of envelope [*sic*] onto the floor result in any emotional reaction, much less one that was detected on psychological testing as a PTSD-like reaction? It was precisely her previous negative life experiences and their unhealed emotional wounds that predisposed Ms. Mays to her unique psychological response. Indeed, the clinical interview indicated that Ms. Mays is a person whose personality did not develop in a healthy manner. Her worldview is that of a person who lives awash in shame while attempting to hide her low self-esteem and guilt from others. However, it was in that moment when the image of her disfigured naked body laid exposed on the floor, that her strained psychological defense mechanisms failed, causing her to be emotionally harmed by the event. She continues to be unable to cope with the event and remains troubled on a daily basis by her PTSD-like and depression symptoms.

7. Plaintiff does not contend that the events alleged in her complaint caused her to suffer physical injury at any time, whether at the time of, or subsequent to, the alleged disclosure of her health care information.

Conclusions of Law

1. In count II of her complaint, Plaintiff asserts a claim for "outrageous conduct"; in count III, she asserts a claim for "intentional infliction of emotional distress" (IIED). These are the same cause of action. *Williamson v. Harden*, 214 W. Va. 77, 81 (2003). ("This Court has explained that the tort of outrage is synonymous with intentional or reckless infliction of emotional distress."); *Travis v. Alcon Labs., Inc.*, 202 W. Va. 369 (1998).

2. The *prima facie* case for IIED has four elements:

The four elements of the tort can be summarized as: (1) conduct by the Defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the Defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the Defendant caused the Plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the Plaintiff was so severe that no reasonable person could be expected to endure it.

Id., 202 W. Va. at 375.

3. Originally recognized in *Harless v. First Nation Bank*, 169 W. Va. 673 (1982), the West Virginia Supreme Court of Appeals has observed that the fact pattern necessary to establish IIED is rare. *See, for example Hines v. Hills Dept. Stores, Inc.*, 193 W. Va. 91 (1994). Moreover, firm judicial oversight is required to avoid losing control over the tort:

In explanation of why "we have demanded such strict proof of unprecedented and extreme misconduct" in these cases, we noted that "[e]specially where no physical injury accompanies the wrong, the tort of outrage is a slippery beast, which can easily get out of hand without firm judicial oversight." *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 651, 461 S.E.2d 149, 157 (1995) (quoting *Keyes v. Keyes*, 182 W.Va. 802, 805, 392 S.E.2d 693, 696 (1990)).

Johnson v. Hills Dept. Stores, Inc., 200 W. Va. 196, 201 (1997). Thus, in *Travis v. Alcon Lab., Inc.*, *supra*, syl. pt. 4, the Court explained that the trial court is taxed, as a matter of law, with determining whether conduct alleged may reasonably be considered outrageous:

In evaluating a Defendant's conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.

4. In *Courtney v. Courtney*, 186 W. Va. 597, 601-602 (1991), the Court reviewed its prior decisions and what they reveal about the extreme conduct which is necessary to support the tort:

One of the more frequently litigated questions concerning the tort of intentional infliction of emotional distress is what type of misconduct will create a cognizable claim. In *Harless*, 169 W.Va. at 695, 289 S.E.2d at 704-05, we stated: "As comment (d) to Section 46 of the *Restatement* suggests, the conduct must be '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.' " ^{FN5}

FN5. In note 20 of *Harless*, 169 W.Va. at 693, 289 S.E.2d at 703-04, we quoted from the text of Comment d. to Section 46 of the *Restatement*:

" 'd. *Extreme and outrageous conduct*. The cases thus far decided have found liability only where the Defendant's conduct has been extreme and outrageous. It has not been enough that the Defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the Plaintiff to punitive damages for another tort. 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."

In several cases, we have determined as a matter of law that a Defendant's conduct did not rise to the requisite level of outrageousness. In *Keyes v. Keyes*, 182 W.Va. 802, 392 S.E.2d 693 (1990), the decedent's brother and mother became involved in a bitter conflict with the decedent's son over the decedent's property shortly after his death. The son was neither listed in his father's funeral obituary nor allowed to ride with the family to the funeral. Finally, he was not permitted to erect the gravestone he had selected. He filed suit for outrageous conduct. We observed that the Defendants' conduct was petty, mean-spirited, and a breach of etiquette, but refused to find that it amounted to outrageous conduct.

Likewise, in *Kanawha Valley Power Co. v. Justice*, 181 W.Va. 509, 383 S.E.2d 313 (1989), we dismissed the Plaintiff's contention that he stated a claim for the tort of outrageous conduct against his employer. The Plaintiff had received overpayments on his sick leave, which the Defendant sought to collect. The Plaintiff claimed that the Defendant orally demanded payment from him. On

another occasion, the employer told the Plaintiff that they could discuss alternatives to his refusal to return the overpayments, which the Plaintiff understood as a threat to terminate his employment. Finally, the Plaintiff alleged that his supervisor treated him like a dog and other employees had implied that he was a thief. In rejecting his claim for intentional infliction of emotional distress, we explained:

“[A]s the *Restatement* further explains, liability may be imposed for outrageous conduct only where the distress that results is more than the ‘transient’ and ‘trivial’ distress that necessarily accompanies life among other people. ‘The law intervenes only where the distress is so severe that no reasonable [person] could be expected to endure it.’ *Restatement (Second) of Torts* § 46, comment j.” 181 W.Va. at 513, 383 S.E.2d at 317.

We affirmed a summary judgment against the Plaintiff in *Wayne County Bank v. Hodges*, 175 W.Va. 723, 338 S.E.2d 202 (1985). The Plaintiff claimed that the bank committed the tort of outrageous conduct when it obtained an attachment on his property. The affidavit that was used to secure the attachment contained a false allegation, which later resulted in the court's quashing of the attachment. We found these facts barren of any outrageous conduct.

Finally, in *Yoho v. Triangle PWC, Inc.*, 175 W.Va. 556, 336 S.E.2d 204 (1985), an employee claimed that her employer committed outrageous conduct when it terminated her employment after she had been off work for more than one year because of a work-related injury. We agreed with the trial court that the claim was groundless.

Thus, conduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent does not constitute outrageous conduct.

See also O'Dell v. Stegall, 226 W. Va. 590 (2010); *Brown v. City of Fairmont*, 221 W. Va. 541(2007); and *Philyaw v. Eastern Assoc. Coal Corp.*, 219 W. Va. 252 (2006).

In 1994, the Supreme Court observed that although the tort was recognized in 1982, “[t]his Court has yet to decide a case where a Defendant’s conduct was found to be sufficiently outrageous to satisfy the requirements for the tort of outrage or intentional infliction of emotional distress.” *Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 285 (1994).

5. It is a matter for the Court to determine whether the alleged conduct may reasonably be considered outrageous. *Travis, supra*. In light of the restraint urged by the West Virginia Supreme Court of Appeals, it is plain that Plaintiff has not asserted facts which approach the required threshold. Plaintiff does not believe that the pre-authorization request was sent to St. Mary's with the intention of causing her harm; she believes it was an honest mistake. Her belief is consistent with the assertion that the MUBOG employee followed what she believed was the proper procedure. Moreover, Plaintiff acknowledges that the surgeon and his staff treated her in a professional manner; no one was rude, dismissive or insensitive to her concerns. At most, Plaintiff alleges "conduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent" – conduct which is insufficient as a matter of law. *Courtney v. Courtney, supra*, 186 W. Va. at 602.

6. As a matter of law, Plaintiff has failed to adduce the kind of extreme facts necessary to support an IIED claim.

7. The West Virginia Supreme Court of Appeals has recognized two separate tests for claims of negligent infliction of emotional distress (NIED). The first test was announced in *Heldreth v. Marrs*, 188 W. Va. 481, syl. pt. 1 (1992):

A Defendant may be held liable for negligently causing a Plaintiff to experience serious emotional distress, after the Plaintiff witnesses a person closely related to the Plaintiff suffer critical injury or death as a result of the Defendant's negligent conduct, even though such distress did not result in physical injury, if the serious emotional distress was reasonably foreseeable.

The second test was announced in *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, syl. pts. 12 and 13 (1996):

12. In order to recover for negligent infliction of emotional distress based upon the fear of contracting a disease, a Plaintiff must prove that he or she was actually exposed to the disease by the negligent conduct of the Defendant, that his

or her serious emotional distress was reasonably foreseeable, and that he or she actually suffered serious emotional distress as a direct result of the exposure.

13. In addition to other factors which may be adduced in evidence to prove that serious emotional distress arising from the fear of contracting a disease is reasonably foreseeable, the evidence must show first, that the exposure upon which the claim is based raises a medically established possibility of contracting a disease, and second, that the disease will produce death or substantial disability requiring prolonged treatment to mitigate and manage or promising imminent death.

Accord, Polk v. Town of Sophia, 2013 WL 6195727 (S.D. W. Va. 27 November 2013); *Travis v. J.P. Morgan Chase Bank, N.A.*, 2012 WL 3193341 (N.D. W. Va. 6 August 2012).

8. Plaintiff's NIED claim fits within neither of the two recognized frameworks. She did not witness the injury or death of a person closely related to her. She was not exposed to a disease which might be expected to cause her serious disability or death.

9. The Court's analysis in *Brown v. City of Fairmont, supra*, is instructive. Brown, a retired firefighter, alleged that his rights of privacy were invaded when the city and officials from the fireman's pension and relief fund met privately with Plaintiff's ex-wife and her counsel to discuss information relevant to Plaintiff's pension rights, and communicated private information about Plaintiff's pension benefits to members of the fire department. He sought damages for NIED. The *Brown* Court affirmed the trial court's grant of summary judgment:

The appellant also brought a cause of action for negligent infliction of emotional distress. In the case of *Lipton v. Unumprovident Corp.*, 10 A.D.3d 703, 783 N.Y.S.2d 601 (N.Y.App.Div.2004), the Plaintiff, a commodities broker, sued a firm through which he cleared his trades and the firm's parent company, seeking to recover damages for breach of contract, negligent representation, negligent infliction of emotional distress, and breach of fiduciary duty, in connection with the insurer's denial of coverage under a group insurance policy which the firm procured for the benefit of the Plaintiff. The trial court dismissed the complaint for failure to state a claim. On appeal, the court found that the Plaintiff did not state a claim for negligent infliction of emotional distress. The court explained,

Although physical injury is no longer a necessary element of a negligent infliction of emotional distress claim, such a cause of action generally must be premised on conduct that unreasonably endangers the Plaintiffs physical safety or causes the Plaintiff to fear for his or her physical safety. No such conduct is alleged in this case.

Lipton, 783 N.Y.S.2d at 603–604. We agree with this reasoning under the specific circumstances of this case insofar as the underlying facts of this case, like *Lipton*, do not pertain to the threatened health or safety of the Plaintiff or a loved one of the Plaintiff. Thus, we conclude that the circuit court correctly granted summary judgment to the appellees on the appellant's negligent infliction of emotional distress claim.

Id., at p. 547.

Plaintiff's claim for the wrongful disclosure of health care information is similar in nature to the invasion of privacy claim asserted in *Brown* and fails for the same reasons.

10. Plaintiff has failed to make out a *prima facie* case for NIED.

11. Plaintiff's NIED claim fails for a second reason. An objective standard is used to determine whether it is foreseeable that Plaintiff would suffer serious emotional distress as a result of the Defendant's conduct:

In determining "seriousness", consideration should be given to whether the particular Plaintiff is a "reasonable person, normally constituted". For the purposes of such consideration, a reasonable person is an ordinarily sensitive person and not a supersensitive person.

Marlin v. Bill Rich Constr., Inc., *supra* at syl. pt. 14.

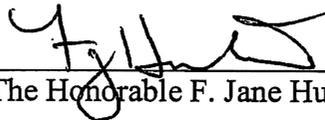
Plaintiff asserts that she suffered distress from the incident because she is an unusually modest person. It is Plaintiff's hypersensitivity which her forensic psychiatrist opined caused her to suffer emotional distress as a result of an occurrence that others would view as "no big deal."

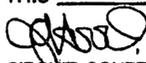
For an NIED claim to lie, Plaintiff must establish that a reasonable person would have suffered real and serious distress; she has established the contrary.

It is, therefore **ORDERED** that Defendant Marshall University Board of Governors' Motion for Partial Summary Judgment be **GRANTED** and that counts II, III and IV of the complaint, be **DISMISSED** with prejudice and stricken from the docket. Plaintiff's exceptions and objections are preserved.

The Clerk will send copies of this Order to counsel of record Jeffrey V. Mehalic, Law Offices of Jeffrey V. Mehalic, P. O. Box 11133, Charleston, WV 25339-1133 and W. Nicholas Reynolds and Cheryl L. Connelly, Campbell Woods PLLC, P. O. Box 1835, Huntington, WV 25719-1835.

ENTER: May 23, 2014.


The Honorable F. Jane Husted, Judge

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON MAY 23 2014
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS MAY 23 2014
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FILED

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JUDGE F. JANE HUSTEAD

J.E. HOOD
CIRCUIT CLERK
CABELL COUNTY, WV

THE MARSHALL UNIVERSITY
BOARD OF GOVERNORS,
Defendant.

ORDER GRANTING DEFENDANT'S
MOTION IN LIMINE

On April 10, 2014, the Motion *in Limine*, No. 1, of Defendant, The Marshall University Board of Governors, came before the Court for hearing. Present were the Plaintiff, by counsel, Jeffrey V. Mehalic; and Defendant, by counsel, W. Nicholas Reynolds and Cheryl L. Connelly. The Defendant's Motion in Limine, No. 1, sought to preclude Plaintiff from referring to or introducing any evidence regarding emotional distress damages. Having considered the pleadings, the arguments of counsel and appropriate legal authority and for the reasons more fully set forth below, Defendant's motion is GRANTED.

Plaintiff seeks recovery in this action for emotional distress, in support of which she proposes to introduce testimony from herself, Desiree Woodrow, and expert Bobby A. Miller II, M.D. Emotional distress damages are permitted where emotional disturbance accompanies or follows physical injury. *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340 (1945); *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673 (1982).

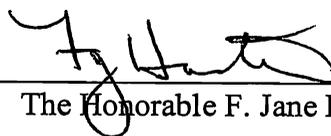
However, Plaintiff does not contend that the events alleged in her complaint caused her to suffer physical injury at any time, whether at the time of, or subsequent to, the alleged disclosure of her health care information. Emotional distress damages are also permitted where the Plaintiff

establishes the elements of intentional infliction of emotional distress or negligent infliction of emotional distress. *Travis v. Alcon Labs., Inc.*, 202 W. Va. 369 (1998); *Heldreth v. Marrs*, 188 W. Va. 481(1992); *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635 (1996). However, this Court has found that Plaintiff's claims for intentional infliction of emotional distress and negligent infliction of emotional distress fail as a matter of law.

It is therefore **ORDERED** that Defendant Marshall University Board of Governors' Motion *in Limine*, No. 1, be **GRANTED**, and Plaintiff may not introduce at trial the testimony of Bobby A. Miller II, M.D., the report of Bobby A. Miller II, M.D., or any other testimony regarding alleged emotional distress suffered by her.

The Clerk will send copies of this Order to counsel of record, Jeffrey V. Mehalic, Law Offices of Jeffrey V. Mehalic, P. O. Box 11133, Charleston, WV 25339-1133 and W. Nicholas Reynolds and Cheryl L. Connelly, Campbell Woods PLLC, P. O. Box 1835, Huntington, WV 25719-1835.

ENTER: May 23, 2014.


The Honorable F. Jane Husted, Judge

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON MAY 23 2014
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS MAY 23 2014
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

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JUL 21 2014
BY: _____

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

L. LINDA MAYS,
Plaintiff,

v.

CIVIL ACTION NO.: 13-C-124
JUDGE F. JANE HUSTEAD

THE MARSHALL UNIVERSITY
BOARD OF GOVERNORS,
Defendant.

JE HOOD
CIRCUIT CLERK
MARSHALL CO., WV

2014 JUL 15 P 3:35

FILED

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

On May 28, 2014, the motion of Defendant, The Marshall University Board of Governors, for summary judgment came before the Court for hearing regarding Plaintiff's claims for negligence (count I), breach of confidentiality (count V), and invasion of privacy (count VI). Plaintiff responded in opposition to the motion. Present were the Plaintiff, in person and by counsel, Jeffrey V. Mehalic; and Defendant, by counsel, W. Nicholas Reynolds and Cheryl L. Connelly. Having considered the testimony of the Plaintiff at an evidentiary hearing, the pleadings and discovery of record, the arguments of counsel, appropriate legal authority, and for the reasons more fully set forth below, Defendant's motion for summary judgment is GRANTED.

By Order on Pre-Trial Conference Procedural Rulings, entered April 17, 2014, an evidentiary hearing was set for May 28, 2014, at which hearing the Plaintiff appeared and presented her anticipated trial testimony in person. Defendant objected to the Plaintiff's

testimony to the extent that it consisted of testimony of her emotional distress, and the Court

initially overruled that objection. At the close of Plaintiff's testimony, Defendant moved to

strike her testimony to the extent that it consisted of testimony of her emotional distress. In light

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Deputy Circuit Clerk

of the findings and conclusions articulated below, Defendant's objection to Plaintiff's emotional distress testimony is now SUSTAINED. However, Defendant's motion to strike that testimony is OVERRULED, the Court deeming it appropriate to preserve a complete record of that testimony. Following the Plaintiff's testimony, the Court heard argument on Defendant's motion for summary judgment.

Standards Applicable to the Motion

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Painter v. Peavy*, 192 W. Va. 189, syl. pts. 2-4 (1994); accord *Marcus v. Staubs*, 230 W. Va. 127, syl. pts. 2 & 3 (2012).

Pursuant to W. Va. R. Civ. P. 12, 52 and 56, the Court makes the following findings of fact and arrives at the following conclusions of law.

Findings of Fact

1. About twelve years ago, Plaintiff underwent a mastectomy and reconstructive

surgery on her left breast, with the insertion of an implant. Some years later, she grew concerned about the appearance of the reconstruction and the possibility that the implant had ruptured or shifted. In October 2010, Plaintiff consulted with Adel A. Faltaous, M.D., a plastic surgeon employed by Defendant MUBOG about corrective surgery. During the course of Plaintiff's examination, the surgeon directed his nurse to take photographs of Plaintiff's naked torso, including her breasts. The photos were taken for the purpose of obtaining authorization for the proposed surgery, although Plaintiff maintains that Dr. Faltaous told her that the photographs were only for use by his office. Throughout, Dr. Faltaous and his staff treated her in a friendly and professional manner.

2. Plaintiff understood that the proposed surgery would have to be preauthorized by her insurance company Mountain State Blue Cross Blue Shield.

3. Plaintiff is employed by St. Mary's Medical Center as an administrative assistant. A few days after Plaintiff's appointment, an employee of MUBOG's plastic surgery department sent a letter to St. Mary's seeking pre-authorization of Plaintiff's surgery. The letter included photographs of Plaintiff's chest. The letter went to St. Mary's human resources department where it was opened by human resources assistant Patty Russell; she read the letter and saw the photographs. Uncertain what to do, Russell took them to her supervisor, Teresa Caserta. After Caserta saw the letter and photographs, she told her supervisor, Dan Weaver, about them, but did not show them to him. Caserta asked what she should do with them; Weaver directed her to give them to Plaintiff. Caserta placed the original envelope, letter and photographs in another envelope, sealed it, marked it "confidential" and gave it to Russell with instructions to deliver it to Plaintiff; Russell did. Plaintiff recalls Russell handing her the original envelope sealed with a piece of tape. When Plaintiff removed the tape, the photographs fell face down on Plaintiff's

desk.

4. Caserta called the surgeon's office and spoke to an employee. Caserta said that they had received photographs of one of St. Mary's employees and that these were not to come to their office; that they never receive them. The MUBOG employee said that "I believed that they did."

5. While Plaintiff contends that the preauthorization should not have been sent to St. Mary's, she believes sending the photographs was an honest mistake. She does not believe anyone intended to do her harm. Neither does she contend that anyone at MUBOG was rude, dismissive or insensitive to her concerns.

6. Plaintiff testified that she is an extremely modest person. She contends that she suffered emotional distress as a result of this incident. Specifically, she asserts that it has humiliated and embarrassed her. Mays testified as follows in her deposition:

Q. [Is there] [a]nything else you'd like to say about this at all?

A. Yes. I'm a little introverted, so it's very intimidating for me to be here in front of all of you-all today, so it's hard for me to remember everything that has happened and the dates and all of that.

But I know you probably are having trouble understanding why this has stopped me kind of in my tracks, as far as getting more treatment, as far as getting more surgery. But one of the aspects of depression is things seem to be—it's hard to get motivated.

Things seem insurmountable to you when have some depression going on, and anxiety. And for me to know that I'll have to take off work and try to find a doctor, maybe in Charleston, and research and make sure he's a good doctor, and then go there for the appointment.

And it's just—there's going to be some anxiety associated with that, too, because, of course, things did not go well here. But that's one of the things that has stopped me from being further along and getting past this to go ahead and have the surgery that you were talking about today.

In the report of plaintiff's retained expert, Bobby A. Miller II, M.D., a forensic psychiatrist who evaluated Plaintiff explained that:

As an aspect of her report of her emotionally traumatic work experience, Ms. Mays related that it is her perception that some persons view her experience as not being a "big deal." After all, she survived an abusive childhood, three abusive romantic relationships and cancer. Why would a photo of a topless (faceless) woman falling out of envelope [sic] onto the floor result in any emotional reaction, much less one that was detected on psychological testing as a PTSD-like reaction? It was precisely her previous negative life experiences and their unhealed emotional wounds that predisposed Ms. Mays to her unique psychological response. Indeed, the clinical interview indicated that Ms. Mays is a person whose personality did not develop in a healthy manner. Her worldview is that of a person who lives awash in shame while attempting to hide her low self-esteem and guilt from others. However, it was in that moment when the image of her disfigured naked body laid exposed on the floor, that her strained psychological defense mechanisms failed, causing her to be emotionally harmed by the event. She continues to be unable to cope with the event and remains troubled on a daily basis by her PTSD-like and depression symptoms.

In addition, Dr. Miller made the following diagnoses:

1. Dysthymic Disorder (pre-existing but exacerbated)
2. Subthreshold Posttraumatic Stress Disorder (DSM-IV Anxiety Disorder NOS)
3. Borderline Personality (traits)

In a letter of January 6, 2014 in which Dr. Miller's supplemented his opinion based on his review of records received after he examined Plaintiff, he opined that:

1. Ms. Mays' previous psychiatric illness predisposed her to emotional trauma.
2. Her character structure was such that she was reactive to emotions of shame.
3. In the past, with treatment she was stable and able to work.
4. These records support my explanation of her emotional injury and subsequent psychiatric condition, defined as subthreshold Posttraumatic Stress Disorder, consequent to her emotionally traumatic event at the workplace on November 1, 2010.

In the discussion section of his report, Plaintiff's forensic psychiatrist, Bobby A. Miller

II, M.D., states:

As an aspect of her report of her emotionally traumatic work experience, Ms. Mays related that it is her perception that some persons view her experience as not being a “big deal.” After all, she survived an abusive childhood, three abusive romantic relationships and cancer. Why would a photo of a topless (faceless) woman falling out of envelope [*sic*] onto the floor result in any emotional reaction, much less one that was detected on psychological testing as a PTSD-like reaction? It was precisely her previous negative life experiences and their unhealed emotional wounds that predisposed Ms. Mays to her unique psychological response. Indeed, the clinical interview indicated that Ms. Mays is a person whose personality did not develop in a healthy manner. Her worldview is that of a person who lives awash in shame while attempting to hide her low self-esteem and guilt from others. However, it was in that moment when the image of her disfigured naked body laid [*sic*] exposed on the floor, that her strained psychological defense mechanisms failed, causing her to be emotionally harmed by the event. She continues to be unable to cope with the event and remains troubled on a daily basis by her PTSD-like and depression symptoms.

7. Plaintiff does not contend that the events alleged in her complaint caused her to suffer physical injury at any time, whether at the time of, or subsequent to, the alleged disclosure of her health care information.

8. Plaintiff does not contend that the events alleged in her complaint caused her to suffer economic damage at any time, whether at the time of, or subsequent to, the alleged disclosure of her health care information.

9. At the evidentiary hearing, Plaintiff testified to her reaction to the alleged disclosure of her health care information. She testified that she was shocked, horrified, and extremely embarrassed. She testified that she was hysterical and in tears when she spoke to employees of St. Mary’s human resources department about the incident. She stated that she became more isolated and lost the momentum to become more social. Through her counsel, she confirmed that if the case proceeds to trial, the only damages about which she will offer evidence will be of her emotional distress.

Conclusions of Law

1. In *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, syl. pt. 4 (1994), the Supreme Court of Appeals specifically considered what causes of action might be supported by allegations of improper disclosure of health care information. The Court noted that other jurisdictions have treated such claims as invasion of privacy, violation of statutes concerning physician conduct, and breach of implied contract claims, but declined to follow those jurisdictions. Instead, the Court formulated the cause of action in these terms:

A patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information.

Id., syl. pt. 4.

2. In *R.K. v. St. Mary's Medical Center, Inc.*, 229 W. Va. 712 (2012), the Court considered whether the Plaintiff's claim of unauthorized disclosure of confidential medical and psychiatric information was pre-empted by the federal Health Insurance Portability and Accountability Liability Act of 1996, or fell within the Medical Professional Liability Act, W. Va. Code § 55-7B-6(b). The Court determined that the answer to both questions was "no." In its only comment on the nature of the cause of action to which unauthorized disclosure might give rise, the *R.K.* Court cited to the cause of action it had previously recognized in *Morris*. *R.K. v. St. Mary's Medical Center, Inc.*, *supra*, at fn. 10.

3. Although Plaintiff asserts three claims – negligence (count I), breach of confidentiality (count V), and invasion of privacy (count VI) – the only cause of action that might arise from the allegations in this action and that is recognized in West Virginia law, is a cause of action for wrongful disclosure of health care information based on alleged breach of a duty of physician confidentiality, as that cause of action is described in *Morris*. Thus, Plaintiff's claims for negligence (count 1) and invasion of privacy (count VI) fail as a matter of law.

4. The West Virginia Supreme Court has not specifically articulated the damages recoverable on a claim of wrongful disclosure of health care information. *See Morris v. Consolidation Coal Co., supra*, and *R.K. v. St. Mary's Medical Center, Inc., supra*. However, nothing in either *Morris* or *R.K.* indicates the Court intended to depart from long-established authority governing damages.

5. As this Court previously held in the Order Granting Defendant's Motion for Partial Summary Judgment and the Order Granting Defendant's Motion *In Limine*, both entered on May 23, 2014, no circumstance that would allow plaintiff to recover for emotional distress is present here. Plaintiff does not contend that physical injury accompanied or followed the disclosure of her health care information. *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340 (1945). She has not alleged the kind of atrocious, utterly intolerable conduct which would support a claim for intentional infliction of emotional distress. *Harless v. First Nation Bank*, 169 W. Va. 673 (1982); *Hines v. Hills Dept. Stores, Inc.*, 193 W. Va. 91 (1994); *Johnson v. Hills Dept. Stores, Inc.*, 200 W. Va. 196, 201 (1997); *Brown v. City of Fairmont*, 221 W. Va. 541, 547 (2007). She has not alleged facts which would support a claim for negligent infliction of emotional distress. She does not allege that she witnessed the critical injury or death of a person closely related to her. *Heldreth v. Marrs*, 188 W. Va. 481 (1992). She does not allege that she suffered an exposure which is medically recognized to create the risk of contracting a disease which will produce death or substantial disability. *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635 (1996). Nor does she contend that defendant's actions "pertained to the threatened health or safety of the plaintiff or a loved one of the plaintiff." *Brown v. City of Fairmont, supra*, 221 W. Va. at 547. Plaintiff alleges no facts upon which emotional distress damages may be recovered.

6. The only remaining damages that Plaintiff might be permitted to recover are for annoyance and inconvenience. *See, for example, Muzelak v. King Chevrolet, Inc.*, 179 W. Va. 340 (1988)(on a lemon law claim, plaintiff may recover damages for annoyance and inconvenience); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323 (1986)(policyholder who prevails against an insurer may recover damages for net economic loss as well as for aggravation and inconvenience); and *Jarrett v. E.L. Harper & Son, Inc.*, 160 W. Va. 399 (1977)(owner of injured realty may recover the cost of repair, expenses including loss of use, and damages for annoyance and inconvenience). Where annoyance and inconvenience damages are recoverable, they are measured by an objective standard:

In *Jarrett v. E.L. Harper & Son, Inc.*, 160 W. Va. 399, 235 S.E.2d 362 (1977) we set forth a standard to measure annoyance and convenience damages:

“We find that annoyance and inconvenience are properly considered as elements in the measure of damages plaintiffs are entitled to recover, provided that these considerations are measured by an objective standard of ordinary persons acting reasonably under the given conditions.”

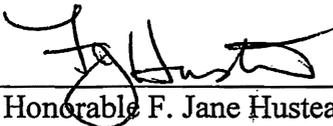
Muzelak v. King Chevrolet, Inc., *supra*, 179 W. Va. at 345.

7. Plaintiff does not intend to proffer evidence of annoyance or inconvenience. The sole evidence she intends to introduce on damages is of her atypically severe emotional distress. Since plaintiff may not recover for emotional distress and does not mean to offer any evidence of damages that might be recoverable for wrongful disclosure, she has no damages as a matter of law. Defendant is entitled to summary judgment on the single remaining claim of wrongful disclosure of health care information.

It is, therefore **ORDERED** that Defendant Marshall University Board of Governors' Motion for Summary Judgment be **GRANTED** and the complaint be **DISMISSED** with prejudice and stricken from the docket. Plaintiff's exceptions and objections are preserved.

The Clerk will send copies of this Order to counsel of record Jeffrey V. Mehalic, Law Offices of Jeffrey V. Mehalic, P. O. Box 11133, Charleston, WV 25339-1133 and W. Nicholas Reynolds and Cheryl L. Connelly, Campbell Woods PLLC, P. O. Box 1835, Huntington, WV 25719-1835.

ENTER: July 11, 2014.


The Honorable F. Jane Husted, Judge

Prepared by:


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STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON JUL 15 2014

GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS JUL 15 2014


CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

The court notes Mr Mehalic's objection to the
form of said order. *JH*