NO. LLI-CV-21-5014019-S

JON A. GOODWIN	:	SUPERIOR COURT
VS.	:	J. D. OF LITCHFIELD
RAYMOND J. MILOT, JUNIOR, ET AL.	:	JANUARY 30, 2023

BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANT HARDY-MASSARO

Three counts of this complaint concern the defendant Hardy-Massro. Those three counts allege slander *per se*, false light invasion of privacy, and intentional infliction of emotional distress. The defendant seeks summary judgment as to those three counts.

The plaintiff agrees that the necessary elements of slander *per se* and false light invasion of privacy are not present here. *E.g.*, Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 488 A.2d 1317 (1982); Pace v. Bristol Hospital, 964 F. Supp. 628 (D. Conn. 1997). There is sufficient evidence, however, to warrant a plaintiff's verdict against this defendant for intentional infliction of emotional distress. Accordingly, as to Count 29, the defendant's motion for summary judgment must be denied.

Regarding Count 29, the defendant claims there is no evidence that she intended to cause the plaintiff to suffer emotional distress and no evidence from which a jury could conclude that the plaintiff's emotional distress was severe.

The issue of the defendant's intent is not one that can be decided on a summary judgment motion. Summary judgment is inappropriate for issues involving "motive, intent and subjective feelings and reactions," United Oil Co. v. Urban Redevelopment Commission, 158 Conn. 364, 376, 260 A.2d 596 (1969).

Similarly, whether the plaintiff's emotional distress was severe also cannot be decided on a motion for summary judgment. It is solely the province of the jury to determine the extent of any emotional distress asserted by the plaintiff and the jury can base that determination solely upon the testimony of the plaintiff, if believed. Berry v. Loiseau, 223 Conn. 786, 811, 614 A.2d 414 (1992); Schanzer v. United Technologies Corp., 120 F. Supp. 2d 200, 217 (D. Conn. 2000). In Opielowski-Brouwer v. Haddam Hills Academy, 2002 WL 180974, 31 Conn. L. Rptr. 193 (Shapiro, J.), the court refused to reduce a jury's award of $260,000 for emotional distress caused by an employer's verbally threatening and abusive conduct during the plaintiff's wrongful termination from employment, in the absence of any medical evidence. Emotional distress consisting of a loss of joy in the everyday events of life, characterized by no longer singing in the shower, with no professional attention whatsoever, is sufficient not only to establish this element of the tort but to support a substantial six-figure jury award. DeLaurentis v. City of New Haven, 220 Conn. 225, 597 A.2d 807 (1991).

"Just as the fact of treatment is not sufficient to prove the existence of severe emotional distress, the absence of treatment does not preclude proof of severe emotional distress." Birdsall v. City of Hartford, 249 F. Supp. 2d 163, 175 (D. Conn. 2003) (Underhill, J.) (holding that "memory loss and anxiety...are sufficiently serious that a reasonable jury could find for the plaintiff").

The issue as to the viability of Count 29, therefore, is simply whether a jury could find the defendant's conduct to be "extreme and outrageous" within the meaning of the law. Whenever "reasonable minds" could disagree on that issue, the matter must be determined by the jury. Hartmann v. Gulf View Estates Homeowners Association, Inc., 88 Conn. App. 290, 295 869 A.2d 275 (2005). The defendant's intent, *whether the conduct was extreme and outrageous*, whether the defendant's conduct caused the plaintiff's distress, and the severity of the plaintiffs' distress are all genuine issues of material fact for the jury. See, *e.g.*, Berry v. Loyseau, 223 Conn. 786, 807, 614 A.2d 414 (1992); Mather v. Griffin Hospital, 207 Conn. 125, 138, 540 A.2d 666 (1988); Gilman v. Gilman, 46 Conn. Sup. 21, 23, 736 A.2d 199 (1999); Lugo v. Rodriguez, 1992 WL 10802; Hansen v. Berger, Lehman Associates, P.C., 1994 WL 591778. See also Batick v. Seymour, 186 Conn. 632, 646-47, 443 A.2d 471 (1982). Courts in sister jurisdictions take the same position. *E.g.*, Shubbe-Hirt v. Baccigalupi, 94 F.3d 111 (3d Cir. 1996); Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759, 764 (2d

Dept. 1961); Murphy v. Murphy, 486 N.Y.S.2d 457, 459 (3d Dept. 1985); Flatley v. Hartmann, 138 A.D.2d 345, 525 N.Y.S.2d 637, 638 (2d Dept. 1988); Richard v. Armon, 144 A.D.2d 1, 4, 536 N.Y.S.2d 1014, 1016 (2d Dept. 1989); Collins v. Willcox Inc., 158 Misc.2d 54, 57, 600 N.Y.S.2d 884, 886 (N.Y. County, 1992).

No two cases, obviously, are identical. An examination of reported decisions in which courts have addressed the issue of what sorts of conduct could be considered "extreme and outrageous" is helpful, however. In Gilman v. Gilman, 46 Conn. Sup. 21, 736 A.2d 199 (1999), for example, the defendant had telephoned the police and falsely reported that her ex-husband was smoking marijuana in his house, at a time when she knew he was entertaining a new girlfriend, resulting in disruption of their dinner. In Song v. Liu, 2012 WL 1759850, the court denied a motion for summary judgment in a case in which the plaintiff alleged that during one summer her former husband refused to allow their children to reside with her at any time and for a period of one month denied her visitation, in violation of a court order respecting custody and visitation. In Nance v. M.D. Health Plan, Inc., 47 F. Supp. 2d 276 (D. Conn. 1999), the court held that an employer's questioning that signaled to others its belief that the plaintiff was a homosexual could be found sufficiently "extreme and outrageous" in the eyes of a jury to constitute a basis for a finding of intentional infliction of emotional distress. In Moss v. Town of East Haven, 2001 WL 1002684, at *2

(Conn. Super. 2001), the court held that a police officer's conduct at the plaintiff's home in threatening the plaintiff "with his hand on his exposed service revolver" while not allowing the plaintiff to leave, was sufficiently "extreme and outrageous" to warrant submitting the action to a jury's determination.The action of a high school principal in accusing a female student of "sexual harassment" for entering the boys' lavatory when he knew that her only purpose in doing so was to retrieve money that had been stolen from her was held sufficiently "extreme and outrageous" to be submitted to a jury. Zulawski v. Stancil, 2006 WL 2089470 (Hartmere, J.). See also Baird v. Rose, 192 F.3d 462 (4th Cir. 1999), holding that the actions of a school teacher in humiliating a student in class because of her clinical depression was "extreme and outrageous" under Virginia law. In Rosten v. Circuit Wise, Inc., 1992 WL 231318, an employer discharged the plaintiff because of her union organizing activities. In Lugo v. Rodriguez, 1992 WL 10802, 5 Conn. L. Rptr. 800, 8 C.S.C.R. 244 (1992), an attorney intentionally delayed in releasing a lis pendens. Breach of an oral agreement to restructure a loan was held sufficiently extreme and outrageous in Connecticut National Bank v. Montanari, 1994 WL 29929 (Aurigemma, J.). Surveillance by an insurance company to determine the validity of a claim was held sufficiently extreme and outrageous to withstand a motion to dismiss in Bosco v. MacDonald, 1995 WL 43763, 13 Conn. L. Rptr. 312. In a similar case, the United States Court of

Appeals for the First Circuit, applying Connecticut law, held that a union officer's conduct over a period of three weeks in driving by a union member's home several times a day and following him when he left his house was sufficiently extreme and outrageous to support a jury verdict in the member's favor. Johnson v. Teamsters Local 559, 102 F.3d 21 (1st Cir. 1996). In Desardouin v. United Parcel Service, Inc., 285 F. Sup. 2d 153, 161 (D. Conn. 2003), the court held that comments by the defendant's driver, made in the presence of the plaintiff's customers, suggesting that the plaintiff was a poor credit risk and arguably making racially demeaning references to him, could be found "extreme and outrageous" so as to survive a motion for summary judgment. A job supervisor's false accusation of lying, made in the presence of one of the plaintiff's fellow employees, is sufficiently "extreme and outrageous" to warrant submitting the case to the jury. Musacchio v. Cooperative Educational Services, 1995 WL 681664, 1 Conn. Ops. 1319 (1995). *Cf.*, Decampos v. Kennedy Center, Inc., 1990 WL 264687 at * 4 (1990). An allegation that a police officer had written a letter in support of his former girlfriend, who was a fellow officer, in which he falsely asserted that a person who had brought charges against her was lying, asserted conduct that was sufficiently extreme and outrageous to survive summary judgment. Stack v. Jaffee, 248 F. Supp. 2d 100, 104-05 (D. Conn. 2003) (Burns, J.). A police detective's statement to the wife of a suspect that her husband was a murderer, that he killed their daughter, and that he never loved her or their daughter, was extreme and outrageous conduct within the meaning of Illinois law. Fox v. Hayes, 600 F.3d 819 (7th Cir. 2010). The action of a school official in falsely reporting suspected child abuse to the Department of Children and Families was held sufficiently "extreme and outrageous" to survive a motion for summary judgment in Chain v. Biddle, 1999 WL 179623, 24 Conn. L. Rptr. 201 (Licari, J.); and to survive a Motion to Strike in Greco v. Anderson, 2000 WL 1763732, 28 Conn. L. Rptr. 605 (Shortall, J.).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue of material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard." DHR Construction Co., Inc. v. Thomas J. Donnelly, 180 Conn. 430, 434, 429 A.2d 908 (1980). "The party moving for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law." Brooks v. Sweeney, 299 Conn. 196, 210, 9 A.3d 347 (2010). "When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." Ramirez v. Health Net of the Northeast, Inc., 285 Conn. 1, 10-11, 938 A.2d 576 (2008); Darin v. Cais, 161 Conn. App. 475, 480 (2015); Capasso v. Christmann, 163 Conn. App. 248, 259 (2016); Hammer v. A.L. Burbank & Co., Inc., 2013 WL4505032 (explaining that a movant's burden on a motion for summary judgment is far heavier under Connecticut law than under the Federal Rules of Civil Procedure).

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party." Sherwood v. Danbury Hospital, 252 Conn. 193, 201, 746 A.2d 730 (2000). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." Nolan v. Borkowski, 206 Conn. 495, 500, 538 A.2d 1031 (1988). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts ..." Hertz Corp. v. Federal Insurance Co., 245 Conn. 374, 381, 713 A.2d 820 (1998). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." Witt v. St. Vincent's Medical Center, 252 Conn. 363, 372, 746 A.2d 753 (2000).

When passing upon a motion for summary judgment, the court must resolve any ambiguities and draw all inferences against the moving party. Appleton v. Board of Education, 254 Conn. 205, 757 A.2d 1059 (2000). The court must construe the evidence in the light most favorable to the party opposing summary judgment and deny the motion unless no construction of the evidence could support judgment in the plaintiff's favor. Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 105, 639 A.2d 507 (1994); D.H.R. Construction Co. v. Donnelly, 180 Conn. 430, 434, 429 A.2d 908 (1980); Connell v. Colwell, 214 Conn. 242, 246-47, 571 A.2d 116 (1990).

"[S]ummary judgment...is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions." Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 111, 639 A.2d 507 (1994).

The defendant also claims that she is entitled to the benefit of quasi-judicial immunity because she was appointed as an attorney for one of the children in a different matter, that is, in a Juvenile Court proceeding. That fact is fatal to her immunity claim. A lawyer appointed by a court to perform a role in a judicial proceeding is entitled to absolute quasi-judicial immunity for her "actions taken during, or activities necessary to, the performance of functions that are integral to the judicial process." Dubinsky v. Reich, 187 Conn. App. 255, 261, 201 A. 3d 1153 (2019), *citing* Carrubba v. Moskowitz, 274 Conn. 533, 537, 877

A.2d 773 (2005). The defendant's statements at a PPT conference, which she was not required to attend in connection with her court-appointed role, plainly do not meet the definition. Her claim of quasi-judicial immunity is misplaced and must be rejected.

Alternatively, the defendant claims statutory immunity pursuant to General Statutes Section 4-165. That claim fails because a jury could find that her action, in gratuitously asserting that the existence of a protective order precluded the plaintiff from attending a ppt at which the protected person was not present, was reckless. The defendant is a lawyer. Obviously she knows the limits of a protective order in general, and of the protective order in her case in particular. Obviously that protective order did not apply to the plaintiff's presence at an event where the protected individual was not present. In addition, she gratuitously disclosed in a public proceeding information which was strictly confidential under the provisions of General Statutes Section 46b-124. Not only was the defendant a lawyer, she was a lawyer working in the Juvenile Court. She knew she had no right to make the disclosure which she made. Her actions were reckless at the very least.

The intent element which Connecticut courts require for the tort of what is called "intentional infliction of emotional distress" is not the specific intent which the defendant would have this court believe. Connecticut recognizes that recklessness is sufficient to establish the intent element. Craig v. Driscoll, 262 Conn. 312, 341-43, 813 A.2d 1003 (2003). Indeed, in Connecticut as in most jurisdictions "intentional" and "reckless" are treated as the same thing. Dubay v. Irish, 207 Conn. 518, 533, 542 A.2d 711 (1988); Myslow v. New Milford School District, 2006 U.S.Dist.LEXIS 9868 *56, 2006 WL 473735 (D. Conn. 2006). The defendant, therefore, need not have had a specific intent to cause the plaintiff to suffer emotional distress so long as he engaged in conduct in willful disregard of the likelihood that such conduct would cause the plaintiff such injury. Clearly, the conduct in this case meets that test.

The plaintiff is entitled to present his case to a jury. Defendant Hardy-Massaro's motion for summary judgment as to Count 29 must be denied.

THE PLAINTIFF

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CERTIFICATION OF SERVICE

On the above date, copies hereof were sent to: Rebecca Mayo Goodrich, LLC,

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