COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP193 **Cir. Ct. No. 2005CV892**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ARIANE WARTKE,

PLAINTIFF-APPELLANT,

V.

SHEBOYGAN COUNTY SHERIFF'S DEPARTMENT AND LT. MARK RUPNIK,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Ariane Wartke appeals from a summary judgment dismissing her invasion of privacy claim against the Sheboygan County Sheriff's Department and Lt. Mark Rupnik. Wartke alleged that her privacy was invaded by an investigation which trod upon her personal life and resulted in the disclosure

of private information gathered during the investigation. The circuit court concluded that the undisputed facts demonstrated that information gathered during the investigation was not disclosed within the meaning of the privacy statute, WIS. STAT. § 895.50 (2003-04).[1] We agree and affirm the order granting summary judgment.

¶2 The investigation of Wartke began after sheriff's department co-workers alleged that she was engaged in a romantic relationship with a supervisor and that the relationship yielded her preferential treatment. In her invasion of privacy complaint against the sheriff's department and Lt. Rupnik, Wartke alleged that Lt. Rupnik questioned her extensively and inappropriately about her personal life under threat of discharge. Wartke alleged that in demanding disclosure of highly sensitive personal information, the defendants "acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed, and did so without Ms. Wartke's authorization, in violation of [WIS. STAT.] § 895.50." The circuit court granted the defendants' motion for summary judgment because the record did not establish the disclosure of private information. Wartke appeals.

¶3 We review decisions on summary judgment by applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes, Mgmt.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often, and we need not repeat it here except to observe that summary

[1] The events giving rise to Wartke's claim occurred in 2004. Wartke filed this suit in December 2005. At that time, the privacy statute was found in WIS. STAT. § 895.50. In April 2006, the legislature renumbered § 895.50 to WIS. STAT. § 995.50. 2005 Wis. Act 155 § 51. We will refer to the statute as § 895.50, its form as of the date Wartke's claim arose.

judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97.

¶4 The elements of an invasion of privacy claim under WIS. STAT. § 895.50(2)(c) are:

> (1) a public disclosure of facts regarding the plaintiff; (2) the facts disclosed are private facts; (3) the private matter made public is one which would be highly offensive to a reasonable person of ordinary sensibilities; and (4) the defendant acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter, or with actual knowledge that none existed. "Publicity," for purposes of § 895.50, has been defined to mean that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."

Pachowitz v. LeDoux, 2003 WI App 120, ¶18, 265 Wis. 2d 631, 666 N.W.2d 88 (citations omitted).

¶5 The parties do not dispute that this case involves private facts that, if disclosed, "would be highly offensive to a reasonable person of ordinary sensibilities." The dispute in this case centers on whether there was a public disclosure of private facts via an unreasonable or reckless act.

¶6 We independently review the summary judgment record to determine whether there are disputed facts relating to the public disclosure of private information. The summary judgment record contains the affidavit of Sheboygan County Sheriff Michael Helmke. Sheriff Helmke assigned Lt. Rupnik to investigate whether Wartke was receiving preferential treatment from her supervisor due to an alleged romantic relationship between them and whether she and her supervisor were using county equipment to exchange personal electronic mail. If true, such conduct would be in violation of the Sheboygan County code of

ethics which barred county officials from exhibiting favoritism or granting advantage to a person beyond that which is available to others. The code also prohibited conflicts of interest.

¶7 Lieutenant Rupnik's investigation revealed that Wartke had committed various infractions of county policy and that there was cause to terminate her. The sheriff also assigned Capt. Adams to investigate Wartke. The sheriff decided to terminate Wartke because she had been untruthful, and her conduct had violated the department's policies and negatively affected working relationships and morale in the department. The announcement of Wartke's termination following an undescribed internal investigation was disseminated through the chain of command.[2] The sheriff averred in his affidavit in support of summary judgment that "[a]ll records relating to the Wartke investigation have been retained in closed files only available to the persons directly involved in the Wartke investigation and myself and senior staff as necessary."

¶8 In his affidavit in support of summary judgment, Lt. Rupnik set out details regarding Wartke's conduct that formed the basis for the sheriff's termination decision. Lt. Rupnik stated that he asked each person whom he interviewed not to disclose or discuss the facts of the investigation.

¶9 In his affidavit in support of summary judgment, Michael Collard, the director of Sheboygan County Human Resources, stated that all of Wartke's employment records were either in the possession of the sheriff's department or

[2] Wartke filed a grievance relating to her termination. The arbitrator ultimately determined that the department had just cause to discipline, but not terminate, Wartke. The arbitrator ordered Wartke reinstated subject to a ninety-working-day suspension.

Human Resources, and employment records were provided to Wartke, her counsel, her union representative and the Wisconsin Employment Relations Commission for the arbitration of her grievance. Collard further stated that "[a]ll employment records related to [Wartke], either in the possession of the Sheriff's Department or the Human Resources Department are closed to all third parties except as required by law."

¶10 In opposition to the defendants' summary judgment motion, Wartke submitted an affidavit in which she averred that her conduct did not warrant termination, the investigators delved into areas of her personal life which were outside the scope of the investigation, and the investigators asked unreasonably personal questions of her. An affidavit of Wartke's counsel alleged that he performed an internet search using Google as the search engine, and a search of "Ariane Wartke" yielded the arbitration finding in her grievance proceeding.

¶11 On appeal, Wartke argues that her private information was disclosed to the Sheboygan County Human Resources department staff, her union representative, the Wisconsin Employment Relations Commission commissioner who adjudicated her arbitration case, Lt. Rupnik, Captains Adams and Scholke (who participated in the investigation at the sheriff's request), the sheriff, Inspector TenHaken of the sheriff's department, and the Sheboygan County Human Resources Committee. Assuming private information was disclosed to these parties, such a disclosure does not support an invasion of privacy claim. These parties were involved in the investigation, termination and arbitration proceedings. In the hands of these entities, Wartke's private information did not constitute "publicity" for purposes of WIS. STAT. § 895.50, i.e., the information was not made public by communicating it to so many persons that the information was substantially certain to become public knowledge. ***Pachowitz***, 265 Wis. 2d

631, ¶18. Furthermore, the affidavits in support of summary judgment indicate that the defendants in this case, the sheriff's department and Lt. Rupnik, treated the investigation materials confidentially and limited access to them to "persons directly involved in the investigation and senior staff, as necessary." Human Resources also treated the materials confidentially.

¶12 Wartke speculates that private information could have been disclosed to the sixteen of her co-workers who were interviewed as part of the investigation. The summary judgment record does not support this claim. There is no affidavit from a co-worker indicating that he or she learned private information about Wartke from the sheriff or Lt. Rupnik. In fact, the co-worker interviews occurred before Lt. Rupnik interviewed Wartke, so the allegedly offensive inquiries made of Wartke post-dated the interviews with her co-workers.

¶13 Wartke claims that her counsel's Google search confirms that public disclosure occurred. We disagree. While counsel's affidavit states that an internet search located Wartke's Wisconsin Employment Relations Commission arbitration finding, counsel's affidavit does not offer any facts that either establish or permit a reasonable inference that the information resulted from a public disclosure by the sheriff's department or Lt. Rupnik.[3] The arbitration decision itself, while on Google, details absolutely no facts about her personal life.

¶14 Wartke wrongly equates the gathering and use of information about her conduct with a supervisor with a privacy-invading public disclosure of that

[3] Because the summary judgment record does not establish that a public disclosure occurred, we need not address whether the alleged disclosure was governed by a conditional privilege or was the result of a discretionary act by public officers.

information. Regardless of the level of distress and concern Wartke experienced as a result of the investigation, the invasion of privacy standards are not established in the summary judgment record.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.