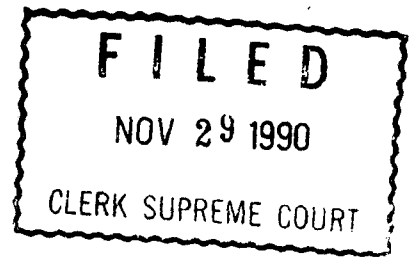


IN THE COURT OF APPEALS OF IOWA

No. 0-392 / 89-1618



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DEBORAH G. HARTWICK,

Appellant,

vs.

CITY OF SIOUX CITY and J.R. CASTNER,

Appellees.

Appeal from the Iowa District Court for Woodbury County, Richard J. Vipond, Judge.

Hartwick appeals a district court order granting the appellees' motion for summary judgment and dismissing Hartwick's petition. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Robert W. Green of Green, Faith & Hendrickson, Sioux City, for appellant.

C. Maurice Rawe and Timothy A. Scherle, Assistant City Attorneys, for appellees.

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

HAYDEN, J.

In March 1985 Deborah Hartwick applied to the City of Sioux City (City) for a thirty thousand dollar (\$30,000) deferred payment loan to rehabilitate a structure in Sioux City. Part of the application was a loan commitment from First National Bank in Sioux City (bank) for eighty-five thousand dollars (\$85,000). The bank's commitment was contingent upon Hartwick obtaining the necessary approval from the City.

On April 4, 1985, the city rehabilitation loan review committee denied Hartwick's application. Hartwick appealed the denial. On April 17, 1985, the department of community development director affirmed the denial of Hartwick's application. On April 17, 1985, Hartwick appealed the decision to the city manager of Sioux City, J.R. Castner.

On April 19, 1985, Castner attempted to contact the assistant vice president of the bank. The assistant vice president was on the city loan review committee. This same assistant vice president was also handling Hartwick's loan commitment from the bank. Castner was calling all the members of the city loan committee to find out their reasons for voting down the city loan to Hartwick.

Castner was informed the assistant vice president was on vacation. Therefore, he contacted the president of the bank. Later that same day the assistant vice president contacted Hartwick. He informed her the bank's loan commitment was withdrawn. A letter to that effect, signed

by the assistant vice president, was sent to Hartwick on April 19. The letter stated the reason for the bank's withdrawal of its commitment was due to Hartwick's "inability to service the present debt that you have with First National Bank and with some of your other HUD projects."

On April 22, 1985, Castner denied Hartwick's appeal of the City denial of the rehabilitation loan. He based his decision on the fact the bank had withdrawn its loan commitment.

On October 18, 1985, Hartwick filed her petition alleging the City and its city manager, Castner, violated her right to privacy and intentionally or negligently interfered with her business relationship with First National Bank. Hartwick based her allegations on the April 19 meeting between Castner and the bank president.

Trial was set for October 10, 1989. On September 22, 1989, the trial court granted summary judgment against Hartwick. It is from this summary judgment Hartwick appeals.

Our scope of review is on errors of law. Iowa R. App. P. 4.

Summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mutual Insurance Co. v. Miline, 242 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. Farm Bureau Mutual Insurance, 424 N.W.2d at 423.

However, the nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. p. 237(e).

Involved here is the basic purpose of summary judgment procedure. Every trial court has on its docket some pleaded claims and defenses which are actually without substance and exist only on paper. To obviate the labor and expense of trial to expose those empty vessels, summary judgment procedure was conceived. By proper motion, a party can compel his adversary to come forth with specific facts which constitute competent evidence showing a prima facie claim or defense. Paper cases and defenses can thus be weeded out to make way for litigation which does have something to it.

The language of our rule on summary judgments is very strong. Rule 237(e) Rules of Civil

Procedure. Affidavits cannot merely be based on what someone has reported to affiant: "Supporting and opposing affidavits shall be made on personal knowledge". Conclusions and beliefs are insufficient: "shall set forth such facts as would be admissible in evidence". The person making the statements must know whereof he speaks: "shall show affirmatively that the affiant is competent to testify to the matters stated therein." When the motion itself is substantiated, the opposing party cannot simply rely upon his pleadings, for the pleadings are the very instruments that the procedure is designed to pierce: "an adverse party may not rest upon the mere allegations or denials of his pleading". Neither can the opposing party assert only generalities in resistance: "his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." [Emphasis added.]

Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971); accord Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973).

The language of our rule is substantially similar to Fed. R. Civ. P. 56. Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). We may look to the interpretation of that rule by the federal courts for guidance in construing our own. Id.; see, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538, 551-53 (1986). See Adickes v. S.H. Kress & Co., 398 U.S. 144, 156-61, 90 S. Ct. 1598, 1607-10, 26 L. Ed.2d 142, 153-56 (1970); see also Celetex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (explaining Adickes).

"Of course, a party may elect to stand on the record as made by his opponent but he must then succeed, if he succeeds at all, not on the strength of his own case, for he has made none, but on the weakness of his adversary's." McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 52, 154 (Iowa 1976).

Even in a case where the main evidence is circumstantial, a jury question may still be raised. In viewing summary judgment as a directed verdict, circumstantial evidence and direct evidence are equally probative. Harsha v. State Savings Bank, 346 N.W.2d 791, 800 (Iowa 1984). The substantial evidence rule requires the circumstances have sufficient probative force to constitute the basis for a legal inference and not for mere speculation. Id. Circumstantial evidence must raise more than a mere suspicion; it must amount to proof. Id. Circumstances are not sufficient when the conclusion in question is based upon surmise, speculation, or conjecture. Id.

Where circumstantial evidence is relied on, it must be sufficient to make the theory asserted reasonably probable, not merely possible, and more probable than any other theory based on such evidence; however, it is generally for the trier of fact to say whether circumstantial evidence meets this test.

Wiley v. United Fire & Casualty Co., 220 N.W.2d 635, 635 (Iowa 1974).

In Iowa, circumstantial evidence may be sufficient to engender a jury question. Schermer v. Muller,

380 N.W.2d 684, 689 (Iowa 1986). However, circumstantial evidence is insufficient to engender a jury question if it merely suggests "a possibility of negligence or shows negligence 'is in the air.'" Id. The plaintiff has the burden to establish that injuries were proximately caused by the negligence of an identified defendant. Id.

Oberreuter v. Orion Industries, Inc., 398, N.W.2d 206, 209 (Iowa App. 1986).

With these principles in mind, we turn to the individual counts in the present case.

I. Invasion of Privacy

Tortious invasion of privacy exists in four forms:

(a) Unreasonable intrusion upon the seclusion of another;

(b) Appropriation of the other's name or likeness;

(c) Unreasonable publicity given to the other's private life; or

(d) Publicity that unreasonably places the other in a false light before the public.

Restatement (Second) of Torts, § 652A (1977); Winegard v. Larson, 260 N.W.2d 816, 822 (Iowa 1978); Yoder v. Smith, 253 Iowa 505, 508, 112 N.W.2d 862, 863-64 (1962).

Under category (a) and category (c) above, a public record defense is available to the alleged intruder. Winegard v. Larson 26 N.W.2d at 822-23 (citing Restatement (Second) of Torts, § 652B, comment c); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 298 (Iowa 1979)

(citing Restatement (Second) of Torts, § 652D, comment b). Matters of public record are, as a matter of law, of legitimate concern to the public, and liability for disclosing public information is precluded. Howard v. Des Moines Register, 283 N.W.2d at 298. All of the records, documents, and "other information" belonging to a municipality are public records. Iowa Code § 22.1. The public, including municipal employees, has a right to examine or use any such public information. Iowa Code § 22.2.

In category (c) and (d) intrusions, an invasion of privacy can occur only when information is disclosed to more than one or, in some jurisdictions, to more than a few persons. Restatement (Second) of Torts, § 652D, comment a, and § 652E, comment a (referring back to § 652D, comment a, see Appendix, § 652E, Note at 362 (1989)); see also Brown v. Mullarkey, 632 S.W.2d 507, 509 (Mo. App. 1982). Further, in a category (d) intrusion, it must be shown the matter was publicized in a false light, i.e., it was not true. Winegard v. Larson, 260 N.W.2d at 823; Restatement (Second) of Torts, § 652E, comment a. Absent an allegation and showing of falsity, the petition must fail.

Finally, in a category (b) intrusion, the name or likeness of another must be shown to have been appropriated. However, appropriation does not occur by the legitimate mentioning of another's name in connection with one's business activities. Restatement (Second) of Torts, § 652C, comment d.

The direct evidence shows the known information which Castner could have disclosed to First National Bank was contained in Hartwick's City file. This information included Hartwick sought a rehabilitation loan, the contents of her application, and the loan had been denied. It was a matter of public record. There was no evidence, direct or circumstantial, any other information was disclosed by Castner. Nor has Hartwick alleged or revealed any specific confidential information of which Castner knew and which he may have used to her disadvantage. Thus, City and Castner were entitled to summary judgment on categories (a) and (c) intrusions under a public record defense.

The direct evidence, as to category (c) and category (d) intrusions, was the communications were solely between Castner and Max Larson, President of First National Bank. A communication to one person does not rise to the level of "publicity" required to establish a tort under either category. The record is void of any direct or circumstantial evidence indicating Castner communicated with anyone other than Max Larson at the bank. The trial court was correct in dismissing the category (c) and category (d) claims. Further, the pleadings do not allege, nor does the evidence show any false communication made by Castner. Therefore, preclusion of recovery for a category (d) intrusion was correct.

Finally, the evidence reveals Castner's mention of Hartwick's name was for a legitimate business concern,

namely, his investigation before deciding the appeal. Hartwick failed in her petition to allege either her name or her likeness was appropriated. No facts were shown indicating an appropriation of her name or likeness. Thus, the trial court was correct in dismissing Hartwick's claim for a category (b) intrusion.

The City and Castner assert all the information they possessed was in public record. An affidavit by a city loan officer supports this assertion. Castner called the bank president on city business, using information available on public record. Both men state in their affidavits their conversation was confined to the business at hand.

The burden of proof then shifted to Hartwick to set forth specific facts and circumstances illustrating the invasion of privacy. Mere allegations and unsupported claims will not suffice. See Adickes, 398 U.S. at 156-61, 90 S. Ct. at 1607-10, 26 L. Ed.2d at 153-56. Speculation and suspicion likewise will not withstand a motion for summary judgment. Harsha, 346 N.W.2d at 800.

Hartwick has failed to state any specific confidential information in Castner's possession not also in the public records. Hartwick has not produced affidavits or other significant evidence in support of her invasion of privacy claim sufficient to overcome the City's assertions and proof to the contrary.

We find nothing in the record to support an invasion of privacy claim. We affirm the summary judgment on this issue.

II. Negligent Interference with a Business Relationship

Interference with a contractual relationship is an intentional tort in the State of Iowa. Edward Vantine Studios, Inc. v. Fraternal Composite Service, Inc., 373 N.W.2d 512, 514-15 (Iowa App. 1985). The same is true of interference with a prospective contractual relationship. Harsha, 346 N.W.2d at 799 (Iowa 1984). Such torts do not exist when based upon the negligence or gross negligence of the defendant. Restatement of the Law Second, Torts, § 766C. Hartwick, asserting negligent interference with a business relationship, is relying on a theory not recognized in Iowa.

We affirm the grant of summary judgment against Hartwick on this issue.

III. Intentional Interference with a Business Relationship

The tort of intentional interference with a contractual relationship requires proof of the four following conjunctive elements:

1. The existence of a valid contractual relationship or business expectancy;
2. Knowledge of the relationship by the interferer;

3. Intentional interference inducing or causing a breach or termination of the relationship or expectancy; and

4. Resultant damage to the party whose relationship or expectancy has been disrupted.

Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 402-03 (Iowa 1982); Edward Vantine Studios, Inc. v. Fraternal Composite, Inc., 373 N.W.2d 512, 514 (Iowa App. 1985). A plaintiff need not show a purpose on the part of the defendant to injure or destroy plaintiff's business. C.F. Sales, Inc. v. Amfert, Inc., 344 N.W.2d 543, 555 (Iowa 1983). However, the plaintiff must show defendant's interference was intentional and improper. Edward Vantine Studios, 373 N.W.2d at 514. Purely incidental interference resulting from the pursuit of defendant's own ends by proper means is not actionable. Page County Appliance Center v. Honeywell, Inc., 347 N.W.2d 171, 177-78 (Iowa 1984).

Most of the circumstantial evidence in the case surrounds this count. We review the evidence in the light most favorable to the nonmoving party.

Hartwick had appealed the city's denial of her loan application to the city manager, Castner. As part of his investigation, Castner contacted each of the members of the city rehabilitation loan review committee.

Castner called the bank on April 19. He asked for the assistant vice president. This assistant vice president

was on the city rehabilitation loan review committee. He also was handling Hartwick's loan commitment from the bank. Castner was informed this assistant vice president was on vacation. He then talked to the bank president.

Both men claim the bank's loan commitment had been withdrawn before the telephone conversations. However, no bank record or affidavit of a bank employee, such as a bookkeeper or loan officer, was introduced to support this claim. See Adickes, 398 U.S. at 156-61, 90 S. Ct. at 1607-10, 26 L. Ed. 2d at 153-56. No loan file was introduced to show the actual date of the withdrawal was before April 19. Id. Neither the City nor Castner gave any reason for not producing such obvious evidence.

The letter to Hartwick stating the loan had been withdrawn was dated April 19, the day of the telephone calls. Additionally, the letter was signed by the bank assistant vice president, who was supposed to have been on vacation. Further, on April 19, apparently after the calls between Castner and the bank president, Hartwick received a call from the assistant vice president. This call informed her of the bank's decision withdrawing its commitment.

On April 22 Castner denied Hartwick's appeal, stating as his reason the withdrawal of the bank's loan commitment. The city rehabilitation loan was contingent on Hartwick getting certain private financing, i.e., the bank's loan commitment.

We cannot say as a matter of law there is no possible inference of intentional interference by the city manager with Hartwick's arrangements with the bank. The City could have introduced evidence of the loan being previously withdrawn. This would have been proof of its version of the events. It has failed to do so. We are confined to the record before us.

Based on that record, there exists a genuine issue of material fact, i.e., whether Castner intentionally interfered with Hartwick's business relation to the bank by inducing the bank to withdraw its loan commitment.

We cannot say Hartwick has not been harmed by this scenario. Absent the production of further exculpatory evidence by the City and Castner, she is entitled to a trial on this matter. We reverse the trial court on this issue.

We affirm the summary judgment on the invasion of privacy and negligent interference with a business relationship claims. We reverse the summary judgment on intentional interference with a business relationship claims and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.