IN THE COURT OF APPEALS OF IOWA

No. 4-093 / 93-0080

FILED
MAY 26 1994
CLERK SUPREME COURT

STEPHEN J. SNYDER,

Plaintiff-Appellant/Cross-Appellee,

vs.

DEBRA ANN FRANCIS and MICHAEL W. KENNEDY,

Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Johnson County, Lynne E. Brady and August F. Honsell, Judges.

Plaintiff, Stephen Snyder, appeals from a judgment entered on verdicts in favor of defendants Kennedy and Francis in Snyder's action for damages and in favor of Francis on her counterclaims. Defendants cross-appeal.

AFFIRMED.

Stephen J. Snyder, San Diego, California, pro se.

Bruce L. Walker and Julie L. Pulkrabek of Phelan, Tucker, Mullen, Bright & Walker, Iowa City, for appellee Francis.

Matthew J. Brandes and Webb L. Wassmer of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellee Kennedy.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

PER CURIAM

This case has a long and painful history. In February 1989 Stephen Snyder filed an action for actual and punitive damages against his former wife, Debra Francis; her former attorney, Michael Kennedy; and her counselor, Bonnie Williams. Snyder's petition contained six counts based on events surrounding the dissolution of the marriage between Snyder and Francis in 1987 and 1988. Counts I and II alleged abuse of process against all defendants. The claims arose from two temporary injunctions obtained by Francis in 1987 which, among other things, restricted Snyder's access to the parties' children. Count III alleged interference with a parent-child relationship against all defendants. This claim involved the removal of the parties' children from Snyder's home in California in 1987. Count IV alleged assault against Francis. Count V alleged Francis made fraudulent misrepresentations concerning the custody of the children and events surrounding the petition for dissolution. Count VI alleged intentional infliction of emotional distress against all the defendants for their conduct during the dissolution action.

The defendants responded to the petition by filing motions to dismiss. The district court dismissed all counts against Kennedy and Williams. All counts against Francis were dismissed except count IV, the claim for assault. Snyder appealed. We subsequently reversed and

remanded the case to the district court for further proceedings. During the appeal, Snyder dismissed count IV against Francis pursuant to a settlement.

Following the remand, the defendants filed answers to Snyder's petition. Francis was then granted leave to amend her answer to include two counterclaims. Francis and Kennedy filed motions for summary judgment. Counts III and VI against Kennedy were dismissed, and count VI against Francis was dismissed. Williams settled with Snyder out of court.

In October 1992 trial began on the remaining counts and counterclaims. The jury found in favor of Francis and Kennedy on all counts. It also awarded Francis $35,000 in compensatory damages and $100,000 in punitive damages on her counterclaim for abuse of process against Snyder. On the counterclaim for intentional infliction of emotional distress against Snyder, the jury awarded Francis $25,000 in compensatory damages and $300,000 in punitive damages. Judgment was entered for these amounts plus interest.

Snyder appeals. He first argues the district court erred in summarily dismissing counts III and VI against Kennedy and count VI against Francis. In particular, he asserts the court should not have entered summary judgment when discovery was incomplete. Second, Snyder contends the district court erred in allowing Francis to file her counterclaims. He argues the counterclaims were illegal and had not matured. He also claims Francis's attorney and

the district court held improper ex parte meetings to discuss the issues Francis could raise in her counterclaims. Snyder believes these issues were purposely kept secret from him to preclude his preparation of a defense. Third, Snyder claims the district court erred in denying his motions for a mistrial and in denying him access to discovery. He alleges, among other things, the district court acted unethically and prejudicially by meeting a defense witness for lunch just before the witness took the stand. Fourth, Snyder claims the court erred in denying his motion for judgment notwithstanding the verdict and motion for a new trial. Finally, Snyder claims the district court erred in instructing the jury.

Francis and Kennedy argue Snyder failed to preserve error on many of his claims. They also assert that a number of his allegations are unfounded. Francis withdraws the issues stated in her notice of cross-appeal, except for the district court's refusal to admit the medical records into evidence which she claims were properly admissible under the business records exception to hearsay. Francis also asserts Snyder's brief on appeal violates the spirit of Iowa Rule of Civil Procedure 80(a) and this court should sanction him by ordering him to pay court costs and her attorney fees.

Kennedy also cross-appeals. He contends the district court erred in failing to grant his motion for a directed verdict on counts I and II, and in improperly instructing the jury on these counts.

I. SUMMARY JUDGMENT

We review a grant of summary judgment to determine whether a genuine issue of material fact exists and whether the law was correctly applied. Ottumwa Housing Auth. v. State Farm Fire and Casualty Co., 495 N.W.2d 723, 726 (Iowa 1993).

The district court summarily dismissed the claim of interference with a parent-child relationship against Kennedy (count III) and the infliction of emotional distress claim against Kennedy and Francis (count IV). Snyder initially asserts the dismissal was improper since discovery was incomplete.

Iowa Rule of Civil Procedure 237 (f) allows a party to request a continuance of the hearing on a motion for summary judgment if additional discovery is needed to properly respond to the motion. Snyder never alerted the trial court to his need for additional time to pursue discovery. Accordingly the issue was not properly preserved for appeal. Peters v. Burlington N. R.R., 492 N.W.2d 399, 401 (Iowa 1992).

Iowa recognizes a claim for interference with parental custody. Lansky v. Lansky, 449 N.W.2d 367 (Iowa 1989). The tort, however, requires either direct contact between the defendant and the child or the violation of a court order. Finn v. Lipman, 526 A.2d 1380, 1381-83 (Me. 1987). Similarly, conspiracy to interfere with parental custody requires some unlawful act. See Marshak v. Marshak, 628

A.2d 964, 970-71 (Conn. 1993); Restatement (Second) of Torts, § 700 cmt. (c) (1965).

The record fails to reveal any evidence that Kennedy had direct contact with the Snyder children or that he violated any court order. Summary adjudication was properly granted on the claim of interference with parental custody.

A critical element of the tort of intentional infliction of emotional distress is that the conduct involved be outrageous. Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 635-36 (Iowa 1990). It is the task of the courts, in the first instance, to determine whether the conduct under examination is outrageous. Id. This requires a finding that the conduct was "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." Id. Substantial evidence of extreme conduct is required. Vinson v. Linn-Mar Community Sch.Dist., 360 N.W.2d 108, 118 (Iowa 1984).

Snyder offered no evidence of extreme and outrageous conduct by Kennedy or Francis, and we cannot find any on our own review of the record. In determining whether conduct is outrageous, the case must be examined in the context of the surrounding circumstances. Reihmann v. Foerstner, 375 N.W.2d 677, 681 (Iowa 1985). The activities of Francis arose out of an unfortunate and bitter dissolution of marriage. In context, they were not

outrageous, nor were the actions of Kennedy in rendering legal advice and assistance to Francis. The trial court correctly granted summary judgment on this claim.

II. COUNTERCLAIM BY FRANCIS

Snyder claims the counterclaim by Francis for abuse of process and infliction of emotional distress was defective and prejudicial. He points out it was attached to the motion for leave to amend the answer and was never signed or separately filed. He also argues, inter alia, that the claim for abuse of process had not matured and the emotional distress claim was barred by the statute of limitations.

We review the granting of a motion allowing an amendment under an abuse of discretion standard. Johnston v. Percy Constr. Inc., 258 N.W.2d 366, 370 (Iowa 1977).

The rule requiring pleadings to be signed by the party or attorney is merely directory. In re Estate of Dull, 303 N.W.2d 402, 406 (Iowa 1981). Moreover, Snyder is unable to point out any prejudice. He was aware the trial court had granted the amendment, and at no time did he object to Francis's failure to sign the counterclaim. See Iowa R. Civ. P. 80(a). We believe the alleged error was not preserved.

The counterclaim for emotional distress was not barred by the statute of limitations. See Iowa Code § 614.12 (1993). The trial court limited the counterclaim to acts occurring within two years of the filing of Snyder's

petition. Furthermore, the jury was instructed on distinguishing set off damages from independent damages by using the two year period prior to the time the motion to amend was filed. See Iowa Code § 614.1 (2) (1993).

A claim for abuse of process does not need to await the completion of the underlying action before it may be brought. Galloway v. Zuckert, 424 N.W.2d 437, 440 (Iowa 1988). It matures at the time the alleged abusive conduct takes place. Id. In this case, the claim of abuse of process brought by Francis arose out of the litigation initiated by Snyder. It was properly brought as a counterclaim.

The claim for infliction of emotional distress was also properly brought as a counterclaim. It had matured at the time it was pled and was related to the overall dispute between Snyder and Francis.

Snyder alleges other complaints with the counterclaim which we do not address. They are not supported by proper authority. See Fosselman v. Waterloo Community Sch. Dist., 229 N.W.2d 280, 285 (Iowa 1985).

III. MOTION FOR MISTRIAL

We review the denial of a motion for mistrial with an abuse of discretion standard. See McCracken v. Edward D. Jones & Co., 445 N.W.2d 375, 378 (Iowa App. 1989). Snyder claims the court erred in denying his motions for mistrial allegedly made during the course of the trial.

The first motion for mistrial occurred during the cross-examination of Kennedy by counsel for Francis, after Kennedy described the emotional effects of Snyder's conduct on Francis. Snyder believes the questioning was improper because he had previously been denied related discovery on the grounds of attorney-client privilege.

A review of the record clearly reveals that Kennedy did not disclose any privileged communications. Observations of conduct are not communications and are outside the scope of the attorney-client privilege. Bishop v. Superior Court, 724 P.2d 23, 29 (Ariz. 1986); McCormick on Evidence, § 89 (4th ed. 1992). Furthermore, even if Francis had waived the attorney-client privilege through the testimony of Kennedy, Snyder's remedy was to request a continuance to pursue discovery.

The record fails to disclose the existence of the second motion for mistrial which Snyder claims was made at trial. We decline to address issues which are not properly raised and not part of the record. See Jones v. Madison County, 492 N.W.2d 690, 693-94 (Iowa 1992).

The final motion for mistrial which Snyder claims was erroneously overruled by the trial court occurred during the examination of Kennedy. Kennedy testified that he consulted with the Snyder children's therapist prior to seeking one of the injunctions. Snyder complains this testimony was unfair because he was prevented from discovering the information prior to trial under the

attorney-client privilege. Again, the record does not support the claim. Snyder never requested Kennedy to disclose during discovery whether he consulted with anyone other than Francis before seeking the injunction.

We find no error in the trial court's denial of the motions for mistrial.

IV. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL

The trial court generally has broad discretion in ruling on motions for new trial. Houvenagle v. Wright, 340 N.W.2d 783, 785 (Iowa App. 1983). We will interfere with the trial court's ruling only when there is a clear abuse of discretion. Id.

Snyder raises a host of arguments in support of his claim that the trial court erred in denying his motion for new trial and motion notwithstanding the verdict. Many of the claims, however, were not raised in the trial court. Others were raised without reference to the record or any authority. Still others were a distortion of the record. These claims will not be addressed on appeal. Peters, 492 N.W.2d at 401; Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612, 611 (Iowa 1991).

The first claim for new trial which we address is that Snyder was prevented from filing court documents pursuant to an order he alleges was entered ex parte. The ex parte communication involved a request to the trial court by

counsel for Francis to enter a ruling on his motion for protective order. The communication was not substantive in nature and does not support a new trial. The same is true for the later harmless inquiry made to the trial judge by counsel for Francis whether the jury instructions had been typed.

Snyder also claims that the trial court committed numerous errors in ruling on the admission of evidence. One claim is the trial court erred in admitting certain medical reports. These reports, however, were the subject of a prior request for admissions. Snyder never responded to this request. Accordingly, they were deemed admitted, and Snyder cannot now assert his objection. See Iowa R. Civ. P. 127; Postma v. Sioux Center News, 393 N.W.2d 314, 316 (Iowa 1986).

Snyder also complains of two occasions when the trial judge allowed hearsay testimony. The first occasion involved the testimony of Bonnie Williams. A review of her testimony reveals no hearsay. The second objection involved testimony concerning a police report. Snyder, however, had offered the report into evidence and waived his objections about its contents.

Snyder also contends it was error to allow witness Wadle to testify about a telephone conversation he had with a person he believed, but was not certain, was Snyder. This was an issue of fact for the jury, and any error would not support a new trial. See Knudsen v. Chicago & N.W. Transp. Co., 464 N.W.2d 439, 443 (Iowa 1990).

Snyder also asserts it was an error to admit evidence of the legal fees incurred by Francis. This was properly admissible to determine the amount of damage in the abuse of process claim. See Pundzak Inc. v. Cook, 500 N.W.2d 424, 431 (Iowa 1993).

Finally, Snyder contends the trial court erred in allowing Francis to reopen her case prior to closing argument. This was within the discretion of the trial court and did not prejudice Snyder. Davidson v. Van Lengen, 266 N.W.2d 436, 440 (Iowa 1978); Iowa R. Civ. P. 192.

V. INSTRUCTIONS

Snyder submits the trial court erred in instructing the jury on the counterclaim, failing to include instructions on ex parte communications, and failing to adopt his proposed instructions. He failed to elaborate on these claims and did not identify any support in the record. Instead, he simply incorporated the trial arguments by reference. This was impermissible. See Iowa R. App. P. 14(a)(5). Notwithstanding, we have reviewed his claims and find they are without support.

VI. CROSS-APPEAL

We affirm the trial court in all respects and deny the request for a new trial. Accordingly, it is unnecessary to address the issues presented on the cross-appeal. We also deny the requests for sanctions and attorney fees.

AFFIRMED.