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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DAVID LA FRENZ,
Plaintiff-Appellant.
vs.
STATE OF IOWA,
Defendant-Appellee.

Filed August 25, 1981

0-448
64730

Appeal from Johnson District Court. Robert Osmundson, Judge.

Plaintiff appeals from the dismissal of his petition in an invasion of privacy suit, alleging that the act of filming his diseased eye condition constituted the tort of intrusion upon seclusion. REVERSED AND REMANDED.

Robert W. Jansen, of Trott & Jansen, Iowa City, Ia., for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, and Patrick McNulty, Assistant Attorney General for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

SNELL, J.

Plaintiff, David LaFrenz, appeals from the dismissal of his petition in an invasion of privacy suit, alleging that the act of filming his diseased eye condition constituted the tort of intrusion upon seclusion. We reverse and remand.

In mid-August, 1975, plaintiff, then a Ph.D. candidate in microbiology at the University of Iowa in Iowa City, and his wife, Karen LaFrenz, drove to Panama City, Florida, to visit plaintiff's brother, Jim. During the visit plaintiff became severely ill, and Karen and Jim drove plaintiff back to Iowa City, where they arrived on August 22, 1975. Karen testified that prior to making the trip back to Iowa City plaintiff had strong headaches, vomited, was almost totally immobile, lay on the floor most of the time, was constantly fatigued and drowsy, slept constantly, was always nauseated, did not seem to have a grip on what was going on around him, would have no meals with Karen and Jim, and was nearly totally incapacitated. Karen testified that during the trip back to Iowa City plaintiff had hallucinations, was delirious, totally disoriented, did not know where he was or who Karen or Jim were, would not eat and was able to talk but not to carry on a rational conversation.

Shortly after their arrival in Iowa City, Karen took plaintiff to the emergency room of University Hospitals. Plaintiff was admitted to the neurology ward, where Dr. Mike Powers suspected him of having encephalitis, an inflammation of the brain. In addition, plaintiff was transported to the ophthalmology department, where he was diagnosed as having a rare eye disease known as opsoclonis. Opsoclonis is characterized by darting, linear, uncontrolled eye movements. In the conference room of the ophthalmology department, Dr. Herbert Thompson, Dr. Peters, and a medical technician made a film of plaintiff showing the ocular activity symptomatic of his opsoclonis. There is not enough evidence to conclude that plaintiff consented to the filming. The testimony of two doctors indicates that the sole purpose of taking the film was to show it to medical students and doctors to enable them to recognize this rare disease. In April, 1976, long after plaintiff was discharged from the hospital, a medical student informed plaintiff that in a neurophysiology class he had viewed the film taken of plaintiff.

Plaintiff brought an invasion of privacy action against defendant under four different theories. The trial court directed a verdict against plaintiff on three of those

theories and rendered a judgment for defendant on the fourth. Plaintiff presses this appeal solely on the fourth theory, the tort of intrusion upon seclusion. The theory applicable here is stated in section 652A as follows:

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another, as stated in section 652B.

Our scope of review is limited to the correction of errrors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding on this court if supported by substantial evidence. Knauss v. Kemin Industries, Inc., 267 N.W.2d 56, 57 (Iowa 1978); Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978); Iowa R. App. 14(f)(1). We are not, however, bound by the trial court's determinations of law. Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 340 (Iowa 1979).

The Iowa Supreme Court has adopted four theories, expressed in section 652A of Restatement Second of Torts (1977), under which one can successfully bring an invasion of privacy action. Winegard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1977). Section 652B entitled "Intrusion upon Seclusion," provides:

> 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.

There are three prerequisites for a successful assertion of a claim based upon an intrusion upon an individual's mental or physical seclusion or solitude. The plaintiff must prove a) an intentional intrusion, b) upon the solitude or seclusion of another or his private affairs and c) that such intrusion would be highly offensive to an ordinary person of average sensitivities. W. Prosser, Torts § 117 at 807-09 (4th ed. 1971). At issue in the case at bar are elements b and c. Element a, the intentional intrusion aspect of the tort, is not controverted.

The essential character of the tort intrusion upon the seclusion of an individual dictates that the tort is complete upon the intrusion, if such intrusion was highly offensive. Publication of the fruits of the intrusion is unnecessary. [1] Dietemann v.

[1] One court has, however, held that although publication is unnecessary, if there is no publication, there must be more of an intrusion than merely a recording made with the aid of a mechanical or electronic listening device. According to that court, there must have been a human eavesdropper or else at least the possibility of subsequent publication of the material. Marks v. Bell Telephone Co. of Pa., 460 73, 85-88, 331 A.2d 424, 430-31 (Pa. 1975).

Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971); Froelich v. Adair, 213 Kan. 357, 358, 516 P.2d 993, 996 (Kan. 1973); Estate of Behtiaume v. Pratt, 106 A.2d 792, 795 (Me. 1976); Hamberger v. Eastman, 106 N.H. 107, 110, 206 A.2d 239, 242 (N.H. 1964); W. Prosser, Torts § 117 at 814 (4th ed. 1971). Regardless of whether films taken of plaintiff's medical symptoms are shown to anyone, a plaintiff states a good cause of action when there has been an offensive intrusion upon the solitude of the person. The fact that such films were subsequently published affects only the plaintiff's measure of damages. Hamberger v. Eastman, 106 N.W. 107, 110, 206 A.2d 239, 242 (N.H. 1964). [2]

In Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976), the Supreme Judicial court held the taking of pictures of a dying patient in his hospital bed, solely for educational purposes and without the patient's consent, was an invasion of his legally protected right to privacy. Id. at 795. Barber v. Time, Inc., 159 S.W.2d. 291, 293 (Mo. 1942), held that liability for intrusion upon the seclusion of an individual attaches when the defendant's intrusion was of the nature and quality such that the defendant should have realized reasonable people of ordinary sensibilities would have been offended. The court went on to say that if there is any right to privacy at all, it should most certainly include the right to obtain medical treatment at home or in a hospital for an individual's personal condition without personal publicity. Id. at 295. In Clayman v. Bernstein, 38 Pa. D & C 543, 547 (Pa. D. & C 1940), the court stated that a physician may not, without consent of the patient or her husband, take photographs of the patient showing facial disfigurement resulting from her illness without a violation of the patient's right

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[2] At this juncture we should note that there is a limited privilege for a physician to publish otherwise private medical information regarding a patient. See Tarasoff v. Regents of the Univ. of Cal., 13 Cal.3d 177, 180, 118 Cal. Rptr. 129, 131, 529 P.2d 553, 555 (Cal. 1954) (disclosure of mental condition of patient to prevent imminent danger to others); Hagaman v. Blackman, 241 So.2d 752 (Fla. App. 1970) (disclosure of a patient's contagious disease). The curiosity or education of the medical profession may not supersede the duty of confidentiality. See Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976); Clayman v. Bernstein, 38 Pa. D & C 543 (Pa. D & C 1940). If this limited privilege applied it would prevent consideration of the subsequent publication in determining damages for intrusion into a plaintiff's seclusion. Consideration of a subsequent publication of information or facts obtained by a highly offensive intrusion into the seclusion of another tends to assimilate this tort with the tort of public disclosure of private facts. However, the plaintiff is entitled to recover for all foreseeable damages arising from the defendant's commission of a tort against the plaintiff. See Meyer v. Nottger, 241 N.W.2d 911, 918 (Iowa 1976); Cowan v. Western Union Tele. Co., 122 Iowa 379, 98 N.W. 281 (Iowa 1904). The amount of damages arising from an intrusion upon the seclusion of a plaintiff is compounded by a subsequent publication of the material appropriated through the intrusion. Thus the trial court may consider the effects of a subsequent publication in determining the amount of damages the plaintiff has suffered from the defendant's offensive intrusion into the seclusion of the plaintiff.

to seclusion. The court reached that result even though the pictures had not been developed. In Doe v. Roe, 93 Misc.2d 201, 400 NN.Y.S.2d 668 (N.Y. 1977), the court held every patient has a right of privacy concerning medical treatment of disease or injury.

The patient's right, however, is protectible only to the extent the intrusion was not a necessary element of diagnosis or of treatment and only when the intrusion would be highly offensive to the average person of normal sensitivities. The testimony in the case at bar indicated that the filming was not done for purposes of diagnosing plaintiff's condition or of treating the plaintiff. Under these circumstances we deem it established that the intrusion upon plaintiff's seclusion was nonconsensual and was not excused by virtue of a medical exception pertaining to diagnosis or to treatment. Whether this intrusion would be highly offensive to an ordinary person of average sensitivities is a fact determination to be made by the court. We, therefore, remand this case to the district court to make this finding of fact as a requisite element in the commission of this tort and to determine what damages, if any, are due plaintiff.

REVERSED AND REMANDED.

Carter, J., dissents joined by Donielson, J.

DONIELSON, J. (dissenting)

I concur with Judge Carter's dissent but place added emphasis on th
University of Iowa Hospital is a teaching hospital. It does not exist merely to diagnose and treat patients in a secluded environment. While it is important that the hospital provide Iowa's citizens with high quality medical care, it is also important that the hospital train new health care professionals and contribute to the expansion of medical knowledge. Plaintiff was suffering from an extremely rare eye disease when admitted to the hospital. His condition could very likely have either gone undiagnosed or been wrongly diagnosed but for the fact that one of the doctors had recently viewed a film of the same rare disease. Since plaintiff received treatment at a teaching hospital I feel the filming of his condition for the purpose of training health professionals would not be "highly offensive to an ordinary person of average sensitivities." Even a lay person under similar circumstances could understand the hospital's responsibility and need to train doctors to properly diagnose rare diseases. Since plaintiff is in training to be a health care professional himself at the University of Iowa (i.e. a Ph. D. candidate in microbiology) he should surely recognize the positive contribution to medical science and education that such a film would make. In light of all the circumstances I cannot agree with the majority when they hold as a matter of law that the filming would be offensive to a person of normal sensitivities.

I would affirm the trial court.

CARTER, J. (dissenting)

I dissent. Because of a tactical litigation decision made by the plaintiff, I can only conclude that he has eliminated from his case the only element upon which he might justifiably base his complaint. This conclusion is based upon the action taken by plaintiff in withdrawing from consideration any claim based upon the unauthorized dissemination of the film. Any ambiguity as to this point was cleared up by a concession of counsel made during oral argument that this was done for reasons of litigation strategy. The result of this tactic is to leave for consideration only the issue of whether the original filming was improper based on the circumstances which then faced the medical personnel in whose care the plaintiff had placed himself.

In evaluating this issue, I cannot accept the standard adopted by the majority of the court which would require that such filming must be a necessary element of treatment in order to be utilized. It is unreasonable to expect that medical personnel at the stage of initial diagnosis will necessarily know whether filming of the patient's symptoms will be necessary for future reference vis-a-vis the treatment of the patient. In the present case, the doctor who made the diagnosis of opsoclonis was no doubt quite certain that he was correct. But the record reveals that this is a relatively rare phenomenon and that the diagnosis would have been hard to confirm based on actual clinical experience of other available medical personnel.

Under these circumstances, I find the action taken in recording plaintiff's symptoms on film for future review was entirely reasonable, even if not believed at the time to be necessary for plaintiff's diagnosis or treatment. The fact that some persons intended to make an unauthorized dissemination of the filmed material does not nullify legitimate reasons existing for the initial filming.

In denying recovery, the trial court analogized the filming process to the medical record keeping process. I find this analogy to be well taken. While physically this film was not kept with the other medical records of the plaintiff, this is not significant. The film was readily available for use as part of plaintiff's medical records if subsequent events had required such use. Given these considerations I cannot agree that the issue of invasion of privacy should depend on whether the medical personnel actually believed the filming would be necessary for plaintiff's diagnosis or treatment or whether in actuality it did prove to be necessary for these purposes. Rather, the test should be whether a reasonable clinician might determine that some useful purpose would be

served by recording these highly unusual symptoms on film.

If the standard just suggested is applied in the present case, I believe the record fully sustains the trial court's order denying recovery. Even assuming the action was taken without the patient's consent, this is not the type of act for which consent should be required. When the act is analyzed it simply involves recording clinical information, an act routinely performed without the patient's knowledge or consent. It just happens that the recordation process employed is in the film medium. But if this film is granted the same confidential status as should be accorded other medical records of the patient, I can see no basis for finding a violation of privacy rights. If such confidentiality is not maintained, this may well give rise to a claim for damages, but this is not the nature of the claim plaintiff is now making. Plaintiff is claiming, and the majority of the court decides, that the original filming was an actionable tort.

It is ironic that although doctors are charged with the responsibility to keep accurate medical records, including prompt and accurate recordation of symptoms, the result reached in this case can only serve to discourage use of one of the most accurate methods available for recording symptoms. For the reasons stated, I cannot agree with the decision of the court. I would affirm the trial court.

Donielson, J., joins in this dissent.