IN THE IOWA DISTRICT COURT FOR ADAMS COUNTY

DEVAN CROZIER Plaintiff,	)	CASE NO. CVCV016126
v.	)	**DEFENDANT'S TRIAL BRIEF**
BROOK CROZIER Defendant.	)	

COMES NOW, Brook Crozier, by and through his counsel, Julia A. Ofenbakh, and files this Motion for Summary Judgment:

TABLE OF CONTENTS

TABLE OF CONTENTS 1

FACTUAL BACKGROUND 1

ARGUMENT 3

QUALIFIED PRIVILEGE 3

COUNT 1: LIBEL PER SE AND COUNT 2: SLANDER PER SE 6

COUNT 3: EMOTIONAL DISTRESS 8

COUNTERCLAIM 1: INVASION OF PRIVACY 9

COUNTERCLAIM 2: CONSPIRACY TO COMMIT INVASION OF PRIVACY 11

COUNTERCLAIM 3: AIDING AND ABETTING INVASION OF PRIVACY 12

CONCLUSION 12

FACTUAL BACKGROUND

On or about the month of February 2013 Brook Crozier began continuously receiving harassing phone calls. The phone calls were directed to him specifically and referenced

members of his family, the house in which he was currently residing, and various aspects of Brook's business. The caller threatened Brook personally, threatened members of his family, and would continuously make crude and intolerable comments. The caller identification listed the phone number as restricted, although the harassing phone calls would occasionally appear to be from various different numbers. After several weeks of receiving these harassing phone calls, Brook's father, began to get calls of a similar nature.

After speaking to the Adam's County Sherriff, Brook was instructed to file a complaint. Brook filed a complaint on or about March 9, 2013. As the Sherriff's office was investigating Brook's complaint, the calls continued. Brook continued to report these calls and was instructed to keep the caller on the phone as long as possible in the hopes of gleaning some identifying information. Brook was also instructed to record the conversations in order to submit them to the Sherriff's office.

On or about May 30, 2013, the Adam's County Sherriff's office completed their investigation and found probable cause to file charges, criminal case numbers AGCR004381 and SMAC011552, charging Devan Crozier with Stalking and Harassment, respectively. Stalking charge was dismissed sometime in November of 2013. Shortly before the one-year mark, the new County Attorney dismissed the Harassment charge. Devan initiated this law suit claiming that Brook accused him of a crime, and got him arrested, solely out of animosity towards his side of the family. Devan states a family estate suit settled between their parents, to which neither is a party, as the reason Brook created these harassing phone calls and accused Devan. However, while there is evidence of the phone calls and their harassing nature, there is no evidence that Brook felt anger over the estate suit or that he disliked Devan. Brook's statements to the police were made under qualified privilege and in good faith.

ARGUMENT

QUALIFIED PRIVILEGE

In this matter, the Plaintiff's Petition complains of defamation in the form of libel, slander, and intentional infliction of emotional distress. These claims all arise from the same event, the petition to investigate the Defendant made to the police in Adams County, Iowa regarding the harassing phone calls he was receiving and the stalking he felt was occurring. The Defendant's communication with the police was a qualified privilege necessitating that the Plaintiff produce evidence of malice in order to prove defamation. *Knudsen v. Chi. & N. W. Transp. Co.*, 464 N.W.2d 439, 442-43 (Iowa 1990)(citing *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108, 116 (Iowa 1984)).

> Under the law of defamation, a qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which that person has a right or duty, if made to a person having a corresponding interest or duty in a manner and under circumstances fairly warranted by the occasion.

Id. (citing *Vinson*, 360 N.W.2d at 116-17; *Brown v. First Nat'l Bank*, 193 N.W.2d 547, 552 (Iowa 1972); *Vojak v. Jensen*, 161 N.W.2d 100, 105 (Iowa 1968)).

> When a private person gives to a prosecuting officer information that 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 his 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.

Restatement (Second) of Torts § 653 cmt. g, at 409 (1977) (adopted by the Iowa Supreme Court in *Rasmussen Buick-GMC v. Roach*, 314 N.W.2d 374, 376 (Iowa 1982)).

To constitute qualified privilege, the communication or statement must have been made in good faith, with the purpose of upholding an interest, limited in scope to upholding that

interest, on a proper occasion, and with the publication of such statements made in the proper manner and to only the proper parties. *Id.* (citing *Brown*, 193 N.W.2d at 552). Qualified privilege protects statements made without actual malice. *Vinson*, 360 N.W.2d at 116. Qualified privilege protects statements regardless of whether the defamation is per se or per quod. *Ryan v. Wilson*, 231 Iowa 33, 52, 300 N.W. 707, 716-17 (1941). In order to defeat a defense of qualified privilege, the plaintiff must prove, by sufficient evidence, that the defendant acted with actual malice, "knowing or reckless disregard of the truth of the statement." *Clay v. Hy-Vee, Inc.*, 2008 Iowa App. LEXIS 1303, *2 (Iowa Ct. App. Dec. 31, 2008)(quoting *Barreca v. Nickolas*, 683 N.W.2d 111, 118 (Iowa 1984)). This standard requires "a high degree of awareness of … probable falsity." *Barreca*, 683 N.W.2d at 123 (quoting *Caveman Adventures UN, Ltd. v. Press-Citizen Co.*, 633 N.W.2d 757, 762 (Iowa 2001)).

The statements the Defendant, Brook Crozier, made to the police constitute qualified privilege. *See Clay*, 2008 Iowa App. LEXIS 1303, *2 (holding that, while allegations of criminal conduct are defamation, communications with law enforcement is qualifiedly privileged). As these statements are qualifiedly privileged, the Plaintiff must produce evidence of actual malice. *See Barreca*, 683 N.W.2d at 118-123. When determining malice regarding allegations made and filing a criminal charge, it is instructive to look at the definition of malice used in malicious prosecution claims. The statements made by the Defendant were not publicized until the Adams County Attorney, Duane L. Golden, made the independent decision to file charges against the Plaintiff based upon probable cause.

"Actual antagonism or contempt has been held insufficient to show malice. So has intent to inflict harm. There must be an intent to inflict harm *through falsehood*." *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 156 (Iowa 1976)(emphasis in original).

"Clear and convincing proof of knowledge of falsity or reckless disregard for the truth must be shown." *Kelly v. Iowa State Educ. Asso.*, 372 N.W.2d 288, 296 (Iowa Ct. App. 1985) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332, 94 S. Ct. 2997, 3008, 41 L. Ed. 2d 789, 800 (1974)). Malice, under this definition, is any wrongful act that was done willfully and purposefully with an improper purpose or motive to cause injury of another. *Craig v. City of Cedar Rapids*, 826 N.W.2d 516 (Iowa Ct. App. 2012)(citing *Brown v. Monticello State Bank*, 360 N.W.2d 81, 87 (Iowa 1984)). As the Plaintiff is not a public official, and this is a case regarding accusation of criminal conduct, malice may be inferred from a lack of probable cause. *Id.* (citing *Vander Linden v. Crews*, 231 N.W.2d 904, 906 (Iowa 1975)). Given that both the Adams County Attorney, Duane L. Golden, and Honorable Magistrate Andrew J. Knuth, found probable cause to file charges against Devan Crozier, there was no malice. In addition,

> One who initiates or continues criminal proceedings against another has probable cause for doing so if [the accuser] correctly or reasonably believes
> a) that the person [accused] has acted or failed to act in a particular manner, and
> b) that those acts or omissions constitute the offense that [the accuser] charges against the accused, and
> c) that [the accuser] is sufficiently informed as to the law and the facts to justify [the accuser] in initiating or continuing the prosecution.

Id. (citing *Sisler v. City of Centerville*, 372 N.W.2d 248, 251 (Iowa 1985); Restatement (Second) of Torts § 662, at 423 (1977)). Throughout the course of both the proceedings related to the criminal charge and this proceeding, the Defendant has consistently maintained that he reasonably believed that it was Devan Crozier who was harassing and stalking him. In so far as a victim can be informed of the laws and facts to justify a complaint, the Defendant passed his reasonable beliefs on to the police and the Adams County Attorney. "[A] person may face liability if he did not have a good faith belief in the suspect's guilt, but the duty falls on the investigating bodies, not on the individual supplying information, to determine what facts are

significant in an investigation." *Id.* (citing *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 466 (3d Cir. 1993) *overruled on other grounds by Miller v. CIGNA Corp.,* 47 F.3d 586 (1995)).

The Defendant's reasonable belief was then investigated by law enforcement officers and the Adams County Attorney who made the independent decision to file charges. As probable cause supporting those charges was found, independently by the Adams County Sheriff, the Adams County Attorney, and Magistrate Knuth, it demonstrates that it was reasonable for the Defendant to believe that the Plaintiff was behind the harassment and stalking. Thus, the only element that must be proven by the Plaintiff in this case, malice, cannot be proven.

COUNT 1: LIBEL PER SE AND COUNT 2: SLANDER PER SE

Libel and slander are essentially the twin torts that constitute defamation. *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998) (citing *Lara v. Thomas*, 512 N.W.2d 777, 785 (1994); W. Page Keeton, Prosser and Keeton on the Law of Torts § 111, at 771 (5th ed. 1984) [hereinafter Prosser & Keeton]). While both deal with defamatory statements made by one individual about another, libel is written defamation and slander is oral defamation. *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998) (citing Prosser & Keeton § 111, at 771). Those twin torts can be found as constituting *per se* defamation. *Schlegel*, 585 N.W.2d at 221. To establish that either form of defamation was *per se*, the Plaintiff must prove that the statements made have "a natural tendency to provoke the plaintiff to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse." *Schlegel*, 585 N.W.2d at 221 (quoting *Prewitt v. Wilson*, 103 N.W. 365, 367 (1905)). The essential difference between defamation, known as defamation *per quod*, and defamation *per se*, other than the natural tendency of the words used, is that *per se* carries presumed damage to the Plaintiff's reputation where *per quod* requires that the Plaintiff prove

actual damage to reputation and any other special damages. *Schlegel*, 585 N.W.2d at 221 (citing Prosser & Keeton § 112, at 795; *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996)).

Being accused of a crime could be considered defamation *per se*, however nothing has been shown that these charges caused "public hatred, contempt, or ridicule, or [deprived Devan] of the benefit of public confidence or social intercourse." *Schlegel*, 585 N.W.2d at 221 (quoting *Prewitt*, 103 N.W. at 367 (1905)). Devan has not lost a job, lost any friends or social status, nor has he been kicked out of any educational programs. Nothing constituting hatred, contempt, or ridicule has been posted in social media or the newspapers regarding Devan's charges. At most, the mere fact that he was arrested was published, but instead of going after the website that published that information, Devan is attempting to recover damages from his cousin who simply told the police his suspicions. Brook does not, and cannot, control who the police arrest, nor can he control what websites decide to publish. Brook did not seek publicity of these charges, only the cessation of the harassing phone calls.

Damages cannot be awarded based upon the libel *per se* statements alone and no other evidence. *Kelly*, 372 N.W.2d at 300. "Recovery is for damages that are the natural and probable consequences of the libel." *Id.* (citing *Brown*, 193 N.W.2d at 555). Evidence of the consequences of the libel *per se* must be presented to the jury in order to determine appropriate damages, even nominal damages which are presumed, and include "evidence such as the nature of the plaintiff's reputation before the libel was published and the extent of the publication." *Id.* (citing as example *Melton v. Bow*, 241 Ga. 629, 631, 247 S.E.2d 100, 101 (1978)). Devan has produced no evidence of damages. As aforementioned, he has not lost a job or social status, nor has he produced any evidence of medical damages, emotional or physical. Devan was not kicked out of school or damaged in any way due to these charges. In fact, he had previously been cited for

public intoxication which was published to a greater extent than these charges as it was published in his school's paper. Given that his reputation was already damaged due to the publication of criminal charges, these charges could not have done any more damage, if they did any at all.

COUNT 3: EMOTIONAL DISTRESS

To prove emotional distress, the Plaintiff must show:

> (1) Outrageous conduct by the defendant;
> (2) The defendant's intentional causing, or reckless disregard of the probability of causing emotional distress;
> (3) Plaintiff has suffered severe or extreme emotional distress; and
> (4) Actual proximate causation of the emotional distress by the defendant's outrageous conduct.

Northrup v. Farmland Industries, 372 N.W.2d 193, 197 (Iowa 1985) (quoting *Vinson*, 360 N.W.2d at 118). In order to show that the Defendant's conduct in disclosing to the police his suspicions that the Plaintiff was behind the harassing phone calls constitutes outrageous conduct, the Plaintiff must prove that this disclosure was in no way reasonably appropriate under the circumstances. *Tomash v. John Deere Indus. Equip. Co.*, 399 N.W.2d 387, 392-93 (Iowa 1987) (citing *Reihmann v. Foerstner*, 375 N.W.2d 677, 681 (Iowa 1985)). "It is for the court to determine in the first instance, as a matter of law, whether the conduct complained about may reasonably be regarded as outrageous." *Northrup*, 372 N.W.2d at 198. As the Defendant's disclosure to the police was a regular step in the criminal process, and was reasonably appropriate given the continued harassment via phone and the Defendant's good faith belief that the Plaintiff got on the phone during one of those calls, the Defendant's conduct in pursuing criminal charges does not constitute outrageous conduct required by law to recover for emotional distress. *See id*.

Regarding element two, the Plaintiff cannot prove that the Defendant intentionally caused, or recklessly ignored the probability of causing, severe emotional distress. The Defendant requested police help to stop the harassing phone calls he was getting at all hours of the night. As the burden rests with the Plaintiff, the Plaintiff must prove the Defendant accused him with the intention of causing emotional distress or with a reckless disregard that such accusation would cause emotional distress. *See id*. No such evidence has been produced. Additionally, the Plaintiff has failed to provide any evidence of severe or extreme emotional distress. There are no medical records, therapy records, or any other type of evidence that would show severe or extreme emotional distress. *See Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 31 (Iowa 2014); *Meyer v. Nottger*, 241 N.W.2d 911, 915-16, 918-19 (Iowa 1976); *Northrup v. Miles Homes, Inc. of Iowa*, 204 N.W.2d 850, 855, 860 (Iowa 1973); *Randa v. U.S. Homes, Inc.*, 325 N.W.2d 905, 908 (Iowa Ct. App. 1982) (all requiring either records or testimony of physical harm or hospitalization due to mental health, that merely feeling depressed was not enough). As such, both elements three and four, the emotional distress and the proximate cause of that emotional distress, cannot be proven.

COUNTERCLAIM 1: INVASION OF PRIVACY

Iowa has adopted the Restatement Second of Torts for invasion of privacy claims. *In re Marriage of Tigges*, 758 N.W.2d 824, 829 (Iowa 2008). The Restatement Second of Torts lists invasion of privacy as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." § 652B. In the comments for this section of the Restatement, telephone calls are listed as one of the ways in which a person can intrude upon the seclusion of another. *See id*.

Iowa has adopted a two-prong test for invasion of privacy. The first is that there was an intentional intrusion into a matter or place in which the victim had a right to expect privacy. *Koeppel v. Speirs*, 808 N.W.2d 177, 181 (Iowa 2011)(citing *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 687 (Iowa 1987)). The Defendant had the right to expect privacy in his own home, particularly at the dead of night. No reasonable person anticipates that the sanctity of their home and seclusion will be violated by a series of obscene and harassing phone calls in the middle of the night, even if their phone number is listed on the advertisements for their business.

The case law that the Plaintiff relies upon in their supplemental brief, *In re Marriage of Tigges*, cites two other cases in their discussion of a public figure. 758 N.W.2d at 829. Those cases discuss whether the person was physically secluded versus sitting in public or whether the matter that was publicized was already public knowledge. *See Stessman*, 416 N.W.2d at 687 (Iowa 1987); *Winegard v. Larsen*, 260 N.W.2d 816, 823 (Iowa 1977). Most telling is the courts discussion of public figure in *Stessman*, where it was discussed that "' [plaintiff's] visibility to some people does not strip him of the right to remain secluded from others." 416 N.W.2d at 687.

Additionally, case law from other jurisdiction who have addressed the invasion of privacy claim as it relates to phone calls has held that harassing phone calls, even when the number is a business number or the caller has a right to phone that person, can be an invasion of privacy. *See Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (1961) (holding that a person still has a right to privacy over a business phone number and that highly offensive is a matter to be determined by the jury); *Housh v. Peth*, 133 N.E.2d 340 (1956) (holding that even if a plaintiff gave her number to the defendant, and the defendant had a right to call, the defendant could still invade her privacy if the calls became harassing and highly offensive); *Philips v. Citimortgage, Inc.*, 430 S.W.3d 324 (2014) (holding that even though the mortgage company had a right to call

the plaintiff regarding a debt, the phone calls became numerous and harassing and thus constituted an invasion of privacy).

The Plaintiff states that the best way for a jury to determine whether the conduct was highly objectionable is to look at the Defendant's actions. The Defendant has put forward that, had the Plaintiff asked him why he stayed on those phone calls and spoke the way he did, he would have said the same thing that he is going to testify to at trial; namely that the Sheriff requested him to keep the conversations going as long as possible to hopefully glean some identifying information out of the caller.

COUNTERCLAIM 2: CONSPIRACY TO COMMIT INVASION OF PRIVACY

In order to prove conspiracy one must prove there was an "agreement of two or more persons acting together to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Shea v. Lorenz*, 869 N.W.2d 196, at *8 (Iowa App. July 9, 2015). "The principal element of conspiracy is the agreement, involving mutual mental action and an intent to commit the act that results in injury." *Id.* "Speculation, relationship, or association and companionship alone do not establish a conspiracy." *Id.* "To establish a conspiracy requires some evidence; suspicion of guilt is of course not sufficient." *American Sec. Benev. Ass'n, Inc. v. District Court of Black Hawk County*, 147 N.W.2d 55, 63 (Iowa 1966).

During one of the harassing calls to the Defendant, a man the Defendant has identified as the Plaintiff was heard in the background. This evidence suggests that the Plaintiff was most likely giving instructions or support to the individuals making such harassing calls to the Defendant.

COUNTERCLAIM 3: AIDING AND ABETTING INVASION OF PRIVACY

In order to prove aiding and abetting, "there must be a wrong to the primary party, knowledge of the wrong on the party of the aider, and substantial assistance by the aider in the achievement of the primary violation." *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994)(citing *Tubbs v. United Cent. Bank, N.A.*, 451 N.W.2d 177, 182 (Iowa 1990)). Each of these elements can be proven by the evidence aforementioned. The appearance of the Plaintiff in the background of one of the harassing calls tends to prove a wrong was committed against the Defendant, that the Plaintiff had knowledge of the wrong committed, and that the Plaintiff was offering substantial assistance to the perpetrator in the commission of this wrong.

CONCLUSION

The Plaintiff cannot prove malice and, consequently, cannot overcome the qualified privilege to even reach the issues of defamation *per se* or intentional infliction of emotional distress. Even if the Plaintiff were to overcome qualified privilege, nothing constituting hatred, contempt, or ridicule has been posted in social media or the newspapers regarding the Plaintiff's charges, nor can he prove any reasonably related damage to his reputation necessary to recover for defamation *per se*. *See Kelly*, 372 N.W.2d at 300. As the Defendant's disclosure to the police was a regular step in the criminal process, and was reasonably appropriate given the circumstances and does not constitute outrageous conduct required by law to recover for emotional distress. *See Tomash*, 399 N.W.2d at 392-93. There are no medical records, therapy records, or any other type of evidence that would show severe or extreme emotional distress. *See Smith*, 851 N.W.2d at 31; *Meyer*, 241 N.W.2d at 915-16, 918-19; *Miles Homes, Inc. of Iowa*, 204 N.W.2d at 855, 860; *Randa*, 325 N.W.2d at 908 (Iowa Ct. App. 1982) (all requiring either records or testimony of physical harm or hospitalization due to mental health, that merely feeling

depressed was not enough). As such, intentional infliction of emotional distress cannot be proven.

Harassing phone calls, even when the caller has permission to contact the victim, constitute an invasion of privacy. *See Harms*, 127 So. 2d 715; *Housh v. Peth*, 133 N.E.2d 340; *Philips*, 430 S.W.3d 324. While these cases are out of state, they have all adopted the Restatement Second of Torts, as has Iowa, and are the best cases to look towards for answers regarding phone calls as Iowa has yet to deal specifically with this type of invasion of privacy by harassing calls. *See In re Marriage of Tigges*, 758 N.W.2d at 829. As the phone records and recordings illustrate, the calls the Defendant received were harassing in nature, highly objectionable to a reasonable person, and occurred in a time and space that the Defendant had a reasonable expectation of privacy. Should the Plaintiff be found innocent of actually placing the calls, there is ample evidence from the conversations between the caller and the Defendant that the Plaintiff either told the caller who to call and what to say or offered aid to the caller as the personal information stated by the caller was known only to the cousins.

Respectfully Submitted,

/s/ Julia A. Ofenbakh
Julia A. Ofenbakh, AT0010124
541 31st Street, Suite C
Des Moines, IA 50312
Phone: (515) 868-0088
Facsimile: (515) 963-5370
Email: julia@ofenbakhlaw.com