[Cite as *Outlaw v. Werner*, 2009-Ohio-2362.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92297

SANDRA OUTLAW

PLAINTIFF-APPELLANT

vs.

SANDRA L. WERNER, M.D., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-645359

BEFORE: Jones, J., Cooney, A.J., and Rocco, J.

RELEASED: May 21, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the

clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Sandra Outlaw ("Outlaw"), appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

{¶ 2} On December 21, 2007, Outlaw originally filed this action against defendants-appellees, Sandra Werner, Saba Aftab, Tung Trang, Michael Smith and Metro Health Medical Center (collectively "appellees"). On January 31, 2008, she submitted an amended complaint. Outlaw alleged that she was defamed and suffered severe emotional distress after certain members of MetroHealth Medical Center's medical staff documented that she had demonstrated signs of attempting to obtain drugs. Appellees made notations in Outlaw's medical records during her attempts to obtain medication at the healthcare facility on December 16, 2006.

{¶ 3} On February 5, 2008, appellees submitted their answer denying the substantive allegations in Outlaw's complaint. Additionally, appellees asserted a number of affirmative defenses, including the fact that the comments appearing in Outlaw's medical chart were protected by a qualified or absolute privilege under Ohio law.

{¶ 4} On July 7, 2008, appellees filed their motion for summary judgment, arguing that Outlaw's defamation claim failed as a matter of law. Specifically, appellees asserted that Outlaw's medical records did not contain any false information

and that the information was never published to anyone outside the MetroHealth System. On August 4, 2008, Outlaw submitted her response to appellees' motion for summary judgment. Outlaw argued that defendants' notations in her medical records were factually incorrect. Further, Outlaw argues that the publication element of the tort of defamation was satisfied because the comment was written in her medical chart and subsequently confirmed by a second physician at MetroHealth without any independent test being conducted to confirm the presence of drugs in her system.

{¶ 5} On August 15, 2008, appellees submitted their reply in support of summary judgment. On September 30, 2008, the lower court granted appellees' motion for summary judgment. The court concluded that Outlaw failed to present any evidence establishing a genuine issue of material fact regarding the prima facie elements of her claims:

> This cause comes on for consideration of defendants' motion for summary judgment. Plaintiff fails to establish prima facie claims for defamation and intentional infliction of emotion distress. Further, defendants are entitled to affirmative defense of qualified privilege to the defamation claims. Therefore, the court having construed the evidence most strongly in favor of plaintiff finds that there remains no genuine issue of material fact and that reasonable minds could only conclude that the defendants are entitled to judgment as a matter of law.

{¶ 6} Outlaw submitted her notice of appeal on October 23, 2008.

{¶ 7} The facts are, on December 18, 2006, Outlaw arrived at the MetroHealth Emergency Department complaining of sinus headaches and insisting that Motrin was not relieving her complaints of pain. Outlaw was prescribed Flonase, Zantac, and the

narcotic Percocet. Upon receipt of these prescriptions, Outlaw allegedly threw away the Flonase and Zantac prescriptions, retained the Percocet prescription, and began to exit the hospital stating, "This is the only one I need."[1] The nurse promptly requested that Outlaw stay for the rest of her discharge instructions. However, Outlaw refused and proceeded to leave MetroHealth with only the Percocet prescription.

{¶ 8} Eight days later, on December 26, 2006, Outlaw showed up at the MetroHealth Ear, Nose and Throat Clinic office of Dr. Saba Aftab. Outlaw complained of sharp pain across her forehead and pain on the bridge of her nose. After determining that Outlaw had no obvious signs of sinus pathology, Dr. Aftab recommended that Outlaw utilize Flonase and nasal saline and attempted to give her prescriptions for each of these medications.

{¶ 9} In response to this suggestion, Outlaw became very agitated and stated that her pain was "life threatening." Dr. Aftab told Outlaw that her symptoms might improve with Flonase and she should finish the few Percocet pills she had from her prior visit to the emergency room and then see how she felt in a few days. Outlaw then tore up the prescriptions for Flonase and nasal saline, threw them on the floor, and stormed out of the office without completing the discussion with Dr. Aftab.

{¶ 10} Because Dr. Aftab was already aware of Outlaw's previous trip to the emergency room, he noted in Outlaw's medical chart that he suspected drug seeking

[1]See Affidavit of Sandra Werner, M.D. attached to Appellee's Brief as Exhibit "A" and 12/18/06 Medical Record attached as Exhibit "B" to defendants' motion for summary judgment.

behavior. The conclusion was supported by evidence that there was no obvious source of Outlaw's pain and she refused a full medical work-up.

{¶ 11} Dr. Trang was the attending physician in the ear, nose and throat clinic on the day Outlaw saw Dr. Aftab. Dr. Trang was scheduled to see the patient once the evaluation had been completed by Dr. Aftab. However, Outlaw stormed out of the office before Dr. Trang was able to see her. Dr. Trang later noted in Outlaw's medical chart that he agreed with Dr. Aftab's assessment.

{¶ 12} Within one hour of her visit to the ear, nose and throat clinic office, Outlaw arrived at the MetroHealth Emergency Room complaining of a headache and that the "only relief" for the pain was Percocet. Another attending physician noted in Outlaw's chart that he was also suspicious that she was "drug-seeking," and he did not dispense Percocet.

{¶ 13} Outlaw now asserts that the doctors' notations in her private medical chart amounted to extreme and outrageous conduct and defamation and that she suffered severe emotional distress as a result.

{¶ 14} Appellant assigns three assignments of error on appeal:

{¶ 15} [1.] "Trial court erred as a matter of law in ruling that Plaintiff failed to establish prima facie claim for Defamation and Intentional Infliction of Emotional Distress;

{¶ 16} [2.] "Trial court erred as a matter of law in ruling no genuine issue of material fact existed to be argued;

{¶ 17} [3.] “Trial court erred in allowing qualified privilege as an affirmative defense to the defamation claim.”

{¶ 18} Due to the substantial interrelation of appellant’s three assignments of error, we shall address them together.

Legal Analysis

{¶ 19} Appellate review of the granting of summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that 1) there is no genuine issue of material fact; 2) the party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

Intentional Infliction of Emotional Distress and Defamation

{¶ 20} To establish a claim for intentional infliction of emotional distress (IIED), a plaintiff must show that: 1) the defendant intended to cause the plaintiff serious emotional distress; 2) the defendant's conduct was extreme and outrageous; and 3) the defendant's conduct was the proximate cause of plaintiff's serious emotional distress. *Phung v. Waste Mgt., Inc.,* 71 Ohio St.3d 408, 410, 1994-Ohio-389, 644 N.E.2d 286. Extreme and outrageous conduct is conduct that goes beyond all possible bounds of decency and is so atrocious that it is "utterly intolerable in a civilized community." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375, 6 Ohio B. 421, 453 N.E.2d 666. "Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to sustain a claim for relief. Id.

{¶ 21} To establish defamation, the plaintiffs must demonstrate: "(1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a result of the publication, and (5) that the defendant acted with the required degree of fault in publishing the statement." *Bisbee v. Cuyahoga Cty. Bd. of Elections* (Mar. 1, 2001), Cuyahoga App. No. 77629, quoting *Pollock v. Rashid* (1996), 117 Ohio App.3d 361, 368, 690 N.E.2d 903.

{¶ 22} R.C. 2739.01, governing libel and slander, provides the following:

> "In an action for a libel or slander, it is sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff. If the allegation is denied, the plaintiff must prove the facts, showing that the defamatory matter was published or spoken of him. In such action it is not necessary to set out any obscene word, but it is sufficient to state its import."

{¶ 23} Outlaw cannot prove the elements necessary to establish her claims of defamation or intentional infliction of emotional distress. In order to establish a prima facie case of defamation, "a plaintiff must establish the utterance of a defamatory statement that is published to a third person for which defendant is responsible, the recipient's understanding of the defamatory meaning, and its actionable character." *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 243. Moreover, even if a plaintiff can establish a claim for defamation, *truth is an absolute defense*. R.C. 2739.02; *Ed Schorey & Sons, Inc. v. Society Natl.Bank* (1996), 75 Ohio St.3d 433. (Emphasis added.)

Truthfulness and Lack of Publication

{¶ 24} Here, Outlaw failed to present any evidence that the notations made in her medical records were defamatory. The notation in Outlaw's medical record simply stated that appellant was exhibiting drug-seeking behavior. A review of the record demonstrates that this notation was consistent with Outlaw's conduct and actions surrounding her refusal of medical treatment.

{¶ 25} In *Reimund v. C. Mitchell, M.D.* (April 9, 1996), Franklin App. No. 95APE11-1545, plaintiff brought suit against his doctor and hospital, alleging defamation with regard to his medical records. In affirming the lower court's granting of summary judgment in favor of the defendants, doctor and hospital, the Court of Appeals stated the following:

> "A claim for defamation requires proof that the party being sued 'published' to a third party information *which was false and which harmed the reputation of the person filing the lawsuit.* In certain situations, the communication can be the subject of a qualified privilege."
>
> "Mr. Reimund has not demonstrated that either Dr. Mitchell or Riverside caused Dr. Mitchell's medical impressions to be shared with anyone not employed by Riverside. He has also failed to show that his reputation was in any way damaged with anyone who is or was employed by Riverside, *so he has failed to show that he was damaged* by the *limited* publication for which Riverside and Dr. Mitchell are responsible."

(Emphasis added.)

{¶ 26} In addition to the fact that Outlaw's behavior was consistent with the notations in the record, a "publication" was never made. The medical records in question are confidential pursuant to the Health Insurance Portability and Accountability Act ("HIPPA"). See 45 C.F.R. Section 164.508.

{¶ 27} Contrary to Outlaw's assertions regarding alleged privacy breaches, no one outside of the MetroHealth System is able to access the information in question without a signed release from the patient. Moreover, the medical records in question were accurate and did not contain false information. As previously stated, Outlaw's behavior was consistent with the notations in the records. More specifically, the record demonstrates that Outlaw made repeated trips to different doctors and medical departments, had complaints of pain with no medical explanation, disregarded all prescriptions except Percocet, and acted with persistent erratic behavior.

Severe and Debilitating Emotional Injury and Some Guarantee of Genuineness is Required

{¶ 28} In addition to the fact that the notations were not false and were not published, Outlaw failed to demonstrate any severe and debilitating emotional injury with some guarantee of genuineness in support of her claim.

{¶ 29} "Serious emotional distress requires an emotional injury which is both severe and debilitating." *Motley v. Flowers Versagi Court Reporters* (Dec. 11, 1997), Cuyahoga App. No. 72069, citing *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 6 Ohio B. 114. To prove "severe and debilitating emotional injury," a plaintiff "must present some guarantee of genuineness in support of his or her claim, such as expert evidence, to prevent summary judgment in favor of the defendant." Id., citing *Knief v. Minnich* (1995), 103 Ohio App.3d 103. "In lieu of or in addition to expert testimony, a plaintiff may submit the testimony of lay witnesses acquainted with the plaintiff who

have observed significant changes in the emotional or habitual makeup of the plaintiff." Id., citing *Uebelacker v. Cincorn Systems, Inc.* (1988), 48 Ohio App.3d 268.

{¶ 30} Outlaw alleges that she has been exposed to contempt, ridicule, shame, and disgrace because of the notations in her medical records. Specifically, Outlaw argued in her brief that "Any and all of these responses [contempt, ridicule, shame, and disgrace] were experienced when the doctors refused to treat a condition seen as willfully contracted."[2] However, Outlaw never presented "some guarantee of genuineness" through expert testimony or lay witness testimony as required by law in order to withstand defendants' motion for summary judgment on this claim.

{¶ 31} Accordingly, Outlaw presented no evidence that the notations in the medical records at issue have caused injury to her reputation or caused her to be exposed to public hatred, contempt, ridicule, shame, or disgrace.

Appellees have a Qualified Privilege on Outlaw's Defamation Claim

{¶ 32} "Defamatory statements are conditionally privileged if they pertain to or are motivated by the existence of some special relationship such as the family, lawyer-client, *doctor-patient*, or insurer-insured relationship. It is generally accepted as appropriate and desirable that one will take steps to protect the interests of another with whom he shares such a relationship." (Emphasis added.) *Hahn*, supra, at 247. If qualified privilege is demonstrated, then the plaintiff must show express malice, which is ill will, hatred, revenge, or wanton and reckless disregard for the truth on the

[2]Appellant's Reply Brief, p. 7.

defendant's part. *Hahn,* supra, at 248; *Tohline v. Cent. Trust Co., N.A.* (1988), 48 Ohio App.3d 280, 284.

{¶ 33} Actual malice is proved by showing that "*** the statements were made with knowledge of their falsity, or with reckless disregard of whether they were false or not." *Smith v. Klein* (1986), 23 Ohio App.3d 146, citing *Hahn,* supra.

{¶ 34} In the case at bar, Outlaw failed to present any evidence demonstrating that appellees' actions were done with malice, ill will, hatred, revenge, or wanton and reckless disregard for the truth. In fact, the evidence demonstrates that appellees' actions were conducted with Outlaw's best interests in mind. Appellees' actions were done with the good faith intention of preventing Outlaw from ingesting non-approved and non-recommended pain medication. Not only did appellees act without malice, they acted under the added protection of operating within a qualified privilege of immunity.

{¶ 35} Accordingly, we find that Outlaw failed to establish a prima facie claim for defamation or intentional infliction of emotional distress. Additionally, we find no error on the part of the trial court in allowing appellees a qualified privilege. Furthermore, based on the evidence in the record, we find that the trial court did not err in its granting of appellees' motion for summary judgment.

{¶ 36} Accordingly, Outlaw's first, second, and third assignments of error are overruled.

{¶ 37} The judgment of the trial court is affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., and
KENNETH A. ROCCO, J., CONCUR