2014 WL 7208818 (Iowa Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Iowa.
Polk County

Charles L. SMITH as Chapter 7 Bankruptcy Trustee for Case No. 13-0*l*383-als7, Plaintiff,

v.

Angella Renee ATZEN, Defendant.

No. LACL127382.
March 27, 2014.

Memorandum of Law in Support of Defendant's Motion for Summary Judgment

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INTRODUCTION

This case involves an ex-wife suing a current wife. Defendant, Angelia Atzen, is married to Steve Atzen. Plaintiff, Kari Atzen, [1] was divorced from Steve Atzen in 2009. [2]

Beginning in approximately 2011 [3], Defendant believed that she and her then-eight year old child were the victims of an increasingly hostile pattern of conduct by Plaintiff. On or about November 5, 2011, both parties were leaving a children's sporting event when Plaintiff and Defendant were involved in a verbal altercation. Defendant felt Plaintiff was being aggressive. Both women reported the incident to the Pleasant Hill Police Department. [4] Additionally, Defendant requested, through Plaintiff's attorney, that Plaintiff refrain from what Defendant believed to be further aggressive behavior towards her.

The following month, on or about December 11, 2011, Defendant was sitting in the bleachers at a child's sporting event when Plaintiff came and sat directly behind Defendant. Defendant believed this to be further aggressive behavior by Plaintiff. Defendant subsequently reported the incident to the Pleasant Hill Police Department.

The Pleasant Hill Police Department found probable cause to send the matter to the Polk County Attorney's Office. The Polk County Attorney's Office submitted a Preliminary Complaint on the charge of Harassment 3rd Degree and, on or about December 30, 2011, the Polk County District Court, The Honorable Cynthia Moisen, found probable cause to charge the Plaintiff, Kari Atzen, and issued an Arrest Warrant

The Court later issued a No Contact Order. Subsequently, on or about February 07, 2012, the No Contact Order was modified to permit the parties to “attend children's sporting events and school functions.”

On February 25, 2012, Steve Atzen and Plaintiff's minor son played a basketball game in Knoxville, Iowa. [5] Both Plaintiff and Defendant were in attendance at the game without incident. Following one of the games, however, Defendant and her husband, Steve Atzen, went to a local restaurant with two other groups of parents and children they had invited. Within minutes of arriving

at the restaurant and arranging tables for themselves and some other parents and children that also showed up, Plaintiff entered the restaurant with the minor child and proceeded to join the group of people that the Defendant and her husband were with.

The impromptu lunch at the restaurant was neither a school function nor a sporting event. Later that day, Defendant inquired of law enforcement whether Plaintiff had violated the No Contact Order by showing up at the lunch where Defendant was already present. Defendant was informed that she would need to travel back to Knoxville to report the Plaintiff's potential violation of the No Contact Order. On the following day, Defendant gave her statement about the lunch to the Knoxville Police Department

On February 27, 2012, the Knoxville Police Department filed a Complaint and Affidavit charging the Plaintiff with violation of the No Contact Order. On February 28, 2012, the Marion County District Court found probable cause to charge Plaintiff with a violation.

The original Harassment 3rd Degree charge filed in Polk County was dismissed following Plaintiff's court-ordered participation in the Victim Offender Reconciliation Program (VORP). The violation of the No Contact Order charge filed in Marion County was dismissed shortly before trial based on Defendant's unwillingness to proceed given Kari Atzen's intent to compel the trial testimony of Plaintiff's and Steve Atzen's minor child.

As a result of the complaints made by Defendant to law enforcement, she now faces this civil lawsuit filed by Plaintiff. Iowa law provides a certain protection against the **financial** burden of a civil lawsuit to one reporting a potential crime. As a matter of law, Plaintiff cannot prove that Defendant should not be entitled to this protection.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when no genuine issue of material fact is disclosed by the record and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3) (2007); *Robinson v. Pound Walls of Iowa, Inc.*, 553 N.W.2d 873, 875 (Iowa 1996).

In response to a motion for summary judgment, the nonmoving party is required to "respond with specific facts that show a genuine issue for trial." *Green v. Racing Ass'n of Central Iowa*, 713 N.W.2d 234, 245-46 (Iowa 2006). The responding party may not rest on mere allegations, denials or their own insistence upon a genuine issue of material fact. *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994).

Summary judgment motions should be interpreted in order to accomplish just, speedy and inexpensive determinations of an action. *Hanna v. State Liquor Control Comm'n*, 179 N.W.2d 374, 375 (Iowa 1970). In particular, where the conflict consists only of determining the legal consequences flowing from the undisputed facts, summary judgment is proper. *Hynes v. Clay County Fair Association*, 672 N.W.2d 764, 766 (Iowa 2003).

I. PLAINTIFF'S ABUSE OF PROCESS CLAIM FAILS AS A MATTER OF LAW

A. Defendant Did Not Use the Legal Process

Plaintiff alleges in this case that "Defendant's provision of false information to law enforcement officers for the purpose of instigating a criminal prosecution constitutes the use of legal process by Defendant." (Petition, paragraph 45). The provision of information to law enforcement in the form of a criminal complaint--even if the information proves to be false-- does not constitute the use of legal process.

Abuse of process is the "use of the legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 398 (Iowa 2001).

Abuse of process requires three essential elements:
(1) the use of the legal process;

(2) its use in an improper or unauthorized manner; and

(3) the plaintiff suffered damages as a result of the **abuse**.

Id. at 421-422 (citing *Palmer v. Tandem management Servs., Inc.*, 505 N.W.2d 813, 817 (Iowa 1993) and *Wilson v. Hayes*, 464 N.W.2d 250, 266 (Iowa 1990)).

As a matter of law, Plaintiff cannot prove that Defendant engaged in "the use of the legal process" as defined by Iowa law. The first element is shown by the use of a legal process against the plaintiff. *Wilson v. Hayes*, 464 N.W.2d 250, 266 (Iowa 1990). The Iowa Supreme Court has ruled that "the mere report to police of possible criminal activity does not constitute legal process" sufficient to support an **abuse** of process claim. *Fuller v. Local Union No. 106 of the United Brotherhood of Carpenters and joiners of American*, 567 N.W.2d 419, 421 (Iowa 1997).

In *Fuller*, the defendant called the police to report that the plaintiff was operating his vehicle while intoxicated. *Fuller*, 567 N.W.2d at 421. The plaintiff was a candidate for a union position that the defendant held and for which defendant was seeking re-election. *Id.* The defendant observed plaintiff drinking beer at a union function. The defendant later called the Des Moines police and reported that plaintiff was driving while intoxicated. *Id* The police stopped the plaintiff but determined he was not intoxicated. *Id.*

The plaintiff sued the defendant for **abuse** of process based on the allegation that the defendant filed a false police report *Id.* The trial court granted the defendant's summary judgment motion and dismissed the plaintiff's **abuse** of process claim. The trial court ruled that the defendant's call to the police wherein he alleged the plaintiff was operating his vehicle while intoxicated--even though not true--did not satisfy the "use of process" requirement *Id*

The Iowa Supreme Court affirmed the trial court's decision. The Court discussed the meaning of "legal process":
"One authority defines the required legal process' as 'process which emanates from or rests upon court authority, and which constitutes a direction or demand that the person to whom it is addressed perform or refrain from doing some prescribed act.' *1 Am.Jur.2d* ***Abuse*** *of Process section 2, at 411 (1994).* Another commentator states that 'it is clear that the judicial process must in some manner be involved' in order to meet the first element. *W. Page Keaton et al., Prosser and Keaton on the Law of Torts section* 121, at 898 (5th ed. 1984).

Fuller, 567 N.W.2d at 422.

The Iowa Supreme Court held that while "[o]ne might criticize selfish or improper motives prompting a false or reckless report" ... the better view is that the mere report to police of possible criminal activity does not constitute legal process." *Id* at 422. "A report to police is not sufficient to constitute legal process' required for an **abuse**-of process claim." *Id*

Accordingly, in this case, Plaintiff cannot prove the first essential element of an **abuse** of process claim (use of the legal process). Plaintiff claims that Defendant used the legal process when she provided (false, according to Plaintiff) information to the police for the purpose of instigating a criminal prosecution. (Petition ¶ 45).

Iowa law provides that "the mere report to police of possible criminal activity does not constitute legal process." *Fuller,* 567 N.W.2d at 422 (finding a report is insufficient even if the information provided is false). Use of the legal process is an essential element of an **abuse** of process claim. *Fuller,* 567 N.W.2d at 421-422. Because the Defendant in this case did not use the legal process as defined by Iowa law, the Plaintiff's **abuse** of process claim fails as a matter of law. The report of a potential crime to the police (even if unfounded or untrue) is not use of the legal process.

B. Process Was Not Used in an Improper or Unauthorized Manner

Moreover, assuming *arguendo* Defendant used the legal process, Plaintiff cannot prove another essential element of an **abuse** of process claim--an act not proper in the regular prosecution of the proceeding. *See Grell v. Poulsen,* 389 N.W.2d 661, 664 (Iowa 1986). An **abuse** of process claim is not supported by an allegation simply that process was initiated for an improper purpose. "Mere 'proof of an improper motive...for even a malicious purpose' will not suffice." *Palmer v. Tandem Mgmt. Sere. Inc.,* 505 N.W.2d 813, 817 (Iowa 1993); *Grell,* 389 N.W.2d at 664. *See also Brody v. Ruby,* 267 N.W.2d 902, 906 (Iowa 1978)(holding a suit commenced solely to procure a settlement was not **abuse** of process); *Froning & Deppe, Inc. v. South Story Bank & Trust Co.,* 327 N.W.2d 214, 215 (Iowa 1982)(holding a suit commenced to intimidate and embarrass a defendant, when plaintiff knew it was not entitled to full amount set forth in the prayer, was not **abuse** of process).

Rather, an **abuse** of process claim requires proof of some act not proper in the regular prosecution of the proceeding. *Grell,* 389 N.W.2d at 664-665 (finding there must be proof of an irregular misuse of the process itself). That is, there is no action for **abuse** of process when the process is used for the purpose for which it is intended even if there is an incidental motive of spite or an ulterior purpose of benefit to the defendant *Id.* at 267. Accordingly, even proof of a malicious motive does not satisfy the requirement that the litigation be instigated primarily for an improper purpose. *Palmer v. Tandem Management Services, Inc.,* 505 N.W.2d 813 (Iowa 1993); *Grell v. Paulsen,* 389 N.W.2d 661, 664 (Iowa 1986).

Plaintiff cannot prove Defendant made the criminal complaints for any purpose other than that for which they were designed and intended. *Id. See also Schmidt v. Wilkinson,* 340 N.W.2d 282, 284 (Iowa 1983) (approving *Restatement (Second) of Torts section 682 app.* (1981) commentary that "the defendant is not liable if he has done no more than carry the process to its authorized conclusion, even with bad intentions"). Plaintiff's **abuse** of process claim fails as a matter of law.

II. PLAINTIFF'S CLAIM FOR DEFAMATION FAILS AS A MATTER OF LAW

In support of her defamation claim, Plaintiff alleges in the Petition that Defendant made and published the following false representations about and concerning Plaintiff:
A. Plaintiff sat by her [Defendant] at the December 11, 2011 basketball game;

B. Plaintiff caused Defendant to experience a sense of great alarm on December 11, 2011 as a result of Plaintiff's proximity to Defendant;

C. The group of teammates and parents that met for lunch was not a team activity within the meaning of the modified Order of Protection;

D. Plaintiff attended the February 25, 2011 Taso's lunch in violation of the modified Order of Protection.

(Petition, paragraph 49). None of these alleged representations supports a claim for defamation.

In Iowa, substantial truth is an "absolute defense" to defamation. *Jones v. Palmer Communications, Inc.,* 440 N.W.2d 884, 891 (Iowa 1989) (citing *Behr v. Meredith Corp.,* 414 N.W.2d 339, 342 (Iowa 1987). A libel defendant need not demonstrate the

"literal truth of every detail" of the statement so long as the "gist" or "heart of the matter in question" is true. *Jones*, 440 N.W.2d at 891 (citing *Behr* 414 N.W.2d at 342). The Court may determine substantial truth as a matter of law. *Id*

Subparagraph A is true and cannot be disputed by Plaintiff. By sworn testimony, Defendant avers that Plaintiff sat by her at the December 11, 2011 basketball game. Plaintiff, on the other hand, cannot prove this is false. Rather, Plaintiff has testified simply that she does not remember seeing Defendant at the game. (KA pg. 67).
Q: Okay. Is it possible that you could have sat behind her [Defendant] or near her and just not have known that you were seated in close proximity to her?

A: It is possible that I was sitting on a bleacher, and she was sitting someplace else on another bleacher. It's possible she was there and that she was sitting -- it's a small gym, so there's there rows of bleachers. There's not a ton of options.

...

Q: And if there's testimony that Angie [Defendant] was seated on the 11th in these bleachers that are the southern bleachers somewhere, your answer would be, "Well, if she was there, I didn't see her"?

A: Correct.

(Kari Atzen deposition, pg. 67-68, 74). In answer to Interrogatory No. 2, Plaintiff stated "I do not recall Angie Atzen [Defendant] in attendance at the game on December 11, 2011." (Answer to Interrogatory No. 2) The statement is indisputably true and/or not provably false.

In addition, the alleged representation of subparagraph A is not defamatory as a matter of law. That Plaintiff sat by Defendant is not injurious to Plaintiff's reputation, it does not subject to her public hate, contempt, or ridicule, and it does not injure the Plaintiff in her occupation or business. *Vinson v. Linn-Mar*. 360 N.W.2d 108 (1984).

Subparagraph B is true and/or Defendant's own opinion and, therefore, does not support a recoverable defamation claim. Defendant claims she experienced a sense of great alarm on December 11, 2011 as a result of Plaintiff's proximity to Defendant. This claim relates to how Defendant claims she felt. Not only is it true, but it is an opinion absolutely protected from a defamation claim. *Kiesau v. Bantz*, 686 N.W.2d 164, 177 (Iowa 2004). How Defendant felt cannot be shown to be false as a matter of law. Further, Officer Tim Brown's police report states "Angie [Defendant] seemed truly fearful for her safety while we were speaking with her." (Affidavit of Officer Covey)

Subparagraph C is not about or concerning Plaintiff and, moreover, is true. First, a "team activity" was not an exception to the No Contact Order. Moreover, a statement about the characterization of a lunch outing cannot be the basis of a defamation claim. It is not about Plaintiff and could not injure or hurt her reputation.

Subparagraph D is true and Plaintiff cannot recover based on this statement. The modified Order of Protection permitted Plaintiff to attend her children's "sporting events" and "school functions." (Modified Order of Protection) The impromptu lunch at Taso's restaurant with some of the parents and children in attendance was neither a "sporting event" nor a "school function."

The evidence is that Defendant merely related the circumstances of the lunch to the Knoxville Police Department. The police department and the Marion County Attorney then decided to charge Plaintiff with a violation of the No Contact Order. Subparagraph D represents, at most, Defendant's opinion, which is absolutely protected from a defamation claim. *See Kiesau*, 686 N.W.2d at 177.

In addition, the alleged statements made by Defendant are subject to a qualified privilege. "[A] qualified privilege constitutes immunity from liability for defamation." *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 199 (Iowa Ct. App. 2006) (citing *Barreca v. Nickolas*, 683 N.W.2d 111, 117 (Iowa 2004). A qualified privilege exists when:
(1) The statement was made in good faith;

(2) The defendant had an interest to uphold;

(3) The scope of the statement was limited to the identified interest; and

(4) The statement was published on a proper occasion, in a proper manner and to proper parties only.

Kiray, 716 N.W.2d at 199-200 (citing *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 458 (Iowa 2002)).

Defendant's statements to the police were made because she was fearful of what she considered to be Plaintiff's continued aggressive behavior toward her. These statements fall within the protection of a qualified privilege.

III. PLAINTIFF'S CLAIM FOR MALICIOUS PROSECUTION FAILS AS A MATTER OF LAW

A. Defendant Did Not Instigate or Procure Prosecution

Plaintiff alleges in this case that Defendant engaged in malicious prosecution by instigation of the two criminal prosecutions against her. Plaintiff's claim must be dismissed because Plaintiff cannot prove "instigation or procurement of the prosecution" by the defendant as required by Iowa law.

The essential elements of malicious prosecution are:
(1) a previous prosecution;

(2) instigation or procurement of that prosecution by the defendant;

(3) termination of that prosecution by acquittal or discharge of the plaintiff;

(4) want of probable cause;

(5) malice on the part of the defendant for bringing the prosecution; and

(6) damages to the plaintiff.

Wilson v. Hayes, 464 N.W.2d 250, 259 (Iowa 1990); *Sarvold v. Dodson*, 237 N.W.2d 447, 448 (Iowa 1976). The purpose of a malicious prosecution tort "is to provide relief in those cases in which a plaintiff brings a meritless suit and has an improper motive for bringing it." *See Wilson v. Hayes*, 464 N.W.2d 250 (Iowa 1990) (further stating courts have not favored the remedy and have construed its requirements strictly against the malicious prosecution plaintiff.)

The mere making of an accusation to police does not constitute a procurement of the proceedings if the decision to proceed is ultimately left to the uncontrolled choice of a third person. *Lukecart v. Swift & Co.*, 130 N.W.2d 716. 724 (Iowa 1964). The Iowa Supreme Court has adopted Restatement (Second) of Torts § 653 cmt. g, p. 409 (1976) as follows:

> When a private person gives to a prosecuting officer information he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the

> informer is not liable under the rule stated in this Section even though the information proves to be false and bis belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Rasmussen Buick - GMC v. Roach, 314 N.W.2d 374, 376 (Iowa 1982)).

In Iowa, the decision to prosecute is a matter within the discretion of the county attorney's office. *State v. Iowa Dist. Court for Johnson Cnty.*, 568 N.W.2d 505, 508 (Iowa 1997) (citing *State v. Kyle*, 271 N.W.2d 689, 693 (Iowa 1978) and *State v. Uebberheim*, 263 N.W.2d 710, 712 (Iowa 1978) (wherein the Court stated: "In our criminal justice system, the decision whether to prosecute, and if so on what charges, is a matter ordinarily within the discretion of the duly elected prosecutor.").

"A prosecutor cannot ethically institute criminal charges when convinced they are not supported by probable cause...." *Iowa Dist. Court for Johnson Cnty.*, 568 N.W.2d at 508 (citing Iowa Code of Prof'l Responsibility DR. 7403(A)). "Under this rule a county attorney owes a duty to do justice, not only for the accusers, but also for the accused. Whether there was probable cause to prosecute [the accused] was a matter for assessment by the prosecutor ..." *Iowa Dist. Court for Johnson Cnty.*, 568 N.W.2d at 508.

In *Craig v. City of Cedar Rapids*, 826 N.W.2d 516 at pg. *4 (Iowa Ct. App. 2012) (Table), the plaintiff argued that the defendant provided false information thereby instigating a prosecution and satisfying the second element of malicious prosecution. The district court granted the defendant's motion for summary judgment after it determined that there was no evidence to suggest that "the decision to prosecute was made by anyone other than the Iowa Attorney General's Office, through the independent exercise of its discretion" and that two entities exercised their discretion before a final decision to bring criminal charges was made. *Id.* at *4-5 (citing *Lukecart v. Swift & Co.*, 130 N.W.2d 716. 724 (Iowa 1964) (holding that making an accusation does not constitute procurement if the institution of criminal charges is left to the uncontrolled choice of a third person).

In the instant case, Defendant did nothing more than report suspected criminal activity to the police. Prior to charges being filed, Defendant did not speak to the county attorney or judge about pursuing the charges.

The decision to prosecute was left to the independent discretion of the police and county attorney. This exercise of independent discretion protects Defendant from liability for malicious prosecution as a matter of law and, therefore, Plaintiff's malicious prosecution claim must be dismissed.

B. Prosecution Was Not Terminated by Acquittal or Discharge

In addition, Plaintiff in this case cannot prove the requisite showing of a termination of the previous prosecution by acquittal or discharge of the plaintiff. This element is satisfied by (1) the refusal of the grand jury to indict; or (2) dismissal of the charge by the county attorney; or (3) acquittal of the plaintiff by a jury. *See, e.g.* Iowa Civil Jury Instruction 2207. Essentially, the termination must be based on a finding of lack of probable cause after review of the evidence against the plaintiff.

The first charge against Plaintiff was dismissed following her participation in Polk County's Victim Offender Reconciliation Program ("VORP"). This is more akin to alternative dispute resolution or settlement rather than a termination in the criminal defendant's favor. *See, e.g. Mills County State Bank v. Roure*, 291 N.W.2d 1, 3-4 (Iowa 1980). Resolution through VORP is not equivalent to a dismissal after review of the evidence by a grand jury, county attorney, or jury.

The second charge against Plaintiff was dismissed following Defendant's desire to not have her stepson be forced to be a witness in a criminal trial against his mother (Plaintiff). Shortly before trial on the second charge, Plaintiff produced her witness list to the State, which included Plaintiff's minor son-- Defendant's stepson. For this specific reason, Defendant asked mat the Marion

County Attorney dismiss the prosecution. Again, the charge was not dismissed by the county attorney based on a finding of lack of probable cause.

Accordingly, Plaintiff cannot prove termination of the prosecutions by acquittal or discharge of the plaintiff as required by Iowa law and, further, the undisputed evidence shows that probable cause existed for the prosecutions. Plaintiff's malicious prosecution claim must be dismissed as a matter of law. Alternatively, if Plaintiff continues to assert that Defendant was the "party commencing the prosecution", the undisputed evidence shows that probable cause existed for said prosecution. In a malicious prosecution claim, "probable cause does not depend on the guilt or innocence of the accused party. Rather it depends on the honest and reasonable belief of the party causing the prosecution." *Craig*, 826 N.W.2d 516 at pg. *7 (quoting *Sundholm v. City of Bettendorf*, 389 N.W.2d 849, 852 (Iowa 1986). Defendant had a reasonable belief that there was probable cause for the criminal complaints to be made to law enforcement.

IV. PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FAILS AS A MATTER OF LAW

Plaintiff alleges that Defendant caused intentional infliction of emotional distress by initiating criminal proceedings against Plaintiff. As a matter of law, Plaintiff in this case cannot prove outrageous conduct by the defendant sufficient to sustain a claim for intentional infliction of emotional distress.

The essential elements of intentional infliction of emotional distress are:
(1) outrageous conduct by the defendant;

(2) the defendant intentionally caused, or recklessly disregarded the probability of causing, the emotional distress;

(3) plaintiff suffered severe or extreme emotional distress; and

(4) the defendant's outrageous conduct was the actual and proximate cause of the emotional distress.

Fuller, 567 N.W.2d at 423 (citing *Steckelberg v. Randolph*, 448 N.W.2d 458, 461 (Iowa 1989)).

It is for the court to decide as a matter of law whether the conduct alleged may reasonably be regarded as outrageous. *M.H. Callahan*, 385 N.W.2d 533, 540 (Iowa 1986). "It is not enough to show that the defendant has acted with tortious intent or that defendant has intended to inflict emotional distress or that his conduct could be characterized by malice or by a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." *Kunau*, 404 N.W.2d 573, 576 (Iowa App. 1987).

To be considered "outrageous" and satisfy element one, the defendant's conduct "must be 'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Fuller*, 567 N.W.2d at 423 (citing *Harsha v. State Savs. Bank*, 346 N.W.2d 791, 801 (Iowa 1984)).

Intentional infliction of emotional distress "is a claim frequently asserted and almost always denied as a matter of law." *Sheridan v. City of Des Moines*, 2000 WL 35626707 at pg. *2 (S.D. Iowa 2000); *Wilson v. Cintas Corp. No. 2*, No. 8/937/08-0698 (Iowa App. 2008)(stating "Iowa case law establishes proving 'outrageous conduct' is not easy"). The plaintiff must establish outrageous conduct by substantial evidence. *Fuller*, 567 N.W.2d at 423 (citing *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 109, 118 (Iowa 1984)).

In *Fuller*, 567 N.W.2d at 421, the defendant called the police to report that the plaintiff was operating his vehicle while intoxicated. As set forth above, the complaining defendant was a union rival of plaintiff. The police stopped the plaintiff but

determined that he was not intoxicated. *Fuller*, 567 N.W.2d at 421. The plaintiff sued the defendant for intentional infliction of emotional distress based on the allegation that the defendant filed a false police report. *Id* The trial court granted the defendant's summary judgment motion and dismissed the plaintiff's intentional infliction of emotional distress claim. *Id*

The Iowa Supreme Court affirmed the trial court and held that the defendant's call to the police could "in no way" qualify as outrageous conduct as defined by Iowa law. *Id.* at 423 ("In no way could the conduct alleged here qualify under the forgoing definition. The claim was correctly dismissed.") *See also Sheridan v. City of Des Moines*, 2000 WL 35626707 at pg. *2 (S.D. Iowa 2000) (calling the Secret Service and police clearly did not amount to outrageous conduct as the term has been defined in the Iowa cases).

Pursuant to Iowa law, merely calling the police to report a potential crime (even if the complaint turns out to be unfounded or untrue) does not qualify as outrageous conduct. Moreover, the circumstances of this case do not otherwise support a claim of outrageous conduct. Accordingly, Plaintiff in this case cannot establish the first element of a claim of intentional infliction of emotional distress. The claim must be dismissed.

V. PLAINTIFF'S HARASSMENT CLAIM FAILS AS A MATTER OF LAW BECAUSE IOWA CODE § 708.7 IS A CRIMINAL STATUTE WHICH AFFORDS NO PRIVATE RIGHT OF ACTION

Plaintiff alleges that Defendant is civilly liable for harassment based on Defendant's provision of false information and reporting of alleged crimes to law enforcement. Plaintiff's claim must be dismissed because Iowa does not recognize a civil cause of action for harassment based on violation of Iowa criminal statute section 708.7.

Iowa Code section 708.7 is a criminal statute on harassment. The Iowa Supreme Court has held that "violation of a criminal statute gives rise to a civil cause of action only if such an action appears, by express terms or clear implication, to have been intended by the legislature." *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 38 (Iowa 1982).

The Iowa Court of Appeals has explicitly found that Iowa Code section 708.7 does not appear "by express terms or clear implication" to have been intended by the legislature to give rise to a civil cause of action. *Davenport v. City of Corning*, 2007 WL 3085797(unpublished) (Iowa App. 2007)(upholding summary judgment dismissing civil harassment claim based on Iowa Code section 708.7). *See also Wilson v. Cintas Corp. No. 2*, 2008 WL 5235514 (unpublished)(Iowa App. 2008) (stating "[w]e agree with an earlier persuasive opinion by this court finding that it does not "appear 'by express terms or clear implication' " that the legislature intended that harassment in violation of Iowa Code section 708.7 give rise to a civil cause of action for harassment").

Neither the Iowa legislature nor the Iowa Supreme Court has otherwise recognized a civil remedy for violation of the criminal harassment statute. Plaintiff cannot provide any basis for the creation of this right under the present circumstances. [6]

VI. PLAINTIFF'S CLAIM OF FRAUDULENT CONCEALMENT FAILS AS A MATTER OF LAW BECAUSE DEFENDANT HAD NO DUTY TO DISCLOSE ANY INFORMATION TO PLAINTIFF

Plaintiff's claim of fraudulent concealment is based on an allegation that Defendant had a duty to disclose the instigation (i.e. a complaint) of the violation of the No Contact Order at or before the time that Plaintiff was in mediation with her ex-husband for issues involving modification of their dissolution decree. Plaintiff cannot prove a duty of disclosure between Plaintiff and Defendant and, therefore, the claim of fraudulent concealment must be dismissed.

The essential elements of fraudulent concealment are:
(1) special circumstances existed which gave rise to a duty of disclosure between the plaintiff and the defendant;

(2) while such relationship existed, the defendant was aware of the withheld facts;

(3) while such relationship existed, the defendant concealed or failed to disclose the information;

(4) the undisclosed information was material to the transaction;

(5) the defendant knowingly failed to make the disclosure;

(6) the defendant intended to deceive the plaintiff by withholding such information;

(7) the plaintiff acted in reliance upon the defendant's failure to disclose and was justified in such reliance;

(8) the failure to disclose was a cause of the plaintiff's damage; and

(9) the nature and extent of the plaintiff's damage.

Air Host Cedar Rapids, Inc. v. Cedar Rapids Commission, 464 N.W.2d 450 (Iowa 1990); *Sinnard v. Roach*, 414 N.W.2d 100 (Iowa 1987); *Cornell v. Wunschel*, 408 N.W.2d 369 (Iowa 1987); *Kunkle Water & Elec. Co. v. City of Prescott*, 347 N.W.2d 648 (Iowa 1984); *Thompson v. Kaczinski*, 774 N.W.2d 829, 836-39 (Iowa 2009) (causation); *Restatement (Second) of Torts*, Section 551 (1977); *American Family Service Corporation v. Michel/**elder***, 968 F.2d (8th Cir. 1992).

Plaintiff cannot prove the first element of a fraudulent concealment claim. A duty of disclosure is an essential element of a fraudulent concealment claim. *See, e.g. Cornell*, 408 N.W.2d at 374. A duty of disclosure does not exist between persons generally, but rather, arises only upon proof of special circumstances that may give rise to such a duty.

This question of whether a person has a duty to another is the threshold inquiry in any tort case and is always a question of law for the Court. *Fry v. Mount*, 554 N.W.2d 263, 265 (Iowa 1996). The undisputed evidence is that, at the time Plaintiff claims Defendant was obligated to tell her about the second charge, Defendant was, in fact, prohibited by law from communicating with Plaintiff.

In fact, Plaintiff has admitted Defendant had no obligation to disclose an alleged violation of the No Contact Order:
Q. So there's no basis that you can assert for them [Steve Atzen or Angie Atzen] being obliged to advise you of when you are violating the order?

A. Right, right.

(Kari Atzen deposition, pg. 234-235)

Further, the finding of a duty to disclose here would essentially mean that a criminal complainant has a duty to disclose that complaint to the perpetrator. More specifically, that a protected party to a No Contact Order was required to disclose a charge of an alleged violation to the person who is to have no contact with the protected party. As a matter of law, no such duty of disclosure should be found.

Finally, Plaintiff claims that the Defendant, her ex-husband's wife, had some duty to disclose information in Plaintiff's and her ex-husband's modification mediation. Defendant was not a part of modification mediation and not a party of any agreement to cooperate.

Plaintiff's fraudulent concealment claim is based on a mediation which took place between Plaintiff and her ex-husband, which was intended to resolve some visitation and child support issues. Defendant was not a party to this mediation; Defendant was not present at this mediation. Defendant made no representations to Plaintiff during this mediation nor did she conceal any information in this mediation. Accordingly, Plaintiff's claim of fraudulent concealment must be dismissed as a matter of law.

VII. PLAINTIFF IS NOT THE REAL PARTY IN INTEREST

The original Plaintiff in this case, Kari Atzen, filed this lawsuit on or about March 26, 2013. Thereafter, on or about May 9, 2013, Plaintiff filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Southern District of Iowa ("Case No. 13-01383-als7"). Plaintiff failed to disclose or list the present lawsuit as an asset of the debtor. On or about August 6, 2013, Plaintiff received a no asset discharge in bankruptcy.

On or about August 20, 2013, the Bankruptcy Case No. 13-01383-als7 was re-opened and Debtor (Kari Atzen) was permitted to amend her bankruptcy Schedule B to list this case as an asset of the estate. On or about November 27, 2013, the Trustee filed a Notice of Intent to Sell Property and Bar Date Notice. The Notice scheduled an auction for January 7, 2014, for the sale, *inter alia*, of the present lawsuit against Defendant

The Bankruptcy Court entered an Order for the auction, which provided that Trustee should cancel the auction if the Debtor (Kari Atzen) remitted sufficient funds to satisfy all allowed claims prior to the auction. According to the Trustee, the Debtor paid all allowed claims, fees and expenses, including the right to pursue this lawsuit (for a total of $67,500) and, on or about January 2, 2014, the auction was cancelled.

The Trustee purports to have sold the above-captioned lawsuit to Kari Atzen and, therefore, the Trustee is no longer the real party in interest and the case should be dismissed. Kari Atzen has not been substituted as the proper party plaintiff.

VIII. CONCLUSION

For the reasons set forth above, Plaintiff's claims fail as a matter of law and should be dismissed.

Respectfully submitted,

<<signature>>

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Footnotes

1 *See* section VII below regarding real party in interest. For purposes of the remaining argument, however, Defendant refers to Kari Atzen as "Plaintiff."

2 Plaintiff and Steve Atzen have two minor children together.

3 Defendant and Steve Atzen were married on July 2, 2011.

4 The Police Department took no action.

5 The basketball game was part of a privately funded, all-tournament club playing team that plays other privately formed competition teams. It is not a function of the S.E. Polk school basketball program.

6 Plaintiff generally refers to an alleged violation of her rights to equal protection. Plaintiff has no such claim, as one would be improper against Defendant as a private citizen (equal protection violation requires state action, *Principal Cos. Ins. Co. v. Blair*, 500 N.W.2d 67,69-70 (Iowa 1993)), and moreover, this general allegation does not provide the basis for creation of a new civil remedy.

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