

IN THE COURT OF APPEALS OF IOWA

No. 7-327 / 96-0294

000169

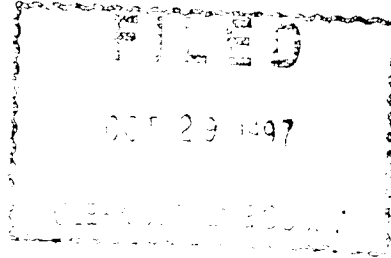
AARON GAROUTTE,

Plaintiff-Appellant/Cross-Appellee,

vs.

**MARIAN HEALTH CENTER, A Division
of Sisters of Mercy Health Corporation,**

Defendant-Appellee/Cross-Appellant.



Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos,
Robert C. Clem, and Gary E. Wennell, Judges.

Plaintiff appeals the district court's orders granting partial summary judgment
and a directed verdict in favor of defendant. **AFFIRMED.**

Robert Tiefenthaler and Roger L. Carter of Carter, Carter & Tiefenthaler,
Sioux City, for appellant.

Charles T. Patterson of Heidman, Redmond, Fredregill, Patterson, Schatz &
Plaza, L.L.P., Sioux City, for appellee.

Heard by Cady, Sackett, Huitink, Streit, and Vogel, JJ, and Habhab, S.J., but
decided by Cady, Sackett, Huitink, Streit, Vogel, and Mahan, JJ.

SACKETT, J.

Plaintiff-appellant/cross-appellee Aaron Garoutte sued defendant-appellee/cross-appellant Marian Health Center for slander, outrageous conduct, and medical malpractice. The trial court granted defendant partial summary judgment on the slander and outrageous conduct claims, and directed a verdict on the medical malpractice claim. Plaintiff appeals contending these rulings were erroneous. Defendant cross-appeals contending the district court erred in denying its motion for summary judgment as to plaintiff's claims on grounds of public policy. We affirm on plaintiff's appeal and, having done so, find the cross-appeal moot and do not address it.

Plaintiff entered as an outpatient the chemical dependency unit at Holy Family Hospital in Estherville, Iowa,¹ in October 1992. Defendant contracted with Holy Family Hospital to provide staff and expertise for the chemical dependency unit.

Another patient, Rachel Roehler, saw a tape recorder and tape. She listened to the tape, which was a recording of a staff meeting of personnel working in the unit. Roehler told plaintiff he was mentioned on the tape. Plaintiff took the tape home to listen to it. Staff personnel were heard to say on the tape defendant was "spooky" and had "buggy-eye." There also was a discussion of defendant's relationship with his girlfriend and her children.

¹ Claims against Holy Family Hospital have been settled.

Plaintiff filed this petition against defendant. Defendant filed a motion for summary judgment seeking dismissal of certain of plaintiff's claims. The trial court dismissed plaintiff's claims for defamation and slander, outrageous conduct, negligent hiring, and invasion of privacy. The supreme court denied plaintiff's application for interlocutory review of this ruling.

Defendant filed a second motion for summary judgment seeking dismissal of plaintiff's claim of medical malpractice. The trial court granted the motion except for plaintiff's claim defendant failed to use the required degree of care in that the statements made by staff constituted malpractice. Again, the supreme court denied plaintiff's application for interlocutory appeal.

Defendant filed a third motion for summary judgment advancing plaintiff was barred from recovering for any injuries plaintiff sustained as a result of listening to the tape on public policy grounds because the tape was wrongfully taken. The district court denied this motion.

The remaining issues went to a jury trial. Following plaintiff's case, the trial court sustained defendant's motion for a directed verdict and the case was dismissed.

Plaintiff first contends the trial court erred in sustaining defendant's motion for summary judgment on his claim he was slandered by defendant's staff. He claims the trial court erred in finding on summary judgment defendant had shown its staff had a qualified privilege to make the statement.

Defamation is the invasion of another's interest in reputation or good name. *See Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). It consists of the twin torts of libel and slander – the former being written and the latter being oral. *Id.* To establish a prima facie case in any defamatory action, a plaintiff must show the defendant (1) published a statement that was (2) defamatory (3) of and concerning the plaintiff. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996).

There are two types of privileged communications: those that are absolutely privileged and those that are qualifiedly or conditionally privileged. *Id.* at 803. Absolute privilege affords a complete defense under any circumstances, even if actual malice is shown, while qualified privilege provides immunity in some but not all instances. *Id.* Qualified privilege is an affirmative defense that must be pled and proven. *Id.* Qualified privilege attaches to communications made (1) in good faith, (2) concerning a subject matter in which the speaker has an interest, right, duty, or obligation, and (3) to a listener who has a corresponding interest, right, duty, or obligation in the subject matter of the communication. *Id.* at 803; *Brown v. First Nat'l Bank of Mason City*, 193 N.W.2d 547, 552 (Iowa 1972); *see also Rees v. O'Malley*, 461 N.W.2d 833, 837 (Iowa 1990).

Qualified privilege protects only those statements made without actual malice. *Taggart*, 549 N.W.2d at 803-04. The only evidence was that the statements were made in a staffing session where counselors, nurses, and a physician were in

attendance. The discussion was a frank discussion of the professional assessment of plaintiff. The statements were subject to the qualified privilege. In resisting the motion for summary judgment, plaintiff failed to introduce evidence to support a finding of malice. We affirm on this issue.

Plaintiff next complains the trial court erred in dismissing on summary judgment his claim alleging outrageous conduct.

The elements of the tort of severe emotional distress are (1) outrageous conduct by the defendant; (2) the defendant's intentional causing, or reckless disregard of the probability of causing emotional distress; (3) the plaintiff suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Powell v. Khodari-Intergreen Co.*, 334 N.W.2d 127, 129 (Iowa 1983); *Poulsen v. Russell*, 300 N.W.2d 289, 296 (Iowa 1981); *Wambsgans v. Price*, 274 N.W.2d 362, 365-66 (Iowa 1979); *Meyer v. Nottger*, 241 N.W.2d 911, 918 (Iowa 1976); *Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252, 255 (Iowa 1972); *Randa v. U.S. Homes, Inc.*, 325 N.W.2d 905, 908 (Iowa App. 1982).

For conduct to be "outrageous" it must be "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." *Roalson v. Chaney*, 334 N.W.2d 754, 756 (Iowa 1983). The conduct must be judged considering all surrounding circumstances. See *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 198-99 (Iowa 1985).

It is not enough defendant acted with an intent which is tortious or even criminal, or that the intent was to inflict emotional distress, or even that the conduct has been characterized by malice or a degree of aggravation that would entitle plaintiff to punitive damages for another tort. *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984). Even a finding a defendant engaged in a deliberate campaign to badger and harass a plaintiff does not support a finding of outrageous conduct. *Suntken v. Den Ouden*, 548 N.W.2d 164, 168 (Iowa App. 1996). The record on summary judgment is void of evidence supporting such a claim. We affirm on this issue.

Plaintiff next contends the trial court erred in sustaining defendant's motion for directed verdict on his claim of medical malpractice. This claim was based on defendant's negligence in allowing access to the tape.

We examine the evidence in the light most favorable to plaintiff to determine whether there is substantial evidence to support a verdict. *See Vinson*, 360 N.W.2d at 118. Plaintiff has failed to introduce any evidence showing defendant had a duty to prevent patients from picking up the tapes, and has further failed to introduce evidence showing the duty, if any, was breached. The trial court correctly directed a verdict.

We find it unnecessary to address defendant's cross-appeal advancing the trial court erred in denying its motion for partial summary judgment because public policy

should prohibit plaintiff from recovering damages where he wrongfully took the tape, the issue raised now being moot.

We affirm.

AFFIRMED.