STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE,

Plaintiff-Appellant

v

AMERICAN MEDICAL PHARMACIES, INC., and SHIRLEY BROCK,

Defendant-Appellees.

UNPUBLISHED
May 3, 2002

No. 230239
Wayne Circuit Court
LC No. 98-838810-NO

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for judgment notwithstanding the verdict (JNOV.) The jury awarded plaintiff $100,000 in damages on his claims for slander, violation of MCR 333.5131, invasion of privacy and intentional infliction of emotional distress. We reverse.

I. Basic Facts and Procedural History

Plaintiff is HIV positive. Plaintiff went to a medical clinic located within his community to fill a prescription to control his HIV status. The medical clinic consists of a dentist's office, a doctor's office and a pharmacy. The waiting rooms for these respective offices are all connected and have chairs for people to sit in while they wait for service. A glass window separates the pharmacy employees from the customers that sit in the waiting room.

When plaintiff arrived at the clinic to fill his prescriptions, he had an altercation with one of the pharmacist's employees, defendant Shirley Brock. Plaintiff and Brock exchanged harsh words which resulted in Brock loudly stating "you're the m _ _ _ _ _ f _ _ _ _ _ with AIDS." According to plaintiff, Brock spoke the offending phrase three times in a very loud tone and in the presence of twenty-five to forty individuals seated in the three waiting rooms.

Among those seated in the waiting rooms were plaintiff's mother and two of his nieces. Plaintiff testified that he never told his mother that he was HIV positive and that prior to this incident he had only advised his partner and probation officer of his condition. Plaintiff indicated that he did not know any of the other individuals that were seated in the waiting rooms personally and could not identify any by name, but indicated that he knew of them from the neighborhood generally.

A few days after this incident, plaintiff overheard a man who had been in the waiting room refer to him as "the one from the doctor's office with AIDS." Over the course of several months, this same man participated in further verbal harassment of plaintiff that culminated in severe physical beatings. Plaintiff further testified that he endured public humiliation and continuing social ridicule from others in the community. Finally, after the exchange in the pharmacy, his relationship with his mother deteriorated significantly.

Plaintiff filed suit against Brock and her employer. The jury returned a verdict for plaintiff in the amount of $100,000. Defendant moved for JNOV. Finding that plaintiff failed to present sufficient evidence to create a jury question on whether the statement was published, released or disclosed to third parties, the trial court granted defendants' motion for JNOV on the slander, invasion of privacy and violation of MCL 333.5131 claims. Finally, the trial court found that as a matter of law, Brock's conduct was not sufficiently outrageous to sustain plaintiff's claim for damages for the intentional infliction of emotional distress. Plaintiff appeals as of right and we reverse.

II. Standard of Review

This court reviews de novo a trial court's grant or denial of a motion for JNOV. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). Accordingly, this court must view the evidence and all legitimate inferences arising there from in a light most favorable to the nonmoving party. *Id*. A JNOV is justified only if the evidence submitted fails to establish a claim as a matter of law. *Barrett v Kirtland Community College*, 245 Mich App 306, 312; 628 NW2d 63 (2001). If reasonable jurors honestly could have reached different conclusions, the jury verdict must stand. *Id.*

III. The Publication Element

Common to plaintiff's claims for slander, violation of MCL 333.5131 and invasion of privacy is the requirement that defendant publish, disclose or release the information to a third party. On this point, the trial court ruled that "the mere fact that the offices were `full of people' does not establish publication/release/disclosure, in the absence of some proof that someone present actually heard and understood the remarks." We disagree.

In the case at bar, plaintiff testified that defendant loudly uttered the complained of statement into a waiting room where people were seated awaiting services. According to plaintiff, defendant's statement caused those in the waiting rooms to turn and look directly at plaintiff. The question thus becomes whether plaintiff's testimony provided sufficient evidence to give rise to a fair inference that legal publication occurred by what defendant said and did. *Bonkowski v Arlan's Dept Store*, 383 Mich 90, 97; 174 NW2d 765 (1970). On the record presented herein for our review, we find that it does.

It is not necessary to present third-party witnesses to prove that a loud statement spoken near an occupied area was overheard; rather, this may properly be inferred. See *Bonkowski v Arlan's Dept Store*, 383 Mich 90, 95-97; 174 NW2d 765 (1970). That no third persons heard or understood the statement uttered is inapposite for purposes of demonstrating legal publication but may bear upon the recoverable amount of plaintiff's damages. *Id*. Furthermore, plaintiff properly gave a lay opinion based on his perception that defendant's statement could be

overheard by others in the pharmacy area. MRE 701; *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999). Although defendant was behind the glass pharmacy window at the time she made the statements and two witnesses testified that they did not hear the statements, the relative credibility of these witnesses, the weight afforded their testimony, along with plaintiff's testimony, were questions properly submitted to the jury for resolution.

Defendant's argument that a third party's remarks about plaintiff were inadmissible hearsay is without merit. The remarks were not introduced to prove the truth of the matter asserted, i.e., that plaintiff was in fact diseased, or was observed in a certain location by the third party. Where a witness merely testifies that a statement was made for a purpose other than proving the truth of its assertion, that testimony is not hearsay. MRE 801(c); *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993).

Because plaintiff demonstrated legal publication, there was no basis justifying the trial court's intrusion into the jury's province by granting defendants' request for JNOV. Accordingly, we find that the trial court committed error requiring reversal in this regard.[1]

IV. Intentional Infliction of Emotional Distress.

Next, plaintiff argues that the trial court erred in granting defendants' motion for JNOV on plaintiff's claim for intentional infliction of emotional distress. We agree.

A plaintiff seeking to state a cognizable claim for intentional infliction of emotional distress must demonstrate 1) extreme and outrageous conduct; 2) intent or recklessness; 3) causation, and 4) severe emotional distress. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). Liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993). Liability does, however, attach where the conduct at issue is so outrageous in character and extreme in degree, as to exceed all bounds of decency and is considered atrocious and utterly intolerable in a civilized community. *Teadt, supra* at 582. Indeed, "the case is generally one in which the recitation of facts to an average member of the community would arouse resentment against the actor, and lead the average member of the community to exclaim `Outrageous!'" *Id*. (Citation omitted.)

This Court has previously recognized that publication of embarrassing private matters suffices to present a jury issue regarding whether conduct is extreme and outrageous. See *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995) (public disclosure of names of women about to undergo abortions sufficient to present jury question); *Smith v Calvary Christian Church*, 233 Mich App 96, 114; 592 NW2d 713 (1998), rev'd on other grounds, 462 Mich 679 (2000) (disclosure of past association with prostitutes to church congregation sufficient to present jury question). In light of these cases, we cannot say as a matter of law that a reasonable person would not find defendant's loud, public and vulgar disclosure of plaintiff's infection with HIV – a confidential medical matter – outrageous.

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[1] Additionally, we note that during oral argument, defendants conceded that the trial court erred by finding lack of publication.

Here, defendant's statement identifying plaintiff as someone suffering from AIDS, a highly communicable disease, not only publicized plaintiff's medical condition, but invited others to make assumptions about plaintiff's personal life. The inference that typically flows from knowledge that one suffers from AIDS is that the individual is homosexual or intravenously injects controlled substances. Given the body of law regulating the method and manner in which information pertaining to an individual's HIV status may be disclosed, for a member of a pharmacist's staff to announce plaintiff's HIV status within hearing of others transcends a mere indignity or petty annoyance. A rational trier of fact could find that Brock's conduct was so extreme in degree and so outrageous in character as to exceed all bounds of ordinary decency in a civilized society. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996).

V. New Trial

In its written opinion, the trial court also noted that if this Court determined that plaintiff's claim for intentional infliction of emotional distress was viable, the trial court would be inclined to order a new trial. We find that a new trial is not warranted. While it is true that the jury did not specifically apportion the amount of damages awarded, a review of the record reveals that defendants did not object to the jury verdict form as submitted. It is axiomatic that a failure to timely and specifically object precludes appellate review absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001). Because we find that the jury instructions rendered by the trial court sufficiently set forth plaintiff's theories and the governing law, we do not find the requisite manifest injustice. *See Stoddard v Mfrs Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999). Accordingly, we reverse the decision of the trial court granting defendants' motion for JNOV and reinstate the jury's verdict.

Reversed and remanded for entry of an order consistent with this opinion.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly