

Original

No. 35978-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Matter of:
JEFFERY BARTON & HEATHER BARTON, husband and wife, et al.,

Respondents,

v.

BATTLE GROUND SCHOOL DISTRICT, a municipal corporation, its
elected Board of Directors in their official and personal/individual
capacities, and its appointed District Superintendent in her official and
personal/individual capacity,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

To establish the tort of outrage, a plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress suffered by the plaintiff. The defendant's conduct must be so outrageous and extreme as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community.

Plaintiff D.B. is a male, Caucasian student who was in the eighth grade when he was told that he was too irresponsible to go on a Spring break trip to the East Coast. D.B. was called out of class and informed of the decision in a private conversation in the principal's office. The two teachers who made the decision to exclude D.B. did not change their minds after D.B.'s mother offered to be a chaperone on the trip. D.B.'s father claimed that one of the teachers was rude to his wife in a telephone call. When the Bartons complained about the exclusion, the school district's attorney responded that the trip was a private activity over which the district did not exercise control and any complaint the Bartons had needed to be raised with the group leaders or with the travel agency involved in booking the trip.

These are the *only* allegations supporting the extreme and outrageous conduct element of Plaintiffs' outrage claim. No reasonable jury would find that these allegations satisfy the steep standards of an outrage claim.

Nor can Plaintiffs satisfy the other elements of outrage: intentional infliction of emotional distress so severe that no reasonable person could be expected to endure it. Plaintiffs presented no evidence that Defendants intentionally or recklessly inflicted emotional distress. Nor does the emotional distress allegedly suffered by D.B. qualify as severe: D.B. stated only that he felt “ripped off” and “confused” by the decision to exclude him and that he does not have “good memories” from his eighth-grade year. These allegations, even when viewed most favorably, do not amount to severe emotional distress.

Nevertheless, the trial court denied Defendants’ motion for summary judgment dismissal of Plaintiffs’ outrage claim and Defendants’ motion for reconsideration of the outrage ruling. Because no reasonable jury would find Defendants’ conduct to be outrageous and because the Plaintiffs’ allegations do not satisfy the other required elements for outrage, the trial court’s decision should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Defendants’ motion for summary judgment dismissal of Plaintiffs’ outrage claim.

2. The trial court erred in denying Defendants’ motion for reconsideration of the order denying Defendants’ motion for summary judgment dismissal of Plaintiffs’ outrage claim.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it refused to dismiss Plaintiffs' outrage claim because no reasonable jury would find that Defendants' conduct was so outrageous that it went beyond all possible bounds of decency and would be regarded as utterly intolerable in a civilized community? (Assignments of Error 1, 2)

2. Did the trial court err when it refused to dismiss Plaintiffs' outrage claim because Plaintiffs presented no evidence that the Defendants recklessly or intentionally intended to inflict emotional distress? (Assignments of Error 1, 2)

3. Did the trial court err when it refused to dismiss Plaintiffs' outrage claim because no reasonable jury would find that the Plaintiffs experienced severe emotional distress so extreme that no reasonable person could be expected to endure it? (Assignments of Error 1, 2)

IV. STATEMENT OF THE CASE

Plaintiff D.B is a male, Caucasian student in the Battle Ground School District. (Clerk's Papers "CP" 3) In the 2003-2004 school year, D.B was in the eighth grade at Pleasant Valley Middle School ("PVMS"). (CP 80-81) During the April 2004 Spring break, approximately 30 eighth-grade students at PVMS and some parents went on an trip to Washington, D.C. and New York City. (CP 80, 90, 119) The trip was scheduled through a private travel company, E.F. Educational Tours, also know as E.F. Explore America. (CP 80, 90)

The group leaders for the trip during the 2003-2004 school year were Lydia Keksi and Dori Hawkey, two teachers at PVMS. (CP 90) The teachers, as group leaders, solicited student and parent involvement for the trip in the fall of 2003. They conducted two orientation sessions where literature was distributed and students and parents were advised of the itinerary and cost of the trip. (CP 81, 91)

Ms. Keksi and Ms. Hawkey determined who was eligible to go on the trip. (CP 81, 91) They decided they did not want to be responsible for chaperoning D.B. and two other students. (CP 81, 91) They concluded that these students had not displayed the level of responsibility and citizenship at school sufficient for the teachers to take the responsibility of chaperoning the three students on the trip. Ms. Keksi stated that an irresponsible student who does not follow directions poses safety risks on a trip. (CP 127)

Ms. Hawkey testified that she had spoken with six teachers who knew D.B. and all six reported that they would not take D.B. on a trip to Washington D.C., stating that “they would not want to be responsible for him.” (CP 306-308) Ms. Keksi stated that she previously observed D.B.’s behavior because her classroom was next to D.B.’s classroom and that she had to correct, or “redirect,” D.B.’s behavior more than other students. (CP 126) On one occasion in his eighth-grade year, D.B. hid in a hallway closet so he could not be found. (CP 129-130) After discussing D.B. with other teachers, Ms. Keksi stated that neither she nor Ms. Hawkey “felt comfortable taking [D.B.] on a 3,000 mile trip away from home.”

(CP 131) In addition, D.B. failed to attend any of the orientation meetings. (CP 25) For these reasons, Ms. Keksi and Ms. Hawkey decided that D.B. would be one of the three students who would not be allowed to go on the trip. (CP 25)

Ms. Keksi and Ms. Hawkey informed the building principal, Ward Holcomb, of their decision and asked Mr. Holcomb to break the news to the students in the privacy of his office. (CP 84, 122) Mr. Holcomb agreed. Mr. Holcomb did not participate in the decision and did not provide any information to Ms. Keksi or Ms. Hawkey prior to them making the decision. (CP 84)

By letter dated November 2, 2003, counsel for the Bartons complained to the District that D.B. was being denied an educational opportunity. (CP 72-73) Counsel for the District responded that the trip was a private activity over which the District did not exercise control and any complaint the Bartons had needed to be raised with the group leaders or with the travel agency involved. (CP 74-75)

Approximately one year later, Plaintiffs filed their Complaint. The Complaint alleged two causes of action: “discrimination”¹ and intentional infliction of emotional distress (also know as the tort of outrage). (CP 7, 12)

¹ While the Complaint does not specify the discrimination causes of action, the trial court treated them as due process and equal protection claims. (CP 330)

Both parties moved for summary judgment. The trial court granted Defendants' summary judgment motion to dismiss Plaintiffs' due process and equal protection claims, denied Defendants' motion to dismiss Plaintiffs' outrage claim, and denied Plaintiffs' motion for summary judgment. (CP 318-19) With Plaintiffs' due process and equal protection claims dismissed, only the outrage claim remained.

Defendants moved for reconsideration of the trial court's ruling regarding Plaintiffs' outrage claim. On February 9, 2007, the trial court denied Defendants' motion for reconsideration. (CP 360-61)

Subsequently, Defendants filed their notice for discretionary review of the February 9, 2007 order. (CP 358-361) On May 3, 2007, this Court granted Defendants' petition for discretionary review.

V. ARGUMENT

A. Standard for Reviewing Summary Judgment Orders

An appellate court reviews de novo a summary judgment order and engages in the same inquiry as the trial court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). To defeat summary judgment, the nonmoving party must come forward with

specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions, as well as inadmissible evidence that unresolved factual issues remain, are insufficient to meet this burden. *White*, 131 Wn.2d at 9; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where reasonable minds could reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

B. Because Plaintiffs Cannot Satisfy Any of the Required Elements of Outrage, the Trial Court Erred When It Failed To Dismiss this Claim.

To establish an outrage claim, “a plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). “Outrage” and “intentional infliction of emotional distress” “are synonyms for the same tort.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003); *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 250, 35 P.3d 1158 (2001) (applying elements of outrage to claim for intentional infliction of emotional distress).

It is the trial court's responsibility to determine if a reasonable jury could find the conduct so outrageous as to result in liability. *Dicomes v.*

State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989); *Jackson v. Peoples Fed. Credit Union*, 25 Wash. App. 81, 84, 604 P.2d 1025 (1979) (trial court must make an initial determination as to whether the conduct may reasonably be regarded as extreme and outrageous, thus warranting a factual determination by the jury). As discussed in the following sections, no reasonable jury would find that the Plaintiffs satisfied any of the required elements for outrage.

1. Plaintiffs Cannot Satisfy the First Requirement of an Outrage Claim Because No Reasonable Jury Would Find that the Defendants' Conduct Would "Be Regarded as Atrocious And Utterly Intolerable in a Civilized Community."

This Court has previously held that outrage requires extreme conduct that goes beyond all possible bounds of decency:

[Outrage] is established when the defendant's conduct is "so outrageous in character, and 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." . . . Conduct does not meet this test if it amounts to mere insults and indignities that cause embarrassment or humiliation. . . . Nor does it meet this test if it involves no more than the firing of an employee in private.

Schonauer v. DCR Entertainment, Inc., 79 Wn. App. 808, 828, 905 P.2d 392 (1995), *rev. denied*, 129 Wn.2d 1014 (1996) (citations omitted).

In *Schonauer*, the court held that an employer's conduct in firing a waitress for refusing to participate in nude dancing did not constitute the tort of outrage. The court noted that the employee was fired "in private, without aggravating circumstances (except those pertaining to sexual

harassment).” *Id.* Although the employer’s conduct amounted to “insults and indignities,” the court held that it did not rise to the level necessary for outrage. *Schonauer*, 79 Wn. App. at 828.

Similarly, in *Keenan v. Allan*, 889 F. Supp. 1320, 1390 (E.D. Wash. 1995), the court held that an employee’s many allegations against her supervisor did not amount to outrage under Washington law. In that case, the employee had alleged several inappropriate acts by her supervisor, including that the supervisor had called her a “bimbo,” “stupid,” “airhead,” and “idiot,” that he threw files at her and yelled at her, and that he criticized her work performance. The court found that such acts “collectively or separately, are not outrageous conduct. No one, except perhaps Keenan and her counsel, would read the previous paragraph and exclaim ‘Outrageous!’” *Id.*

Also, the summary judgment dismissal of an outrage claim was affirmed in *Albright v. State*, 65 Wn. App. 763, 829 P.2d 1114 (1992). In that case the court held that a school district’s conduct in requiring a counselor to undergo a psychiatric evaluation to verify the severity of his alleged hypertensive disorder was not so outrageous as to give rise to an outrage claim. *Id.* at 770.

Even conduct that may be tortious or even criminal may not be outrageous enough to constitute outrage. *Lewis v. Bell*, 45 Wn. App. 192, 724 P.2d 425 (1986) (affirming summary judgment dismissal because defendant’s attempt to push his way into the plaintiff’s home, although

possibly tortious or criminal, was not so outrageous as to constitute outrage.)

As the Washington Supreme Court has held, liability for outrage “does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities.” *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). The *Grimsby* court explained that persons in our society “must necessarily be hardened to a certain degree of rough language, unkindness, and lack of consideration.” *Id.*

Grimsby, however, does illustrate the type of extreme conduct that could be considered outrageous. In *Grimsby*, the court held that a plaintiff who alleged that he was forced to watch his wife die a painful death did state a cause of action for outrage:

Turning to plaintiff’s complaint, we find that it states a cause of action It is alleged that defendants’ conduct was reckless and wanton; that it was Outrageous in that plaintiff ‘was Required to witness the terrifying agony and explicit pain and suffering of his wife while she Proceeded to die right in front of his eyes and at all times remaining helpless because of his inability to secure any medical care or treatment for his wife at all’ Finally, this conduct on the part of the defendants is alleged to have Caused plaintiff severe mental anguish which has resulted in physical injury.

Grimsby, 85 Wn. 2d at 60.

Similarly, the defendant in *Kloepfel* acted outrageously: the defendant threatened to kill the plaintiff; threatened to kill the man she was dating; violated several no contact orders; was convicted twice for “harassment, domestic violence;” called plaintiff’s “home 640 times, her

work 100 times, and the homes of men she knew numerous times as well,” repeatedly drove by plaintiff’s home at all hours, and was subsequently convicted for making harassing phone calls and felony stalking. *Kloepfel*, 149 Wn.2d at 194-95. For these reasons, the court affirmed a jury verdict for outrage.

Here, the evidence submitted by the Plaintiffs in support of their outrage claim does not come close to satisfying the requirement of extreme and outrageous conduct. For example, D.B. states that the principal “called me down into his office out of class and told me that I would not be able to go on this trip because I was too irresponsible.” (CP 184) D.B adds that even after his mother offered to be a chaperone, the teachers who made the decision to exclude D.B. refused to change their minds. (CP 184) The declaration of D.B.’s mother repeats these allegations. (CP 190) D.B.’s father adds that a teacher was rude to his wife over the telephone. (CP 187)

In addition, the Complaint states that the District denied that the eighth-grade trip was a school activity. (CP 16) In their response to Defendants’ Motion for Reconsideration, Plaintiffs contended that:

If Defendants argue at trial that the trip was a private activity, and the jury finds otherwise, a reasonable jury could conclude that defendants actions were, in fact, outrageous.

(CP 333) This bald assertion is not supported by any reference to any acts or statements of the Defendants that could be considered deceptive, dishonest, or outrageous.

Thus, the *sole* allegations supporting Plaintiff's claim of outrageous conduct are: the principal pulled D.B. from class and told him that he was "irresponsible," a refusal to allow D.B. to go on the trip after his mother volunteered to be a chaperone, a rude telephone call, and the District's contention that the Spring-break trip was a private activity. There are *no* other allegations of outrageous conduct.² Moreover, as in *Schonauer*, D.B.'s conversation with Principal Holcomb occurred in private, without any aggravating circumstances.

Thus, no reasonable jury would find that Plaintiffs' allegations, even if true, would constitute conduct so extreme in degree and outrageous in character as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Thus, Plaintiffs cannot satisfy the first element of an outrage claim.

2. No Reasonable Jury Would Find that the Defendants Intentionally or Recklessly Caused Emotional Distress.

The second element of an outrage claim requires that plaintiffs prove that the defendant intentionally or recklessly caused emotional distress. *Reid*, 136 Wn.2d at 202. Mere negligence does not suffice; the emotional distress must be inflicted intentionally or recklessly. *Id.*

A person intentionally or recklessly causes emotional distress if the person:

- (1) acts with the intent to cause emotional distress; or

² Indeed, Plaintiff's Complaint, CP 12-17, and briefing submitted to the trial court, CP 241, 313-14, 332-37, make it clear that there are no other allegations of outrageous conduct.

(2) knows that emotional distress is certain or substantially certain to result from [his] [her] conduct; or

(3) is aware that there is a high degree of probability that [his] [her] conduct will cause emotional distress and proceeds in deliberate disregard of it.

Washington Pattern Jury Instruction (WPI)—Civil 14.03.03 (5th Ed. 2005); Restatement (Second) of Torts § 46 cmt. i (1965).

Here, there is no evidence to suggest that the Defendants knew that their actions would cause emotional distress, that it was substantially certain to result from their conduct or even that they deliberately disregarded the high degree of probability that emotional distress would occur. Thus, Plaintiffs cannot satisfy the second element of an outrage claim as a matter of law.

3. No Reasonable Jury Would Find that the Plaintiffs Experienced “Severe Emotional Distress” so Extreme that “No Reasonable Person Could Be Expected To Endure It.”

The third element of an outrage claim requires that a plaintiff experience severe emotional distress as a result of the defendant’s conduct. While holding that objective symptomatology is not required, the *Kloepfel* court stressed that the emotional distress must be so severe that no reasonable person would be expected to endure it:

Even without the objective symptomatology requirement, outrage's third element requires evidence of severe emotional distress. "Emotional distress" includes "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." . . . Severe emotional distress is, however, not "transient and trivial"

but distress such “that no reasonable man could be expected to endure it.”

Kloepfel, 149 Wn.2d at 203 (quoting Restatement (Second) of Torts § 46 cmt. j (1965)). As the Washington Supreme Court has noted, “mere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability on a claim of outrage.” *Dicomes*, 113 Wn.2d at 630.

In the case at hand, Plaintiff D.B. stated that he felt “ripped off” and “confused” by the decision to exclude him from that trip, that he felt “intimidated” by teachers who did not like him, that he had a “big lump in his throat” when he saw other students returning from a trip, that he did not have “good memories” from his eighth-grade year, and that his memories consist of teachers telling him that he is “irresponsible and a bad person.” (CP 184) D.B.’s mother added that she felt frustrated, angered, outraged, disgusted, and hurt by the District’s actions. (CP 190-91) D.B.’s father stated that the family felt shunned and hated by the school. (CP 187)

These allegations, even when viewed in the most favorable light, do not constitute emotional distress so severe that “no reasonable person could be expected to endure it.” Because no reasonable jury would find that Plaintiffs experienced severe emotional distress, Plaintiffs failed to satisfy the third required element of an outrage claim.

VI. CONCLUSION

Plaintiff D.B. was told in private that he was too irresponsible to go on a Spring-break trip to the East Coast. The two teachers who

excluded D.B. from the trip did not change their decision after D.B.'s mother volunteered to chaperone D.B. One of the teachers may have been rude to Mrs. Barton on the telephone. The District contended that the Spring-break trip was a private activity and not school-related. No reasonable jury would find that these allegations, even when viewed most favorably, amount to atrocious conduct that is utterly intolerable in a civilized society. Moreover, Plaintiffs presented no evidence that the Defendants recklessly or intentionally intended to inflict emotional distress. Finally, D.B.'s feelings of being "ripped off" and confused by the decision to exclude him, and of being intimidated by teachers and not having good memories of his eighth-grade year, do not constitute severe emotional distress. Because the trial court erred in refusing to dismiss the outrage claim, Defendants request that this Court reverse the trial court and dismiss Plaintiffs' outrage claim as a matter of law.

RESPECTFULLY SUBMITTED this 6th day of June, 2007.

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COURT OF APPEALS
THE STATE OF WASHINGTON
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In re the Matter of: JEFFERY)
BARTON & HEATHER BARTON,) No. 35978-2-II
husband and wife, et al.,)
Respondents,) PROOF OF SERVICE
v.)
BATTLE GROUND SCHOOL)
DISTRICT, a municipal corporation,)
its elected Board of Directors in their)
official and personal/individual)
capacities, and its appointed District)
Superintendent in her official and)
personal/individual capacity,)
Appellants.)

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY DEPUTY
M. M.

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 6th day of June, 2007, I caused the following documents to be served via overnight mail by Federal Express, postage prepaid, for delivery on June 7, 2007:

- Brief of Appellants;

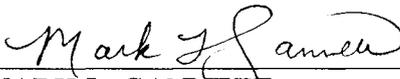
PROOF OF SERVICE - 1

- Proof of Service

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