IN THE COURT OF APPEALS OF IOWA

No. 3-086 / 92-1182

FILED
MAY 0 1993
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STEVE SOURBIER,

Appellant,

vs.

ROBERT DARRAH,

Appellee.

ROBERT DARRAH,

Cross-Petitioner-Appellee,

vs.

DEBRA SUE SOURBIER,

Defendant to Cross-Petition.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

Plaintiff appeals district court's dismissal of his intentional infliction of emotional distress claim. **AFFIRMED.**

Richard B. Maher, Council Bluffs, for appellant.

John M. Burns of Timmermier, Gross & Burns, Omaha, Nebraska, for appellee.

Redge Berg, Spencer, for Debra Sue Sourbier.

Heard by Schlegel, P.J. and Hayden and Habhab, JJ.

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PER CURIAM.

The only issue on appeal is whether the district court erred in summarily dismissing a claim alleging intentional infliction of emotional distress caused by an affair between plaintiff's wife and defendant. We hold the district court properly granted defendant's motion for summary judgment.

Steve Sourbier brought this action against Robert Darrah seeking damages for intentional infliction of emotional distress. Sourbier alleged Darrah inflicted the distress by having an affair with his wife, Debra Sue Sourbier.

Debra and Steve were married from approximately 1983 until 1991. During their marriage, they both worked for a CPA firm in which Darrah was a senior partner. Debra was another partner and Steve was a janitor.

Steve alleges on the evening of October 8, 1990, he overheard a telephone conversation between Debra and Darrah, which indicated the two were having an affair. Steve confronted Debra and she allegedly admitted to having the affair. Steve also confronted Darrah and told him to stay away from his wife.

After Steve and Debra were divorced in December 1991, Steve filed a petition seeking damages against Darrah for the intentional infliction of emotional distress. Steve alleged Darrah's affair with Debra was the cause of his emotional distress and resultant psychiatric treatment.

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Darrah cross-claimed against Debra seeking contribution if Steve prevailed. Darrah then filed a motion for summary judgment on the ground his conduct did not rise to the level of outrageous conduct required to prevail on a claim for intentional infliction of emotional distress. The court granted Darrah's motion. Steve appeals. We affirm.

Summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. Id. The evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423.

The elements of an intentional infliction of emotional distress tort are:

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

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Vinson v. Linn-Marr Community School Dist., 360 N.W.2d 108, 118 (Iowa 1984).

In Van Meter v. Van Meter, the Iowa Supreme Court explained the distinction between the elements of an intentional emotional distress claim and the elements of an alienation of affections claim. Van Meter v. Van Meter, 328 N.W.2d 497, 497-98 (Iowa 1983). The court stated "the viability of an emotional distress claim ordinarily could not be determined on a motion to dismiss: 'Whether such facts are present is more appropriately resolved upon presentation of evidence through summary judgment . . . or by trial.'" Roalson v. Chaney, 334 N.W.2d 754, 756 (Iowa 1983) (quoting Van Meter, 328 N.W.2d at 498)). In this case, plaintiff's claim is addressed in a summary judgment proceeding.

One element of an intentional infliction of emotional distress tort is outrageous conduct by the defendant. Restatement (Second) of Torts § 46(1) (1965); Roalson, 334 N.W.2d at 756. In order to constitute as outrageous the 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.'" Roalson, 334 N.W.2d at 756 (quoting Restatement (Second) of Torts § 46(1) cmt. h (1977)); see Strauss v. Cilek, 418 N.W.2d 378, 379 (Iowa App. 1987) (citing Vinson v. Linn-Marr Community School Dist., 360 N.W.2d 108, 118 (Iowa 1984)). In this case, the district

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court looked at the relevant conduct and determined, as a matter of law, defendant's conduct was not outrageous. "It is for the court to determine in the first instance whether the relevant conduct may reasonably be regarded as outrageous." Strauss, 418 N.W.2d at 379 (citing Roalson, 334 N.W.2d at 756). We determine the evidence in the summary judgment record shows no genuine issue of material fact on the outrageous conduct element. See id.

Plaintiff claims defendant's conduct is outrageous because he and defendant were close friends. The Iowa Supreme Court has stated "[w]e do not say that sexual relations between a plaintiff's friend and spouse would never give rise to a finding of outrageous conduct." Id. at 380. The relationship between defendant and plaintiff's wife lasted for approximately four years. The affair continued after Sourbier confronted his wife. Debra testified Darrah asked her to marry him at one point in the affair. Steve notes he and his wife were employed by Darrah. Steve worked as a janitor in Darrah's accounting office, and Debra was an accounting partner. We find the facts of this case and the relationship between employer and his employees could not support a conclusion Darrah's conduct was outrageous.

We follow the direction of the Iowa Supreme Court and its assessment of this type of situation:

> We do not condone promiscuous sexual conduct. However, we do not find defendant's conduct in participating in a sexual relationship with a married woman, his friend's wife, who

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> willingly continued the affair over an extended period, is atrocious and utterly intolerable conduct so extreme in degree as to go beyond all possible bounds of decency. . . . A recitation of the facts of this case to an average member of the community would not lead him to exclaim, "Outrageous!"

Id. (citations omitted).

We affirm the district court.

AFFIRMED.