

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001944-MR

BRENDA CHILDERS

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 10-CI-00287

CANIFF FUNERAL HOME, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER AND MOORE, JUDGES.

KELLER, JUDGE: Brenda Childers (Childers) appeals from the circuit court's summary judgment in favor of Caniff Funeral Home, Inc. (the Funeral Home). On appeal, Childers argues that genuine issues of material fact exist regarding her

claims that the Funeral Home improperly arranged for the cremation of the remains of her mother, Pauline Moore Lemaster (Pauline). The Funeral Home argues that it does not fall within the statute regulating cremation; that it has immunity; and that its actions or inactions did not rise to the level sufficient to support Childers's claim of intentional infliction of emotional distress. Having reviewed the record, we affirm.

FACTS

The facts essentially are not in dispute. On March 18, 2009, Pauline died at home. After receiving a report of Pauline's death, the deputy coroner, Mark Hammond (Hammond), conducted an investigation and determined that Pauline died of natural causes. As part of the investigation, Hammond asked Pauline's son, Roger Lemaster (Lemaster), if all of the family members had been notified. Lemaster told Hammond that Childers had not been notified because of a "family dispute," and he asked Hammond to notify Childers of Pauline's death. Hammond called Childers, told her of her mother's death, and asked Childers if she wanted to come to the house to see her mother before personnel from the Funeral Home took Pauline's body. Childers said that she did not. However, in the event Childers might change her mind, Hammond stayed at the house for an additional fifteen minutes to a half hour with Marcia Caniff Davis (Davis), a representative of the

Funeral Home. While they waited to see if Childers would arrive, Hammond told Davis that there was some sort of family dispute. However, he did not tell her the nature of the dispute, because he did not know what it was.

On March 19, 2009, Lemaster signed a "Cremation and Disposition Authorization" form (the Authorization Form) stating that he was the executor or administrator of Pauline's estate; that he had written instructions from Pauline authorizing her cremation; and that Pauline's children knew of her death and agreed that her remains should be cremated. Based on the Authorization Form, the Funeral Home made arrangements for Pauline's remains to be cremated. Because the Funeral Home did not perform cremations, it transported Pauline's remains to a crematorium in Portsmouth, Ohio.

During the day on March 19, 2009, Childers and her husband made several telephone calls to the Funeral Home in an attempt to find out what funeral arrangements were being made. Late that afternoon, Childers learned that Pauline was to be cremated that night and that her remains had been transported to Portsmouth. Childers advised Pat Caniff, the director of the Funeral Home, that Pauline did not want to be cremated. She then contacted the crematorium in Portsmouth and, after obtaining approval from the Funeral Home, the crematorium agreed to wait until the morning of March 20 to cremate Pauline's remains.

Childers and her husband then drove to Portsmouth the morning of March 20 so that Childers could "say her final 'goodbye' to her mother." Pauline's remains were cremated later that day.

On March 18, 2010, Childers filed a *pro se* complaint alleging that the Funeral Home had ignored her statements that Pauline did not want to be cremated. According to Childers, the Funeral Home acted willfully, maliciously, and outrageously, intentionally inflicting extreme emotional distress. Approximately six weeks later, Childers amended her complaint to allege that the Funeral Home violated statutory provisions regulating cremation.

The Funeral Home filed a motion for summary judgment on July 12, 2010, making the same arguments as it does here. In response to that motion, Childers filed a "motion" asking the court "not to award summary judgment." After reviewing the pleadings and hearing the parties, the court granted the Funeral Home's motion. In doing so, the court found that the Funeral Home is not a crematorium and therefore is not subject to the statutes governing crematoria. Furthermore, the court found that the Funeral Home was exempt from liability under KRS 367.97524(3) because it acted in good-faith reliance on Lemaster's authorization. Finally, the court found that the conduct of the Funeral Home, if

wrongful, did not rise to the level of conduct sufficient to support a claim of intentional infliction of emotional distress.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

ANALYSIS

Childers lists four issues in her brief; however, we believe those four can be condensed to three: (1) whether KRS 367.97501, *et seq.* applies to the Funeral Home; (2) whether the Funeral Home's knowledge of a family dispute abrogated its ability to claim that it acted in good faith; and (3) whether the Funeral Home's actions or inactions rose to the level of intentional infliction of emotional distress. With the above standards of review in mind, we address each issue in turn.

1. Application of KRS 367.97501 *et seq.*

With one exception, KRS 367.97501 *et seq.* applies to crematoria and those providing cremation services. It is undisputed that the Funeral Home is not a crematorium and does not provide cremation services. Therefore, the trial court correctly determined that Childers's claims based on alleged violations of KRS 367.97501 *et seq.* are unfounded.

2. Good Faith

One section of KRS 367.97501 *et seq.* does apply to the Funeral Home. Pursuant to KRS 367.97524(3), "a licensed funeral director arranging a cremation shall not be held liable for good faith reliance on representations made by the authorizing agent regarding the authority to cremate." In pertinent part, that authority can come from: "(a) The decedent through a preneed cremation authorization; (b) The surviving spouse of the decedent; [or] (c) The surviving adult children of the decedent" KRS 367.97501(1).

The Funeral Home obtained written authorization from Lemaster for Pauline's cremation. That authorization indicated that Lemaster had written instructions from Pauline authorizing cremation and that all of Pauline's adult children agreed to the cremation. We agree with the Funeral Home that it was entitled to rely in good faith on the representations made by Lemaster in the

authorization. Furthermore, absent any information to the contrary, the Funeral Home had no independent duty to investigate Lemaster's authorization.

However, once Childers notified the Funeral Home that neither she nor her mother wanted the cremation, whether the Funeral Home's reliance on the authorization was in good faith became a question of fact for the jury. Therefore, we disagree with the trial court's finding that, as a matter of law, the Funeral Home had immunity from liability.

Having determined that the Funeral Home was not, as a matter of law, immune from liability, we next address Childers's sole claim of wrongful conduct – intentional infliction of emotional distress.

3. Intentional Infliction of Emotional Distress

As correctly noted by the trial court, "[i]t is for the court to decide whether the conduct complained of can reasonably be regarded to be so extreme and outrageous as to permit recovery." *Goebel v. Arnett*, 259 S.W.3d 489, 493 (Ky. App. 2007). In order to recover, a plaintiff must make a *prima facie* case by showing that: the wrongdoer's conduct was intentional or reckless and so outrageous and intolerable that it "offends against the generally accepted standards of decency and morality;" that there is a causal connection between the conduct

and the emotional distress; and that the emotional distress is severe. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 788 (Ky. 2004).

The trial court found that Childers failed to make that *prima facie* case. We agree for two reasons. First, even taken in the light most favorable to Childers, the Funeral Home's conduct does not rise to the level of outrageous and intolerable. In reaching this conclusion, we note that this Court and the Supreme Court of Kentucky have found outrageous conduct

where the defendants [sic]: (1) harassed the plaintiff “by keeping her under surveillance at work and home, telling her over the CB radio that he would put her husband in jail and driving so as to force her vehicle into an opposing lane of traffic”; (2) intentionally failed to warn the plaintiff for a period of five months that defendant's building, in which plaintiff was engaged in the removal of pipes and ducts, contained asbestos; (3) engaged in “a plan of attempted fraud, deceit, slander, and interference with contractual rights, all carefully orchestrated in an attempt to bring [plaintiff] to his knees”; (4) committed same-sex sexual harassment in the form of “frequent incidents of lewd name calling coupled with multiple unsolicited and unwanted requests for homosexual sex”; (5) was a Catholic priest who “used his relationship [as marriage counselor for] the [plaintiff] husband and the wife to obtain a sexual affair with the wife”; (6) agreed to care for plaintiff's long-time companion-animals, two registered Appaloosa horses, and then immediately sold them for slaughter; and (7) subjected plaintiff to nearly daily racial indignities for approximately seven years.

Id. at 789-90 (footnotes omitted.)

On the other hand, this Court and the Supreme Court have found the requisite conduct lacking when

the defendant: (1) refused to pay medical expenses arising out of an injured worker's compensation claim; (2) wrongfully converted the plaintiff's property in a manner that breached the peace; (3) negligently allowed his vehicle to leave the road and struck and killed a child; (4) committed "reprehensible" fraud during divorce proceedings by converting funds belonging to his spouse for the benefit of defendant and his adulterous partner; (5) wrongfully terminated the plaintiff; (6) displayed a lack of compassion, patience, and taste by ordering plaintiff, who was hysterical over the fact that she had just delivered a stillborn child in her hospital room, to "shut up" and then informing her that the stillborn child would be "disposed of" in the hospital; (7) erected a billboard referencing defendant's status as a convicted child molester; (8) wrongfully garnished plaintiff's wages pursuant to a forged agreement; and (9) impregnated plaintiff's wife. Courts have found other elements of the prima facie case missing, or have otherwise found recovery . . . unavailable, in cases where the defendant: (1) a Catholic priest, sexually abused a ten-year-old boy; (2) breached a promise to marry; (3) chained a high school student to a tree by his ankle and neck; and (4) shot and killed a beloved family pet, which had been misidentified as a stray dog.

Id. at 790-91 (footnotes omitted).

Although there is no case directly on point, we believe that this matter falls within the line of cases wherein the plaintiff failed to make a *prima facie* case of outrageous conduct. In doing so, we note that, in the majority of cases wherein

this Court and the Supreme Court have determined the requisite conduct existed, that conduct was aimed directly at the plaintiff. Furthermore, that conduct appears to have been not only aimed at the plaintiff but designed to harm the plaintiff.

Childers has put forth evidence that the Funeral Home acted against her wishes and, viewed in a light most favorable to Childers, her mother's. However, Childers has put forth no evidence that the Funeral Home had any desire to directly or indirectly harm her. In fact, the evidence indicates that the Funeral Home was acting so as to comply with the authorization and wishes of Lemaster, not out of any ill-will toward Childers. At worst, the Funeral Homes' actions amounted to a significant lack of compassion, but they did not rise to the level necessary to support a claim for intentional infliction of emotional distress. *See Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 4 (Ky. 1990).

Second, we note that Childers, as the party opposing the Funeral Home's motion for summary judgment, was required to present some affirmative evidence to support her claim. *See Steelvest*, 807 S.W.2d at 481. Childers has not presented any evidence, other than her self-serving statements, that she suffered severe emotional distress. Therefore, we conclude that the trial court correctly granted summary judgment to the Funeral Home on the issue of intentional infliction of emotional distress.

CONCLUSION

The trial court incorrectly found that there was no issue of material fact regarding the Funeral Home's entitlement to immunity. However, because the court correctly determined that the Funeral Home was not governed by KRS 367.97501 *et seq.* and that Childers had not presented a *prima facie* case regarding intentional infliction of emotional distress, her sole allegation of wrongful conduct, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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