NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0177

MICHELLE CONNER, WIFE OF AND GARY CONNER

VERSUS

STEVE TAYLOR, MD AND ST. TAMMANY PARISH HOSPITAL DISTRICT NO. 1

Judgment Rendered: SEP 18 2015

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2008-12441

Honorable Reginald T. Badeaux, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

WHIPPLE, C.J.

This is an appeal by plaintiff, Michelle Conner, from a judgment of the trial court, granting the defendants' motion for summary judgment and dismissing plaintiff's claims, with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

In March of 2008, Michelle Conner was admitted to St. Tammany Parish Hospital for multiple complaints, including leg weakness, back pain, and paresthesia. Conner underwent several MRIs, all of which were unremarkable, prompting the neurology department to conclude that her complaints were likely due to "conversion disorder" or "malingering."[1] Based on Conner's past medical history and presenting symptoms, the consulting neurologist referred Conner to Dr. Steve Taylor, a psychiatrist at St. Tammany Parish Hospital, for a conversion disorder treatment consultation. Dr. Taylor interviewed Conner at the hospital at the request of the attending neurologist, reviewed her records, and issued a report on March 18, 2008, reflecting his observations and impressions of Conner's condition. After setting forth, in detail, his assessment of her condition, Dr. Taylor ultimately concluded that Connor was not suicidal and advised that she could be discharged from the hospital.

Shortly thereafter, on May 5, 2008, Conner filed a petition for damages, naming Dr. Taylor and St. Tammany Parish Hospital, District No. 1 as defendants.[2] In the petition, Conner alleged that Dr. Taylor had treated her in a cruel and inappropriate manner, was verbally abusive to her, and had used inappropriate language toward her publicly, as memorialized in his consultation report, and that

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[1]Conversion disorder, in psychiatric terms, is defined as somatic symptoms (e.g., paralysis, pain, loss of sensation) occurring as the symbolic physical expression of a psychic conflict or painful emotion. Attorney's Illustrated Medical Dictionary, C74 (Ida G. Dox, Gilbert M. Eisner, June L. Melloni, and B. John Melloni, eds., West 1997).

[2]Conner's husband, Gary Conner, initially joined her in the filing of the petition; however, he later voluntarily dismissed all of his claims and causes of action.

his actions constituted defamation of character, intentional infliction of emotional distress, and violation of her privacy rights.

In addition to the petition for damages filed with the trial court, Conner filed an ancillary medical review panel claim, pursuant to the Louisiana Medical Malpractice Act, LSA-R.S. 40:1299.41 et seq., alleging therein that Dr. Taylor had failed to exercise the requisite degree of professional care expected of a physician in his field, and that St. Tammany Parish Hospital had likewise failed to meet the expected standard of care.[3] Conner's claims in the trial court were stayed pending a decision by the medical review panel.

The medical review panel issued its opinion in October 2010, concluding that the evidence did not support a finding that Dr. Taylor or St. Tammany Parish Hospital breached the applicable standard of care.[4] Conner then filed a supplemental petition with the trial court, adding her allegations of medical malpractice to her petition for damages.

Following the filing of the supplemental petition, St. Tammany Parish Hospital, Dr. Taylor, and his insurer, Louisiana Medical Mutual Insurance Company ("LAMMICO"), filed motions for summary judgment, contending that Conner had failed to produce expert medical testimony to establish the applicable standard of care and any breach of the same, as required in medical malpractice actions, and that

[3]Pursuant to the Louisiana Medical Malpractice Act, all malpractice claims against qualified health care providers must be reviewed by a medical review panel prior to the institution of a lawsuit. LSA-R.S. 40:1299.47(A)(1)(a).

[4]As to Dr. Taylor, the panel specifically noted that: there is no requirement for a separate consent to be executed by a patient for a psychiatric consult requested by a treating physician in an inpatient setting; his consult met the standard of care and was appropriately placed in the patient's chart; and that other than placing his consultation report in the chart, there was nothing to indicate that the consult or any other record was disseminated by Dr. Taylor. As to the hospital, the panel noted there was nothing in the evidence presented to indicate that the hospital or its employees deviated from the requisite standard of care, and there was nothing in the record to support the allegation "that the hospital and/or its employees conspired to attack the patient's mental state in anticipation of litigation," as alleged by Conner.

accordingly, Conner's claims should be dismissed and summary judgment rendered in favor of the defendants as a matter of law.

Following a hearing, the trial court rendered judgment, granting summary judgment and dismissing Conner's causes of action "concerning the claim of medical malpractice."[5] However, in granting summary judgment, the trial court expressly noted that it found Conner's defamation claim to be a separate and distinct issue not before it at that time and that the court would not consider this claim *sua sponte* in deciding the motion before it. Additionally, although the judgment did not dismiss the entirety of Conner's claims, the trial judge designated the judgment dismissing her "claim of medical malpractice" as a final judgment for purposes of an immediate appeal. See LSA-C.C.P. art. 1915(B). However, Conner did not appeal that judgment, which is now final. Tolis v. Board of Supervisors of Louisiana State University, 95-1529 (La. 10/16/95), 660 So. 2d 1206, 1206 (per curiam).

After the initial summary judgment became final, Dr. Taylor and LAMMICO then filed a "Motion for Summary Judgment Regarding [Conner's] Claims of Defamation and Intentional Infliction of Emotional Distress." In this motion for summary judgment, Dr. Taylor and LAMMICO averred that Conner's remaining claims for defamation and intentional infliction of emotional distress should be dismissed because: (1) Dr. Taylor's consultation report was not "published," as required to establish a defamation claim, and (2) there was no evidence of extreme and outrageous conduct or intent, as required to establish a claim of intentional infliction of emotional distress. Following a hearing, the trial court again rendered summary judgment in favor of the defendants and dismissed, with prejudice, all of Conner's remaining claims against Dr. Taylor and LAMMICO. Conner then filed the instant appeal.

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[5]Following the hearing, Conner voluntarily dismissed all claims against St. Tammany Parish Hospital, reserving her rights to all claims and/or causes of action against Dr. Taylor.

On appeal, Conner contends that the trial court erred: (1) in finding that no evidence of "publication" or "injury" existed or was shown as required to meet her burden of proof for defamation; (2) in dismissing her claim for intentional infliction of emotional distress; (3) in failing to decide her claim of negligent infliction of emotional distress; and (4) in failing to decide her claim of invasion of privacy.

SUMMARY JUDGMENT

Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2).

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action and is now favored. LSA-C.C.P. art. 966(A)(2). On a motion for summary judgment, the initial burden of proof is on the mover. If the moving party will not bear the burden of proof at trial, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, but rather to point out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. If the nonmoving party fails to do so, there is no genuine issue of material fact, and summary judgment should be granted. LSA-C.C.P. art. 966(C)(2).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. McLin v. Hi Ho, Inc., 2012-1702 (La. App. 1st Cir. 6/17/13), 118 So. 3d 462, 467. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the

case. Cason v. Saniford, 2013-1825 (La. App. 1st Cir. 6/6/14), 148 So. 3d 8, 11, writ denied, 2014-1431 (La. 10/24/14), 151 So. 3d 602.

Defamation
(Assignment of Error No. 1)

Defamation is a tort involving the invasion of a person's interest in his or her reputation and good name. Four elements are necessary to establish a claim for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. Costello v. Hardy, 2003-1146 (La. 1/21/04), 864 So. 2d 129, 139. Notably, if even one of the required elements of the tort is lacking, the cause of action fails. Costello, 864 So. 2d at 140. Moreover, because of the potential chilling effect on the exercise of free speech, defamation actions have been deemed to be particularly susceptible to summary judgment. Summary judgment, being favored in the law, is a useful procedural tool and an effective screening device to eliminate unmeritorious defamation actions that would threaten the exercise of First Amendment rights. Cook v. American Gateway Bank, 2010-0295 (La. App. 1st Cir. 9/10/10), 49 So. 3d 23, 31, citing Kennedy v. Sheriff of East Baton Rouge, 2005-1418 (La. 7/10/06), 935 So. 2d 669, 686.

At the hearing on the motion for summary judgment, the primary focus of the parties (and the trial court) was whether or not, under the undisputed facts of the case, the placing of Dr. Taylor's consult report in the hospital record constituted a "publication" to a third party. The trial court ultimately concluded that Conner's defamation claim should be dismissed as she could not satisfy her evidentiary burden of demonstrating that Dr. Taylor's consultation report, which contained the alleged defamatory statements, was published. On appeal, Dr. Taylor again avers that his consultation report was not published, in that it was properly placed in Conner's privileged and confidential, HIPAA-protected hospital record. Conner counters that

merely by placing the report in her medical records, Dr. Taylor published the consultation report to third parties, because her medical records are open to all of her future health care providers, are sent to Medicaid and other insurance companies for their review, and are used as a basis for denial or acceptance of medical insurance coverage. Thus, Conner contends, the trial court erred as a matter of law in concluding that there was no evidence of publication.

For purposes of maintaining a defamation action, communication to a third party is considered a publication, if the communication is not subject to a privilege, absolute or qualified. Costello, 864 So. 2d at 142. Privileged communications may be either: (1) absolute (such as statements by judges in judicial proceedings or legislators in legislative proceedings), or (2) conditional, or qualified. Cook, 49 So. 3d at 33, citing Kennedy, 935 So. 2d at 681.[6]

The existence of a qualified privilege is an affirmative defense which must be specifically pled.[7] Costello, 864 So. 2d at 142, n. 13. The doctrine of privilege is founded upon the principle that as a matter of public policy, in order to encourage the free communication of views in certain defined instances, a person is sometimes justified in communicating defamatory information to others without incurring liability. Kennedy, 935 So. 2d at 681.

The basic elements of a conditional privilege are: (1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to that interest; (4) a proper occasion for the communication of the statement; and (5) publication in a proper manner and to proper parties only. Cook, 49 So. 3d at 33, citing Kennedy, 935 So. 2d at 682. The analysis for determining whether a conditional privilege exists

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[6]The existence of an absolute privilege applicable to statements by judges or legislators is not at issue in this case.

[7]This pleading requirement was satisfied herein as Dr. Taylor's answer to Conner's petition states, in pertinent part, that "Steve Taylor, M.D. and LAMMICO affirmatively plead an absolute privilege and/or conditional or qualified privilege as a defense to the claim of defamation."

involves a two-step process. First, it must be determined whether the attending circumstances of a communication occasion a qualified privilege. The second step of the analysis is a determination of whether the privilege was abused, which requires that the grounds for abuse, i.e., malice or lack of good faith, be examined. Kennedy, 935 So. 2d at 682.

Once a privilege is established, it becomes incumbent on the plaintiff to come forward with rebuttal evidence establishing abuse. Kennedy, 935 So. 2d at 687. Required proof of abuse is proof that the defendant/publisher knew the defamatory statements to be false, or acted in reckless disregard as to their truth or falsity. Kennedy, 935 So. 2d at 687. To establish reckless disregard of the truth, a plaintiff must prove that the publication was deliberately falsified, published despite the defendant's awareness of probable falsity, or published when the defendant in fact entertained serious doubts as to the truth of his publication. Cook, 49 So. 3d at 34, citing Kennedy, 935 So. 2d at 688.

Here, Conner's defamation claim is based on Dr. Taylor's March 2008 consultation report. There are no allegations (or evidence) that Dr. Taylor made any statements concerning Conner in any manner, other than the statements set forth in his consultation report. Additionally, there are no allegations (or any evidence) that Dr. Taylor published the consultation report in any manner other than by placing it in Conner's hospital medical record, as is customarily done in the care, treatment, and assessment of a patient. On review, we find that the consultation report was a communication subject to a conditional or qualified privilege.

In her affidavit, attached to her memorandum in opposition to the motion for summary judgment, Conner attests that:

1. She is a person of the full age of majority.
2. Dr. Taylor's consultation report was provided and/or disseminated to her subsequent physicians and health care providers as part of her hospital record.

3. The consultation report has become part of her permanent medical record.
4. When she read the information contained in her permanent medical record "she was outraged, traumatized, humiliated[,] and fearful for her future physical welfare."
5. The statements about her in the consultation report are "false, cruel, demeaning, outrageous, shocking[,] and insulting."
6. She treated with a psychiatrist and other therapists "in relation to the mental trauma she incurred due [to] Dr[.] Taylor's contact with her, as well as her learning of the statements made by him in her [m]edical records."

However, Conner has failed to come forward with any evidence that the statements made by Dr. Taylor were made by him with the knowledge that the statements in the consultation report were false or that he acted in reckless disregard as to the truth or falsity of the statements. Rather, Conner merely argues that the report was not generated in "good faith," because the report was generated to discredit her and "help [the hospital] dodge a medical malpractice action." Even if these allegations as to his motives were shown to be true, such motives would not be sufficient to establish a defamation claim herein, given the absence of any evidence that the statements were made with knowledge of their falsity or that they caused grave injury. In sum, these conclusory allegations as to Dr. Taylor's purported motives in filing his consultation report do not establish that Dr. Taylor knew that the statements made in his report were false, or that he acted in reckless disregard as to the truth or falsity of the statements, for purposes of Conner's defamation claim. Further, we find that the mere conclusory statements in Conner's affidavit are insufficient to meet her evidentiary burden of demonstrating that the statements were false, or that there was an abuse of the privilege, as required to maintain her defamation action.

In sum, the evidence of record herein demonstrates that Dr. Taylor's consultation report was rendered by him in his capacity as a consulting psychiatrist during Conner's hospital stay, was placed only in Conner's medical records file, and was not disseminated to or discussed with others not involved in her medical treatment. Under these undisputed facts, we find that the consultation report enjoys

a qualified privilege. Further, even if Dr. Taylor had ill motives toward her when rendering the report, Conner's defamation claim must fail in the absence of **evidence** that the statements were false, known to be false, or that Dr. Taylor acted in reckless disregard as to the truth of the statements. Accordingly, we find no error by the trial court in dismissing Conner's defamation claims on summary judgment.

This assignment of error lacks merit.

Intentional Infliction of Emotional Distress
(Assignment of Error No. 2)

One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. White v. Monsanto Co., 585 So. 2d 1205, 1209 (La. 1991). However, in order to recover for intentional infliction of emotional distress, a plaintiff must establish: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. Richardson v. Home Depot USA, 2000-0393 (La. App. 1st Cir. 3/28/01), 808 So. 2d 544, 547, citing White, 585 So. 2d at 1209. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are not enough to trigger liability; rather, persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are inconsiderate and unkind. Richardson, 808 So. 2d at 547, citing White, 585 So. 2d at 1209. The actor's conduct must be intended or calculated to cause severe emotional distress and not just some lesser degree of fright, humiliation, embarrassment, worry or the like. Richardson, 808 So. 2d at 548, citing White, 585 So. 2d at 1210.

Moreover, conduct which may otherwise be extreme and outrageous may be privileged under the circumstances. Liability for intentional infliction of emotional distress does not attach where the actor has done no more than to insist upon his legal rights in a permissible way, even though he is aware that such insistence is certain to cause emotional stress. White, 585 So. 2d at 1210.

Here, the evidence establishes that Dr. Taylor saw Conner at the hospital at the request of the treating neurologist. After consulting with Conner, Dr. Taylor dictated and placed his consultation report in Conner's hospital record, as is usually and customarily done to document the psychiatric assessment of a patient. As noted above, there is no evidence that Dr. Taylor disseminated the report in any other manner, nor is there evidence that he even provided Conner with a copy of the report. While some of the statements in Dr. Taylor's report are arguably (and perhaps unnecessarily) harsh and insulting to Conner, Dr. Taylor had a duty as a consulting psychiatrist to evaluate her mental health and to generate a report for the medical team accurately reflecting his observations and conclusions as to Conner's psychological state.

On *de novo* review of the record, we are unable to find that Dr. Taylor's actions constitute "extreme and outrageous conduct," a necessary element in a claim for intentional infliction of emotional distress.[8] Accordingly, on *de novo* review, we find no error by the trial court in dismissing Conner's claim for intentional infliction of emotional distress on summary judgment.

This assignment of error also lacks merit.

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[8]To support her contention that Dr. Taylor's conduct was severe and outrageous, Conner argues that several statements made in the report were irrelevant to Dr. Taylor's treatment and diagnosis of her condition and were made to further the hospital's position to defeat a medical malpractice claim. While these arguments as to the deficiencies of the report and his underlying motives may have had some relevance to her medical malpractice claim, they provide little assistance to Conner in establishing her claim for **intentional** infliction of emotional distress.

Negligent Infliction of Emotional Distress and Invasion of Privacy
(Assignment of Error No. 3)

In her final assignments of error, Conner argues that the trial court erred in failing to decide her claims of negligent infliction of emotional distress and invasion of privacy. These arguments likewise lack merit.

The failure of the trial court to specifically discuss a claim in its judgment does not constitute error. Rather, silence in a judgment as to any part of a demand made in a litigation is construed as a rejection of that part of the claim. Williams v. Dohm, 2014-0102 (La. App. 1st Cir. 10/14/14), 153 So. 3d 542, 549, citing Hendrix v. Hendrix, 457 So. 2d 815, 818 (La. App. 1st Cir. 1984).

Moreover, given the procedural posture of this case, there is nothing further presented for review. Conner's claims of negligent infliction of emotional distress and invasion of privacy constitute unintentional tort claims, subject to the medical malpractice act.[9] As such, these claims are no longer viable, given the earlier summary judgment of the trial court, which dismissed Conner's medical malpractice claims.[10] This prior judgment was designated by the trial court as a final judgment from which an appeal could be immediately taken. See LSA-C.C.P. art. 1915(B).

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[9]Malpractice for purposes of the Medical Malpractice Act is defined as-

> [A]ny **unintentional tort** or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient, including loading and unloading of a patient, and also includes all legal responsibility of a health care provider arising from acts or omissions during the procurement of blood or blood components, in the training or supervision of health care providers, or from defects in blood, tissue, transplants, drugs, and medicines, or from defects in or failures of prosthetic devices implanted in or used on or in the person of a patient. (Emphasis added.)

LSA-R.S. 40:1299.41(A)(13)

[10]We note that while the record reflects that Conner previously argued in this suit that her tort claims, i.e., defamation and **intentional** infliction of emotional distress, were separate and apart from her "malpractice" claims, there was no mention, argument, or holding by the trial court that any claims for **negligent** infliction of emotional distress and invasion of privacy would be considered as separate from her medical malpractice claims.

In granting summary judgment and dismissing the medical malpractice claims, the trial court stated that it was not ruling on or dismissing the defamation claim. While we recognize that a defamation claim can arise from acts constituting an unintentional tort, there was no similar reservation of rights or limitation in the earlier summary judgment as to the claim of negligent infliction of emotional distress or the claim for invasion of privacy.

However, Conner did not timely appeal the judgment addressing her medical malpractice claims and, thus, the dismissal of these claims acquired the authority of a thing adjudged. Matherne v. TWH Holdings, L.L.C., 2012-1878 (La. App. 1st Cir. 12/6/13), 136 So. 3d 854, 860, citing Tolis, 660 So. 2d at 1206. (A final judgment acquires the authority of the thing adjudged if no further review is sought within the time fixed by law). Once a final judgment acquires the authority of a thing adjudged, no court has jurisdiction, in the sense of power and authority, to modify, revise or reverse the judgment, regardless of the magnitude of the error in the final judgment. Tolis, 660 So. 2d at 1206-07 (per curiam).

Accordingly, herein, this appeal presents no basis for review of Conner's claims for negligent infliction of emotional distress and invasion of privacy, as these claims were dismissed by a prior final judgment of the trial court, i.e., the judgment dismissing Conner's medical malpractice claims, from which no timely appeal was taken.

For these reasons, these remaining assignments of error are without merit or are otherwise not subject to appellate review.

CONCLUSION

For the above and foregoing reasons, the December 2, 2013 judgment of the trial court, granting Steve Taylor, M.D. and LAMMICO's motion for summary judgment and dismissing, with prejudice, Michelle Conner's remaining claims against them, is hereby affirmed. Costs of this appeal are assessed to plaintiff, Michelle Conner.

AFFIRMED.