ELIZABETH T. GOTWALS, Plaintiff vs. BROOK LANE PSYCHIATRIC CENTER, INC., R. LYNN RUSHING, and TIMOTHY JACK WILCOX, PH.D., Defendants, Franklin County Branch, Civil Action - Law No. 30 of 1996 C.

Gotwals v. Brook Lane Psychiatric Center, Inc. et. al.

Civil Action - Summary Judgment - Defamation

1. Summary judgment may only be granted when there is no genuine issue of any material fact or after the completion of discovery, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

2. In a defamation action, plaintiff has the burden of proving the defamatory character of the communication, its publication by the defendant, its application to the plaintiff, the understanding by the recipient of its defamatory meaning, the understanding by the recipient of it as intended to be applied to the plaintiff, special harm to the plaintiff, and, if the defendant has proven the privileged character of the publication, the abuse of a conditionally privileged occasion.

3. Defamation is a communication which tends to harm a person's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her.

4. Even where there is a plausible innocent interpretation of the communication, if there exists an alternative defamato[illegible]rpretation, the matter must be presented to a jury.

5. A publication in which the speaker imputes to another conduct, characteristics, or a condition that would adversely affect her in her lawful business or trade is "slander per se".

6. The description of a person as "burnt out" is capable of a defamatory meaning.

7. Communications are privileged when made on a proper occasion, from a proper motive, and in a proper manner.

8. Where defendants made statements which were capable of a defamatory meaning about plaintiff who was a potential business competitor of defendants, it cannot be said as a matter of law that a conditional privilege existed.

John N. Keller,, Esquire Attorney for Plaintiffs
Michael M. Badowski,, Esquire Attorney for Defendant

ORDER OF COURT

Walker, P. J., July 22, 1997:

Factual and Procedural Background

Before the court is defendants' motion for summary judgment in plaintiff's defamation suit. Plaintiff Elizabeth T. Gotwals is a licensed clinical social worker who was employed by defendant Brook Lane Psychiatric Center (hereinafter "Brook Lane") from 1979 until

October 27, 1995, when she resigned to accept a position with Manito, Inc. During the last three years of her employment at Brook Lane, plaintiff served as the only clinical social worker for Brook Lane's satellite office located at the Fulton County Medical Center.

On November 7, 1995 four officers from Brook Lane, including defendants R. Lynn Rushing and Timothy Jack Wilcox, Ph.D., met with doctors and staff members of Fulton County Medical Center to discuss how the Medical Center could replace the services which plaintiff had formerly provided. A nonverbatim transcript of the meeting was prepared by an employee of Fulton County Medical Center. Plaintiff alleges that Brook Lane's representatives made several defamatory comments about her during the course of the meeting.

First, when one of Fulton County Medical Center's doctors mentioned that plaintiff had expressed an interest in continuing to work with patients in Fulton County on a part-time basis, Brook Lane's representatives replied that "She is severely burnt out - and she is doing the right thing to take care of herself a little bit." (Medical Staff Meeting Transcript, November 7, 1995, p. 4). They went on to state that plaintiff "needs time to take care of herself, she needs to heal and to regroup a little bit before she can provide." (*Id.*).

In discussing how Brook Lane hoped to revamp the Fulton County office after plaintiff's departure by narrowing the scope of services to be provided, Brook Lane's representatives said, "Elizabeth was doing 10 hours a week but only one hour was reimbursed. She was working very, very hard and there is no question about that. From Brook Lane's standpoint she was generating a very high waiting list - she would only take several cases." (*Id.* at p. 1-2).

Depositions have been taken and the pleadings are now closed. Defendants have moved for summary judgment and offer the following four bases for the motion: (1) that the remarks complained of were not defamatory as a matter of law; (2) that the remarks were merely a repetition of statements made by plaintiff to defendant Brook Lane's agent; (3) that the remarks represent a privileged communication; and (4) that plaintiff has suffered no actual damages.

Discussion

The Pennsylvania Rules of Civil Procedure provide for summary judgment after the close of the pleadings:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.
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> Pa. R.C.P. No. 1035.2.

In a defamation action, the plaintiff has the burden of proving the following:

> (1) The defamatory character of the communication.
>
> (2) Its publication by the defendant.
>
> (3) Its application to the plaintiff.
>
> (4) The understanding by the recipient of its defamatory meaning.
>
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
>
> (6) Special harm resulting to the plaintiff from its publication.
>
> (7) Abuse of a conditionally privileged occasion.
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> 42 Pa.C.S.A. § 8343(a).

When the issue is properly raised the defendant has the burden of proving:

> (1) The truth of the defamatory communication.
>
> (2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern.

42 Pa. C.S.A. § 8343(b).

In applying the summary judgment standard to defendants' claim, the court must examine whether plaintiff has produced enough evidence on all the issues essential to her case such that a jury could return a verdict in her favor. The court will examine the elements of her cause of action and the evidence presented *seriatim*.

Defamation is a communication which tends to harm a person's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her. *Elia v. Erie Ins. Exchange*, 430 Pa.Super. 384, 634 A.2d 657 (1993). A communication is also defamatory if it ascribes conduct, character or a condition to another that would adversely affect his fitness for the proper conduct of his business, trade or profession.

The court must first determine whether the communication complained of is capable of a defamatory meaning. *Rybas v. Wapner*, 311 Pa.Super. 50, 457 A.2d 108 (1983). If there is any doubt about whether the communication is defamatory, the issue must be given to the jury to determine whether the defamatory meaning was understood by the recipient. *Vitteck v. Washington Broadcasting Co., Inc.*, 256 Pa.Super. 427, 389 A.2d 1197 (1978). Even where there is a plausible innocent interpretation of the communication, if there exists an alternative defamatory interpretation, the matter must be presented to a jury. *Zelik v. Daily News Publishing Co.*, 288 Pa.Super 277, 431 A.2d 1046 (1981).

In normal conversational usage the term "burnt out" has a generally benign meaning. It is frequently used to signify that a person has been performing some task for an extended period of time and has become fatigued or frustrated. However, in the instant case the court finds that the comments by Brook Lane's representatives that plaintiff is "severely burnt out" is capable of a defamatory meaning. The deposition testimony of the doctors present at the meeting indicates that at least some of them interpreted the remarks to have a less charitable connotation. Dr. McLucas stated that his understanding of what was meant by the person who said that

plaintiff was "burnt out" was that "if you're burnt out, you're nonfunctional." (McLucas Depo. at 15). Dr. Tray testified that he understood the comments as a reflection on plaintiff's ability to provide services, that she was "sick, mentally ill and can't provide services..." (Tray Depo. at 23). Defendants point out that the witnesses stated that they didn't come to believe that plaintiff was impaired as a result of hearing the comments made by defendants. However, as stated above, the question of whether the defamatory meaning was understood by the recipient is a matter for the jury to determine. At this point, the court is only concerned with whether the remarks were capable of a defamatory meaning, and the court holds that they were.

Next, for defamation to occur, the defamatory statement must be published or communicated to a third person. *Agriss v. Roadway Express, Inc.*, 334 Pa.Super. 295, 483 A.2d 456 (1984). Here, the court finds that the comments were sufficiently published or communicated to doctors and staff of Fulton County Medical Center. It is also clear that the statements by Brook Lane's representatives applied to plaintiff and that the recipients understood that the remarks were intended to apply to her.

The next element the plaintiff must show is special damages as a result of the publication. However, it has been held that if a plaintiff pleads and proves slander per se, she need not prove special damages in order to recover. *Walker v. Grand Central Sanitation, Inc.*, 430 Pa.Super. 236, 634 A.2d 237 (1993). A publication in which the speaker imputes to another conduct, characteristics, or a condition that would adversely affect her in her lawful business or trade is termed a "slander per se." *Id.* at 244-45, 634 A.2d at 241, citing, *Thomas Merton Center v. Rockwell Internat'l Corp.*, 497 Pa. 460, 442 A.2d 213, *cert. denied*, 457 U.S. 1134, 102 S.Ct. 2961, 73 L.Ed.2d 1351 (1982).

In the instant case, the remarks complained of fit within the definition of slander per se. If the plaintiff were in fact exhibiting characteristics of being "burnt out," her ability to perform her duties and maintain her employment as a clinical social worker would be adversely affected. One witness, Carie Crone, who was employed by Fulton County Medical Center as Manager of Quality Assurance, testified that she was very concerned at the characterization of

plaintiff as being "burnt out" because that would mean that she would have had a duty as a risk manager to report it to the licensing authorities. (Crone Depo. at 8). The remarks clearly impute to plaintiff a condition which would adversely affect the performance of the duties of her profession.

Therefore it is sufficient in this case for the plaintiff to plead and prove general damages; that is proof that her reputation was actually affected by the slander, or that she suffered personal humiliation, or both. *Walker*, *supra.*, at 246, 634 A.2d at 242. Here, plaintiff submitted affidavits of herself and her husband, Edward Gotwals, which set forth averments of adverse emotional reactions and humiliation suffered by plaintiff as a result of the remarks made at the November 7, 1995 meeting. The court finds that plaintiff has shown that she suffered damages as a result of the publication by defendants.

The final element of plaintiff's burden of proof is abuse of a conditional privilege. But first defendants bear the burden of proving that such a privilege existed. Communications are privileged when made on a proper occasion, from a proper motive, and in a proper manner. *Beckman v. Dunn*, 276 Pa.Super. 527, 419 A.2d 583 (1980). Pennsylvania courts have held that communications among management personnel concerning an employee's job performance were necessary for the operation of the department and therefore privileged. *Rutherfoord v. Presbyterian-University*, 417 Pa.Super. 316, 612 A.2d 500 (1992). In addition, the court in *Daywalt v. Montgomery Hospital* held that a supervisor's expressing her concerns that an employee may have been altering her time card to the personnel director was privileged. 393 Pa.Super. 118, 573 A.2d 1116 (1990).

However, in these cases, the sharing of information occurred within the company where the plaintiff had been employed. In the case before the court, plaintiff had voluntarily left defendant's employment and had obtained work elsewhere. The statements were made to officials of Fulton County Medical Center who had expressed an interest in hiring plaintiff in some capacity to perform the same duties she had performed while working for defendants. Plaintiff raises the possibility that defendants may have been attempting to degrade her and therefore strengthen their position in the eyes of the Medical Center because they viewed her a potential

competitor. The court is not prepared to say as a matter of law that defendants have met their burden of demonstrating a conditional privilege in that the statements were made on a proper occasion, for a proper motive, and in a proper manner. Therefore, plaintiff is not required at this point in the proceedings to prove abuse of a conditional privilege.

The final issue raised by defendants is that at the meeting with Fulton County Medical Center officials they were merely repeating remarks which plaintiff had previously stated herself. In conversations with her supervisor during her employment with Brook Lane, plaintiff had expressed her frustrations with the perceived lack of support she was receiving from Brook Lane's management. Plaintiff stated that she was "burnt out" and by that she meant that she was "tired from fighting a cause that was not supported." (Gotwals Depo. at 42).

Therefore, defendants assert that they cannot be held liable for defamation because their remarks were the truth. However, plaintiff points out that she was encouraged to have these discussions with her supervisor and believed they were confidential.[1] The meaning that she attributed to the phrase "burnt out" (frustrated by the lack of support; tired) is obviously different from the meaning taken by Fulton County Medical Center's doctors and staff members (nonfunctional; sick; mentally ill). As the court pointed out earlier, the term is capable of both a benign and a defamatory meaning. Therefore, the court finds that defendants have not met their burden of proving the truth of the statements.

Conclusion

For the reasons discussed, the court finds that plaintiff has produced evidence of facts essential to the cause of action which in a jury trial would require the issues to be submitted to a jury. Therefore, defendants' motion for summary judgment is denied.

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[1]While there was undoubtedly a conditional privilege permitting plaintiff's supervisor to relay plaintiff's comments to Brook Lane's management, for the reasons discussed *supra*, the privilege did not extend to permit defendants to pass the information along to Fulton County Medical Center.

ORDER OF COURT

July 22, 1997, the court finds that plaintiff has produced evidence of facts essential to the cause of action which in a jury trial would require the issues to be submitted to a jury. Therefore, defendants' motion for summary judgment is denied.

MEMORIAL RESOLUTION OF FRANKLIN COUNTY BAR ASSOCIATION ON THE PASSING OF BLAKE E. MARTIN, ESQUIRE

WHEREAS, on Thursday, August 21, 1997, Almighty God called from our midst, our colleague, fellow member and friend, Blake E. Martin, Esquire, and this death especially saddens us; and

WHEREAS, we, the members of Franklin County Bar Association, are now specially assembled, to reflect upon our various recollections of Blake and to adopt such Memorial Resolution, upon his passing, as may be appropriate; and while the following is, by no means, an exhaustive list of Blake's many attributes, both personal and professional, nor of his considerable accomplishments, nor of all our many, fondly remembered experiences with Blake, we hope that it will convey, at least a part of why we feel that Blake was such a very special person, as well as so considerably successful, in a way which surpassed a mere pecuniary measure of success, in his practice of the law, to wit:

Blake was born on January 14, 1929, in Chambersburg, Franklin County, Pennsylvania, the son of the late, well known local grocer, of that same name, and his wife, also now deceased, Edna M. Senseny Martin, and attended the Public Schools, there. This was followed by service in the United States Army, during the Korean Conflict, and then, a college education, at Shippensburg State College, and a legal education, at the Dickinson School of Law, from which law school, Blake graduated, in 1957. Later on, Blake became a member of the Pennsylvania Association of Criminal Defense Lawyers, and was State President of that Association, from 1979 to 1982 and received its first "Gideon Award," in 1994. His other memberships included the Pennsylvania Bar Association, the Franklin County Bar Association and a number of Veterans' and other civic associations. In 1993, Blake received the Citizen of the Year award, from the Benevolent and Protective Order of Elks, No. 600. A member of First United Methodist Church, in Chambersburg, Blake had, at one time, taught Sunday School, there.