KUCHINSKY V. SHAPIRO, C.P. Franklin County Branch, No., A.D. 1987 - 250

Summary Judgment - Defamation - Intentional Infliction of Emotional Distress - Privilege

1. A defamation case involving conflicting allegations by the plaintiff and defendant has a genuine issue of a material fact and is not subject to summary judgement.
2. It is a question of law whether a privilege applies in a given case, but a question of fact whether a privilege has been abused.
3. It is a question of law for the Court to decide whether a particular statement is a fact or an opinion.
4. Statements that are mixed expressions of fact and opinion are actionable.
5. The fact that plaintiff is greatly distressed, embarrassed and humiliated by defendant's statements does not rise to the level of extreme and outrageous conduct necessary for a cause of action of intentional infliction of emotional distress.

Spero T. Lappas, Esq., Attorney for Plaintiff
Timothy I. Mar, Esq., Attorney for Defendant/Shapiro
Frank Lavery, Esq., Attorney for Defendant/Overcash

OPINION AND ORDER

Keller, P.J., October 11, 1990:

The plaintiff originally filed a complaint solely against Stephen J. Overcash. On September 6, 1988, the plaintiff filed a complaint against Harvey Shapiro, alleging two theories of liability, Count I - defamation and Count II - intentional infliction of emotional distress. By an order of court dated November 30, 1988, the two suits were consolidated for trial. On November 29, 1988, the defendant Shapiro filed an answer to the plaintiff's complaint along with new matter.

On October 13, 1988, the plaintiff filed a reply to defendant Shapiro's new matter. Subsequent to the filing of the pleadings, extensive and voluminous depositions were amassed. On April 18, 1990, the defendant Shapiro filed a motion for summary judgment on both counts. Thereafter, arguments were heard and briefs submitted. This matter is now ripe for disposition.

In Pennsylvania, motions for summary judgment are governed by Pa. R.C.P. 1035. The applicable sections provide:

> (a) After the pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment on the pleadings and any depositions, answers to interrogatories, admissions on file and supporting affidavits.
>
> (b) The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages.

When ruling on a motion for summary judgment, we must:

> Accept as true all well-pleaded facts in the non-moving party's pleadings and give the non-moving party the benefit of all reasonable inferences to be drawn there-from. In order to uphold a grant of summary judgment, the record must demonstrate both an absence of genuine issues of material fact and an entitlement to judgment as a matter of law. *Curry v. Estate of Thompson,* 332 Pa. Superior Ct. 364, 366, 481 A.2d 658, 659 (1984). See also Pa.R.Civ. P. 1035 (b).

Chicarella v. Passant, 343 Pa. Super. 330, 340, 494 A.2d 1109, (1985).

COUNT I DEFAMATION

Summary judgment will be denied to the defendant Shapiro on Count I - defamation. This Court finds when we accept as true all well-pleaded facts and inferences from the plaintiff's case, clearly a genuine issue of a material fact is present. The genuine issue of material fact and, indeed, the crux of the plaintiff's case, is whether the plaintiff actually made the statements that the defendant Shapiro attributes to her, and vice versa in light of their denials. *See, Chicarella v. Passant, supra;* a defamation case where the Court held that conflicting allegations by the plaintiff and the defendant created a genuine issue of a material fact.

The defendant Shapiro also raises two defenses, which we now address.

PRIVILEGE

It is well settled that "it is a question of law whether a privilege applies in a given case, but a question of fact for the jury whether a privilege has been abused." *Agriss v. Roadway Express, Inc.*, 334 Pa. Super. 295, 483 A.2d 456 (1984), citing *Montgomery v. City of Philadelphia*, 392 Pa. 178, 140 A.2d 100 (1958); *see also, Rankin v. Phillippe*, 206 Pa. Super. 27, 211 A.2d 56 (1965). A conditional privilege exists when

> "(1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is pulished or some other third person is involved; or (3) a recognized interest of the public is involved"

Sugarman v. RCA Corp., 639 F. Supp. 780, 787 (M.D. Pa. 1985); *Beckman v. Dunn*, 276 Pa. Super. 527, 536, 419 A.2d 583, 588 (1980).

We hold that, as a matter of law, a conditional privilege exists in this case. Both the first and second situations apply to the Shapiro/Overcash telephone conversation of November 11, 1986; the defendant Shapiro being the person who published the allegedly defamatory matter and Dr. Overcash being the person to whom the matter was published. The interest of both doctors centered around a particular patient. Dr. Shapiro requested Dr. Overcash to perform a consulation on the patient. The alleged defamatory matter was the relay from Dr. Shapiro to Dr. Overcash of information allegedly supplied by the plaintiff - that she would not allow the patient to receive nursing support if Dr. Overcash performed the consulation.

A conditional privilege is abused when:

> The publication is actuated by malice or negligence, *Baird v. Dun & Bradstreet, Inc.*, [446 Pa. 266, 285 A.2d 166 (1971)], is made for a purpose other than that for which the privilege is given, *Rankin v. Phillippe*, [206 Pa. Super. 27, 211 A.2d 56 (1965)], or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, [*Rankin*, supra.], or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose. See Restatement (Second) Torts §599 (1976).

Beckman v. Dunn, 276 Pa. Super. 527, 537, 419 A.2d 583, 588 (1980). Since it is a question of fact for the jury to determine if the

conditional privilege was abused by the defendant Shapiro, the defense of conditional privilege is not avilable to the defendant at this stage of the litigation.

OPINION

It is a question of law for the Court to decide whether a particular statement is a fact or an opinion. *See, Braig v. Field Communications*, 310 Pa. Super. 569, 456 A.2d 1366 (1983), U.S. Cert. denied 466 U.S. 970, citing *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) and *Doman v. Rosner*, 246 Pa. Super. 616, 371 A.2d 1002 (1977).

Braig adopted §566 of the Restatement (Second) of Torts (1977) which pertains to expressions of opinion. "A defamatory communi-cation may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." This section has been construed as holding that there exists two types of opinion, pure and mixed. Pure opinion is not actionable. *Gordon v. Lancaster Osteopathic Hospital*,340 Pa. Super. 253, 489 A.2d 1364 (1985). A mixed expression of opinion is actionable if "it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Gordon, supra*, at 263.

We conclude that the defendant Shapiro's statements to Dr. Overcash during their November 11, 1986 telephone conversation were not pure expressions of opinion. We believe the statements were mixed expressions of fact and opinion, and thus, the statements are actionable. The defendant Shapiro testified that, as a result of his November 11, 1986 telephone conversation with the plaintiff, he told Dr. Overcash that the patient would not be receiving nursing services if Dr. Overcash performed the consultation. (Shapiro Deposition 7/17/87 N.T. 82, 1. 2. to N.T. 86, 1.3). The plaintiff has repeatedly testified she said no such thing. (Kuchinsky Deposition 1/5/90, N.T. 106, 1. 17-21; N.T. 109, 1. 15-21; N.T. 116, 1.5-14 and 3/9/90 N.T. 2-161, 1. 6-12). We are required to accept what the plaintiff states as true in a motion for summary judgment, *see, Chicarella v. Passant*, 343 Pa. Super. 330, 494 A.2d 1109 (1985) and *Sugarman v. RCA Corp.*, 639 F. Supp. 780 (M.D. Pa. 1985). Consequently, we must for the purpose of this proceeding find that the defendant must have mixed the expressions of fact stated by the plaintiff with his own opinion.

PUNITIVE DAMAGES

Defendant Shapiro also moves for summary judgment on the issue of punitive damages. In Pennsylvania, it is well settled that "the decision of whether to award puntive damages and the amount to be awarded are within the discretion of the fact finder." *Delahanty v. First Pennsylvania Bk., N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983), citing cases. A jury trial has been demanded in this case; thus, this Court is not and will not be sitting as a finder of act and we cannot determine the propriety of any award concerning punitive damages.

COUNT II - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

With regard to the intentional infliction of emotional distress count asserted by the plaintiff, summary judgment will be granted. The Commonwealth of Pennsylvania does recognize the tort of intentional infliction of emotional distress; it has been characterized as the actions of

> "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress"

Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984), citing Section 46 of the Restatement (second) of Torts (1965).

This cause of action was recognized in Pennsylvania in *Chuy v. Philadelphia Eages Football Club,* 595 F.2d 1265 (3d Cir. 1979). In *Chuy,* the court held that proof of four elements is requred for a cause of action to be stated for intentional infliction of emotional distress under §46: "(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe." *Chuy* at 1273. Although this case has been questioned, *See, Kazatsky v. King David Memorial park, Inc.,* 515 Pa. 183, 197, 527 A.2d 988, 995 (1987), (where the court expressed a reservation concerning the viability of §46 by specifying the type of medical evidence necessary to prove the existence of causation and the severity of the emotional distress); it remains a fact that as of this writing Pennsylvania does recognize the tort. *Williams v. Guzzardi,* 875 F.2d 46 (3d Cir. 1989).

LEGAL NOTICES, cont.

SALE NO. 12
Writ No. AD 1990-430
Judg. No. AD 1990-430
First National Bank and Trust Co., Waynesboro, Pennsylvania
—vs—
Harvey D. West, Jr. and Elizabeth A. West
Atty: Timothy W. Misner

ALL THAT CERTAIN following described real estate, lying and being situate in Waynesboro, Franklin County, Pennsylvania, improved by a double dwelling, known as 228-230 Ridge Avenue, bounded and described as follows:

BEGINNING at the southeast corner of Lot No. 7 and running west with same 120 feet 10 inches to a 12 foot alley, thence along said alley 76 feet to the northwest corner of Lot No. 10, thence along said lot east 120 feet 10 inches to Ridge Avenue; thence north along said Ridge Avenue 76 feet to the place of beginning. The same being known as Lots Nos. 8 and 9 of a plot of lots laid out by J. I. Beck and John G. Corbett, and being part of a larger tract purchased by them from A. H. Strickler and Clara A. Strickler, his wife, by deed dated May 31, 1900, and recorded in Franklin County Deed Book 118, Page 172.

BEING the same real estate conveyed to Harvey D. West, Jr. and Elizabeth West, husband and wife, by deed of Harvey D. West, Jr. and Elizabeth A. West, husband and wife, and Ariel Gonzalez and Miriam Gonzalez, husband and wife, dated May 30, 1986 and recorded in Franklin County Deed Book 957 Page 557.

SUBJECT to all conditions, restrictions, easements and other matters legally affecting the same.

SAID real estate is improved with a two and one-half story double brick dwelling and has a street address of 228-230 Ridge Avenue, Waynesboro, Pennsylvania 17268.

BEING sold as the property of Harvey D. West, Jr. and Elizabeth A. West, Writ No. AD 1990-430.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN June 24, 1991 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on June 28, 1991 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

5/24, 5/31, 6/7/91

The first requirement the plaintiff must prove is that the conduct of the defendant Shapiro was extreme and outrageous.

> "Liability has been found only where the conduct has been so outrageous in character and 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 . . ."

Wells v. Thomas, 569 F. Supp. 426, 433 (E.D. Pa. 1983), quoting Comment (d) to §46 of the Restatement Second) of Torts (1965). The case law demonstrates how difficult a burden the plaintiff must meet. *See,* e.g. *Sugarman v. RCA Corp.,* 639 F. Supp. 780 (M.D. Pa. 1985), where the court entered summary judgment in favor of the defendant who "falsely charged (the plaintiff) with theft and was humiliated and embarrassed in front of his fellow employees." *Sugarman,* at 788. The District Court held the plaintiff may have been embarrassed, but no reasonable person could consider the statement outrageous.

In *Wells v. Thomas,* 569 F. Supp. 426 (E.D. Pa. 1983), the court granted summary judgment in favor of the defendants where the

> defendants, without cause, stripped [the plaintiff] of her position as Personnel Director at HUP and placed her in a newly created position without responsibilities. They took away plaintiff's private office and had her working in a "corral space." Her secretary was reassigned to someone who had previously reported to Wells and a line was removed from plaintiff's phone without prior consultation. Wells was the only managerial level employee who, if she was away from her desk, would have her phone calls go unanswered. Additionally, Thomas gave plaintiff poor performance evaluations on two occasions, the first time she was rated below excellent in 25 years. Failure to give Wells an annual salary increase in 1977 and her final termination have also been pleaded in support of this claim.

The court acknowledged that the conduct was intentional and highly inappropriate and that the plaintiff suffered "humiliation, depression, and mental distress." However, the distress was not "so severe that no reasonable [person] could be expected to endure it." *Wells,* at 433.

In *Lazor v. Milne,* 346 Pa. Super. 177, 499 A.2d 369 (1985), no cause of action was made out for intentional infliction of emotional distress where a letter was sent to a private club employee which

accused the plaintiff of various atrocities. In *Gordon v. Lancaster Osteopathic Hospital,* 340 Pa. Super. 253, 489 A.2d 1364 (1985), a group of doctors wrote a series of letters to hospital personnel. The letters have a vote of no confidence to a fellow physician who was attempting to accede to department chairperson. The letters were held not actionable as a matter of law.

In the case at bar, we must accept as true the plaintiff's version of the facts. *Sugarman, supra.* The gravamen of Court II of the plaintiff's complaint against the defendant Shapiro appears in paragraphs five through seven.

5. On or about November 11, 1986, the defendant placed a telephone call or otherwise spoke to Stephen J. Overcash, a licensed psychologist who had consulting privileges at the Chambersburg Hospital.

6. At some time prior to this conversation. Dr. Shapiro had requested that Dr. Overcash provide some consulting services to one of Dr. Shapiro's hospitalized patients.

7. During the conversation of November 11, 1986, Dr. Shapiro reported an alleged conversation which he claimed to have had with Hazel Kuchinsky. Shapiro told Overcash that Hazel Kuchinsky had demanded or otherwise requested that Shapiro cancel or withdraw the Overcash consultation order. Shaprio further told Overcash that Hazel Kuchinsky had told Shapiro that unless Shapiro cancelled the Overcash consultation Hazel Kuchinsky was going to withdraw nursing support or services from this particular patient or from Dr. Overcash's patients in general.

After a thorough and exhausting review of the pleadings, depositions and briefs, we conclude that summary judgment should be granted to the defendant Shapiro on this count.

In her depositions, the plaintiff admits that she called the defendant Shapiro to ask him to clarify what type of consultation he wanted Dr. Overcash to perform on a certain patient. The defendant Shapiro responded, "Well, I guess you don't want Dr. Overcash to consult with this patient and that's why you're calling me." (Kuchinsky Deposition 1/5/90 N.T. 105, 1. 20-22). The plaintiff testified that she did not threaten to withdraw nursing

support if Dr. Overcash performed the consultation. (Kuchinsky Deposition 1/5/90 N.T. 106, 1. 17-21; N.T. 109, 1. 15-21; N.T. 116, 1. 5-14 and 3/9/90 N.T. 2-161, 1. 6-12). However, the plaintiff did tell Dr. Shapiro that if Dr. Overcash did perform the consultation, the nurses would not give individual psychotherapy to that patient, individual therapy being one aspect of nursing care services. (1/5/90 N.T. 118, 1. 25 to N.T. 119, 1. 13 and N.T. 120, 1.5-10).

It is a determination for the Court to make whether the conduct of the defendant is sufficiently extreme and outrageous as to allow recovery. *See, Gaiardo v. Ethyl Corp.,* 697 F. Supp. 1377 (M.D. Pa. 1986) affirmed 835 F.2d 479 (3d Cir. 1987), and *Lazor v. Milne,* 346 Pa. Super. 177, 499 A. 2d 369 (1985). In our judgment we need go no further than the first requirement of the test; the alleged extreme and outrageous conduct of the defendant.

The plaintiff has failed to produce evidence sufficient to establish that the defendant Shaprio's conduct was extreme and outrageous. Even accepting the plaintiff's version of her conversation with Dr. Shapiro, and that Dr. Shapiro told Dr. Overcash everything Dr. Overcash wrote about it in his November 12, 1986 letter, and that the statements in the letter attributed to the defendant about the plaintiff are false; Dr. Shapiro's conduct is not extreme and outrageous. We do not doubt that the plaintiff experienced great distress, embarrassment and humiliation. However, as a matter of law, Dr. Shapiro's conduct was not "so outrageous in character and so extreme in degree, [that it exceeded] all possible bounds of decency." It cannot be "regarded as atrocious, and utterly intolerable in a civilized community." *Wells v. Thomas,* 569 F. Supp. 426, 433 (E.D. Pa. 1983). We find this is particularly true when considered in the light of the aforementioned cases, where defendants whose conduct under the circumstances was more horrendous than that hereunder consideration were granted summary judgment.

We are not persuaded defendant Shapiro's conduct rose to the level of outrageousness required by the law; thus we conclude the plaintiff has failed to make out a cause of action for intentional infliction of emotional distress.

ORDER OF COURT

NOW, this 11th day of October, 1990, the motions of Harvey Shapiro, M.D. for summary judgment as to:

Count I is denied;
Count II is granted.

Exceptions are granted the plaintiff and defendant, Harvey Shapiro, M.D.