

Essay Question No. 4

Answer question in booklet No. 4

Pat owns a business that takes hunters on guided trips. Over the last few years she has done very well. Dale runs a rival business. Dale has seen a number of his clients switch to Pat. Dale asked Wally, one of his former clients, why he decided to switch to Pat. Wally said Pat got better hunting results. Wally also said that on his last trip with Pat “every day was a success, with the exception of one lousy day.”

Dale publishes a popular newsletter for hunters and guides. After speaking with Wally, Dale wrote an article for the newsletter describing hunters as not satisfied with Pat’s hunting trips and quoting one as saying his trip was “lousy.” Dale anonymously wrote the article. Pat’s bookings dropped significantly after it was published. Pat is told by her former clients that they stopped hiring her after reading the article.

Dale felt bad about Pat losing business and went to her office to talk with her. Pat invited him inside her office and Dale then told her that he wrote the article. Upon hearing this, Pat locked the door, grabbed a cane from behind the door, quickly spun around, and hit Dale with the cane.

1. Pat wants to file a lawsuit against Dale for defamation. Discuss the elements of Pat’s defamation claim and the likelihood of her prevailing on the claim.

2. Dale wants to file a lawsuit against Pat for what occurred in the office. Assume that he cannot claim intentional or negligent infliction of emotional distress. Discuss which intentional tort claims Dale may raise and the likelihood he will prevail on those claims.

GRADERS' GUIDE
*****Question No. 4*****
TORTS

1. Pat wants to file a lawsuit against Dale for defamation. Discuss the elements of Pat's defamation claim and the likelihood of her prevailing on the claim. (60%)

Pat will most likely be successful if she files a lawsuit against Dale for defamation. The elements that a plaintiff must prove to establish a defamation claim are “(1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) the existence of either ‘per se’ actionability or special harm.” *MacDonald v. Riggs*, 166 P.3d 12, 15 (Alaska 2007) (citing *French v. Jadon, Inc.*, 911 P.2d 20, 32 (Alaska 1996)). A statement “is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Id.* at 16 (citing *Green v. N. Pub. Co.*, 655 P.2d 736, 739 (Alaska 1982) (citing Restatement (Second) of Torts § 559 (1977))).

“An expression of opinion is defamatory if the expression contains an implied assertion of false fact and is sufficiently derogatory as to cause harm to the subject’s reputation.” *State v. Carpenter*, 171 P.3d 41, 51 (Alaska 2007) (citing Restatement (Second) of Torts § 566 cmt. a (1977)). “It is not necessary that the communication actually cause harm to another’s reputation; its character depends upon its general tendency to do so.” *Id.* (citing Restatement (Second) of Torts § 559 cmt. d (1977)). The Alaska Supreme Court follows federal precedent that “a pure expression of opinion” may not serve as basis for a defamation suit, only “implied or stated assertions of false fact.” *Id.*

Dale wrote an “anonymous” article that contained a false and defamatory statement. Dale’s article stated that Pat’s clients were dissatisfied with her service and that her trips were “lousy,” likely based on the comment made by Wally. Dale may claim that Wally used the word “lousy” and, therefore, the statement made in the newsletter was the truth. “The truth of a defamatory statement of fact is a complete defense to an action for defamation.” *Fairbanks Pub. Co. v. Pitka*, 376 P.2d 190, 192-93 (Alaska 1962). However, Dale’s reliance on this defense is unlikely to prevail given the context in which Wally used the word “lousy.” Wally liked the results he got with Pat’s hunting service and used the word “lousy” to describe one day of a hunting trip. Dale took Wally’s use of the word out of context when he wrote the article. The statement did not reflect Wally’s opinion of Pat’s service and was false. The statement was defamatory because it damaged Pat’s reputation, leading to hunters not wanting to use her services.

Dale may argue that his statement is privileged because it was made in a newsletter that caters to hunters and guides. “One who publishes defamatory matter concerning another is not liable for the publication if: (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused.” *Briggs v. Newton*, 984 P.2d 1113, 1121 (Alaska 1999) (quoting *Schneider v. Pay’N Save Corp.*, 723 P.2d 619, 623 (Alaska 1986) (quoting Restatement (Second) of Torts § 593 (1977))). The Alaska Supreme Court has recognized a conditional privilege “when a person ‘having a common interest in a particular subject matter believes that there is information that another sharing the common interest is entitled to know.’” *Id.* (citing *Schneider v. Pay’N Save Corp.*, 723 P.2d at 623-24 (citing *Lull v. Wick Constr. Co.*, 614 P.2d 321 (Alaska 1980)) (internal quotation marks omitted)).

Dale may claim that he has a common interest – and as a result, a conditional privilege – with the hunting community at large. Assuming that Dale is able to convince a finder of fact that he believed the statement to be true, even though it was false, he could argue that his article was privileged because it was written simply to warn other hunters of Pat’s service based on Wally’s comment. Dale is unlikely to prevail on this defense because a conditional privilege is abused when “(1) the publisher acted with malice;” or “(2) the defamatory matter is published for some purpose other than that for which the particular privilege is given.” Alaska Civil Pattern Jury Instructions 16.10, cmt. (citing *Schneider v. Pay’N Save Corp.*, 723 P.2d at 623-24; *DeNardo v. Bax*, 147 P.3d 672, 679-80 (Alaska 2006)).

The facts in the question show that Dale approached Wally because he had been losing business to Pat. Wally was a former client of Dale’s who began hunting with Pat. Pat’s business was increasing as Dale’s decreased. These facts support a finding that Dale acted with malice towards Pat to gain Wally’s business back. Given that the statement was published with malice, it does not qualify for any privilege that Dale may claim to enjoy.

Pat should also be able to prove that Dale’s article is actionable per se. A statement is actionable per se if “the words used [are] so unambiguous as to be reasonably susceptible of only one interpretation – that is, one which has a natural tendency to injure another’s reputation.” *Fairbanks Publ’g Co. v. Pitka*, 376 P.2d 190, 194 (Alaska 1962). Dale wrote that hunters were dissatisfied with Pat’s trips and referred to them as “lousy.” This statement is unambiguous and actually injured Pat’s reputation. The damage to Pat’s reputation also caused special harm in the form of lost clients and business.

2. Dale wants to file a lawsuit against Pat for what occurred in the office. Assume that he cannot claim intentional or negligent infliction of emotional distress. Discuss which intentional tort claims Dale may raise and the likelihood he will prevail on those claims. (40%)

a. Assault and Battery

Dale may file a claim for assault and battery. “An actor is subject to liability to another for assault if he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and the other is thereby put in such imminent apprehension.” *Williams v. Alyeska Pipeline Service Co.*, 650 P.2d 343, 348 (Alaska 1982) (citing Restatement (Second) of Torts § 21(1) (1965)). “Battery occurs when an actor intends to cause harmful or offensive contact with another and an offensive contact results.” *Maddox v. Hardy*, 187 P.3d 486, 498 (Alaska 2008) (citing Restatement (Second) of Torts § 18 (1965)).

Pat’s conduct may constitute a battery. Pat used the cane to strike Dale. This would be the essence of offensive contact. Further evidence of the offensive nature of the contact rests in what precipitated Pat’s behavior – hearing Dale tell her about the article. Given the proximity of Dale’s confession to the use of the cane, it is likely that Pat intended to cause harmful contact.

Dale may have more difficulty with prevailing on an assault claim. An assault claim relies on a finding of imminent apprehension of harmful or offensive contact. The facts in this case are ambiguous as to whether Dale was imminently aware that Pat was about to strike him with the cane. The two were having a conversation free from any physical animosity that was interrupted by Pat quickly locking the door, grabbing the cane and striking Dale. Dale may have certainly known what was going to happen once Pat grabbed the cane, but the relative suddenness of the act itself will make the claim more difficult to establish.

b. False Imprisonment

Dale might also file a false imprisonment claim against Pat. Alaska law recognizes the tort of false imprisonment. *Waskey v. Municipality of Anchorage*, 909 P.2d 342, 345 (Alaska 1996). To prove false imprisonment one must show: (1) the defendant did something or said something which resulted in the plaintiff being confined; (2) the defendant acted with the intent to keep the plaintiff confined; (3) the plaintiff knew of the confinement or was seriously harmed by the confinement; and (4) the plaintiff did not consent to being confined. Alaska Civil Pattern Jury Instructions 15.01 (citing Restatement (Second) of Torts § 35-45A (1965)).¹

¹ The commentary to the pattern instruction notes that the Alaska Supreme Court has recognized the tort of false imprisonment, but has never commented on the elements of the claim. See *Malvo v. J.C. Penney Co., Inc.*,

Pat's act of locking the door to the office could be construed as an act of confinement. Locking the door prevented anyone from coming in and Pat, who was wielding a cane as a weapon, prevented Dale from leaving. Dale could certainly argue that by locking the door Pat intended to keep him confined and that he was harmed by the confinement as it resulted in him being injured. Dale should also be able to prove that he did not consent to being confined in the office or the resulting battery.

512 P.2d 575 (Alaska 1973); *City of Nome v. Aliak*, 570 P.2d 162 (Alaska 1977). The commentary goes on to state that "there is nothing to suggest that Alaska would depart from the established traditional rules" regarding false imprisonment in citing to the Restatement.