STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY J. WHITSITT

Plaintiff-Appellant,

v

FRANK J. MANLEY III and MANLEY & MANLEY,

Defendants-Appellees.

UNPUBLISHED
January 3, 1997

No. 181871
LC No. 93-024746-NZ

Before: McDonald, P.J., and Bandstra and C.L. Bosman,* JJ.

PER CURIAM.

In this defamation action, plaintiff appeals as of right an order of summary disposition that was granted under MCR 2.116(C)(10). We reverse.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants and dismissing plaintiff's defamation claim. To establish a claim of libel or slander, a plaintiff must prove: (1) the defendant made a statement concerning the plaintiff that was false and defamatory in some material respect, (2) the statement was communicated to a third person without privilege, (3) fault amounting to at least negligence, and (4) the statement is actionable regardless of special harm or had a tendency to cause special harm to the reputation of the plaintiff. *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 323; 539 NW2d 774 (1995); *Stablein v Schuster*, 183 Mich App 477, 480; 455 NW2d 315 (1990).

The trial court granted summary disposition because it concluded that plaintiff had failed to establish a genuine issue of fact whether defendant's statement had been "published" within the meaning of defamation law, i.e., that plaintiff had failed to proffer evidence that there were any third parties who had heard and understood defendant's statements. We conclude that the trial court erred. Plaintiff testified in her deposition that defendant screamed the allegedly defamatory statements in the presence

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* Circuit judge, sitting on the Court of Appeals by assignment.

of others. She was not required to specifically name another person who had heard the statements in order to avoid summary disposition. *Bonkowski v Arlan's Dept Store*, 383 Mich 90, 97; 174 NW2d 765 (1970) (Publication was established by evidence that the defendant's employee hollered the challenged statements within the hearing of others, regardless of whether or not the plaintiff identified them). Although most persons plaintiff alleged had heard defendant's statements denied having heard them, plaintiff did provide evidence from which a jury could conclude that one unidentified person heard defendant's statements, by testifying in her deposition regarding an individual who came up to her shortly after the incident.[1] Although plaintiff's case on the publication issue appears exceedingly weak, we are bound by *Bonkowski* and must conclude that summary disposition was improperly granted.

Defendant, citing *Arneja v Gildar*, 541 A2d 621 (D C, 1988), alternatively contends that summary disposition was proper because his statements were protected by the absolute privilege afforded to judicial proceedings. There, however, the court stated that statements made outside a courtroom may not be subject to the privilege.

Defendant additionally argues that summary disposition was proper because the alleged defamatory statements were protected opinion, based upon disclosed or assumed nondefamatory facts. See 3 Restatement Torts, 2d, § 566, p 170. Defendant's statements regarding plaintiff's reputation and competence were not based upon any disclosed or assumed facts. Defendant argues that his statement was opinion commentary on facts that preceded it in the courtroom, but we cannot conclude that persons in the hallway heard what had transpired in the courtroom.

We reverse.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman

[1] Plaintiff admitted at her deposition that this unidentified person did not know plaintiff. Thus, the reasoning of the Court of Appeals in *Bonkowski* would apply to support summary disposition: "Since damage to reputation is the gravamen of an action for slander, there must be proof that the alleged defamation was published to someone who at least recognized the plaintiff." *Bonkowski v Arlan's Dept Store*, 12 Mich App 88, 102; 162 NW2d 347 (1968), rev'd 383 Mich 90; 174 NW2d 765 (1970). While we find this analysis compelling, it appears to have been rejected by the Supreme Court.