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SC Court of Appeals

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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

PAUL B. WICKENSIMMER

COUNTY OF GREENVILLE 2015 FEB 27 PM 4 35 THIRTEENTH JUDICIAL CIRCUIT

Carol Simpson,

C.A. NO.: 2013-CP-23-01762

Plaintiff,

v.

Frank A. Landgraff, Carol Sutton, Carol Sutton & Associates-Investigations, Inc.,

AMENDED ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT LANDGRAFF

Defendants.

Plaintiff brought this action claiming Defendant Frank A. Landgraff hired Defendant Carol Sutton and her private investigative agency to place a video camera in Landgraff's bedroom for the purpose of capturing evidence of her adultery with Landgraff's then-wife. Her complaint alleges causes of action for invasion of privacy, outrage, and civil conspiracy. Defendant Landgraff now moves for summary judgment.

The court has considered all filings made by the parties, even those that may have been untimely. This includes Plaintiff's lengthy affidavit filed in Defendant Landgraff's divorce case. Both sides have presented this affidavit to the court at different stages of this case, and both have indignantly criticized the other for disclosing it, contending it was "sealed" by Family Court order, even though no such order has been presented. The court prefers to resolve this dispute on the entire record.

Defendant claims there is no genuine material factual dispute concerning any of Plaintiff's claims. Construing the record in the light most favorable to Plaintiff, there are factual allegations that Defendant set up a motion-activated video camera in Landgraff's master bedroom for the purpose of recording Plaintiff. Plaintiff had been a frequent houseguest of Landgraff and

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believed she had a right to privacy in Landgraff's bedroom. According to Plaintiff, the record also requires the following inference:

Inference—Landgraff attempted to have an affair with Plaintiff. When she refused, he encouraged a friendship with his Wife. He then pushed for a threesome. When that ended, he orchestrated an evening between Plaintiff and his Wife. He set up a camera to record his fantasy. He then attempted to rekindle the threesome. When his efforts ultimately failed, he portrayed himself as the victim and ended his already troubled marriage. He showed no remorse for Plaintiff for using her in his scheme.

See Plaintiff's Memorandum in Opposition to the Defendants' Proposed Order at 20.

While the court is required to draw inferences and ambiguities in Plaintiff's favor at the summary judgment stage, it is not required to indulge a party's selective accounts of events and turn them kaleidoscope-like until some illusory factual dispute faintly appears. Inference need not produce ignorance. While in the above excerpt Plaintiff declares she refused to have an affair with Landgraff, her previous sworn Affidavit to the Family court flatly admits she did.

But that is neither here nor there. Nowhere in the record do we learn precisely what is on the videotape, if it still exists, or whether its contents were shared with a third party outside of the judicial process.¹

Plaintiff argues that a Greenville County Sheriff's Office Incident Report raises an inference that the video contains images of sexual activity between her and Landgraff's then-wife, and references "still shots" that Defendant Sutton provided to investigators. The Incident Report also states that the investigator had "a copy of the digital recording itself," and mentions that a certain sex toy appears in the video.

The Incident Report was generated in the course of investigating Defendants for potential prosecution for voyeurism and, as noted in the Order on Plaintiff's Motion for Reconsideration,

¹ There is evidence Defendant Landgraff submitted a copy of the tape to counsel and the court during the Family Court litigation, and someone gave it to law enforcement.

was not furnished to the court or made part of the record until over two months after the summary judgment hearing, 54 days after the court issued a Form 4 granting Defendant summary judgment, and a month after Defendant had submitted a proposed order noting the lack of any evidence regarding the recording.

Assuming the recordings show Plaintiff with Landgraff's then-wife, summary judgment is still warranted. Accepting the slant Plaintiff pushes for and presuming her credibility, Landgraff was videotaping her while she was in his bedroom having sexual contact with his wife. South Carolina law recognizes "[i]t is a well founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This rule applies at both law and in equity and whether the cause of action is in contract or in tort." Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168 (Ct. App. 1993) (citations omitted). This defense has been known as in pari delicto, which translates as "in cases of equal or mutual fault, the position of the defending party is the better one," Proctor v. Whitlark & Whitlark, Inc., 406 S.C. 225, 228, 750 S.E.2d 93, 94 (Ct. App. 2013) (cert. granted Aug. 22, 2014), although our supreme court long ago appeared to prefer Lord Mansfield's rendering: "The principle of public policy is this. 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." White v. Commercial & Farmers' Bank, 66 S.C. 491, 45 S.E. 94, 102 (1903); see generally 4 S.C. Jur. Action § 21.

Other states recognize the principle, sometimes calling it the "wrongful conduct" bar, the unlawful acts doctrine, or ex turpi causa. Long part of American law, it is kin to the discredited "outlaw" doctrine that appeared in early English society. See Davis, The Plaintiff's Illegal Act as a Defense in Actions of Tort, 18 Harv. L. Rev. 505 (1905); King, Outlaws and Outlier Doctrines:

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The Serious Misconduct Bar in Tort Law, 43 Wm. & Mary L. Rev. 1011 (2002). It was applied in the famous "Highwayman" case, Everett v. Williams (Ex. 1725), where two robbers sought an accounting. The case did not end well: the solicitors were fined for contempt for bringing it to court, and the robbers were hanged. Still robust, the principle reminds that "the law leaves the quarreling accomplices where it finds them." Thomas v. UBS AG, 706 F.3d 846, 857 (7th Cir. 2013) (Posner, J.).

A Plaintiff's wrongful conduct will bar his right to claim damages caused by the conduct. The misconduct must be immoral, criminal or otherwise prohibited. And it must have been at least a concurring cause of the injury. See Restatement (Second) of Torts § 889 (1979) (one injured not barred from recovery merely because at time of injury he was committing a tort or crime).

The wrongful conduct rule has arisen in numerous contexts. It has been used to bar a Plaintiff convicted of possessing child pornography from suing his social worker for failure to effectively treat his sexual addiction, Greenwald v. Van Handel, 311 Conn. 370, 88 A.3d 467 (2014), an action for recovery of injuries from a gunshot wound that occurred when decedent attempted to steal a handgun, Ryan v. Hughes-Ortiz, 959 N.E.2d 1000 (Mass. App. 2012), a claim for injuries due to Oxycontin addiction when the Plaintiff had unlawfully obtained multiple prescriptions, Price v. Purdue Pharma Co., 920 So.2d, 479 (Miss. 2006), a lawsuit by a patient at a substance abuse treatment center against his counselor with whom he had an adulterous affair and used illegal drugs, Correll v. St. John's Hospital-Macomb Center, 2002 WL 226935 (Mich. App. 2002), and a claim by a teenager against a boy who sold him fireworks from which he extracted gunpowder to make a pipe bomb that exploded in his hands, Barker v. Kallash, 63 N.Y.2d 19, 468 N.E.2d 39 (1984).

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Cardozo noted that "the principle that no man should profit from his own inequity or take advantage of his own wrong" had "its roots deeply fastened in universal sentiments of justice." Cardozo, The Nature of the Judicial Process at 41 (Yale Univ. Press 1921). In a different context, Justice Brandeis explained the driving rationale:

The court's aid is denied only when [the plaintiff] has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.

Olmstead v. United States, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting); see also Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985) ("The defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.")(footnotes omitted).

If Defendant Landgraff had stormed into his bedroom and caught Plaintiff and his then-wife in flagrante delicto, no court would countenance Plaintiff later suing him-- the husband and homeowner-- for invasion of privacy, emotional distress and outrage, even if he had a photographic memory. Or, if Defendant husband had stationed a private investigator in his bedroom or outside its window to collect evidence of his wife's suspected infidelity with Plaintiff, it would be remarkable if Plaintiff as the paramour could then mulct the husband and the private investigator in damages for conspiring to invade her privacy.²

² This forms an alternative basis for granting Defendant Landgraff summary judgment. Specifically, the court finds there is no proof of a substantial and unreasonable intrusion into Plaintiff's privacy and therefore her invasion of privacy claim fails as a matter of law. Snakenberg v. Hartford Casualty Ins. Co., Inc., 299 S.C. 164, 383 S.E.2d 2 (Cl. App. 1989). Her outrage cause of action claim must be dismissed as well, given there is insufficient proof of extreme and outrageous conduct by Defendants. See Hubbard & Felix, The S.C. Law of Torts at 468-69 (4th ed. 2011) (whether Defendant's conduct is sufficiently extreme and outrageous is initially question of law for court). Finally, there can be no civil conspiracy without proof of special damages or an agreement to injure Plaintiff.

Adultery is a criminal offense. S.C. Code § 16-15-60. While this statute is rarely enforced and regularly violated, it still represents our state's express public policy. This policy is deafeningly echoed in South Carolina domestic law, which recognizes adultery as a ground for divorce, § 20-3-10(1), and our Constitution. S.C. Const. Art. XVII, § 3. Consequently, Plaintiff's adulterous conduct bars her claims. Her wrongful conduct is directly connected to her injury, and her claims fundamentally depend on proof of that conduct.

Plaintiff appears to contend she was entrapped by Landgraff, who through a long, lecherous and manipulative scheme made her think his home was a haven when in reality he was building evidence that would be helpful when he sought a divorce. But the wrongful conduct rule is not reserved for puritan Defendants; as Lord Mansfield noted the defense "sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff..." White v. Commercial & Farmers' Bank, 66 S.C. 491, 45 S.E. 94, 102 (1903) (quoting Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775)); see also Coppel v Hall, 74 U.S. 542, 559 (1868) ("The defence is allowed, not for the sake of the defendant, but of the law itself.").

In this digital age our important privacy interests are especially threatened by recorded images. That the images may persist on some relatively permanent medium does not alter the analysis or the result required by the wrongful conduct bar. There is no evidence Defendant has disclosed them to non-parties outside of the judicial process, and if there was such evidence the wrongful conduct rule likely would not apply. If such disclosure ever occurs, other state and federal remedies may be available.

IT IS THEREFORE ORDERED that Defendant Landgraff is granted summary judgment pursuant to Rule 56, SCRCF because:

1. There is no genuine issue of material fact as to Plaintiff's claims against Defendant;
2. Even if there is a scintilla of such evidence, Plaintiff's claims are barred as a matter of law due to the wrongful conduct bar and the in pari delicto doctrine.

IT IS SO ORDERED.



D. Garrison Hill
Circuit Judge

February 27, 2015
Greenville, South Carolina