

**Keith Thornburg, Appellant v. Federal Express Corporation, et al., Joe Hardin, Trevor Talley, Respondents**

Mo. Ct. of Appeals  
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Opinion:

Keith Thornburg appeals the trial court's judgment granting the motion to dismiss for failure to state a cause of action filed by Federal Express Corporation, Trevor Tally, and Joe Hardin [hereinafter "defendants"]. On appeal, Mr. Thornburg argues that he sufficiently stated his claims for alienation of affections, intentional infliction of emotional distress and negligent infliction of emotional distress, and the trial court, therefore, erred in dismissing his petition. The judgment of the trial court is affirmed.

**I. Facts**

The facts, as derived from Mr. Thornburg's first amended petition, are that Keith and Roberta Thornburg were married on November 8, 1986. Two children were born of the marriage. The marriage was dissolved of October 6, 1998.

During the marriage, Ms. Thornburg was an employee of Federal Express. Wade Hunt was a manager for Federal Express and Ms. Thornburg's supervisor. Ms. Thornburg and Mr. Hunt began an extra-marital affair in September 1997. At about the time the affair began, Ms. Thornburg was promoted to a full-time position with a desirable work schedule.

Mr. Thornburg learned of the affair and confronted Mr. Hunt. As a result of the confrontation, Mr. Hunt ended the affair. The Thornburgs then reconciled their marriage in early 1998. Around this same time, one or more employees of Federal Express filed grievances concerning Mr. Hunt's alleged sexual misconduct in the workplace and alleged unlawful discrimination in the workplace as a result of this conduct. The grievances led to an internal investigation by Federal Express. The investigation and resultant workplace disclosure of the affair between Ms. Thornburg and Mr. Hunt caused distress to Ms. Thornburg. This distress caused Ms. Thornburg to become unable to safely or efficiently perform her current job duties and, thus, she was placed on light-duty assignments.

Federal Express encouraged Ms. Thornburg to find other employment outside of Federal Express and provided her assistance to do so. This attempt to find alternative employment was unsuccessful. Around April 1998, Federal Express offered Ms. Thornburg a lateral transfer to Savannah, Georgia. Hoping that Mr. Thornburg would agree to relocate his family to Georgia, Ms. Thornburg discussed this job offer with him. Mr. Thornburg decided he did not want to relocate himself or his family for various reasons. Mr. Thornburg told Ms. Thornburg that her accepting the transfer would be a choice to abandon the marriage.

Ms. Thornburg ultimately accepted the job transfer and moved with her children to Savannah, Georgia on May 6, 1998, without Mr. Thornburg's knowledge. The physical move took place while Mr. Thornburg was out of town on a business trip. Federal Express provided Ms. Thornburg assistance to facilitate the move.

Upon returning from his business trip and discovering that Ms. Thornburg had moved out of the family home, Mr. Thornburg visited the Federal Express offices where Ms. Thornburg had previously been working and demanded to be told the new address and phone number of Ms. Thornburg in Savannah, Georgia. Federal Express refused to provide Mr. Thornburg with any information regarding Ms. Thornburg's whereabouts.

Mr. Thornburg thereafter filed a petition in the Circuit Court of Cole County alleging three separate counts against the defendants including: 1) alienation of affections, 2) negligent infliction of emotional distress, and 3) intentional infliction of emotional distress. The defendants filed a motion to dismiss Mr. Thornburg's claims. The trial court sustained the defendants' motion and dismissed each count in Mr. Thornburg's petition for failing to state a claim. This appeal followed.

## **II. Standard of Review**

In reviewing the trial court's dismissal of a petition for failure to state a claim upon which relief may be granted, the appellate court is required to determine whether the facts pleaded and the inferences reasonably drawn therefrom state any ground for relief. *Veling v. City of Kansas City*, 901 S.W.2d 119, 121 (Mo. App. W.D. 1995). In making such determination, no attempt is made to weigh any facts alleged to conclude whether they are credible or persuasive. *Id.* Instead, the facts and their reasonable inferences are viewed in the light most favorable to the plaintiffs in determining if the facts alleged meet the elements of a recognized cause of action. *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993).

## **III. Points on Appeal**

Mr. Thornburg raises a total of seven points on appeal, each stating separate arguments averring reasons why the trial court's dismissal of Mr. Thornburg's petition for failing to state a claim was erroneous. The first four points relate to the trial court's dismissal of Mr. Thornburg's claim against the defendants for alienation of affection. Mr. Thornburg's fifth point argues that he sufficiently stated a claim against the defendants for negligent infliction of emotional distress. Similarly, Mr. Thornburg contends in his sixth point on appeal that his petition adequately stated a claim against the defendants for intentional infliction of emotional distress. Finally, in his last point on appeal, Mr. Thornburg contends that the trial court erred in dismissing the petition on the basis that an employer cannot be held liable under the doctrine of respondeat superior for the adulterous affairs of its employees because his claims were not based on the occurrence of the adulterous affair.

### **A. Alienation of Affection**

[discussion omitted]

### **B. Negligent Infliction of Emotional Distress**

The trial court found that Mr. Thornburg failed to state a claim for negligent infliction of emotional distress because he failed to make allegations of fact supporting the necessary elements of a negligent infliction of emotional distress cause of action. The tort of negligent infliction of emotional distress is a negligence action. The general elements of a negligence

action are 1) a legal duty of the defendant to protect the plaintiff from injury, 2) breach of the duty, 3) proximate cause, and 4) injury to the plaintiff. *Pendergist v. Pendergrass*, 961 S.W.2d 919, 923 (Mo. App. W.D. 1998). Claims seeking recovery of damages for the negligent infliction of emotional distress require proof of two additional elements: 1) that the defendant should have realized that his conduct involved an unreasonable risk of causing distress, and 2) that the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant. *Id.* Mr. Thornburg's petition must contain allegations of fact in support of the two elements required to recover damages for emotional distress in addition to the even more basic elements of any claim for negligence. See *id.*; *Turner v. General Motors Corp.*, 750 S.W.2d 76, 78 (Mo. App. E.D. 1988).

Mr. Thornburg's petition makes no allegation that the defendants owed Mr. Thornburg any legally recognized duty. Mr. Thornburg's brief, likewise, fails to cite any Missouri case imposing a legal duty on coworkers or employers to their employees' spouses. Instead, in his brief, Mr. Thornburg argues that the duty in this case was established by the foreseeable likelihood that the defendants' acts would result in harm to him. The asserted facts and reasonable inferences attributable to Mr. Thornburg's petition do not support the necessary conclusion that the defendants' conduct would cause Mr. Thornburg to suffer severe emotional distress. Accordingly, the petition failed to allege Mr. Thornburg was owed any legally recognized duty by the defendants, and thus, failed to state a claim for negligent infliction of emotional distress. The trial court's judgment dismissing Mr. Thornburg's claim for negligent infliction of emotional distress is affirmed.

### **C. Intentional Infliction of Emotional Distress**

In order to state a claim for intentional infliction of emotional distress, Mr. Thornburg must plead that 1) the defendants' conduct was extreme and outrageous, 2) the conduct was intentional or done recklessly, and 3) the conduct caused severe emotional distress that results in bodily harm. *Gibson v. Brewer*, 952 S.W.2d 239, 249 (Mo. banc 1997). Missouri case law recognizes the difficulty in defining acts that are "extreme and outrageous," and thus, each case must turn on its individual facts. *J.R. v. P.B.A.*, 773 S.W.2d 235, 236 (Mo. App. S.D. 1989); *Viehweg v. Vic Tanny Intern. of Missouri, Inc.*, 732 S.W.2d 212, 213 (Mo. App. E.D. 1987). The defendant's conduct must be more than simply malicious or intentional; the conduct must have been "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." *Gibson*, 952 S.W.2d at 249. The conduct must also be "intended only to cause extreme emotional distress to the victim." *Id.*

"It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Viehweg*, 732 S.W.2d at 213. In making such a determination, the court is to decide whether an average member of the community upon learning of the facts alleged by the plaintiff would exclaim "outrageous!" *Id.*

The trial court dismissed Mr. Thornburg's claim for intentional infliction of emotional distress finding that he failed to allege the defendants' conduct was extreme and outrageous. Mr. Thornburg argues that this finding by the trial court is erroneous.

In his petition, Mr. Thornburg alleged that: 1) Federal Express offered Ms. Thornburg a transfer to Savannah, Georgia; 2) defendants offered Ms. Thornburg the transfer to remedy the current hostile work environment and to preserve and protect the careers and positions of its managers; 3) the transfer opportunity provided Ms. Thornburg with a lucrative full-time schedule that would allow her to support herself and her children; 4) the transfer opportunity provided Ms. Thornburg with a fresh start in a non-hostile workplace environment; 5) defendants provided Ms. Thornburg with relocation assistance; 6) the relocation occurred while Mr. Thornburg was out of town on a business trip; 7) defendants did not announce the transfer or resulting vacancy at Federal Express until after Ms. Thornburg had already relocated; 8) the defendants provided packing materials and physical assistance to Ms. Thornburg to help her remove property from the Thornburg's home; 9) Federal Express made money in Ms. Thornburg's retirement account available to her; 10) defendants served as an employment reference for Ms. Thornburg; 11) the original transfer opportunity offer was altered from a Tuesday through Saturday to a Monday through Friday work schedule; and 12) after the relocation the defendants refused to provide Mr. Thornburg with Ms. Thornburg's location and address. While Mr. Thornburg complains that this conduct by the defendants, and Ms. Thornburg's resulting transfer, caused him to suffer severe emotional distress, in making his allegations, Mr. Thornburg admitted that 1) the defendants did not desire to terminate Ms. Thornburg's employment with Federal Express; and 2) upon learning of Ms. Thornburg's transfer opportunity, he informed Ms. Thornburg that he did not wish to relocate and that if she accepted the transfer it was her choice to abandon the marriage.

While the defendants' conduct may have been self-serving as argued by Mr. Thornburg, his petition fails to allege conduct so outrageous and extreme as to be utterly intolerable in a civilized society. Accordingly, Mr. Thornburg's petition failed to state a claim for intentional infliction of emotional distress. The trial court's judgment dismissing Mr. Thornburg's intentional infliction of emotional distress claim is affirmed.

#### **D. Respondeat Superior**

[discussion omitted]

#### **IV. Conclusion**

Mr. Thornburg failed to sufficiently state in his petition claims for alienation of affection and negligent and intentional infliction of emotional distress against defendants. Likewise, Mr. Thornburg failed to state a claim for relief against Federal Express under the doctrine of respondeat superior. The trial court was, therefore, correct in dismissing Mr. Thornburg's petition for failure to state a cause of action.

The judgment of the trial court is affirmed.