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Melany Zoumadakis v. Uintah Basin Medical Center, Dr. Mark Mason, Lloyd Neilson, Carolyn Smith, and John Does 1-10 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MELANY ZOUMADAKIS,

Plaintiff/Appellant,

vs.

UINTAH BASIN MEDICAL CENTER,
INC., and individuals, DR. MARK
MASON; LLOYD NIELSEN; CAROLYN
SMITH; and JOHN DOES 1-10,

Defendants/Appellees/Cross-
Appellant.

**REPLY BRIEF OF APPELLEES
UINTAH BASIN MEDICAL CENTER,
INC., DR. MARK MASON, LLOYD
NIELSEN AND CAROLYN SMITH
AND CROSS APPELLANT DR.
MARK MASON**

Case No. 20080067

Appeal from the Eighth Judicial District Court For Duchesne County, State of Utah,
Honorable John R. Anderson, Presiding

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CROSS-APPEAL

As set forth in the initial brief of defendants, appellees and cross-appellant Uintah Basin Medical Center, Inc., Dr. Mark Mason, Lloyd Nielsen and Carolyn Smith, in the event the Court reverses the jury's verdict, Dr. Mason cross-appeals the district court's denial of summary judgment with respect to one alleged statement by Dr. Mason and its denial of Dr. Mason's directed verdict motion at trial. This appeal is conditional on reversal of the jury verdict in Dr. Mason's favor.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT TO DR. MASON

The district court granted summary judgment on the bulk of Zoumadakis' defamation claim, including with respect to all other defendants. Appellees' Initial Brief at 17. In granting summary judgment, the court held that a conditional privilege existed between Uintah Basin and Dr. Mason with respect to Dr. Mason's statements to Uintah Basin regarding Zoumadakis. However, while the district court found the privilege protected one of Dr. Mason's statements, the district court denied summary judgment with respect to Dr. Mason's statement to Uintah Basin that Zoumadakis had questioned Dr. Mason's care with a patient, holding that whether malice existed as to that statement was a question of fact. R. 442-44. As set forth in the initial brief of defendants, appellees and cross-appellant and below, this ruling was error.

To demonstrate malice sufficient to overcome a qualified privilege requires evidence of ill will, excessive publication or that the defendant did not reasonably believe

his statements. *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-05(Utah 1992). At summary judgment, Zoumadakis' only argument in support of her claim of malice was that Dr. Mason must have wanted her gone, and the way to do so was to maliciously spread untruths about her questioning his care. R. 273-274. As pointed out in the opening brief, on its face, this argument is based on speculation and assumption, not on fact, and therefore it could not properly support the district court's denial of summary judgment. See *Winter v. Nw. Pipeline Corp.*, 820 P.2d 916, 919 (Utah 1991) (plaintiff's reliance on his own unsupported conclusions without evidentiary support is insufficient to defeat a motion for summary judgment); *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985) (affidavit and arguments based solely on unsubstantiated opinion and belief is insufficient to defeat summary judgment). Because this was the only argument raised, summary judgment should have been granted.

In addition, to the extent Zoumadakis now claims that summary judgment was properly denied because Dr. Mason's request that Zoumadakis not be assigned to his patients demonstrates he acted with malice in telling Uintah Basin that Zoumadakis questioned his care, this argument also fails. The concept of malice examines the motivation behind the alleged defamatory statement. Dr. Mason's request that Zoumadakis no longer see his patients does not on its face evidence that Dr. Mason acted maliciously, i.e., out of ill will toward Zoumadakis, that he excessively published the statement (his comments were made only to appropriate personnel at Uintah Basin) or that he did not reasonably believe Zoumadakis had questioned his care.

Zoumadakis appears to argue that the statement creates an inference of malice because Dr. Mason's request would not have been made unless he had some ill will against her. In fact, the inference Zoumadakis seeks to draw is not reasonable. *See e.g., Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827, 831 (Utah Ct. App. 1988) (at summary judgment, the evidence and any reasonable inferences therefrom are drawn in favor of the non-moving party).

At summary judgment (and at trial), Dr. Mason testified (without dispute) that his patient told him that Zoumadakis said Dr. Mason's prescribed treatment was wrong, that he had received similar feedback from patients on previous occasions and that he was concerned that such communications between Zoumadakis and his patient(s) could compromise patient care and treatment. R. 246-48; R. 660 at 198, 205-206; 214-218. In light of what his patient told Dr. Mason about Zoumadakis' comments, there is simply no basis for inferring from Dr. Mason's request that Zoumadakis not see his patients that he was motivated by malice, as opposed to legitimate patient care concerns, in reporting to Uintah Basin that Zoumadakis had questioned his care.¹

In her response to the cross-appeal, Zoumadakis also argues that "the severity" of the alleged defamatory statement establishes malice. Malice cannot be inferred from the

¹ Zoumadakis continues to assert that she did not question Dr. Mason's treatment. However, Zoumadakis provided no evidence to dispute Dr. Mason's testimony that his patient said she questioned his treatment. Moreover, for purposes of malice, whether his patient correctly reported Zoumadakis' statements to Dr. Mason is irrelevant. If Dr. Mason acted on the legitimate concerns raised by his patient's report, he did not act maliciously, even if the patient misreported the conversation with Zoumadakis.

mere fact of the alleged defamatory statement. Otherwise, a qualified privilege could always be defeated. The point of a qualified privilege is that it protects the speaker from liability, notwithstanding the “severity” of the alleged statement.

At summary judgment, Zoumadakis failed to provide any legitimate evidence, direct or circumstantial, that Dr. Mason’s alleged statement was made maliciously. Without evidence – as opposed to speculation – of malice, Zoumadakis failed to preserve any question for the jury and summary judgment should have been granted.

II. THE DISTRICT COURT ERRED IN FAILING TO GRANT DR. MASON’S MOTION FOR DIRECTED VERDICT

Similarly, the district court erred in failing to grant Dr. Mason’s motion for a directed verdict at the close of Zoumadakis’ case. Following the close of Zoumadakis’ case, Dr. Mason moved for a directed verdict on the ground that Zoumadakis had failed to provide evidence of malice sufficient to overcome the qualified privilege the district court found protected communications between Dr. Mason and Uintah Basin.

In response to the cross-appeal, Zoumadakis first argues that the falsity of the alleged defamatory statement establishes malice. Again, as noted above, malice goes to the motivation behind the alleged defamatory statement and requires evidence of ill will, excessive publication or that the defendant did not reasonably believe his statements. *Russell*, 842 P.2d at 904-05. Malice cannot be established from the mere fact of the statement or its falsity. The point of a qualified privilege is that if applicable, it precludes liability for a defamatory statement, which by definition must be false.

Zoumadakis also asserts that the district court correctly denied Dr. Mason's directed verdict motion because the following evidence demonstrated malice: (i) Dr. Mason's acknowledged request that Uintah Basin not assign Zoumadakis to his patients and his statement that he would refer his patients to another home health agency if she continued to see his patients; (ii) Dr. Mason's testimony that Zoumadakis had a somewhat "know it all" attitude and tended to be "somewhat disagreeable if [Dr. Mason] tried to explain his position." (R. 660 at 223); and (iii) Dr. Mason's testimony that he felt Zoumadakis complained to him excessively (R. 660 at 224).

The first statement referred to above is insufficient to establish malice for the reasons explained above in Section I. With respect to the second and third items, again, neither piece of testimony provides express or direct evidence of malice. Once again, although not expressly articulated, Zoumadakis appears to assert that malice can be inferred from the cited testimony. Again, however, only reasonable inferences may be drawn from the evidence. *Beehive Brick Co.*, 780 P.2d at 831. That Dr. Mason felt Zoumadakis could be somewhat difficult to deal with on occasion does not demonstrate that his complaint to Uintah Basin that Zoumadakis questioned his care with a patient was motivated by ill-will, as opposed to the legitimate basis he explained, i.e., concerns about patient care.

Given Zoumadakis' failure to provide any legitimate evidence of malice, a directed verdict should have been granted to Dr. Mason on Zoumadakis' defamation claim.

CONCLUSION

For the reasons stated above, in the event this Court reverses the jury verdict in Dr. Mason's favor, the district court should order that judgment be entered in favor of Dr. Mason on the ground (i) the trial court erred in denying summary judgment to Dr. Mason with respect to his alleged statement to Uintah Basin regarding Zoumadakis and (ii) the trial court erred in not granting a directed verdict in Dr. Mason's favor.

DATED this 24th day of March, 2009.

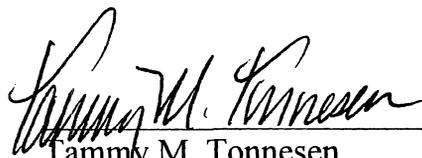

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the **REPLY BRIEF OF APPELLEES UINTAH BASIN MEDICAL CENTER, INC., DR. MARK MASON, LLOYD NIELSON AND CAROLYN SMITH AND CROSS APPELLANT DR.**

MARK MASON was mailed, postage pre-paid, on the 24 day of March, 2009, to the following:

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