1. Hendry v. Conner, 303 Minn. 317

   Client/Matter: -None-

   Narrowed by:

Content Type	Narrowed by
Cases	-None-

2. Richie v. Paramount Pictures Corp., 544 N.W.2d 21

   Client/Matter: -None-

3. Stubbs v. North Memorial Medical Center, 448 N.W.2d 78

   Client/Matter: -None-

4. Hentges v. Thomford, 569 N.W.2d 424

   Client/Matter: -None-

5. Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306

   Client/Matter: -None-

6. Copeland v. Hubbard Broadcasting, 526 N.W.2d 402

   Client/Matter: -None-

7. P.L. v. Aubert, 545 N.W.2d 666

   Client/Matter: -None-

Hendry v. Conner

Supreme Court of Minnesota

March 14, 1975

No. 44777

Reporter
303 Minn. 317; 226 N.W.2d 921; 1975 Minn. LEXIS 1535

Judy Hendry v. William Conner

Prior History: [***1] Action in the Ramsey County District Court wherein plaintiff sought damages for invasion of privacy. The court, Ronald E. Hachey, Judge, ordered the cause of action dismissed with prejudice, and plaintiff appealed from the judgment entered. Considered and decided by the court without oral argument.

Disposition: Affirmed.

Core Terms

invasion of privacy, cause of action, privacy, waiting, public disclosure, private facts

Case Summary

Procedural Posture

Plaintiff debtor challenged a judgment of the Ramsey County District Court (Minnesota), which dismissed her action on the ground that she had failed to state a cause of action for relief. The debtor had sought damages from defendant, the creditor's employee, for invasion of privacy.

Overview

The debtor took her child to the hospital, the creditor, for treatment. While waiting in the hospital to have her child admitted, she was told by the employee that the child could not be admitted unless an outstanding bill was paid. Further reference, which was alleged to have been made in a loud voice in the presence of a number of people waiting in the room, was made to the fact that the debt had been included by the debtor in a petition for bankruptcy. The debtor had, in fact, owed the hospital, and the debt had been discharged in bankruptcy. The court found that the debtor's claim fell into the category of public disclosure of private facts, sometimes referred to as a disclosure of indebtedness. The court found that Minnesota did not recognize a cause of action for invasion of privacy. Even if such cause was recognized, the court held that the conduct of the employee in the single incident occurring in the hospital waiting room did not constitute a violation of the debtor's privacy. The court affirmed and concluded that the record of bankruptcy was a public fact and that the debtor could not establish that there was publicity except for a very small number of persons.

Outcome

The court affirmed the judgment dismissing the debtor's cause of action.

LexisNexis® Headnotes

Torts > Intentional Torts > Defamation

Torts > Intentional Torts > Invasion of Privacy > General Overview

Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > General Overview

HN1 There are four separate kinds of invasion of privacy. The kinds are (1) appropriation for a defendant's benefit or advantages of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's physical solitude or seclusion; (3) publicity that places the plaintiff in a false light in the public eye; and (4) public disclosure of private facts.

Contracts Law > Standards of Performance > Creditors & Debtors

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion > Elements

Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > General Overview

HN2 Some oppressive or coercive conduct by a creditor is generally essential to the tort of invasion of privacy. While all but a few states recognize the tort, they are not in agreement as to what constitutes actionable conduct. The extent of publicity or degree of harassment determines whether the right is invaded, rather than the character of the oral or written communication. To be actionable, the collector's conduct must generally constitute a continuous harassment of the debtor.

Torts > Intentional Torts > Defamation

Torts > Intentional Torts > Invasion of Privacy > General Overview

HN3 Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy, even though many other states have done so.

Headnotes/Syllabus

Headnotes

Invasion of privacy -- dismissal of action -- propriety.

Counsel: *Connolly & Heffernan* and *Donald J. Heffernan*, for appellant.

Jardine, Logan & O'Brien and *Gerald M. Linnihan*, for respondent.

Judges: Considered and decided by the court without oral argument.

Opinion by: PER CURIAM

Opinion

[*317] **[**922]** Plaintiff brought this action alleging an invasion of privacy by defendant. As disclosed in her complaint and the answers to interrogatories, plaintiff alleges she took her minor child to St. Paul Ramsey Hospital for treatment. While waiting in the hospital **[*318]** to have her child admitted, she was told by defendant, an employee of the credit department of the hospital, that the child could not be admitted unless an outstanding bill for prior treatment was paid. Reference was further made to the fact that the debt had been included by **[***2]** plaintiff in a petition for bankruptcy which she had filed. The statement was alleged to have been made in a loud voice in the presence of a number of people waiting in the room. Plaintiff had, in fact, owed the hospital $ 1,500, and the debt had been discharged in bankruptcy.

The trial court dismissed plaintiff's action on the ground that she had failed to state a cause of action for relief, and this appeal is from the judgment for defendant. We affirm.

Prosser, Torts (4 ed.) pp. 802 to 818, states in an analysis of the subject that ***HN1*** there are four separate kinds of invasion of privacy. The kinds included by Prosser are (1) appropriation for the defendant's benefit or advantages of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's physical solitude or seclusion; (3) publicity which places the plaintiff in a false light in the public eye; and (4) public disclosure of private facts.

Plaintiff's claim falls into the category of public disclosure of private facts, sometimes referred to as a disclosure of indebtedness. See, Annotation, *33 A.L.R. 3d 154*. The essentials of this offense are summarized as follows in the annotation (33 A.L.R. 3d 157):

HN2 "Some oppressive **[***3]** or coercive conduct by the creditor is generally essential to the tort of invasion of privacy. While all but a few states recognize the tort, they are not in agreement as to what constitutes actionable conduct. In earlier cases, for example, recovery was denied for an oral telephone communication either on the ground that it gave no undue publicity or that it did not constitute an unwarranted invasion of the debtor's peace of mind. It now seems clear, however, that the extent of publicity or degree of harassment determines whether **[**923]** the right is invaded, rather than the character of the oral or written communication. To be actionable, the collector's conduct must generally constitute a continuous harassment of the debtor."

[*319] ***HN3*** Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy, even though many other states have done so. Prosser, Torts (4 ed.) pp. 802 to 812; Annotation, *33 A.L.R. 3d 154*. It is not necessary for the disposition of this case to decide whether a cause of action for invasion of privacy should be recognized in Minnesota. It is sufficient to hold that, even if we were to do so, the conduct [***4] of defendant in the single incident occurring in the hospital waiting room does not constitute a violation of plaintiff's privacy.

First of all, the record of bankruptcy is a public fact. Further, as evidenced by answers to interrogatories, plaintiff cannot establish that there was publicity except for a very small number of persons. There is no allegation that there were other occasions when the defendant made the same or similar statements.

While we do not condone the acts complained of, in our judgment they did not constitute undue or oppressive publicity and do not constitute an actionable violation of plaintiff's right of privacy. [1] The order dismissing plaintiff's cause of action was properly entered, and the judgment is affirmed.

[***5] Affirmed.

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[1] In Reed v. Ponton, 15 Mich. App. 423, 166 N.W. 2d 629 (1968), the plaintiff alleged that the store manager's statement made in the presence of clerks and customers that she had failed to pay for her layaway purchase was an invasion of plaintiff's right of privacy. In affirming a dismissal of the plaintiff's action, the court stated (15 Mich. App. 426, 166 N.W. 2d 630): "When there has been no misappropriated use of, or physical intrusion into, the private life, employment, property, name, likeness, or other personal place or interest, so that the privacy action is premised solely upon a disclosure of secret or confidential matter or upon being put *publicly* in a 'false light', then if (without deciding) mere words of mouth can ever be actionable (except by a slander action) the oral communication must be broadcast to the public in general or publicized to a large number of people. Moreover, such publicity must lift the curtain of privacy on a subject matter that a reasonable man of ordinary sensibilities would find offensive and objectionable: supersensitiveness is not protected; Prosser, Torts (3d ed), § 112, 77 CJS 396 et seq.; 19 ALR 3d 1318 et seq."

Richie v. Paramount Pictures Corp.

Supreme Court of Minnesota

February 23, 1996, Filed

CX-94-2249, C5-94-2501

Reporter
544 N.W.2d 21; 1996 Minn. LEXIS 104; 24 Media L. Rep. 1897

James Richie, et al., Respondents, vs. Paramount Pictures Corporation, et al., petitioners, Appellants (CX-94-2249), Defendants (C5-94-2501), Hubbard Broadcasting, Inc., d/b/a KSTP, et al., Defendants (CX-94-2249), Kathy Tatone, petitioner, Appellant (C5-94-2501)

Prior History: [**1] Review of Court of Appeals.

Disposition: Reversed; trial court judgment reinstated.

Core Terms

reputation, damages, defamation, defamation action, broadcast, presumed, prerequisite, defamation claim, actual harm, media, court of appeals, trial court, actual malice, humiliation, matter of public concern, summary judgment motion, summary judgment, emotional harm, compensable, photograph, producer, cases, allegations, survive, sexual, granting summary judgment, injury to reputation, emotional damage, mental anguish, actual injury

Case Summary

Procedural Posture

Appellants filed a defamation and false light invasion of privacy action against respondents, television show, producer, and attorney. The Minnesota Court of Appeals reversed the trial court's grant of summary judgment in favor of the show, producer, and attorney and remanded the case for trial. The show, producer, and attorney appealed.

Overview

Appellants were erroneously identified in a picture on a television show as child molesters. The court of appeals reversed the grant of summary judgment in favor of the show, producer, and attorney, holding that no privilege applied to the attorney, that harm to reputation could be presumed for purposes of summary judgment, and that Minnesota law was applicable to the case. The court reversed the court of appeals. The court held that where the defamatory statements were made by the media, involved a matter of public concern, and there were no allegations of actual malice, recovery could not be based on presumed damages. In addition, appellants did not demonstrate that there was a material question of fact as to whether either of them suffered sufficient harm to their respective reputations to support a defamation claim. The most they showed was that a few people, who knew the photo was a mistake, contacted appellants about the show. The court held that in a defamation suit, emotional damages were not compensable absent harm to reputation and that whether New York or Minnesota law applied, a reputational harm prerequisite was in place.

Outcome

The court reversed the court of appeals' judgment, which reversed the trial court's grant of summary judgment in favor of the show, producer, and attorney.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 On appeal from summary judgment, the reviewing court asks whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. Further, the trial court's findings of facts, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous.

Communications Law > Overview & Legal Concepts > Related Legal Issues > Defamation

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Elements > General Overview

HN2 In Minnesota , the elements of defamation require the plaintiff to prove that a statement was false, that it was communicated to someone besides the plaintiff, and that it tended to harm the plaintiff's reputation and to lower him in the estimation of the community.

Constitutional Law > ... > Freedom of Speech > Defamation > General Overview

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > Procedural Matters

HN3 Harm to reputation can, of course, be proven by direct evidence. Moreover, in cases of defamation per se, the common law allowed harm to reputation to be presumed. However, the United States Supreme Court holds that in a private plaintiff defamation action against a media defendant speaking on a matter of public concern, states may not constitutionally permit recovery of presumed damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN4 In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Torts > Remedies > Damages

Torts > ... > Defenses > Privileges > Absolute Privileges

Torts > Intentional Torts > Defamation > Procedural Matters

HN5 Absent allegations of actual malice, in order to survive a summary judgment motion in a defamation action concerning statements made by the media and involving a matter of public concern, there must be a genuine issue of material fact as to whether the victims suffered actual harm. Damages cannot be presumed.

Torts > Intentional Torts > Defamation

Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > Remedies

HN6 In a defamation suit, emotional damages are not compensable absent harm to reputation.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN7 In determining whether the forum state's or a foreign state's law applies, a threshold consideration is whether the choice of one state's law over another's creates an actual conflict.

Syllabus

1. Absent allegations of actual malice, in order to survive a summary judgment motion in a defamation action concerning statements made by the media and involving a matter of public concern, there must be a genuine issue of material fact as to whether plaintiffs suffered actual harm; damages cannot be presumed.
2. In a defamation suit, emotional damages are not compensable absent damage to reputation.

Counsel: Kevin P. Hickey, Lewis A. Remele, Jr., John P. Borger, Eric E. Jorstad, Minneapolis, MN, for appellant.

Tyrone P. Bujold, Robert J. Gilbertson, Minneapolis, MN, for respondent.

Judges: TOMLJANOVICH, Justice

Opinion by: Esther M. Tomljanovich

Opinion

[*23] Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

James Richie and Karen Gerten commenced this action in May of 1993 alleging defamation and false light invasion of privacy. These charges were based upon a photograph shown during the November 5, 1992 telecast of The Maury Povich Show (the Show), a nationally syndicated television program. Appellant, Paramount Pictures Corp. (Paramount), produced the Show and employed **[**2]** the personnel who obtained the photograph and incorporated it into the Show. Appellant, Kathy Tatone, provided the photograph to the Show. Appellant, MoPo Productions Inc. (MoPo), provided the services of host Maury Povich to the Show, but Povich himself was not aware that a photograph was being used in connection with the segment of the Show in question. [1]

On July 12, 1994, Hennepin County District Court granted summary judgment in favor of Paramount and MoPo on both the defamation and privacy claims. On November 17, 1994, the court granted summary judgment in favor of Tatone on both claims. However, on May 30, 1995, the court of appeals reversed the trial court and remanded the case for trial. *Richie v. Paramount Pictures Corp., 532 N.W.2d 235 (Minn. App. 1995)*. This court granted review on July **[**3]** 20, 1995.

In September of 1992, attorney Kathy Tatone represented Denise Richie in a successful civil case against her parents arising out of sexual abuse by Denise's father, Dennis Richie. Denise also obtained a favorable verdict against her mother, Lynnell (also spelled "Lanell") Richie, for negligently failing to take any action to prevent the abuse.

Following the verdict, a producer for the Maury Povich Show contacted Tatone regarding an appearance on that program by Tatone and Denise Richie. Tatone negotiated and entered into a legal agreement with the Show regarding the terms of the appearance. Shortly before the program was scheduled to be taped, the Show requested **[*24]** photographs of Denise Richie and her parents. Tatone contacted Denise Richie to obtain approval to use photographs for the Show and to discuss with Denise what photographs should be used. Denise Richie had provided Tatone with a family photo album in connection with the trial. Denise suggested that Tatone look through the album and find a picture of her in a graduation gown with her parents. Tatone found a single picture in which Denise Richie was standing in a gown between an adult male and female. Tatone provided **[**4]** this and one other photograph to the Show's producers.

The program was broadcast on November 5, 1992. The Show's producers displayed the photo of Denise Richie in her graduation gown standing between two adults. The two adults standing next to Denise Richie, however, were not Denise's parents, but her godparents, [2] Karen Gerten and James Richie. The photo was displayed at various times during the broadcast including times coinciding with Denise Richie's description of the sexual abuse perpetrated against her by her father. Gerten and Richie, however, were never identified by name; the names of Denise's parents were used throughout the Show. Also, with Gerten and Richie's permission, a retraction was aired by the Show a few weeks after the broadcast. Neither Karen Gerten nor James Richie saw their pictures used during the original telecast. Each learned later, however, of the

[1] Hubbard Broadcasting, which broadcast the Show within Minnesota, was also originally named as a defendant. However, claims against Hubbard were dismissed with prejudice by stipulation dated August 25, 1993.

[2] Respondents have also been referred to as Denis Richie's maternal aunt and paternal uncle.

Show from family or friends and eventually each watched a videotape of the interview.

[5]** After viewing the tape, Richie stated that he was "shocked," "humiliated," "blown away," and felt "just crushed" and "very sick" about the broadcast. Richie also testified that:

I don't take this lightly. I put up with sexual abuse when I was a child in my home.

> My father sexually abused my sister * * *. The whole thing was so distasteful for me, you know, and -- I don't want to go back and live my childhood over again for anything. When I left the house and I started doing my own life and being a different person, then, you know, that was a great thing to me. And now how many years later, all of a sudden now Denny commits these crimes and through someone's careless mistake or some bunch of people's careless mistake, you know, all of a sudden now I'm thrust back into a situation, you know. That has caused me a great deal of emotional pain since I was a child * * * it * * * affect[s] me a lot and I * * * think about it every day.
>
> Gerten also testified concerning how the broadcast affected her:
>
> [I was] embarrassed by having that shown, that I was the mother of someone who was sexually molested by her dad and that I thought it was okay. When I thought about it, I **[**6]** would get sick to my stomach and -- emotionally, it was very upsetting * * * .
>
> When people would look at you, you would wonder if they saw the show, you know, are they staring at me because they saw the show * * *. It was always on my mind. It was upsetting and embarrassing. You're already ashamed that it's even been involved in your family and then you're portrayed as the one who condoned it. I guess I have to say that emotionally I was really, I guess you would say, a basket case.

Finally, both Gerten and Richie testified that they will never know whether people saw the broadcast or think ill of them because of it. The trial court found that neither Karen Gerten nor James Richie have lost any income or incurred any other special damages as a result of the broadcast.

On July 12, 1994, the trial court granted summary judgment for appellants MoPo and Paramount. The court found that Gerten and Richie did not show sufficient harm to reputation to sustain a defamation claim, and that harm to reputation could not be presumed. Additionally, the court found that the emotional harm shown by them could not support a defamation claim. Finally, MoPo and Paramount had argued that New York **[**7]** law should apply to their case essentially because the broadcast originated in New York. The trial court, however, declined to hold on the choice of law issue because it **[*25]** found that under either state's law, it would grant summary judgment.

On November 17, 1994, the trial court granted summary judgment for Kathy Tatone. It found that Tatone's communication was privileged by either the qualified immunity protecting an attorney from liability to third parties for actions arising out of the attorney-client relationship, or by a qualified privilege for statements made on a proper occasion for a proper motive. It further found that Tatone was not liable for defamation because "allowing recovery for emotional distress damages in a defamation action without injury to reputation would, in effect, convert defamation into false light invasion of privacy," and Minnesota has rejected the latter cause of action.

In a split decision, the court of appeals reversed. The majority found that no privilege applied to Tatone. *Richie, 532 N.W.2d at 243 (Minn. App. 1995)*. The court also found that harm to reputation could be presumed for purposes of summary judgment. *Id. at 240*. Finally, the court **[**8]** held that Minnesota law was applicable to the case. *Id. at 242*.

Tatone appeals the court's findings regarding privileges for defamation and presumed harm in a defamation action. MoPo and Paramount appeal the court's findings regarding presumed harm and choice of law.

HN1 On appeal from summary judgment, the reviewing court asks whether there are any

genuine issues of material fact and whether the trial court erred in its application of the law. *Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990)*. Further, the trial court's "findings of facts, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous * * *." *Minn. R. Civ. P. 52.01*.

HN2 In Minnesota, the elements of defamation "require the plaintiff to prove that a statement was false, that it was communicated to someone besides the plaintiff, and that it tended to harm the plaintiff's reputation and to lower him in the estimation of the community." *Rouse v. Dunkley & Bennett, P.A., 520 N.W.2d 406, 410 (Minn. 1994)*. It is the final element of this cause of action that is in dispute in this case.

HN3 Harm to reputation can, of course, be proven by direct evidence. Moreover, in cases of defamation per **[**9]** se, [3] the common law allowed harm to reputation to be presumed. *See Becker v. Alloy Hardfacing & Engineering Co., 401 N.W.2d 655, 661 (Minn. 1987)*. However, in *Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)*, the U.S. Supreme Court held that in a private plaintiff [4] defamation action against a media defendant speaking on a matter of public concern, states may not constitutionally "permit recovery of presumed * * * damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id. at 349*; see *also Jacobson v. Rochester Communications, 410 N.W.2d 830, 836 n.7 (Minn. 1987)*; *Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 492 (Minn. 1985)*. The Court reached this conclusion through balancing the "need for a vigorous and uninhibited press" reflected in the First Amendment with a strong and "legitimate state interest in compensating private individuals for wrongful injury to reputation * * * ." *Gertz at 342* and 348. The Court went on to state that "it is necessary to restrict defamation plaintiffs who do not prove knowledge of **[*26]** falsity or reckless disregard for the **[**10]** truth to compensation for actual injury." *Gertz at 349*.

In the **[**11]** current case, the defamation occurred during a discussion of sexual abuse of children by their parents and legal recourse available to the abused child. Such matters are certainly of public concern and were publicized by Paramount, MoPo and Tatone [5] via the television media. Additionally, there are no allegations of actual malice. Nonetheless, the court of appeals found that recovery could be based on presumed damages. *Richie at 239-40*. We find this holding to be in contravention of the Supreme Court's holding in *Gertz.* In a case such as this, where the defamatory statements were made by the media, involved a matter of public concern, and there have been no allegations of actual malice, recovery cannot be based on presumed damages. Therefore, to successfully litigate their defamation claim, plaintiffs must demonstrate actual damages.

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[3] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 112, at 795 (5th ed. 1984) defines defamation per se to be

> actionable without the necessity of pleading and proving that the plaintiff had suffered any impairment of his reputation or other harm as a result. In other words, the existence of damage [is] conclusively presumed or assumed from the publication of the libel itself, without any evidence to show actual harm of any kind.

"Among those types of actions which are defamatory per se are false accusations of committing a crime * * * ." *Becker*, 401 N.W.2d at 661. Also, "[a] statement is defamatory per se if it imputes serious sexual misconduct to the subject of the statement." *Baufield v. Safelite Glass Corp.*, 831 F. Supp. 713, 717 (D. Minn. 1993); *see also* Restatement (Second) of Torts § 559-570 (1977).

[4] That is, a plaintiff that is neither a public figure nor a public official.

[5] Because Tatone's communication utilized the television media, we place her in the same legal position with respect to Gerten and Richie's claims as we place Paramount and MoPo. *See*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts,* § 112 at 796 (stating that presumed damages cannot be recovered in defamation actions "at least against the press or broadcast media *and those who utilize these means*" unless actual malice is shown) (emphasis added).

This requirement does not change because plaintiffs might be attempting only to survive a summary judgment motion. The court of appeals stated that "at least 'some' actual injury to [respondents] reputations can be assumed from the seriousness of [the] false statement seen on national TV, *at least enough to survive a motion for summary* **[**12]** *judgment. Richie at 240* (emphasis added).

We disagree. In *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, the U.S. Supreme Court stated that ***HN4*** "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." As discussed above, the "substantive evidentiary burden" in this case requires that Gerten and Richie show actual harm. Thus, we hold that, ***HN5*** absent allegations of actual malice, in order to survive a summary **[**13]** judgment motion in a defamation action concerning statements made by the media and involving a matter of public concern, there must be a genuine issue of material fact as to whether Gerten and Richie suffered actual harm; damages cannot be presumed.

Neither Gerten nor Richie argue to this court that they should survive summary judgment based on presumed harm to reputation. Rather, they claim that they have suffered demonstrable harm to their reputations. Gerten and Richie cite "several inquiries [Richie received] from family and friends regarding his involvement with the abuse and criminal trial described in Maury Povich's interview." Richie also testified that an employee at a Hardee's restaurant in Eden Prairie who was usually "pretty nice," gave him the "cold shoulder" and, approximately a year after the broadcast, the restaurant served him three cheeseburgers that were all raw. Finally, both respondents argue that they "have come to understand they will never know whether people saw the broadcast or think ill of them because of it."

The trial court, however, found that neither Gerten nor Richie suffered actual damages to his or her respective reputation. Regarding Richie, the **[**14]** trial court stated:

> Richie has lost no income as a result of the broadcast, and he has incurred no expenses to mitigate, correct or counteract the broadcast, aside from this suit. No one has indicated to him that they think less of him because of the broadcast. No one has indicated to Richie that they thought he was one of Denise Richie's parents or was involved actively or passively in Denise Richie's abuse. There has been no change in the behavior of those he regularly encounters as a Xerox service representative.

With respect to Gerten, the court found:

> In the more than one year between the broadcast and Gerten's deposition, only [two people, who knew the photos were a mistake] contacted her about the show; no one else has contacted her or told her they watched the show.
>
> **[*27]** In addition, the show had no effect on her work. She has lost no income, incurred no expense and taken no steps to mitigate, correct or counteract the broadcast, aside from this suit. No one has told Gerten they thought less of her because of the broadcast, and she can point to no specific facts demonstrating that her reputation has been affected. Finally, she has heard no rumors in her **[**15]** home community * * * as a result of the broadcast.

These findings were based on deposition testimony of Gerten and Richie and are not clearly erroneous. We conclude that neither Gerten nor Richie demonstrated that there is a material question of fact as to whether either of them suffered sufficient harm to their respective reputations to support a defamation claim.

Both Gerten and Richie, however, argue that even if they have not shown sufficient actual harm to their reputations, they should be allowed to recover for damages based on mental anguish and humiliation. It is generally the case that once a defamation claim is established, damages for wounded feelings and humiliation are recoverable as "parasitic" damages. *Prosser* states:

> Once the cause of action is established, either by the character of the defamation itself or by the proof of pecuniary loss, the bars are lowered, and "general" damages may be recovered for the injury to the plaintiff's reputation, his wounded feelings and humiliation, and resulting physical illness and pain, as well as estimated future damages of the same kind. In other words, such damages are insufficient in themselves to make the slander **[**16]** actionable, but once the cause of action is made out without them, they may be tacked on as "parasitic" to it.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 112, at 794-95 (5th ed. 1984).

While *Gertz* did require a plaintiff to demonstrate actual harm, it did not mandate that the actual harm be to reputation. That is, while actual damages are required in a defamation action of the type before us, there is no constitutional prerequisite that damages be based on *reputational* harm. In *Gertz,* the Court stated: "suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id. at 350*.

Indeed, two years after *Gertz,* in *Time, Inc. v. Firestone, 424 U.S. 448, 460, 47 L. Ed. 2d 154, 96 S. Ct. 958 (1976)*, the Supreme Court allowed recovery in a defamation action to be based on elements other than injury to reputation. In *Firestone* the Court stated:

> In *[Gertz]* we made it clear that States could base awards on elements **[**17]** other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

Firestone at 460. Thus, there is no constitutional bar to recovery for a defamation claim based solely on emotional damages.

The question, then, becomes whether Minnesota allows defamation claims based exclusively on mental anguish and humiliation. This court has never squarely addressed this issue. However, Gerten and Richie argue that Minnesota law "imposes no prerequisite of reputational harm on recovery of actual damages." They cite *Jadwin, 367 N.W.2d at 491-92 (Minn. 1985)* and *Becker, 401 N.W.2d at 655 (Minn. 1987)* in support of their argument.

Jadwin, however, primarily involved the issue whether the plaintiff was a public figure for purposes of a libel action and the commensurate standard of fault. This court merely acknowledged that "as **[**18]** required by *Gertz,* a private plaintiff may only recover compensation for actual injury * * *." *Jadwin* **[*28]** at 491-92. Gerten and Richie then point out that, under *Gertz,* "actual injury" may include personal humiliation and mental anguish and suffering. While this may be, nothing in *Gertz required* that emotional harm be found sufficient to support recovery in a defamation claim. Thus, *Jadwin* neither supports nor defeats Gerten and Richie's argument.

Becker is also inapplicable to the present case. *Becker* allowed general damages based on a defamation per se claim. *Id. at 661*. However, the case involved a private plaintiff suing a private defendant on a matter that was not of public concern. *Id.* Thus, the First Amendment limitations to defamation claims laid down in *Gertz* were inapplicable to *Becker.* However, as explained above, that is not the situation here. Thus, *Becker* is not controlling in the present circumstances.

Gerten and Richie also quote language from *State Farm Mut. Auto. Ins. Co. v. Village of Isle 265 Minn. 360, 122 N.W.2d 36 (1963)*, *Larson v. Chase, 47 Minn. 307, 50* N.W.238 (Minn. 1891), and *Langeland v. Farmers State* **[**19]** *Bank of Trimont, 319 N.W.2d 26 (Minn. 1982)* to support

their argument. However, both *Village of Isle* and *Langeland* only state that except in cases such as defamation, physical injury is required before recovery for mental anguish could be sustained. Additionally, in *Larson,* Justice Mitchell simply pointed out that some right of the plaintiff must be violated before recovery for emotional damage would be allowed. None of the cases in any way stated that emotional harm alone, unaccompanied by harm to reputation, could sustain a defamation claim.

Tatone, Paramount and MoPo, on the other hand, argue that a showing of actual harm to reputation should be required before a defamation action can be sustained. We agree. This court has consistently acknowledged that the purpose of a defamation action is to "compensate private individuals for wrongful injury to reputation." *See, e.g.,* Jadwin, 367 N.W.2d at 480 (Minn. 1985).

Further, this court has exercised "historical caution regarding emotional distress claims." K.A.C. v. Benson, 527 N.W.2d 553, 559 (Minn. 1995). *See, e.g.,* Garvis v. Employers Mutual Casualty Co., 497 N.W.2d 254, 257 n.3 (Minn. 1993) ("Emotional **[**20]** distress is highly subjective, often transient, and easily alleged."). While neither *K.A.C.* nor *Garvis* involved a defamation claim, we see nothing inherent in such a claim that should inhibit our caution.

Finally, while defamation focuses on injury to reputation, it is invasion of privacy torts [6] **[**21]** that compensate for "mental distress from having been exposed to, public view." Time Inc. v. Hill, 385 U.S. 374, 385 n.9, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967). Thus, to allow emotional harm to form the basis for liability in a defamation action would be the practical equivalent of allowing a plaintiff to bring an invasion of privacy claim. However, this court "has never recognized, either by legislative or court action, a cause of action for invasion of privacy, even though many other states have done so." Hendry v. Conner, 303 Minn. 317, 226 N.W.2d 921, 923 (Minn. 1975) To allow emotional harm as the basis of a defamation action would be inconsistent with this court's rejection of invasion of privacy claims. Thus we hold that ***HN6*** in a defamation suit, emotional damages are not compensable absent harm to reputation. [7]

Having decided that Minnesota law imposes a reputational harm prerequisite in defamation actions, we must now address whether Minnesota law applies in this action. Because the Show was taped and **[*29]** broadcast from New York, Paramount and MoPo contend that New York law should apply. However, because we find that the outcome of this action would be the same regardless of whether we applied Minnesota or New York law, we can dispose of this issue without engaging in a full blown choice of law analysis.

HN7 In determining whether the forum state's or a foreign state's law applies, a threshold consideration is whether "the choice of one state's law over another's **[**22]** creates an actual conflict." Jepson v. General Cas. Co. of Wisc., 513 N.W.2d 467, 469 (Minn. 1994). In this case, such a conflict would arise if New York law did not impose a reputational harm prerequisite in defamation actions. [8]

The court of appeals found New York law to be unsettled on the issue of a reputational harm

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[6] *Prosser* notes that there are four separate kinds of invasion of privacy: (1) appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's physical solitude or seclusion; (3) publicity which places the plaintiff in a false light in the public eye; and (4) public disclosure of private facts. *Id.* § 117 at 851-66.

[7] We note that we are not the only jurisdiction to so hold. Other jurisdictions have also imposed a reputational harm prerequisite in defamation actions. *See, e.g.,* Garziano v. E.I. DuPont De Nemours & Co., 818 F.2d 380, 395 (5th Cir. 1987) (applying Mississippi law); Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933, 936-37 (Ark. 1983); Gobin v. Globe Publishing Co., 232 Kan. 1, 649 P.2d 1239, 1243 (Kan. 1982).

[8] As the court of appeals points out, if this case were to be remanded for trial, the question of the standard of proof in a defamation action by a private plaintiff would create an actual conflict. Minnesota applies a negligence standard, Jadwin at 492, and New York, a gross irresponsibility standard, Chapadeau

prerequisite. *Richie, 532 N.W.2d at 240, n.3*. While we agree that New York law is muddled in this area, we find that even if **[**23]** we were to decide that New York law applied, we would still impose a reputational harm prerequisite. Applying *Gertz, France v. St. Clare's Hospital and Health Ctr., 82 A.D.2d 1, 441 N.Y.S.2d 79 (N.Y. App. Div. 1981)*, and *Salomone v. MacMillan Publications Inc.*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (N.Y. App. Div. 1980), specifically held that in a defamation action, claims for emotional distress are not compensable absent damage to reputation. *France, 441 N.Y.S.2d at 82*; *Salomone, 429 N.Y.S.2d at 443*. However, two later cases, *Matherson v. Marchello, 100 A.D.2d 233, 473 N.Y.S.2d 998 (N.Y. App. Div. 1984)* and *Hogan v. Herald Co., 84 A.D.2d 470, 446 N.Y.S.2d 836 (N.Y. App. Div. 1982)*, *aff'd 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (N.Y. 1982)*, found that allegations of both reputational and emotional harm "sufficiently claim actual injuries" to survive a summary judgment motion. *Id., 446 N.Y.S.2d at 843*.

Nonetheless, we find that neither *Hogan* nor *Matherson* are as unequivocal about the absence of a reputational harm prerequisite as *France* and *Salomone* are about its existence. In *Hogan,* the plaintiff was not claiming only emotional **[**24]** harm, but was also claiming harm to reputation. Thus, *Hogan* did not directly address the question of a reputational harm prerequisite as both *France* and *Salomone* did. Further, while *Matherson* does limit the holdings of both *France* and *Salomone,* we do not read *Matherson* as completely abrogating those two cases' imposition of a reputational harm prerequisite. [9]

[25]** Respondents also cite to *Pirre v. Printing Developments, Inc., 468 F. Supp. 1028 (S.D.N.Y. 1979)* and *Guccione v. Hustler Magazine Inc., 632 F. Supp. 313 (S.D.N.Y. 1986)* in support of the absence of a reputational harm prerequisite in New York. However, following both cases, the Second Circuit decided *Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921 (2nd Cir. 1987)*, in which the court stated that "New York does not permit compensatory damages to be recovered **[*30]** absent proof of injury to reputation or malice." *Id. at 926-27*. We read this as overruling any contrary holdings in either *Pirre* or *Guccione.*

Finally, courts in other jurisdictions have found that New York does have a reputational harm prerequisite in defamation cases. *See e.g., Little Rock, Newspapers Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933, 936-37 (Ark. 1983)*; *Gobin v. Globe Publishing Co., 232 Kan. 1, 649 P.2d 1239, 1243 (Kan. 1982)*.

For these reasons, we find that whether we apply New York or Minnesota law in this case, we would impose a reputational harm prerequisite. Thus, for purposes of this appeal, no actual conflict exists between the law of the two states and we therefore need **[**26]** not reach the issue of which law should be applied.

We are now in a position to decide the matter at hand. We have determined that it would violate

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v. Utica Observer-Dispatch Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61 (N.Y. 1975). However, because this appeal disposes of all the issues in this case without remand, no "actual" conflict is created by this difference in law.

[9] In *Matherson,* the court stated that "we find that the cases which require a plaintiff to plead special damages, establish * * * actual malice, or suffer dismissal of the complaint (e.g. [citing *France* and *Salomonel),* cut far too broadly and their analysis has been rejected by the Court of Appeals." *Matherson,* 473 N.Y.S.2d at 1003. In *Matherson,* special damages were defined to be "'the loss of something having economic or pecuniary value' * * * which 'must flow directly from the injury to reputation caused by the defamation, not from the effects of defamation.'" *Id.*, 473 N.Y.S.2d at 1000 (citations omitted). Thus, *Matherson,* could be read to have specifically rejected the reputational harm prerequisite of *Salomone* and France.

However, *Matherson* rejected only the requirement that a plaintiff plead *special* damages to support a defamation action. Thus, given the definition of special damages, *Matherson* could be read as rejecting only the necessity of finding *pecuniary* damage flowing from harm to reputation, not a general showing of some harm to reputation such as lowering of esteem in the eyes of the community. Therefore, *Matherson* could be read as not rejecting the reputational harm prerequisite erected in *France* and *Salomone.*

the First Amendment to allow Gerten and Richie to recover based on presumed damage to their reputations. We have also held that respondents' defamation claim cannot succeed based only on humiliation or other types of emotional harm. Thus, respondents must be able to show actual harm to their reputations. Because the trial court was not clearly erroneous in finding that neither Gerten nor Richie suffered actual harm to their reputations, we hold that neither Gerten's nor Richie's defamation action can succeed. We therefore reinstate the trial court's orders granting summary judgment to appellants Tatone, Paramount and MoPo.

Reversed; trial court judgment reinstated.

Stubbs v. North Memorial Medical Center

Court of Appeals of Minnesota

November 7, 1989, Decided ; November 14, 1989, Filed

No. C4-89-918

Reporter
448 N.W.2d 78; 1989 Minn. App. LEXIS 1214; 17 Media L. Rep. 1090

Bonnie J. Stubbs, Appellant, v. North Memorial Medical Center, et al., Dr. Bryan Hubble, Respondents

Subsequent History: Review denied by *Stubbs v. N. Mem. Med. Ctr., 1990 Minn. LEXIS 475 (Minn., Jan. 12, 1990)*

Prior History: [**1] Appeal from Hennepin County District Court, Hon. Michael J. Davis, Judge.

Disposition: Affirmed in part, reversed in part and remanded.

Core Terms

patient, Rights, trial court, summary judgment, cause of action, invasion of privacy, severe, intentional infliction of emotional distress, breach of implied contract, implied contract, photographs, alleges, surgery, granting summary judgment, emotional distress, client relationship, reviewing court, distress, sleep, private cause of action, inpatient facility, tortious breach, sore throat, outrageous, headaches, sores, cold

Case Summary

Procedural Posture

Plaintiff patient appealed from the summary judgment and partial summary judgment that were entered for defendant hospital and defendant doctor by the Hennepin County District Court (Minnesota) on various tort claims arising out of the unauthorized publication of photographs. The doctor appealed from the denial of summary judgment on a claim under the Minnesota Patients' Bill of Rights, *Minn. Stat. § 144.651* (1988).

Overview

When before and after photographs were published of her cosmetic surgery without her consent, the patient sued the hospital and doctor for invasion of privacy, intentional infliction of emotional distress, and violation of *§ 144.651*. She brought additional claims against the doctor for breach of the physician-client relationship and breach of implied contract. Except for the *§ 144.651* claim against the doctor, each was disposed of by summary judgment. In reversing in part, the appellate court ruled that Minnesota recognized an implied contract of confidentiality in the physician-patient relationship. However, the patient did not have a claim under *§ 144.651* against the doctor or the hospital because she did not fall within the statutory definition of a "patient" for purposes of the Patients' Bill of Rights. In affirming in part, the court ruled that Minnesota law did not recognize a cause of action for invasion of privacy or for breach of the physician-client relationship. Also, the patient's allegations of lost sleep and other pains failed to meet the severity requirement for intentional infliction of emotional distress.

Outcome

The summary judgment in favor of the doctor on a claim of breach of implied contract was reversed and that claim was remanded. The denial of the doctor's motion for summary judgment on the Patients' Bill of Rights claim was reversed. The remainder of the judgment against the patient was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 On appeal from a summary judgment it is the function of the reviewing court only to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. The reviewing court must view the evidence in the light most favorable to the party against whom the motion was granted.

Governments > Courts > Authority to Adjudicate

Torts > Intentional Torts > Invasion of Privacy > General Overview

Torts > ... > Invasion of Privacy > Appropriation > General Overview

Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > General Overview

HN2 Minnesota has never recognized a cause of action for invasion of privacy, although many other states have done so. Where unwanted publicity is given to an aspect of an individual's life which is inherently private, justice would seem to require that there be some form of redress under the law. It is not, however, the function of the Court of Appeals of Minnesota to establish new causes of action.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

HN3 To establish the tort of intentional infliction of emotional distress a plaintiff must prove: (1) the conduct was extreme and outrageous; (2) the conduct was intentional or reckless; (3) the plaintiff suffered emotional distress; and (4) that distress was severe. To be considered extreme and outrageous, the actionable conduct must be so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community. Severe emotional distress is defined as distress which is so severe that no reasonable person could be expected to endure it. The operation of this tort is sharply limited to cases involving particularly egregious facts. Allegations of lost sleep, sore throats, cold sores, and headaches fail to meet the severity standard.

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN4 A denial of summary judgment is not ordinarily appealable. The reviewing court may, however, make a determination on the issue if it is found to be in the interest of judicial efficiency to resolve all controversies between the parties at this time.

Constitutional Law > Bill of Rights > General Overview

Healthcare Law > Medical Treatment > General Overview

HN5 The Minnesota Patients' Bill of Rights is a broad legislative enactment, articulating a series of patients' rights, and intended to promote their interests and well being. *Minn. Stat. § 144.651, subd. 1* (1988). A "patient" is defined as a person who is admitted to an acute care inpatient facility for a continuous period longer than 24 hours, for the purpose of diagnosis or treatment bearing on the physical or mental health of that person. *Minn. Stat. § 144.651, subd. 2* (1988). The language in the statute defining patient is clear and unambiguous in requiring that the person seeking to qualify as a patient must be admitted to an acute care inpatient facility for a continuous period of longer than 24 hours.

Contracts Law > Types of Contracts > Contracts Implied in Fact

HN6 Implied contracts are recognized in Minnesota . The courts have held that a contract implied in fact is in all respects a true contract. The existence of a contract to be implied in fact is a question for the trier of fact. The terms and

construction of the contract are also to be determined by the factfinder.

Contracts Law > Types of Contracts > Express Warranties

Contracts Law > Types of Contracts > Contracts Implied in Fact

Evidence > Privileges > Doctor-Patient Privilege > Elements

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

Healthcare Law > Medical Treatment > Patient Confidentiality > Breach

HN7 Minnesota has not expressly held that an implied contract can exist between a patient and their physician. However, there appears to be no reason why such a contract could not be found in certain circumstances. Any time a doctor undertakes the treatment of a patient, and the consensual relationship of physician and patient is established, two jural obligations are simultaneously assumed by the doctor. Doctor and patient enter into a simple contract, the patient hoping that he will be cured and the doctor optimistically assuming that he will be compensated. As an implied condition of that contract, the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission. Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence. The promise of secrecy is as much an express warranty as the advertisement of a commercial entrepreneur. Consequently, when a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract.

Governments > Courts > Authority to Adjudicate

HN8 The function of the Court of Appeals of Minnesota is primarily decisional and error correcting, rather than legislative or doctrinal.

Syllabus

1. Invasion of privacy and tortious breach of the physician/client relationship are not recognized as causes of action in Minnesota.

2. The trial court erred in stating that Minnesota does not recognize implied contracts.

3. Evidence of loss of sleep, cold sores, headaches and sore throats do not indicate sufficient severity of emotional distress to support a claim of intentional infliction of emotional distress.

4. A person undergoing same-day surgery and receiving preoperative and postoperative treatment at her physician's office does not fit the definition of "patient" in *Minn. Stat. § 144.651, subd. 2* (1988), the Patients' Bill of Rights.

Counsel: Russell H. Crowder, Beverly K. Dodge, Steffen & Munstenteiger, P.A., Anoka, Minnesota, for Appellant.

David Alsop, Gislason, Doslund, Hunter & Malecki, New Ulm, Minnesota, for Respondents North Memorial Medical Center, et al.

Jerome C. Briggs, Regina M. Chu, Bassford, Heckt, Lockhart, Truesdell & Briggs, P.A., Minneapolis, Minnesota, for Respondent Hubble.

Judges: Schumacher, Presiding **[**2]** Judge, Forsberg, Judge, and Gardebring, Judge. Forsberg, Judge concurs specially.

Opinion by: GARDEBRING

Opinion

[*79] This case arises from the unauthorized publication of "before" and "after" photographs of appellant's cosmetic surgery.

On July 15, 1988, the trial court granted summary judgment on all of appellant's claims in favor of respondent, North Memorial Medical Center. On December 27, 1988, the trial court granted summary judgment in favor of respondent, Dr. Bryan Hubble, on all of appellant's claims, except her claim of a violation of *Minn. Stat. § 144.651* (1988), the Patients' Bill of Rights. Appellant seeks review of the entry of summary judgment granted to North Memorial and partial summary judgment granted to Dr. Hubble. Dr. Hubble filed a notice of review

claiming the trial court erred in denying his request for summary judgment on appellant's Patients' Bill of Rights claim. We affirm in part, reverse in part and remand.

FACTS

Respondent Dr. Bryan Hubble performed cosmetic surgery on appellant Bonnie Stubbs. The surgery was performed on an outpatient basis at a same-day surgery center. Dr. Hubble photographed appellant before and after the surgery on her chin and nose.

On **[**3]** September 4, 1986, North Memorial Medical Center began distributing copies of a promotional/educational publication entitled "Sketches." "Before" and "after" **[*80]** photographs of appellant's face, taken by Dr. Hubble, were contained in "Sketches." Appellant was not identified. Appellant's photographs appeared on the same page as unidentified "before" and "after" photographs of a patient's breast reduction and abdominoplasty (removal of fat from the abdomen). Appellant gave no consent for the publication of the photos.

Appellant alleges that as a result of the publication of her photographs, she lost sleep, and had sore throats, cold sores and headaches.

Appellant commenced this action against North Memorial alleging invasion of privacy, intentional infliction of emotional distress and violation of *Minn. Stat. § 144.651* (1988), the Patients' Bill of Rights. The trial court granted summary judgment in favor of North Memorial.

Appellant's causes of action against Dr. Hubble include invasion of privacy, tortious breach of the physician/client relationship, breach of an implied contract, intentional infliction of emotional distress and violation of the Patients' Bill of Rights. The trial court **[**4]** granted summary judgment in favor of Dr. Hubble on all of appellant's claims, with the exception of the violation of the Patients' Bill of Rights claim.

The trial court determined that invasion of privacy, tortious breach of the physician/client relationship and breach of implied contract are not recognized as causes of action in Minnesota. The trial court concluded that appellant failed to establish a prima facie case of intentional infliction of emotional distress, specifically finding that appellant's alleged distress did not meet the necessary standard of severity. Finally, the trial court determined that the Patients' Bill of Rights applied with respect to Dr. Hubble, but not with respect to North Memorial.

ISSUES

1. Did the trial court err in finding that invasion of privacy, breach of implied contract and tortious breach of the physician/client relationship are not recognizable causes of action in Minnesota?

2. Did the trial court err in concluding that appellant failed to allege sufficient facts to show intentional infliction of emotional distress?

3. Did the trial court err in its application of *Minn. Stat. § 144.651* (1988), the Patients' Bill of Rights?

ANALYSIS

[5]** *Standard of Review*

HN1 On appeal from a summary judgment it is the function of the reviewing court only to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Betlach v. Wayzata Condominium, 281 N.W.2d 328, 330 (Minn. 1979)*. The reviewing court must view the evidence in the light most favorable to the party against whom the motion was granted. *Grondahl v. Bulluck, 318 N.W.2d 240, 242 (Minn. 1982)*.

Invasion of Privacy

HN2 Minnesota has never recognized a cause of action for invasion of privacy, although many other states have done so. *Hendry v. Conner, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975)*. However, when considering claims for invasion of privacy, the courts have identified factors necessary to support such a claim, were it to be recognized. *Id. at 318, 226 N.W.2d at 922-23*.

The tort, invasion of privacy, can be of four different types: (1) unreasonable invasion upon

the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the others' [**6] private life; or (4) publicity that unreasonably places the other in a false light before the public. Prosser, *Torts* (4 ed.) pp. 802-818. In the instant case, appellant alleges that unreasonable publicity has been given to her private life and that the publicity has unreasonably placed her in a false light.

Where, as here, unwanted publicity is given to an aspect of an individual's life which is inherently private, justice would seem to require that there be some form of redress under the law. It is especially [*81] distressing that the published information was disclosed by a physician. There are few relationships between individuals more sacrosanct than that between a physician and patient.

It is not, however, the function of this court to establish new causes of action. The long established rule in Minnesota is that invasion of privacy is not recognized as a cause of action and for this reason the trial court is affirmed on this issue.

Intentional Infliction of Emotional Distress

Appellant argues that Dr. Hubble and North Memorial intentionally inflicted emotional distress resulting in a loss of sleep, cold sores, headaches and sore throats.

HN3 To establish the tort of intentional [**7] infliction of emotional distress appellant must prove: (1) the conduct was extreme and outrageous; (2) the conduct was intentional or reckless; (3) appellant suffered emotional distress; and (4) that distress was severe. *Hubbard v. United Press International, Inc., 330 N.W.2d 428, 438-39 (Minn. 1983)*. To be considered "extreme and outrageous," the actionable conduct must be so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community. *Id. at 439*.

"Severe emotional distress" is defined as distress which is so severe that no reasonable person could be expected to endure it. *Id. at 439*. The *Hubbard* court notes that the operation of this tort is sharply limited to cases involving particularly egregious facts. *Id*. In *Hubbard*, the plaintiff's allegations that, as a result of the emotional distress, he suffered from stomach disorders, a skin rash and high blood pressure, were determined not to be sufficiently severe. *Id*.

Appellant's allegations of lost sleep, sore throats, cold sores and headaches fail to meet the severity standard set out by the court [**8] in *Hubbard*. On this basis, we determine that the trial court correctly granted summary judgment against both respondents on appellant's intentional infliction of emotional distress claim. We do not, therefore, reach the issue of whether the publication of appellant's photographs meets the standard of extreme and outrageous conduct, or intentional and reckless, as required by *Hubbard*.

Patients' Bill of Rights

Appellant alleges that both North Memorial and Dr. Hubble violated *Minn. Stat. § 144.651* (1988), the Patients' Bill of Rights. The trial court granted North Memorial's request for summary judgment on this issue, determining that, as to North Memorial, appellant did not fall within the definition of "patient" under *Minn. Stat. § 144.651, subd. 2* (1988). Appellant has appealed this ruling. Further, the trial court denied Dr. Hubble's motion for summary judgment on this issue, determining that the act governed appellant's relationship with Dr. Hubble, and Dr. Hubble seeks review of the denial of summary judgment.

HN4 A denial of summary judgment is not ordinarily appealable. *Cole v. Paulson, 380 N.W.2d 215, 219 (Minn. Ct. App. 1986)*. The reviewing [**9] court may, however, make a determination on the issue if it is found to be in the interest of judicial efficiency to resolve all controversies between the parties at this time. *See McGuire v. C. & L. Restaurant, Inc., 346 N.W.2d 605, 614 n.11 (Minn. 1984)*. Because we determine that no cause of action against either defendant arises under the Patients' Bill of Rights, judicial efficiency is served by resolving the issue in this appeal.

HN5 The Patients' Bill of Rights is a broad legislative enactment, articulating a series of

patients' rights, and intended to promote their interests and well being. *Minn. Stat. § 144.651, subd. 1* (1988).

A "patient" is defined as:

> [A] person who is admitted to an acute care inpatient facility for a continuous period longer than 24 hours, for the purpose of diagnosis or treatment bearing on the physical or mental health of that person.

Minn. Stat. § 144.651, subd. 2 (1988). The language in the statute defining patient is **[*82]** clear and unambiguous in requiring that the person seeking to qualify as a patient must be admitted to an acute care inpatient facility for a continuous period of longer than 24 hours. Appellant here does **[**10]** not fit within the confines of that definition.

Appellant's surgery took place at a same-day surgery center, not a party to this action. Appellant not only fails to meet the 24-hour requirement, but was also not admitted to an inpatient facility. The Patients' Bill of Rights is not applicable to this factual situation. Accordingly, we affirm the grant of summary judgment on appellant's Patients' Bill of Rights claim with respect to North Memorial and reverse the trial court's denial of summary judgment with respect to Dr. Hubble. [1]

[11]** *Breach of Implied Contract*

Appellant alleges that Dr. Hubble breached an implied contract. The trial court determined that Minnesota does not recognize implied contracts, and granted summary judgment in favor of Dr. Hubble.

HN6 Implied contracts are recognized in Minnesota. The courts have held that a contract implied in fact is in all respects a true contract. *Roberge v. Cambridge Cooperative Creamery, 248 Minn. 184, 188, 79 N.W.2d 142, 145 (1956)*. The existence of a contract to be implied in fact is a question for the trier of fact. *Id. at 189, 79 N.W.2d at 146*. The terms and construction of the contract are also to be determined by the factfinder. *Bergstedt, Wahlberg, Berquist Associates, Inc. v. Rothchild, 302 Minn. 476, 480, 225 N.W.2d 261, 263 (1975)*.

Dr. Hubble argues that breach of an implied contract does not constitute a recognized cause of action in Minnesota when the parties are a physician and his patients. Other jurisdictions have recognized implied contracts between physicians and their patients. *See Hammonds v. Aetna Casualty & Surety Company, 243 F. Supp. 793 (N.D. Ohio 1965)*; **[**12]** *Horne v. Patton, 291 Ala. 701, 287 So.2d 824 (1973)*; *Geisberger v. Willuhn, 72 Ill. App. 3d 435, 28 Ill. Dec. 586, 390 N.E.2d 945 (1979)*; *MacDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982)*; *Doe v. Roe, 93 Misc.2d 201, 400 N.Y.S.2d 668 (N.Y. Sup. Ct. 1977)*.

HN7 Minnesota has not expressly held that an implied contract can exist between a patient and their physician. However, there appears to be no reason why such a contract could not be found on these facts.

The court in *Hammonds* reasoned as follows:

> Any time a doctor undertakes the treatment of a patient, and the consensual relationship of physician and patient is established, two jural obligations (of significance here) are simultaneously assumed by the doctor. Doctor and patient enter into a simple contract, the patient hoping that he will be cured and the doctor optimistically assuming that he will be compensated. As an implied condition of that contract, this Court is of the opinion that the doctor

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[1] We note, without deciding, that there may be no private cause of action available under the Patients' Bill of Rights. Whether a statute creates a private cause of action is a question of legislative intent. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979); *Morris v. American Family Mutual Insurance Co.*, 386 N.W.2d 233 (Minn. 1986). In drafting the Minnesota Patients' Bill of Rights the legislature did not explicitly create a private cause of action, and did instead provide a specific, administrative enforcement mechanism. Its intent as to the creation of a private cause of action is, therefore, at best, unclear.

> warrants that any confidential information gained through the relationship will [**13] not be released without the patient's permission. Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence. The promise of secrecy is as much an express warranty as the advertisement of a commercial entrepreneur. Consequently, when a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract.

Hammonds, 243 F. Supp. at 801.

The trial court erroneously granted Dr. Hubble summary judgment on appellant's breach of an implied contract claim. [*83] Minnesota does recognize implied contracts. Therefore, we reverse and remand.

Tortious Breach of the Physician/Client Relationship

Appellant alleges that Dr. Hubble tortiously breached the physician/client relationship. This cause of action has not previously been recognized in Minnesota.

In *Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976)*, the plaintiff brought a petition for a writ of prohibition to restrain the district court from enforcing an order directing plaintiff to provide defendant with authorizations allowing interrogation of plaintiff's [**14] attending physician outside the presence of plaintiff's counsel. The court, in discussing the importance of the presence of the plaintiff's attorney while the physicians were being questioned, stated:

> We note without deciding that a physician who discloses confidential information about his patient to another in a private interview may be subject to tort liability for breach of his patient's right to privacy or to professional discipline for unprofessional conduct.

Id. at 411, 240 N.W.2d at 337. However, no Minnesota case has gone beyond this mere recognition of the issue.

HN8 The function of this court is primarily decisional and error correcting, rather than legislative or doctrinal. For this reason, we decline to recognize a cause of action which has not been recognized previously by the courts or created by legislative action. Therefore, the trial court's grant of summary judgment in favor of Dr. Hubble is affirmed.

Punitive Damages

Dr. Hubble seeks review of the trial court's decision to allow appellant to amend her complaint to assert punitive damages against him. Because of our decision here, appellant's only remaining cause of action against Dr. Hubble [**15] is for breach of an implied contract. Nothing remains to which punitive damages may attach. Therefore, we decline to consider whether the trial court abused its discretion in allowing the amendment.

DECISION

Affirmed in part, reversed in part and remanded.

Forsberg, Judge concurs specially.

Concur by: FORSBERG

Concur

FORSBERG, Judge, concurring specially:

I concur with the majority except that I would find that the so-called Patients' Bill of Rights statute, *Minn Stat. § 144.651* (1988), did not provide for a private cause of action for damages.

Hentges v. Thomford

Court of Appeals of Minnesota

October 7, 1997, Filed

C7-97-537

Reporter
569 N.W.2d 424; 1997 Minn. App. LEXIS 1133

Michele Hentges, as Trustee for the next of kin of John Wesley Hentges, Decedent, judgment creditor, Respondent, vs. Reverend Joel W. Thomford, judgment debtor, Respondent, and Church Mutual Insurance Company, garnishee, Appellant.

Subsequent History: [**1] Petition for Review Denied December 8, 1997, Reported at: *1997 Minn. LEXIS 938*.

Prior History: Kandiyohi County District Court. File No. C8-94-1145.

Disposition: Reversed.

Core Terms

church, hunting, scope of employment, insurer, congregation, district court, vacation, deer, negligent act, parishioners, recreational, vicarious, coverage, killed

Case Summary

Procedural Posture
Appellant, a church's insurer, sought review of a decision of the Kandiyohi County District Court (Minnesota), which denied the insurer's alternative motions for judgment notwithstanding the verdict (JNOV) or a new trial following a jury finding that the church's pastor was acting within the scope of his employment when he accidentally shot and killed a hunting companion who was a church parishioner.

Overview
The insurer provided liability coverage to the church and its pastor while acting within the scope of employment. After the shooting, the widow of the victim agreed to a settlement with the pastor and then brought a garnishment action against the pastor as judgment debtor and the insurer as garnishee. At trial, the pastor stated that the day was a "day off" and that he did not go hunting with the purpose of benefiting the church, although contact with congregation members maintained good relationships. After the jury found that he was acting within the scope of employment, the insurer's motion for JNOV was denied. The court reversed. To support a finding that the pastor's negligent act occurred within his scope of employment, it had to be shown, among other things, that his conduct to some degree furthered the church's interests. Although evidence as to other factors could support the jury's finding, the pastor's conduct was not in furtherance of the employer's interest as a matter of law. Any residual benefit to the church from the pastor's hunting with congregation members was too tenuous to support a determination that the pastor was acting within the scope of employment.

Outcome
The court reversed and ruled that the insurer was entitled to JNOV.

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Appeals > Standards of Review > General Overview

HN1 Judgment notwithstanding the verdict (JNOV) is proper when a jury verdict has no reasonable support in fact or is contrary to the law. Whether to grant a JNOV presents an issue of law, but the analysis admits every reasonable inference to be drawn from the evidence, and an order denying JNOV should stand unless the evidence is practically conclusive against the verdict. A reviewing court applies the same standard as the district court in determining whether JNOV is warranted.

Torts > Vicarious Liability > Employers > General Overview

HN2 An employer is liable for the negligent acts of its employee committed in the course and scope of employment. "Scope of employment" does not have a fixed or technical definition, and is ordinarily a question of fact for the jury. But when the evidence in the record is conclusive on all of the necessary elements or there is an absence of evidence to support a necessary element, no fact issue is presented for the jury and the scope of employment is determined as a matter of law. To support a finding that an employee's negligent acts occurred within his scope of employment, it must be shown that the conduct was, to some degree, in furtherance of the interests of his employer. Other factors to be considered are whether the employee is authorized to perform this type of act, whether the act occurs substantially within authorized time and space restrictions, and whether the employer should reasonably have foreseen the employee's conduct.

Torts > Vicarious Liability > Employers > General Overview

HN3 The "furtherance of the employer's interest" factor in the scope of employment inquiry has been described expansively as requiring that an employee must be "acting primarily" for the benefit of the employer to be within the scope of employment. The more current definition requires only that the conduct must be brought about "at least in part" by a desire of the employee to serve the employer or that the conduct is "to some degree," in furtherance of the interests of the employer. The employee's state of mind is relevant to this determination. To analyze whether the evidence satisfies this factor we apply the lower standard of "at least in part" or "to some degree."

Syllabus

A church is not vicariously liable for its pastor's negligent conduct that occurs during a personal recreational activity on the pastor's day off and the activity is not sponsored by the church, is not actuated to further the church's interest, and is only marginally related to the church's general interest of maintaining pastoral-parishioner relationships.

Counsel: Joe E. Thompson, Schmidt, Thompson, Johnson & Moody, P.A., 707 Litchfield Avenue SW, P.O. Box 913, Willmar, MN 56201 (for respondent Hentges).

Jeffrey R. Brauchle, Interchange South, Suite 110, 400 South Highway 169, Minneapolis, MN 55426 (for respondent Hentges).

John H. Scherer, Rajkowski Hansmeier Ltd., 11 Seventh Avenue North, P.O. Box 1433, St. Cloud, MN 56302 (for respondent Thomford).

Richard L. Pemberton, Jr., W.D. Flaskamp, Leatha G. Wolter, Meagher & Geer, P.L.L.P., 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402 (for appellant).

Judges: Considered and decided by Lansing, Presiding Judge, Randall, Judge, and Harten, Judge.

Opinion by: LANSING

Opinion

[*426] OPINION

LANSING, Judge

On appeal from the denial **[**2]** of alternative motions for judgment notwithstanding the verdict or a new trial, a church's insurer disputes the legal and factual adequacy of the evidence to establish vicarious liability. The jury found that the church's pastor was acting within the scope of his employment when he accidentally shot and killed a hunting companion who was a church parishioner. We reverse the denial of JNOV.

FACTS

Church Mutual Insurance Company provided general comprehensive liability insurance coverage to Immanuel Evangelical Lutheran Church and its pastor, Joel Thomford, while acting within the scope of employment. On Saturday, November 6, 1993, during the policy coverage period, Thomford went hunting with two parishioners, John Hentges and Art Rosenau. While the three men were tracking a deer, Thomford's gun accidentally discharged, killing Hentges.

Hentges' widow, Michele Hentges, brought a wrongful death action against Thomford and the church. Church Mutual agreed to defend the church and, under a reservation of rights, to defend Thomford. The Church Mutual policy had a liability limit of $ 1 million. Millbank Mutual Insurance Company insured Thomford under a separate homeowner's **[**3]** policy with coverage limits of $ 100,000.00.

Thomford and Michele Hentges negotiated a Miller-Shugart agreement under which Thomford stipulated to entry of a $ 1 million judgment against him to be satisfied only from the Church Mutual Insurance proceeds. The agreement also provided that if Michele Hentges was unable to satisfy the judgment from Church Mutual proceeds she would accept the $ 100,000.00 policy limits under the Millbank Insurance coverage as full and final satisfaction of the judgment. [1] She then brought this garnishment action against Thomford as the judgment debtor and Church Mutual as the garnishee.

The sole issue at trial was whether Thomford was acting within the scope of his employment with the church when his gun accidentally discharged and killed Hentges. The testimony was largely undisputed. Michele Hentges presented evidence from Thomford and three other church pastors. Thomford **[**4]** testified that he had been a deer hunter for ten to fifteen years. When Thomford accepted employment with the church and moved to Willmar in 1990 he had gone hunting by himself the first year. Between 1990 and 1993 he had hunted twice with Hentges who was a church trustee and with Rosenau who was a member of the church's strategic planning committee.

Thomford stated that he did not go hunting with the purpose of formally serving as a pastor or formally benefiting the church, although contact with members of the congregation confers an indirect benefit of maintaining good relationships. He testified that getting to know his congregation helped him carry out his functions and be a better minister, which benefits the church. He testified that going hunting with Hentges and Rosenau gave him an opportunity to cultivate and maintain relationships with them and he was close friends with Hentges and Rosenau in part because they were active members of the congregation. Thomford did not mention church matters on the day of the accident, **[*427]** and there was nothing on that day that was "spiritual." Thomford testified that the day was a "day off" from his ministry when he felt no obligation to the **[**5]** congregation. He characterized it as a "personal day" and "strictly on a day of vacation" for himself. He also testified that he was "off duty," and "on vacation doing [his] own thing" and "not for the benefit of the church."

Three other ministers testified on behalf of Hentges. Each testified that it was very important for a pastor to develop comfortable relationships with members of the congregation and that social and recreational activities, including hunting, could help a pastor to develop those relationships and lay a foundation for pastoral visits. One minister testified that he specifically organized hunting groups for the benefit of his church. Another qualified his testimony on pastoral relationships by saying that he believed Thomford was "on call" but not "on duty" if the hunting activity was not sponsored by the church and took place on a vacation day.

Church Mutual presented evidence through church officials and the supervising minister of Immanuel Evangelical Lutheran Church's synod. The church officials testified that Thomford was

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[1] The district court held that the settlement amount was reasonable and that decision has not been appealed.

responsible for teaching a catechism or confirmation class on Saturday mornings. He had obtained permission from the church council to [**6] take Saturday November 6 as his day off, instead of his usual day off. Thomford confirmed much of this testimony, saying that he had told the parents of children in his class that he always took one weekend off "for his own sake" to go deer hunting. Thomford's supervising minister testified that on a vacation day, a pastor was "on call" but off duty. According to the supervising minister, a pastor can do what he wants on his vacation days and he is not working for the church or acting within the scope of his employment.

The jury found that Thomford was acting within the scope of his employment at the time of the hunting accident, and the district court entered judgment for $ 1 million against Church Mutual. The court denied Church Mutual's motions for JNOV or a new trial, and Church Mutual appeals.

I S S U E

Did the district court err by denying Church Mutual's motion for JNOV?

ANALYSIS

HN1 Judgment notwithstanding the verdict is proper when a jury verdict has no reasonable support in fact or is contrary to the law. *Diesen v. Hessburg, 455 N.W.2d 446, 452 (Minn. 1990)*. Whether to grant a JNOV presents an issue of law, but the analysis admits every reasonable inference [**7] to be drawn from the evidence, and an order denying JNOV should stand unless the evidence is practically conclusive against the verdict. ***Seidl v. Trollhaugen, Inc.**, 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975)*. A reviewing court applies the same standard as the district court in determining whether JNOV is warranted. ***Sikes v. Garrett**, 262 N.W.2d 681, 683 (Minn. 1977)*.

HN2 An employer is liable for the negligent acts of its employee committed in the course and scope of employment. ***Edgewater Motels, Inc. v. Gatzke**, 277 N.W.2d 11, 15 (Minn. 1979)*; ***see also** **McLaughlin v. Cloquet Tie & Post Co.**, 119 Minn. 454, 457, 138 N.W. 434, 435 (1912)* (abstract rule is well settled; the confusion is in applying it concretely). "Scope of employment" does not have a fixed or technical definition, and is ordinarily a question of fact for the jury. ***See** **Marston v. Minneapolis Clinic of Psychiatry**, 329 N.W.2d 306, 311 (Minn. 1982)*; ***Boland v. Morrill**, 270 Minn. 86, 96, 132 N.W.2d 711, 718 (1965)*. But when the evidence in the record is conclusive on all of the necessary elements or there is an absence of evidence to support a necessary element, [**8] no fact issue is presented for the jury and the scope of employment is determined as a matter of law. ***See** **Lange v. National Biscuit Co.**, 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973)*; ***Pesio v. Sherman**, 285 Minn. 246, 248, 172 N.W.2d 748, 750 (1969)*.

To support a finding that an employee's negligent acts occurred within his scope of employment, it must be shown that the conduct was, to some degree, in furtherance of the interests of his employer. ***Edgewater Motels**, 277 N.W.2d at 15* (citing ***Lange v.*** [*428] ***National Biscuit Co.**, 297 Minn. 399, 211 N.W.2d 783 (1973)*; ***Laurie v. Mueller** 248 Minn. 1, 4, 78 N.W.2d 434, 437 (1956)*; *Restatement (Second) of Agency, § 235*). Other factors to be considered are whether the employee is authorized to perform this type of act, whether the act occurs substantially within authorized time and space restrictions, and whether the employer should reasonably have foreseen the employee's conduct, ***Id.***; 4 ***Minnesota Practice***, CIVJIG 252.1 (Supp. 1997).

On the factors of time and space restrictions, authorization, and foreseeability, the evidence in the light most favorable to the verdict does not [**9] preclude the jury from reasonably finding that the accidental discharge of the gun occurred within the scope of Thomford's employment. Although Thomford was not at work on the church's property, his job was described as a "twenty-four hour job" not restricted to the pulpit. ***Compare** **Edgewater Motels**, 277 N.W.2d at 11* (reinstating jury verdict of vicarious liability for employee's negligent actions in hotel while completing reports when employee was on duty or on call twenty-four hours a day), ***with** **Laurie**, 248 Minn. at 1, 78 N.W.2d at 434* (reversing denial of JNOV for employer when

twenty-four hour caretaker negligently injured tenant).

The deer hunting was not authorized or sponsored by the church, but it was foreseeable that Thomford would participate in recreational activities with parishioners. ***Compare*** ***Ermert v. Hartford Ins. Co.***, *559 So. 2d 467 (La. 1990)* (reinstating judgment against employer for injuries sustained from accidental discharge of shotgun at a hunting camp used to entertain customers and employees for employer's economic purposes because such injury could be anticipated), ***with*** ***Hall v. Danforth***, **[**10]** *172 A.D.2d 906, 567 N.Y.S.2d 958 (1991)* (ordering judgment for employer landowner on issue of vicarious liability for injury sustained by another hunter when employee was deer hunting on the land).

The remaining factor, that the conduct was in furtherance of the employer's interest, is a central question and must be satisfied in order for the jury to reasonably find that the conduct was within the scope of Thomford's employment. ***See*** ***Edgewater Motels***, *277 N.W.2d at 15* (initial question is whether factual situation can constitute conduct in furtherance of employer's interest); ***Kuehmichel v. Western Union Tel. Co.***, *125 Minn. 74, 76, 145 N.W. 788, 789 (1914)* (first inquiry is determining whether employee was engaged in serving employer or at liberty and pursuing own interests exclusively).

HN3 The "furtherance of the employer's interest" factor has been described expansively as requiring that an employee must be "acting primarily" for the benefit of the employer to be within the scope of employment. ***Gackstetter v. Dart Transit Co.***, *269 Minn. 146, 150, 130 N.W.2d 326, 329 (1964)*. The more current definition requires only that the conduct must be brought about "at least **[**11]** in part" by a desire of the employee to serve the employer or that the conduct is "to some degree," in furtherance of the interests of the employer. ***Marston***, *329 N.W.2d at 309*; ***Edgewater Motels***, *277 N.W.2d at 15*. The employee's state of mind is relevant to this determination. ***See*** 4 ***Minnesota Practice***, CIVJIG 252 (Supp. 1997) (citing *Restatement, (Second) of Agency § 235, comt. a* (1958)). To analyze whether the evidence satisfies this factor we apply the lower standard of "at least in part" or "to some degree."

The evidence established that Thomford had changed his day off, had taken a vacation day, and had cancelled a religious education class scheduled for that day. He testified that he took the day off "for his own sake" to go hunting, and that he would have gone hunting even by himself if Rosenau and Hentges could not have gone. He went hunting with them because of their close relationship, not because they were church members. He testified that he did not go hunting to benefit the church. The only benefit to the church is an indirect and nonspecific benefit from participating in social and recreational events with parishioners. We recognize **[**12]** that the ministers who testified for Hentges stated that social and recreational interaction was important to pastoral-parishioner relationships and in some instances this benefit is the planned purpose for the interaction.

[*429] The undisputed facts in this case, however, demonstrate that the deer hunting did not have the planned purpose of furthering pastoral-parishioner relationships. At best the testimony establishes the residual benefit to the church of fostering an ongoing relationship between Thomford, Rosenau, and Hentges that could benefit the church and help Thomford to be a better minister. On these facts, where the act of hunting occurred off church property on Pastor Thomford's day off, was not sponsored by the church, and was outside the church's physical and spiritual influence, the residual benefit of fostering ongoing pastoral-parishioner relationships is too tenuous in its connection to Thomford's employment to support a determination that he was acting within its scope.

The justification for holding an employer liable for the torts of employees is that the employer can and should consider the liability as part of the full endeavor and a cost of doing business. **[**13]** ***See*** ***Lange***, *297 Minn. at 403, 211 N.W.2d at 785*. But the employer's responsibility for the overall endeavor is not carried "to the point where an employer is absolutely liable for every tortious act of his employees." ***Laurie***, *248 Minn. at 4, 78 N.W.2d at 437*. When the connection between the activity and the

employer's interest is as marginal as established on these facts, the rationale for the doctrine does not support the extension of the employer's liability; the doctrine of vicarious liability does not transform an employer into a comprehensive insurer. ***See Id***.

D E C I SI O N

On the facts of this case Church Mutual is entitled to judgment notwithstanding the verdict. In light of our decision we do not reach Church Mutual's alternative arguments for reversal.

Reversed.

Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.

Supreme Court of Minnesota

December 23, 1982

Nos. 81-447, 81-469

Reporter
329 N.W.2d 306; 1982 Minn. LEXIS 1891

Barbara Marston, Appellant (81-447), and Nancy E. Williams, Appellant (81-469), v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., et al., Respondents

Subsequent History: [**1] As Modified on Denial of Rehearing February 3, 1983.

Prior History: Appeal from District Court, Hennepin County; Hon. Stanley D. Kane, Minneapolis, Judge.

Disposition: Reversed in part, affirmed in part, and remanded.

Core Terms

scope of employment, patient, Clinic, sexual, assault, cases, vicarious liability, therapy, motivation, jury instructions, sessions, new trial, punitive damages, massages, duties, award of punitive damages, time limit, psychologist, work-related, respondeat superior, sexual act, occurs, intentional torts, question of fact, trial court, services, professional association, sexual assault, biofeedback, profession

Case Summary

Procedural Posture

In consolidated cases, plaintiff patients and defendant psychologist cross-appealed rulings from the District Court, Hennepin County (Minnesota), which denied their motions for a judgment notwithstanding the verdict (JNOV) or a new trial on the issues of whether a punitive damages award was excessive and whether defendant clinic was liable under respondeat superior for the psychologist's sexual misconduct during therapy sessions.

Overview

The patients alleged error in denying their requested jury instructions on scope of employment. On appeal, the court reversed, holding that the jury instruction on the scope of employment was reversible error because it included the phrase "and (the specific conduct) was brought about, at least in part, by a desire by the agent to serve the principal." The psychologist's sexual overtures were intentional, and his motivation should not have been a consideration for imposition of vicarious liability. Under such circumstances, an employer was liable for its employee's conduct that was related to the employee's duties and occurred within the work-related limits of time and place. But the court refused to disturb the punitive damages award because there was no indication that it was the result of passion or prejudice, it was not excessive, and there was sufficient evidence of malice to support it.

Outcome

The court reversed the district court's judgment denying a JNOV or a new trial and remanded for a new trial in both cases.

LexisNexis® Headnotes

Torts > Vicarious Liability > Employers > General Overview

HN1 An employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and occurs within work-related limits of time and place.

Torts > Intentional Torts > General Overview

Torts > Intentional Torts > Assault & Battery > General Overview

Torts > Vicarious Liability > Employers > General Overview

HN2 For an intentional tort, the focus is on whether the assault arises out of a dispute occurring within the scope of employment. It is irrelevant whether the actual assault involves a motivation to serve the master. On the other hand, when the claim lies in negligence, the relevant duty of care is determined by employment status. Consequently, the requirement that the employee act, at least in part, in furtherance of his employer's interest requires both the existence of the duty and its exercise.

Torts > Vicarious Liability > Employers > General Overview

HN3 It is both unrealistic and artificial to determine at which point the acts leave the sphere of the employer's business and become motivated by personal animosity or an improper, personal benefit.

Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > General Overview

Torts > Intentional Torts > Assault & Battery > General Overview

Torts > Vicarious Liability > Employers > General Overview

HN4 Some courts have not found sexual assaults to be necessarily outside the scope of employment. Rather, they also are treated as presenting a question of fact to be determined on a case-by-case basis. Thus, it should be a question of fact whether the acts of an employee were foreseeable, related to, and connected with acts otherwise within the scope of employment.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

HN5 The general rule is that whether punitive damages are appropriate is within the discretion of the jury. The weight and force to be given evidence relating to punitive damages is exclusively a jury question and in determining whether punitive damages are unreasonably excessive, the court should consider, among other factors, the degree of malice, intent or willful disregard, the type of interest invaded, and the amount needed to truly deter such conduct in the future.

Syllabus

1. In determining whether intentional acts of employee were within scope of employment, inclusion of that part of JIG II 252 which requires consideration of whether the employee was motivated by a desire to serve the principal was prejudicial error. Rather, where employee was a psychologist and engaged in sexual acts with patients, rule for intentional torts as set forth in *Lange v. National Biscuit Company, 297 Minn. 399, 211 N.W.2d 783 (1973)*, applies and use of motivation test is improper.

2. It is a question of fact whether sexual acts committed by employee were within scope of employment. Whether act was within scope of employment should include consideration of whether acts were foreseeable, related to and connected with duties of employee and were committed during work-related limits of time and place.

3. Punitive damages awarded against employee were not excessive.

Counsel: Dayton, Herman, Graham & Getts and Philip W. Getts, Minneapolis, Minnesota, (for Marston 81-447).

[2]** Gilmore, deLambert, Aafedt, Eustis & Forde, Warren P. Eustis, and Janet Monson, Minneapolis, Minnesota, (for Williams 81-469), for Appellants.

Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan, J. Richard Bland and Robert

E. Salmon, Minneapolis, Minnesota, for Respondents.

Judges: Heard, considered, and decided by the court en banc. Yetka, Justice. Coyne, J., took no part in the consideration or decision of this case. Todd, Justice, concurring specially. Peterson, Justice, Kelley, Justice, dissenting.

Opinion by: YETKA

Opinion

[*307] Both cases, brought against the same defendants, were tried separately in Hennepin County District Court. Case No. 81-447 (Marston) is an appeal from judgment filed on March 11, 1981, and an order dated April 3, 1981, denying plaintiff's and defendant Nuernberger's motions for judgment NOV or, in the alternative, a new trial. Plaintiff, Barbara Marston, brought this suit against defendants, Dr. E. Philip Nuernberger (Dr. Nuernberger) and Minneapolis Clinic of Psychiatry and Neurology (Minneapolis Clinic), for damages resulting from sexual acts committed during plaintiff's therapy sessions with defendant Nuernberger. The jury returned a special **[**3]** verdict, finding that the sexual conduct occurred outside the scope of employment, but that defendant Nuernberger was liable for $ 15,000 actual and $ 50,000 punitive damages. Plaintiff moved for judgment NOV on the issue of whether defendant Minneapolis Clinic was liable under respondeat superior; defendant Nuernberger, for judgment NOV on the issue of whether the award of $ 50,000 punitive damages was excessive. From the denial of these motions, the parties appeal.

Case No. 81-469 (Williams) is an appeal from the trial court's denial of plaintiff's motion for a new trial dated April 15, 1981. In this case, tried separately, the jury found that the plaintiff suffered damages as a result of the sexual acts committed by defendant Dr. Nuernberger, but that the defendant Minneapolis Clinic was not liable either under respondeat superior or directly for negligence in supervising Dr. Nuernberger. Plaintiff appeals from the order denying a new trial on the issue of liability under respondeat superior against the Minneapolis Clinic.

We reverse and remand for a new trial in each of these cases.

The facts in these consolidated cases are largely undisputed for the purposes of this **[*308]** **[**4]** appeal. In the Marston case, plaintiff Barbara Marston was referred to defendant Minneapolis Clinic for "biofeedback" therapy of chronic headaches and back pains. A friend suggested that she contact defendant Dr. Nuernberger, who, at all times relevant, was a licensed psychologist employed by the Minneapolis Clinic. Marston made an appointment to see Dr. Nuernberger for treatment. The first two sessions were routine and involved relaxation exercises and therapy on the biofeedback machine -- a device that registers and measures the degree of muscular tension. On the third session, Dr. Nuernberger had Marston lie down on a sofa and instructed her to begin a relaxation exercise. Dr. Nuernberger later gave Marston a facial massage. He then reached over, put his arms around Marston and kissed her. Marston testified that, because of the trust she had placed in Dr. Nuernberger, she became quite upset and confused. She wrote a letter to Dr. Nuernberger explaining her feelings. Dr. Nuernberger persuaded her to continue treatment, however, and Marston scheduled a fourth session.

At the fourth session, as Marston was leaving, Dr. Nuernberger pulled her onto his lap, kissed her and commented: **[**5]** "There, that's not so bad, is it?" Marston, however, did not end her therapy relationship with Dr. Nuernberger and continued to make appointments. After the next session had ended, Dr. Nuernberger gave Marston a neck and shoulder massage, unbuttoned her blouse and engaged in petting. Eight more sessions followed, with heavy petting, kissing and sexual encounters occurring after the end of therapy. No sexual intercourse took place, however. Marston became increasingly depressed and finally terminated the therapy sessions. In March 1977, Marston called Dr. Maland Hurr, a neurologist at the clinic, and related the actions of Dr. Nuernberger.

In the Williams case, plaintiff Nancy Williams was referred by another physician to the Minneapolis Clinic for biofeedback therapy to relieve severe chronic migraine headaches. Williams' first sessions with Dr. Nuernberger were uneventful. Eventually, the pattern changed.

After approximately 45 minutes of therapy on the biofeedback machine, consultation and relaxation exercises, Dr. Nuernberger would begin a neck and back massage to help relieve tension. Dr. Nuernberger would then move Williams to a different room, have her lie down on a couch, **[**6]** and begin to caress and kiss her. This pattern continued from February to May. Sexual intercourse never occurred, although at one point Dr. Nuernberger suggested that Williams move out of her parents' home and get an apartment for the purpose of conducting nude body massages. Dr. Nuernberger never suggested that the sexual encounters had any therapeutic effect. He told Williams that she was his favorite patient, that he would see her regardless of her ability to pay for the therapy, and that she should not see any other psychologists. Williams further testified that the therapeutic value of her regular treatment suffered when she requested Dr. Nuernberger to cease his sexual advances and that she did not leave him because she was confused and desperate for help. Apparently Williams was severely depressed and seriously chemically dependent during this period.

Finally, in June 1977, Williams told Dr. Nuernberger that his sexual advances had to cease. Williams did not inform the Minneapolis Clinic of Dr. Nuernberger's actions.

At both trials, various experts testified as to the impropriety and seriousness of Dr. Nuernberger's actions. Dr. Nuernberger testified that facial and back massages **[**7]** are an accepted technique of biofeedback therapy and are generally used at the Minneapolis Clinic. Witnesses for the clinic, however, testified that any sexual contact or relationship with a patient is absolutely forbidden. Further, experts testified that sexual contact is so aberrant that effective therapy ceases. In addition, there was uncontradicted testimony that any sexual contact or relationship with a patient is totally unethical, of no therapeutic purpose, purely personal and strictly proscribed by the Code of Ethics of the American Psychological Association. One witness testified that the **[*309]** problem of a dual relationship between a doctor and patient is considered to be a well-recognized hazard.

In both cases, plaintiffs' requested jury instructions on scope of employment were denied. Instead, the trial court instructed the jury pursuant to JIG II 252. Both juries returned verdicts finding that Dr. Nuernberger violated his profession's standards of care. None of the parties contests these findings. The juries also found that Dr. Nuernberger acted outside the scope of his authority. In addition, in Williams, the jury absolved the Minneapolis Clinic of any separate **[**8]** negligence in its duty towards the plaintiff. The parties appeal only on the issue of respondeat superior and the amount of punitive damages awarded.

The issues raised on appeal are:

> I. Did the trial court err by instructing the jury under JIG II 252 on the issue of respondeat superior?
>
> II. Were the acts of Dr. Nuernberger outside his scope of employment as a matter of law?
>
> III. Was the award of $ 50,000 punitive damages excessive in the Marston case?

Appellants' Marston and Williams major argument concerns the correctness of the trial court's jury instructions and the validity of JIG II 252 on the issue of scope of employment. The trial court instructed the jury pursuant to JIG II 252 as follows:

> An agent is acting within the scope of his employment when he is performing services for which he has been employed or while he is doing anything which is reasonably incidental to his employment. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal but rather whether such conduct should have fairly been foreseen from the nature of the employment and the duties relating to it *and was brought about, at least* **[**9]** *in part, by a desire by the agent to serve the principal*.

(Emphasis added.) Appellant Marston, however, proposed that the test is whether "the conduct occurs during the time of employment and at a place of employment." Appellant Williams requested that the court instruct the jury that

the employer is liable when the employee is "doing anything which is reasonably incidental to his employment, and * * * within work related limits of time and place." Both instructions were refused. [1]

Appellants challenge the use of JIG II 252, arguing that it does not correctly state the rule enunciated in *Lange v. National Biscuit Company, 297 Minn. 399, 211 N.W.2d 783 (1973)* (hereinafter *Lange*). Appellant's argument is that *Lange* overruled prior **[**10]** cases requiring that the employee be "motivated by a desire to further the employer's business." *Id. at 401, 211 N.W.2d at 784*. Respondent, Minneapolis Clinic, however, contends that the appellants have misinterpreted *Lange* and emphasizes this court's recent decision in *Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (Minn. 1979)*.

Prior to *Lange*, the rule in Minnesota imposed liability only where it was "shown that the employee's acts were motivated by a desire to further the employer's business." *297 Minn. at 401, 211 N.W.2d at 784*. *Lange* concerned a cookie salesman employed to sell cookies to grocery stores in a particular territory. At one store, an argument developed as to the amount of shelf space allotted for defendant's cookies. The cookie salesman threatened and then assaulted the store owner. After noting the prior rule and discussing the policy basis for a liberal rule of liability under respondeat superior, this court stated:

> We believe that the focus should be on the basis of the assault rather than the motivation of the employee. We reject as the basis for imposing liability the arbitrary determination of when, and at what point, the argument **[**11]** and assault leave the sphere of the employer's business **[*310]** and become motivated by personal animosity. Rather, we believe the better approach is to view both the argument and assault as an indistinguishable event for purposes of vicarious liability.

Id. at 403-04, 211 N.W.2d at 785. This court then adopted the rule that ***HN1*** "an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and * * * occurs within work related limits of time and place," noted that the motivation test was "abandoned" and held that all prior decisions, to the extent they were inconsistent, were overruled. *Id. at 405, 211 N.W.2d at 786*.

Minneapolis Clinic argues that the exact scope of the rule enunciated in *Lange* has been rendered unclear by this court's recent holding in *Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (1979)*. In that case, this court held that there was sufficient evidence to support a jury verdict that an employee was acting within the scope of employment when he *negligently* caused a fire at the plaintiff's hotel. The court noted, citing *Lange*, that in order to establish that an employee **[**12]** is acting within the scope of employment "it must be shown that his conduct was, to some degree, in furtherance of the interests of his employer." *Id. at 15*. This court also quoted, with approval, the *Restatement (Second) of Agency § 235* (1958) and further stated that among the factors to be considered was whether the act was "motivated in part to further the interests of the employer." [2] *277 N.W.2d at 17 n.6*.

We see no conflict between *Lange* and *Gatzke. Lange* deals with an intentional tort while *Gatzke* deals with a case of negligence. ***HN2*** For an intentional tort, the focus is on whether the assault arises out of a dispute occurring within the scope of employment. It is irrelevant whether the actual **[**13]** assault involves a motivation to serve the master. On the other hand, when the claim lies in negligence, the relevant duty of

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[1] It should be noted initially that the proposed instructions, regardless of the validity of JIG II 252, do not correctly and completely reflect the rule established in *Lange v. National Biscuit Co.*, 297 Minn. 399, 211 N.W.2d 783 (1973), as discussed below.

[2] Restatement (Second) of Agency § 235 (1958) provides: "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." The comments stress that intent is the most important factor here.

care is determined by employment status. Consequently, the requirement that the employee act, at least in part, in furtherance of his employer's interest requires both the existence of the duty and its exercise. Some confusion evidenced by this appeal stems from the statement by this court in *Lange* that "the employee originally was motivated to become argumentative *in furtherance of his employer's business*." *297 Minn. at 404, 211 N.W.2d at 786* (emphasis added). This statement, however, was intended merely to indicate that, even under the motivation test, the original precipitating event for the assault in *Lange* occurred in the scope of employment. It was not intended to preserve the motivation test for intentional torts.

In the present case, the employee's sexual overtures to his patients cannot really be characterized as assaults, certainly not in the same way that the cookie salesman in *Lange* physically attacked the store owner nor the way the deliveryman sexually assaulted plaintiff in *Lyon v. Carey, 174 U.S. App. D.C. 422, 533 F.2d 649* **[**14]** (D.C. Cir. 1976). Dr. Nuernberger's advances may have been unwelcome, but they were not unconsented to and there is no evidence the doctor persisted in his conduct over any explicit objections or resistance. Neither, on the other hand, was Dr. Nuernberger's conduct simply negligence, as was the case of the employee in *Gatzke*.

Dr. Nuernberger, however, did act intentionally. In his relations with his patients, he intentionally departed from the standards of his profession, not, it is true, to cause harm to the two patients, but rather to confer a personal benefit on himself. This does not appear to be simply a case of a mutual infatuation; rather, it seems to be one where it is shown that the doctor imposes his personal, improper designs on the patient in a professional setting and -- as some of the evidence suggests -- the patient submits to the advances because of the very **[*311]** mental and emotional problems for which she is being professionally treated, thereby exacerbating these problems. In such a case, a jury might find that the employee's conduct is so related to the employment that the employer may be vicariously liable. To require that the employee who intentionally **[**15]** acts in his own personal interests in this factual setting must also have the intention to be acting in furtherance of his employer's interests unfairly distorts, as *Lange* would put it, the focus on how the employment relates to the incident.

We conclude, therefore, that the *Lange* rule should apply here and that the employee's motivation should not be a consideration for imposition of vicarious liability. One basic rationale underlying *Lange* is that it would be a rare situation where a wrongful act would actually further an employer's business. In addition, ***HN3*** it is both unrealistic and artificial to determine "at which point the [acts] leave the sphere of the employer's business and become motivated by personal animosity" -- or, as in this case, an improper, personal benefit. *297 Minn. at 403, 211 N.W.2d at 785*.

We hold, therefore, that it was reversible error, in giving JIG II 252 to the jury, to include the phrase "and was brought about, at least in part, by a desire by the agent to serve the principal." We think, consistent with the *Lange* rationale, that JIG II 252 may be used in cases where the employee's or agent's conduct involves an intentional wrong if mention **[**16]** is made that the conduct must occur within work-related limits of time and place and if the offending phrase above quoted is deleted. [3]

It should also be noted that appellants' argument that this court should determine that the acts are within the scope of employment as matter of law is without merit. Nor, as respondent argues, are

[3] We note that JIG II 252 was drafted prior to our *Lange* decision. In the case of an intentional wrong, then, the JIG instruction might be modified to read: "An agent is acting within the scope of his employment when he is performing services for which he has been employed or while he is doing anything which is reasonably incidental to his employment. The conduct must occur within work-related limits of time and place. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal but rather whether such conduct should fairly have been foreseen from the nature of the employment and the duties relating to it."

Dr. Nuernberger's [**17] acts necessarily outside the scope of employment. Rather, this presents a question of fact requiring a remand on this issue. There was testimony that sexual relations between a psychologist and a patient is a well-known hazard and thus, to a degree, foreseeable and a risk of employment. In addition, the instant situation would not have occurred but for Dr. Nuernberger's employment; it was only through his relation to plaintiffs as a therapist that Dr. Nuernberger was able to commit the acts in question. *See generally* Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5 (1946) (work-related assault); *Pritchard v. Gilbert*, 107 Cal. App. 2d 1, 236 P.2d 412 (1951) (work-related assault). Moreover, the acts occurred during or shortly after regular therapy sessions and were preceded by normal massages. It is noteworthy that ***HN4*** other courts have not found sexual assaults to be necessarily outside the scope of employment. Rather, they also are treated as presenting a question of fact to be determined on a case-by-case basis. *E.g.,* *Lyon v. Carey, 174 U.S. App. D.C. 422, 533 F.2d 649 (D.C. Cir. 1976)*. Thus, it should be a question of fact whether the acts of Dr. Nuernberger were foreseeable, [**18] related to and connected with acts otherwise within the scope of employment. *Todd v. Forest City Enterprises, 300 Minn. 532, 219 N.W.2d 639 (1974)*.

Dr. Nuernberger argues that the award of punitive damages of $ 50,000 was excessive, contrary to law, the product of passion and prejudice, and requests a remittitur to a lesser amount or a new trial on this issue only. Dr. Nuernberger's basic argument, that the trial court abused its broad discretion to set aside an excessive jury verdict, refers only to general principles. He also claims that there was no evidence of malice. Both contentions are without merit.

[*312] ***HN5*** The general rule is that "whether punitive * * * damages are appropriate * * * is within the discretion of the jury. [Citation omitted] The weight and force to be given evidence relating to punitive damages is exclusively a jury question" and "in determining whether punitive damages are unreasonably excessive, the court should consider, among other factors, the degree of malice, intent or willful disregard, the type of interest invaded, the amount needed to truly deter such conduct in the future * * *." *Wilson v. City of Eagan, 297 N.W.2d 146, 150-51 (Minn.* [**19] 1980); *see Minn. Stat. § 549.20, subd. 3* (1980).

In this regard, the trial court did not abuse its discretion in refusing to reduce the award of punitive damages. Upon review of the transcript, there is no indication that the punitive damages were the result of passion or prejudice; there was no prejudicial testimony and no comments which would have acted to inflate the size of the award. Further, there was sufficient evidence of malice to justify the award of punitive damages. Although Dr. Nuernberger denied that he committed the acts complained of, his testimony establishes that he was well aware that the rules of his profession and the canon of ethics unequivocally proscribe sexual activity with patients. This also tends to establish the magnitude of Dr. Nuernberger's transgressions. Thus, the award of punitive damages against Dr. Nuernberger was not excessive and will not be disturbed.

Reversed and remanded for new trials consistent with this opinion. In the *Marston* case, the new trial shall be restricted to liability; there need not be a retrial on damages. In *Williams*, there must be a retrial on all issues. In neither case is there any evidence that would justify [**20] an award of punitive damages against the clinic.

Coyne, J., took no part in the consideration or decision of this case.

Concur by: TODD

Concur

TODD, Justice (concurring specially)

I concur in the majority opinion but would change the *Lange* standards as applied to professional associations. Once the time and place standards of *Lange* are met, I would then hold that in the case of professional associations a different standard should be applied in determining scope of employment and in allocating the burden of proof. I would instruct the jury that because of the personal and confidential relationship that

exists between the members or employees of the association and the patient or client of the professional association, any transgressions are the responsibility of the association. Any violation of the ethics of the particular profession should be the responsibility of the entity offering the services. A person seeking the services of the professional association should not be denied recovery for injuries caused by transgressions that occur at the professional office on the grounds that the particular act of the individual member or employee violates the code of ethics of the particular **[**21]** profession. The patient or client has no responsibility to regulate the ethical conduct of the person rendering services. Also, in many cases, the very nature of the services being rendered diminish the capacity of the patient or client to protect themselves from the transgressions as they may occur.

On remand I would direct the trial court to instruct the jury in accordance with the standards set forth herein.

Dissent by: PETERSON; KELLEY

Dissent

PETERSON, Justice (dissenting).

I acknowledge that our decision in *Lange v. National Biscuit Company, 297 Minn. 399, 211 N.W.2d 783 (1973)*, substantially diminishes the motivation test for determining whether an intentional tort is committed within the scope of the tortfeasor's employment, although our later decision in *Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (Minn. 1979)*, indicates it was not wholly discarded. Whether or not JIG II 252 is an accurate statement of our law, I dissent because Dr. E. Phillip Nuernberger's conduct **[*313]** was clearly outside the scope of his employment as a matter of law, and thus any error in instructing the jury was without prejudice. The test enunciated in *Lange* does not compel, and policy **[**22]** considerations urge against, the extension of vicarious liability to the employer in the cases now before us.

The motivation test was challenged in *Lange* because it imposed liability on an employer according to an arbitrary determination of an employee's state of mind at the precise moment the tort occurs. *297 Minn. at 403, 211 N.W.2d at 785*. The *Lange* test, as applied to an argument that escalates into an assault, shifts the focus backward in time to the precipitating cause of the initial dispute. *297 Minn. at 403-04, 211 N.W.2d at 785*. The argument and assault are treated as an indistinguishable event for purposes of vicarious liability.

Thus, in *Lange*, we observed that the initial dispute arose out of the employee's employment-related efforts to secure shelf space for his product. Since the ensuing assault took its "color and quality from the earlier act" it was held within the scope of employment as a matter of law. *297 Minn. at 404, 211 N.W.2d at 786* (quoting *Gulf, C. & S.F. Ry. Co. v. Cobb, 45 S.W.2d 323, 326 (Tex. Civ. App. 1931))*. In the cases before us, the sexual acts of Dr. Nuernberger are not themselves within the scope of his duties as a therapist and **[**23]** cannot under any view of the facts be traced to precipitating acts from which they can draw an employment-related "color and quality."

The majority notes that the sexual acts were preceded by normal massages. There is no evidence, however, that the therapeutic massages administered by Dr. Nuernberger caused or were the source of the sexual contact. These cases should not turn on the fortuitous fact that massages were given in the course of treatment. I would not view these cases differently if the unethical sexual conduct of the therapist was preceded solely by counseling without physical contact.

The only case cited by the majority for the proposition that sexual acts may be found to be within the scope of employment does not sustain the decision to remand. In *Lyon v. Carey, 174 U.S. App. D.C. 422, 533 F.2d 649 (D.C. Cir. 1976)*, a violent sexual assault arose out of an argument between the plaintiff and a deliveryman over the delivery of merchandise in the course of the employer's business. The court limited its holding by noting that if "the [sexual] assault was not motivated or triggered off by anything in the employment activity but was the result of only propinquity and **[**24]** lust, there should be no liability [on the employer]." *Id. at*

655. Similarly, under the *Lange* rule, the employer should not be liable when the source of Dr. Nuernberger's tortious acts lay not in his duties as an employee but in his aberrant desire for his patients.

Having concluded that the result reached by the majority is contrary to precedent, I object to the apparently inadvertent expansion of the vicarious liability doctrine. Commentators have struggled without success to arrive at a single, self-sufficient reason for holding an employer vicariously liable, [1] so it is necessary to measure the majority's holding against several commonly advanced rationales.

Under one rationale, vicarious liability is imposed on an employer because of the "control" or right of "control" by the employer over the physical conduct of **[**25]** his employee. This consideration justifies vicarious liability "only if control is interpreted as the ability of the principal to monitor the precautionary behavior of the agent." [2] Vicarious liability, when triggered by activities such as those surrounding the tort in *Lange*, creates incentives for an employer to monitor an employee's behavior and perhaps adjust the standards by which job **[*314]** performance is judged. [3] The defendant clinic, however, is unable effectively to monitor a patient-therapist relationship without breaching the confidentiality of the relationship.

A second justification argues that since the employer reaps a benefit when the employee acts properly, the employer should share the cost when he acts improperly. If the salesman in *Lange* had **[**26]** succeeded through aggressive behavior in swaying the store manager, the immediate beneficiary would have been his employer. The benefit theory justified vicarious liability in that case. The logical limit to vicarious liability under the benefit theory must be at those cases involving activities that could never result in a benefit to the employer. Dr. Nuernberger's conduct falls outside of this rationale.

Perhaps the predominant modern justification for vicarious liability is a conscious rule of public policy forcing businesses to treat liability for the acts of employees as a cost of doing business, which cost is then spread to the community at large. In *Lange* we called this the "entrepreneur theory." *297 Minn. at 403, 211 N.W.2d at 785*. This justification appeals to an instinctive sense of justice, especially in regard to those negligent torts that will occur even with reasonable precautions. But there may be a social cost to the spreading of risks. Where the employee alone is in a position to monitor his behavior, vicarious liability "tends to increase the number of torts, perhaps to the detriment of efficiency, by diluting the [employee's] incentives for precautionary **[**27]** behavior." [4]

For the foregoing reasons, I disagree that these facts warrant a broader "scope of employment" rule. Nor should we adopt at this time a special rule by which professional associations are vicariously liable for the actions of their members or employees whenever the time and place standards are met. The far-reaching ramifications of such a rule have received no consideration by the parties or the court below. The cases were tried solely on the theory of a simple employer-employee relationship, and both plaintiffs argued before this court under the *Lange* rule.

KELLEY, Justice (dissenting).

I join in the dissent of Justice Peterson.

COYNE, J., took no part in the consideration or decision of this case.

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[1] See, *e.g.*, W. Prosser, The Law of Torts 459 (4th ed. 1971); Brill, *The Liability of an Employer for the Wilful Torts of His Servants*, 45 Chi.-Kent L. Rev. 1, 2-3 (1968).

[2] Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 Yale L.J. 168, 191 (1981).

[3] The control theory was mentioned as a "secondary consideration" in *Lange*, 297 Minn. at 403, 211 N.W.2d at 785.

[4] Note, *supra* note 2, at 197. The dilution of incentives is evident in one of the present consolidated cases, where plaintiff Williams proceeded against employer without joining Dr. Nuernberger as defendant.

Copeland v. Hubbard Broadcasting

Court of Appeals of Minnesota

January 24, 1995, Filed

C4-94-1629

Reporter
526 N.W.2d 402; 1995 Minn. App. LEXIS 98; 23 Media L. Rep. 1441

Greg Copeland, et al., Appellants, vs. Hubbard Broadcasting, Inc., d/b/a KSTP-TV, et al., Respondents.

Subsequent History: [**1] As Amended.
Review denied by, Request denied by *Copeland v. Hubbard Broadcasting, 1995 Minn. LEXIS 256 (Minn., Mar. 29, 1995)*
Subsequent appeal at Copeland v. Hubbard Broad., 1997 Minn. App. LEXIS 1276 (Minn. Ct. App., Nov. 25, 1997)

Prior History: Appeal from District Court, Ramsey County; Hon. James H. Clark, Jr., Judge. District Court # C19312721.

Disposition: Affirmed in part, and reversed and remanded in part.

Core Terms

trespass, homeowners', statutes, veterinarian, wiretapping, broadcast, denial of motion, summary judgment, amend, invasion of privacy, motion to amend, intercepted, videotape, district court, television station, trial court, possessor's, purposes, tortious, entrant

Case Summary

Procedural Posture

Appellant homeowners challenged an order from the District Court, Ramsey County (Minnesota), which granted summary judgment in favor of respondent television station on the homeowners' trespass complaint and denied the homeowners' motion to amend their complaint to add counts of invasion of privacy and violation of the State and federal wiretap statutes, *Minn. Stat. § 626A.02* (1992), *18 U.S.C.S. § 2511*.

Overview

The homeowners invited a veterinarian into their home to treat their cat. The veterinarian brought his assistant with him. Without the knowledge of the homeowners or the veterinarian, the assistant video taped the veterinarian's treatment of the homeowners' cat and portions of the homeowners' residence. The assistant was also employed by the television station. The television station aired a portion of the video in its investigative report regarding the veterinarian. On appeal, the court determined that the trial court erred in finding that the television station was not liable as a matter of law for trespass. The court found that whether the homeowners consent allowing the veterinarian and the assistant into their home was also consent for the assistant to videotape was a question of fact. The court concluded, however, that the trial court did not abuse its discretion in denying the homeowners' motion to amend their complaint. The court found that the homeowners failed to state a cause of action in either invasion of privacy or under *Minn. Stat. § 626A.02* (1992) or *18 U.S.C.S. § 2511*.

Outcome

The court affirmed the district court's denial of the homeowner's motion to amend their complaint. The court reversed the district court's grant of summary judgment in favor of the television station on the homeowner's trespass complaint.

LexisNexis® Headnotes

Real Property Law > Torts > Trespass to Real Property

Torts > Premises & Property Liability > Trespass to Real Property > General Overview

Torts > ... > Trespass to Real Property > Defenses > Consent

HN1 A trespass is committed when a person enters the land of another without consent. Consent may be implied from the conduct of the parties, but silence alone will not support an inference of consent. Consent may be geographically or temporally restricted.

Torts > ... > Duty On Premises > Trespassers > General Overview

Torts > Premises & Property Liability > Trespass to Real Property > General Overview

HN2 An entrant may become a trespasser by moving beyond the possessor's invitation or permission.

Real Property Law > Torts > General Overview

Real Property Law > Torts > Trespass to Real Property

Torts > Premises & Property Liability > Trespass to Real Property > General Overview

HN3 Trespass is a remedy when broadcasters use secret cameras for newsgathering. Newsgathering does not create a license to trespass or to intrude by electronic means into the precincts of another's home or office. Whether a possessor of land has given consent for entry is, when disputed, a factual issue.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN4 Under *Minn. R. Civ. P. 15.01*, the decision by a trial court to deny a motion to amend a pleading may be reversed only if the trial court abused its discretion. It is not an abuse of discretion to deny a motion to amend a complaint to assert a claim that is not legally recognized. It is also not an abuse of discretion to deny a motion to amend when the movant fails to establish evidence to support its claims.

Torts > Intentional Torts > Defamation

Torts > Intentional Torts > Invasion of Privacy > General Overview

Torts > ... > Invasion of Privacy > Appropriation > General Overview

Torts > ... > Invasion of Privacy > Intrusions > General Overview

Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > General Overview

HN5 Invasion of privacy is a term that has been used to refer to four different causes of action: (1) appropriation of the plaintiff's name or likeness for commercial benefit, (2) unreasonable intrusion into the plaintiff's seclusion, (3) public disclosure of private facts about the plaintiff, and (4) placing the plaintiff in a false light before the public. Minnesota has not recognized any of the four privacy torts.

Criminal Law & Procedure > Criminal Offenses > Illegal Eavesdropping > General Overview

Criminal Law & Procedure > Criminal Offenses > Illegal Eavesdropping > Elements

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

Evidence > Inferences & Presumptions > General Overview

HN6 Minnesota's wiretapping statutes are nearly identical to the federal wiretapping statutes. *Minn. Stat. § 626A.02, subd. 1* (1992), *18 U.S.C.S. § 2511(1)*. The statutes provide that any person who intentionally intercepts an oral communication is subject to liability. *Minn. Stat. § 626A.02, subd. 1(a)*; *18 U.S.C.S. § 2511(1)(a)*. A party to the conversation is exempted from liability, however, unless the communication is intercepted for the purpose of committing any criminal or tortious act. *Minn. Stat. § 626A.02, subd. 2(d)*; *18 U.S.C.S. § 2511(2)(d)*. The burden of proof is on the party attempting to show that the communication was intercepted for criminal or tortious purposes.

Syllabus

In a common law trespass action, the homeowners' consent to allow a student to

accompany an attending veterinarian for educational purposes does not, as a matter of law, confer a privilege on the student to videotape secretly for television broadcasting.

Counsel: For Greg Copeland, et al., Appellants: Patrick T. Tierney, Bonnie J. Bennett, Collins, Buckley, Sauntry & Haugh, St. Paul, MN.

For Hubbard Broadcasting, Inc., d/b/a KSTP-TV, et al., Respondents: Robert Lewis Barrows, Carolyn V. Wolski, Minneapolis, MN.

Judges: Considered and decided by Lansing, Presiding Judge, Klaphake, Judge, and Mulally, Judge. *

Opinion by: Harriet Lansing

Opinion

[*404] OPINION

Homeowners appeal the district court's summary judgment against their trespass claim and the denial of their motion to amend their complaint to add claims of invasion of privacy and violation of state and federal wiretapping statutes. We affirm the district court's denial of the motion to amend **[**2]** the complaint, but we reverse the summary judgment on the trespass claim.

FACTS

In the spring of 1993, KSTP television broadcast an investigative report on the practices of two metro-area veterinarians. One of the veterinarians, Dr. Sam Ulland, treated Greg and Betty Copeland's cat. Before an April 1993 visit to the Copeland home, Dr. Ulland received the Copelands' permission to bring along a student interested in a career in veterinary medicine. The student, Patty Johnson, did not tell the Copelands or Dr. Ulland that, in addition to being a part-time student at the University of Minnesota, she was also an employee of KSTP and was videotaping Dr. Ulland's practice methods.

When the investigative report was broadcast, it included two brief video portions filmed inside the Copelands' house. The Copelands sued KSTP and Johnson (collectively KSTP) for trespass, and later moved to amend their complaint to add claims for invasion of privacy and violation of state and federal wiretapping statutes. The district court denied the motion to amend and granted KSTP's summary judgement motion on the trespass claim.

ISSUES

I. Did the district court err in granting KSTP's motion for summary **[**3]** judgement on the homeowners' trespass claim?

II. Did the district court err in denying the homeowners' motion to amend their complaint by adding claims for invasion of privacy and violation of state and federal wiretapping laws?

ANALYSIS

HN1 A trespass is committed when a person enters the land of another without consent. ***Martin v. Smith,*** *214 Minn. 9, 12, 7 N.W.2d 481, 482 (1942)*. Consent may be implied from the conduct of the parties, but silence alone will not support an inference of consent. ***Northern States Power Co. v. Franklin,*** *265 Minn. 391, 396, 122 N.W.2d 26, 30 (1963)*. Consent may be geographically or temporally restricted. ***See id.*** (consent to enter particular part of land does not supply consent to enter any other part); ***Mitchell v. Mitchell,*** *54 Minn. 301, 304, 55 N.W. 1134, 1135 (1893)* (rightful entrant may become trespasser by refusing to leave when requested).

The district court concluded that KSTP was entitled to summary judgment on the Copelands' trespass claim because Johnson did not exceed the geographic boundaries **[**4]** of the Copelands' consent and the Copelands did not expressly limit their consent to Johnson's educational or vocational goals. We read the case law differently. For reasons we will more fully discuss, we hold that KSTP is not entitled to summary judgment on either basis.

Minnesota case law establishes that ***HN2*** an entrant may become a trespasser by moving beyond the possessor's invitation or permission.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

See ***State v. Brooks-Scanlon Lumber Co.,*** *128 Minn. 300, 302, 150 N.W. 912, 913 (1915)* (when consent given to cut mature [*405] trees, cutting of immature trees exceeded scope of consent and constituted trespass); ***Rieger v. Zackoski,*** *321 N.W.2d 16, 20 (Minn. 1982)* (court correctly instructed jury that lawful entrant may become trespasser by moving beyond scope of possessor's invitation). Although trespass in ***Brooks-Scanlon*** related to tangible objects, the decision nonetheless demonstrates that the scope of consent can be exceeded even though the entrant remains within the geographic limits of the consent. The holding in ***Brooks-Scanlon*** has not been confined to actions under the treble damages statute [**5] (*Minn. Stat. § 548.05*) but has been generally cited for the proposition that wrongful conduct following an authorized entry on land can result in trespass. ***See Northern States Power,*** *265 Minn. at 396, 122 N.W.2d at 30*.

In support of its motion for summary judgment, KSTP cites ***Baugh v. CBS, Inc.,*** for the proposition that the scope of consent can be exceeded only when physical boundaries are crossed. *See* *828 F. Supp. 745, 756 (N.D. Cal. 1993)*. ***Baugh*** is, however, factually distinguishable. In ***Baugh,*** the homeowner granted the broadcaster permission to videotape events at her house so long as they were not shown on television. ***Id.*** *at 752*. The homeowner brought a trespass action when the videotape was subsequently broadcast. **Id.** *at 756*. The court held that the scope of consent was not exceeded because the plaintiff agreed to the initial videotaping and the homeowner's cause of action was not trespass. ***Baugh*** has limited applicability to this case because the Copelands did not consent to any videotaping.

Courts in [**6] other jurisdictions have recognized ***HN3*** trespass as a remedy when broadcasters use secret cameras for newsgathering. ***See, e.g., Miller v. National Broadcasting Co.,*** *187 Cal. App. 3d 1463, 1480, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986)*; ***Anderson v. WROC-TV,*** *109 Misc. 2d 904, 441 N.Y.S. 2d 220, 223 (N.Y. App. Div. 1981)*; ***Ayeni v. CBS, Inc.,*** *848 F. Supp. 362, 368 (E.D.N.Y. 1994)*; *see also* Chad E. Milton et al., ***Emerging Publication Torts,*** Practising Law Institute (1994), *available in* WESTLAW, 389 PLI/PAT 651, at 20-22. Newsgathering does not create a license to trespass or to intrude by electronic means into the precincts of another's home or office. ***Dietemann v. Time, Inc.,*** *449 F.2d 245, 249 (9th Cir. 1971)*.

Whether a possessor of land has given consent for entry is, when disputed, a factual issue. ***See, e.g., Meixner v. Buecksler,*** *216 Minn. 586, 590, 13 N.W.2d 754, 756 (1944)*. The district court determined that the Copelands did not present any evidence indicating [**7] that the scope of consent was limited to educational purposes. The record, however, indicates that consent was given only to allow a veterinary student to accompany Dr. Ulland. Viewing the evidence in the light most favorable to the Copelands, ***see*** ***Fabio v. Bellomo,*** *504 N.W.2d 758, 761 (Minn. 1993)*, there is sufficient evidence to withstand summary judgment.

II

HN4 Under *Minn. R. Civ. P. 15.01*, the decision by a trial court to deny a motion to amend a pleading may be reversed only if the trial court abused its discretion. ***Fabio,*** *504 N.W.2d at 761*. It is not an abuse of discretion to deny a motion to amend a complaint to assert a claim that is not legally recognized. ***Envall v. Independent Sch. Dist.*** ***No. 704,*** *399 N.W.2d 593, 597 (Minn. App. 1987)*. It is also not an abuse of discretion to deny a motion to amend when the movant fails to establish evidence to support its claims. ***Bib Audio-Video Products v. Herold Mktg. Assocs., Inc.,*** *517 N.W.2d 68, 73 (Minn. App. 1994)*.

The Copelands appeal the district court's denial of their motion to amend their [**8] complaint to add a claim for invasion of privacy. ***HN5*** Invasion of privacy is a term that has been used to refer to four different causes of action: (1) appropriation of the plaintiff's name or likeness for commercial benefit, (2) unreasonable intrusion into the plaintiff's seclusion, (3) public disclosure of private facts about the plaintiff, and (4) placing the plaintiff in a false light before the public. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 117, at 849-66 (5th ed. 1984). Specifically, the Copelands allege that

KSTP committed the torts of intrusion into seclusion and appropriation.

[*406] Minnesota has not recognized any of the four privacy torts. ***See*** ***Hendry v. Conner,*** *303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975)*; ***House v. Sports Films & Talents, Inc.,*** *351 N.W.2d 684, 685 (Minn. App. 1984)*; ***Stubbs v. North Memorial Medical Ctr.,*** *448 N.W.2d 78, 80-81 (Minn. App. 1989)*. Although KSTP's actions may satisfy the elements necessary for the tort of intrusion, we decline to recognize an additional cause of action, particularly when the Copelands have not **[**9]** alleged any injury not addressed by their trespass claim.

The Copelands also appeal the district court's denial of their motion to amend their complaint to add a claim for violation of Minnesota and federal wiretapping statutes. ***HN6*** Minnesota's wiretapping statutes are nearly identical to the federal wiretapping statutes. ***Compare*** *Minn. Stat. § 626A.02, subd. 1*(1992), ***with*** *18 U.S.C. § 2511(1) (1992)*. The statutes provide that any person who intentionally intercepts an oral communication is subject to liability. *Minn. Stat. § 626A.02, subd. 1(a)*; *18 U.S.C. § 2511(1)(a)*. A party to the conversation is exempted from liability, however, unless the communication is intercepted for the purpose of committing any criminal or tortious act. *Minn. Stat. § 626A.02, subd. 2(d)*; *18 U.S.C. § 2511(2)(d)*. The burden of proof is on the party attempting to show that the communication was intercepted for criminal or tortious purposes. ***Thomas v. Pearl,*** *998 F.2d 447, 451 (7th Cir. 1993)*, ***cert. denied,*** __ U.S. __ (1994).

The Copelands **[**10]** have not presented evidence that would create a triable issue. They allege that KSTP is not entitled to the party exemption because it committed the tort of trespass. This allegation is insufficient because the statute requires that the communication be intercepted for the *purpose* of committing a tortious act. The evidence is undisputed that KSTP intercepted the communication for commercial purposes and not for the purpose of committing trespass.

The Copelands have not sought review of that part of the district court's order dismissing their intentional misrepresentation claim or denying their motion to amend to assert a negligent misrepresentation claim or punitive damages.

DECISION

The district court did not abuse its discretion in denying the motion to add claims of invasion of privacy and violation of the wiretapping statutes, but the broadcaster is not entitled to summary judgment on the homeowners' claim for trespass.

Affirmed in part, and reversed and remanded in part.

Harriet Lansing

January 17, 1995.

P.L. v. Aubert

Supreme Court of Minnesota

April 5, 1996, Filed

C2-94-1502

Reporter
545 N.W.2d 666; 1996 Minn. LEXIS 204; 11 I.E.R. Cas. (BNA) 1035

P.L., Respondent, v. Lynn Aubert, Respondent, Daniel Brooks, Independent School District No. 306, petitioners, Appellants.

Prior History: [**1] Review of Court of Appeals.

Disposition: Reversed and remanded.

Core Terms

teacher, supervision, school district, foreseeable, duties, sexual, summary judgment, infliction of emotional distress, time limit, safety and welfare, intentional torts, unforeseeable, work-related, classroom, imputable, unrelated, intimate

Case Summary

Procedural Posture

Appellants, a school district and a school superintendent, sought review of a judgment of the court of appeals, which reversed a grant of summary judgment to them on claims of battery, intentional infliction of emotional distress, and negligent supervision brought by respondent student. The student brought the action against appellants and respondent teacher after he claimed that he had an inappropriate relationship with the teacher.

Overview

The student alleged that he and the teacher had an intimate relationship and that their clandestine meetings often occurred during school hours and on school property. The student's claims included battery, intentional infliction of emotional distress, sexual harassment, breach of fiduciary duty, negligent supervision, negligent infliction of emotional distress, and negligent hiring. On appeal from the reversal of the summary judgment on several of the claims against appellants, the court reversed and remanded the case to the trial court with instructions that it reinstate the summary judgment in favor of appellants on all the claims. Limiting its holding to the facts of the case, the court found that appellants were not liable for the intentional torts of the teacher even though the acts occurred within work-related limits of time and place, where such acts were unforeseeable and were unrelated to the duties of the teacher. Because the school district could not foresee such a relationship between the teacher and the student, it could not be held liable. The court noted that the school district had employed reasonable measures to insure the safety and welfare of its students.

Outcome

The court reversed the judgment and remanded the case to the trial court with orders to reinstate the summary judgment on all counts in favor of appellants.

LexisNexis® Headnotes

Torts > ... > Employers > Scope of Employment > General Overview

HN1 In order for liability to lie with the employer for an employee's tortious acts, the source of the attack must be related to the duties of the employee and occur within work related limits of time and place.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

Education Law > ... > Misconduct & Performance > Sexual Misconduct > Relationships With Students

Torts > ... > Employers > Scope of Employment > General Overview

HN2 The master is liable for any such act of the servant which, if isolated, would not be imputable to the master, but which is so connected with and immediately grows out of another act of the servant imputable to the master, that both acts are treated as one indivisible tort.

Contracts Law > Formation of Contracts > Consideration > General Overview

Torts > Business Torts > Negligent Hiring, Retention & Supervision

HN3 A school district cannot be held liable for actions that are not foreseeable when reasonable measures of supervision are employed to insure adequate educational duties are being performed by the teachers, and there is adequate consideration being given for the safety and welfare of all students in the school. The safety and welfare of the students in a school setting is paramount.

Torts > Vicarious Liability > Employers > General Overview

Torts > ... > Employers > Activities & Conditions > Intentional Torts

Torts > ... > Employers > Scope of Employment > General Overview

HN4 An employer is not liable for the intentional torts of its employee even though the acts occurred within work-related limits of time and place, where such acts were unforeseeable and were unrelated to the duties of the employee.

Syllabus

1. In this case, the employer is not liable for the intentional torts of the employee, even though the acts occurred within work-related limits of time and place, where such acts were unforeseeable and were unrelated to the duties of the employee.

2. An employer is not liable for negligently supervising an employee who commits a tort when such behavior could not have been anticipated or otherwise discovered through the normal exercise of reasonable care.

Counsel: Michael T. Milligan, Kenneth H. Bayliss, St. Cloud, MN, for appellant.

Katherine S. Flom, Minneapolis, MN, for respondent.

Judges: TOMLJANOVICH, Justice.

Opinion by: TOMLJANOVICH

Opinion

[*666] Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

Lynn Aubert was a 42-year-old licensed school teacher starting her first year of teaching at LaPorte High School, LaPorte, Minnesota in September of 1989. She was interviewed for the position by Daniel Brooks, who was the high school principal and school superintendent for School District No. 306 (ISD No. 306), the LaPorte school district. A standard background check was completed and she was found **[**2]** to have good **[*667]** academic credentials and exceptional personal references.

P.L. was a student in three classes that Aubert taught -- clerical, business math and accounting. Early in the school year, Aubert began talking with P.L. about personal problems with her marriage and her family. She also spoke with him about his family's problems and his personal problems with drinking.

In November or December of that school year, Aubert began kissing P.L. while they were alone in the classroom. In December, Aubert had a Christmas party at her home for her business

math students. During the party, she spent time dancing with P.L., resting her hands on his buttocks. More intimate contact occurred in the months following the party.

During times alone with P.L., Aubert would lock the classroom door, and she and P.L. would engage in intimate sexual contact both over and under their clothing. She would also have him sit with her at her desk during class and they would engage in intimate sexual contact hidden only by her desk, while other students were present in the room. Aubert also asked other teachers to excuse P.L. from their classes so that he might receive "extra help." P.L. would meet Aubert **[**3]** in her classroom, she would lock the door, and they would engage in intimate sexual contact consisting of repeated touching of the genitals over and under their clothing, kissing and hugging.

Although sexual intercourse never occurred, the relationship continued until homecoming dress-up week in the spring of 1990. [1] At that time, P.L. told Aubert the relationship had to end and it did end at that time. At no time either during or immediately after the relationship between Aubert and P.L. did either party tell anyone about the relationship or their clandestine meetings during school hours.

In December 1992, P.L. filed a complaint alleging several counts of inappropriate behavior on the part of Aubert, and alleging that Brooks and ISD No. 306 **[**4]** were responsible for Aubert's behavior. The complaint alleged causes of action against Aubert, Brooks and ISD No. 306 for battery, intentional infliction of emotional distress, sexual harassment, breach of fiduciary duty, negligent supervision, negligent infliction of emotional distress, and negligent hiring.

The trial court granted summary judgment to ISD No. 306 and Brooks, and denied summary judgment to Aubert. On appeal, the court of appeals found fact issues remained regarding the battery, intentional infliction of emotional distress and negligent supervision claims against ISD No. 306 and Brooks. The court of appeals reversed summary judgment on those three claims and affirmed summary judgment in favor of ISD No. 306 and Brooks on the negligent infliction of emotional distress, breach of fiduciary duty, sexual harassment, and negligent hiring claims. ISD No. 306 and Brooks appealed.

In *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1983)*, we affirmed the two-prong test established ten years earlier in *Lange v. National Biscuit Company, 297 Minn. 399, 211 N.W.2d 783 (1973)*, that ***HN1*** in order for liability to lie with the employer, **[**5]** "the source of the attack [must be] related to the duties of the employee and * * * [occur] within work related limits of time and place." *Id. at 405, 211 N.W.2d at 786*.

In *Marston* the employee was a psychologist who made unwelcome and improper sexual advances to patients during and immediately after therapy sessions in his office. *Marston, 329 N.W.2d at 308*. We noted that the doctor "intentionally departed from the standards of his profession, not * * * to cause harm * * *, but rather to confer a personal benefit on himself." *Id. at 310*. In that situation, we held the employer liable for the employee's actions, because there was a fact issue as to whether the acts were within the scope of the doctor's employment. We stated that "it should be a question of fact whether the acts of [defendant] were foreseeable, **[*668]** related to and connected with acts otherwise within the scope of employment." *Id. at 311*. This issue of foreseeability was raised because of expert testimony at the lower court that sexual relations between doctors and patients was a "well-known hazard and thus * * * foreseeable." *Id.* It was the foreseeability of the risk that determined the outcome **[**6]** of the *Marston* case.

Here we find no evidence that such relationships between teacher and student are a "well-known hazard"; thus foreseeability is absent. While it is true that teachers have power and authority

[1] There is a discrepancy as to the date of this school event and apparently no school calendar for that particular year was available from ISD No. 306 to determine the exact date. Aubert claims the event was in February of 1990; P.L. thought it was in May of 1990.

over students, no expert testimony or affidavits were presented regarding the potential for abuse of such power in these situations; thus there can be no implied foreseeability.

HN2 "The master is liable for any such act of the servant which, if isolated, would not be imputable to the master, but which is so connected with and immediately grows out of another act of the servant imputable to the master, that both acts are treated as one indivisible tort * * *." *Lange at 785-86* (quoting *Gulf. C. & S. F. Ry. Co. v. Cobb, 45 S.W.2d 323, 326 (Tex. Civ. App. 1931))*. Here, the sexual contact by the teacher toward the student could not be considered an "indivisible" act directly related to her teaching duties. Thus liability of the master cannot be imputed, even though the acts were committed within work related time and place.

In *Larson v. Independent School District No. 314, 289 N.W.2d 112 (Minn. 1980)* we found that a principal had a duty to exercise reasonable care **[**7]** in supervising and evaluating the work of teachers within the school. *Id. at 116*. The exercise of that due care involved "maintaining conditions conducive to the safety and welfare of students during the school day." *Id.*

In *Larson* we found that a first year teacher, by his inexperience and lack of supervision, caused injuries to a student. *Id.* A jury in that case found the principal liable for failure to "reasonably * * * supervise the teaching of an inexperienced instructor", thus creating the opportunity for harm. *Id.* We affirmed in *Larson,* finding that a jury could have reasonably believed that closer supervision may have averted the injury. *Id.*

Brooks and ISD No. 306 performed standard teacher evaluations of Aubert. In addition to the evaluations, Brooks and his assistant made several unannounced visits to Aubert's classrooms. Because the school had no public address system, all messages were hand-delivered by staff and students to classrooms throughout the course of the school day. Even with all of this interaction during the school day, the clandestine relationship between teacher and student was never observed.

HN3 A school district cannot be held **[**8]** liable for actions that are not foreseeable when reasonable measures of supervision are employed to insure adequate educational duties are being performed by the teachers, and there is adequate consideration being given for the safety and welfare of all students in the school. The safety and welfare of the students in a school setting is paramount. However, in this case, closer vigilance would not have uncovered the relationship because both participants worked hard to conceal it.

We hold that in this case ***HN4*** the employer is not liable for the intentional torts of its employee even though the acts occurred within work-related limits of time and place, where such acts were unforeseeable and were unrelated to the duties of the employee. By this holding, we do not change the test set out in *Marston* and *Lange;* we simply clarify that because the acts were not foreseeable by the school district, it cannot be held liable in this instance.

We reverse and remand to the trial court to reinstate the summary judgment on all counts for Brooks and ISD No. 306.

Reversed and remanded.