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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-198 / 89-618

608

KATHLEEN J. STROUD,

Appellant/Cross-Appellee,

vs.

BROADLAWNS MEDICAL CENTER, A County Public Hospital, and **DOUG HART, JEANNE MILLER, WILLIAM A. DYAR, MARGARET STOUT, CAROL ROMINE, JOHN AHERN, MILTON BROWN,** As Members of its Board of Trustees, **BETH REINKE,** and **JAN CLEMENT,**

Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Plaintiff was discharged from her employment as a psychiatric nurse for having a personal relationshsip with a patient. She appeals claiming that the district court erred in denying her motion for new trial. The defendant cross appealed alleging error on the part of the district court for not granting their motion for directed verdict on the libel issue. **AFFIRMED IN PART AND REVERSED IN PART.**

Robert B. Scism of Scalise, Scism, Sandre & Uhl, Des Moines, for plaintiff-appellant.

David L. Brown of Hansen, McClintock & Riley, Des Moines, for defendants-appellees.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Plaintiff Kathleen J. Stroud was a registered nurse employed in the psychiatric department of Broadlawns Medical Center. In 1984 Stroud developed a personal relationship with a patient, Mark Westlake, after he had been discharged from the medical center, but while still attending a day treatment program. Stroud's conduct was considered an intolerable offense by her supervisor, which is one that showed significant negligence in the care of a patient and directly endangered the occupants of the medical center. Stroud was discharged on February 8, 1985, for violating a policy of the psychiatric department.

Stroud initiated this suit claiming libel and breach of an employment contract. She alleged she lost $18,875.15 in wages and benefits because of her discharge. The case was first tried in February 1988, but the jury failed to reach a verdict. The case was retried in February 1989. The jury awarded Stroud $1 on her libel claim and found for the defendants on the breach of employment contract claim.

Stroud appeals. She raises several issues on appeal, but withdrew all but one in her reply brief. She now appeals solely on the ground the district court erred in overruling her motion for a new trial. She states that the jury's disparate verdicts on the libel and contract claims reveals the jury was confused. She also states that the award of $1 was inadequate because it was less than her undisputed special damages of $18,875.15. Because we

reverse on other grounds, these issues need not be considered.

Defendants cross-appeal. They state the issues in the cross-appeal are limited to whether rulings on the motions for directed verdict and judgment notwithstanding the verdict were correct. Defendants contend that Stroud did not establish the element of actual malice as part of her libel claim. They also allege that Stroud produced no evidence on the element of publication. Further, defendants believe they are protected by a qualified privilege since their statements were work-related. We agree there has been no showing of actual malice by the plaintiff. Thus the libel claim should not have been submitted to the jury.

I.

Our review is for the correction of errors at law. Iowa R. App. P. 4. Defendants contend the district court erred in overruling its motion for directed verdict. As this court has previously noted:

> Parties to a lawsuit have a right to have a legal theory submitted to the jury so long as it is supported by the pleadings and by substantial evidence. In determining whether a jury question is raised, the evidence must be viewed in the light most favorable to the party having the burden of proof. If reasonable minds can differ on the issue, it is for the jury to decide.

Fratzke v. Meyer, 398 N.W.2d 200, 203-04 (Iowa App. 1986) (citations omitted).

II.

Libel in Iowa is the "malicious publication expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person, or to expose the person to public hatred, contempt or ridicule, or to injure the person in the maintenance of the persons business." Vinson v. Linn-Mar Comm. School Dist., 360 N.W.2d 108, 115 (Iowa 1984), citing, Plendl v. Butler, 253 Iowa 259, 262, 111 N.W.2d 669, 670-71 (1961).

Certain statements are libelous per se which means they are actionable in and of themselves without proof of malice, falsity, or damage. In actions based on languages not libelous per se, all of the elements must be proved before recovery can be had, but when a statement is libelous per se they are presumed from the nature of the language used. Vinson, 360 N.W.2d at 113-14.

The trial court treated the statements as libel and instructed the jury accordingly. The withdrawal of her assigned error under Division I of the trial court's decision in this respect is not challenged. Accordingly, for the purposes of this appeal, we consider the statements under the law of libel.

As it relates to libel, the law recognizes that circumstances may arise when a person, in order to protect his own interest or the interest of others, must make statements about another which are libelous. When this happens, the statement is said to be privileged, which

means that no liability attaches to its publication. Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa App. 1988).

A privilege may be either absolute, in which event there can be no liability under any circumstances, even if actual malice is shown, or it may be considered or qualified, which provides immunity in some, but not all, instances. Id. at 308. We are not here concerned with absolute privilege, but we are with qualified.

The supreme court in Vojak v. Jensen, 161 N.W.2d 100 (Iowa 1968), adopted the following definition of qualified privilege from 33 Am. Jur. Libel and Slander, § 126, p. 124 (1941):

> A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable and although the duty is not a legal one. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The [qualified] privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within narrow limits.
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> In the absence of malice an utterance may be qualifiedly privileged, even though it is not true. But the mere color of lawful occasion and pretense of justifiable end cannot shield from liability a person who publishes and circulates defamatory matter. Hence, a publication loses its character as privileged, and is actionable, on proof of actual malice.

The court correctly determined that a qualified privilege[1] existed as a matter of law. The Iowa Supreme Court has held that a qualified privilege arises from "statements without regard to whether they are defamatory per se when they are made on an appropriate occasion in good faith on a subject in which the communicator and addressee have a shared interest, right or duty." Vinson v. Linn-Mar Comm. School Dist., 360 N.W.2d 108, 116 (Iowa 1984). The Court further recognized in Vinson that the privilege is extended to employers in making statements to their employees within the employer-employee relationship. Id. at 116.

Qualified privilege is an affirmative defense that must be pleaded and proved. Id. The privilege protects only statements made without actual malice. Id. Thus, a publication loses its character as privileged and is actionable on proof of actual malice. Id.

Since the court found that the defendants established a qualified privilege, case law dictates that the plaintiff must now show proof of actual malice to succeed on her claim of libel. Vinson v. Linn-Mar Comm. School Dist., 360 N.W.2d at 116. Actual malice depends upon the motive for

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1. With appellees' withdrawl of the assigned errors under Divisions I, II, and III, we conclude there are no longer any objections to the instructions given by the trial court. We also conclude that the parties are in agreement that the trial court was correct when it determined as a matter of law that a qualified privilege existed here.

making the statement. "Actual malice requires proof that the statement was made with malice in fact, ill-will or wrongful motive." Id. In order to remove the privilege there must be proof of ill-will or wrongful motive. Id. The plaintiff has failed to produce evidence that would suggest that the defendants were motivated by ill-will or malice.

Plaintiff maintains that the alleged libelous statement which the defendants utilized to establish Mrs. Stroud's violation was defamatory and made without belief in its truth. When the language is considered in its entirety, we are unable to find any falsehood. The fact does exist that the individual Mrs. Stroud became involved with was still a patient at Broadlawns Hospital. Because he was an outpatient does not render Mrs. Stroud's behavior acceptable within the meaning of the rules of the hospital.

Mrs. Stroud violated an established rule which required that no personal relationships with patients would be tolerated. There is proof that the relationship endangered the patient's recovery process. Evidence presented at trial indicates that after Mr. Westlake and Mrs. Stroud became involved, he discontinued his treatment at Broadlawns Hospital. The record clearly stated that Mr. Westlake experienced both mental and alcohol disabilities and that treatment was necessary for his improvement.

In a previous decision we held that it is necessary to show "intent to inflict harm through falsehood" to show

actual malice . . . clear and convincing knowledge of falsity or reckless disregard for the truth must be shown." Kelley v. Iowa State Education Assoc., 372 N.W.2d 288, 296 (Iowa App. 1985), citing, Gertz v. Robert Welch Inc., 418 U.S. 323, 332, 94 S. Ct. 2997, 3008, 41 L. Ed. 2d 789, 800 (1974). We also suggested in Kelley that it is necessary, when determining if actual malice exists, to focus on the state of mind of the defendant at the time the statement was made. Id. Here the defendant categorized the violation and then terminated plaintiff's employment in good faith. From the evidence presented by the plaintiff, we are unable to reach any other conclusion.

There is the allied question as to whether the plaintiff has established as part of her burden of proof the element of publication. Although we have some concern as to this issue, we need not address it in view of our holding that it was improper to submit the libel question to the jury.

Viewing the evidence in the light most favorable to the plaintiff, we see no indication that reasonable minds could differ on the libel issue. "Where no substantial evidence exists to support each element of a plaintiff's claim, directed verdict or judgment not withstanding the verdict is proper." Stover v. Lakeland Square Owner's Assoc., 434 N.W.2d 866, 873 (Iowa 1989). We reverse the case on cross-appeal.

II.

The breach of employment contract issue was also submitted to the jury. In reviewing the record, we find the jury verdict was supported by substantial evidence and affirm the verdict finding there was not a breach of an employment contract by the defendant.

III.

In reversing the trial court, we must order that the $1 judgment be set aside and this case dismissed.

AFFIRMED IN PART, REVERSED IN PART.