IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

January 25, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

DAVID W. KENT, Plaintiff/Appellant, v. EDWARDS & ASSOCIATES, INC., AERONAUTICAL ACCESSORIES, INC., AERONAUTICAL PLASTICS, INC., AERONAUTICAL ROTOR BLADES, INC., GLORIA M. WOLFE, EXECUTRIX OF THE ESTATE OF JAMES A. WOLFE, and ROBERT B. McNAB, Defendants, Appellees.	)	No. E-1999-00399-COA-R9-CV Appeal by Permission From SULLIVAN COUNTY CIRCUIT COURT HON. JOHN S. McLELLAN, III

For the Appellant:
Cecil W. Laws, Kingsport
Franklin L. Slaughter, Bristol

For the Appellees:
Robert D. Van de Vuurst, Johnson City
Alice K. Corker, Johnson City
Carl McAfee, Norton, Virginia

AFFIRMED & REMANDED

Swiney, J.

OPINION

This is an appeal by David W. Kent ("Plaintiff") under T.R.A.P. Rule 9 alleging error in the Trial Court's ruling on a Motion for Summary Judgment filed by Defendants/Appellees, related corporations and two individuals who were the shareholders, directors and officers of the companies. Plaintiff was an employee of one

or more of the Defendant companies, and filed suit after his employment was terminated for outrageous conduct, interference with employment contract, conspiracy to interfere with employment contract, retaliatory discharge, and conspiracy relating to retaliatory discharge. The Trial Court entered judgment on separate motions for summary judgment filed by Defendants, dismissing all claims against Defendants Wolfe, McNab, Aeronautical Plastics, Inc. ("API"), and Aeronautical Rotor Blades, Inc. ("ARBI"), and dismissing claims relating to outrageous conduct against Defendants Edwards & Associates, Inc. ("EAI") and Aeronautical Accessories, Inc. ("AAI"). Pursuant to our order granting this Rule 9 appeal, our review is limited to those issues specified by the Trial Court in its order granting Plaintiff's Motion For Permission To Appeal under T.R.A.P. Rule 9. For the reasons set forth below, we affirm the judgment of the Trial Court and remand this cause of action for further proceedings.

BACKGROUND

Plaintiff was hired by Defendants Wolfe and NcNab as an employee of Defendant AAI in 1979, by a contract with a term of two years. Defendants Wolfe and McNab were the shareholders, directors, and officers of EAI and the other corporate Defendants during Plaintiff's employment. Plaintiff's original work was in sales of helicopters and related parts. Plaintiff served in various sales-related capacities during his employment, including the corporate office of vice president of sales. In 1990 Aeronautical Plastics of Texas, Inc. ("APOTI") was formed as a subsidiary of EAI to purchase a Texas plastics company and enter military supply contracts with the United States government. Plaintiff served as contract administrator for APOTI on these military supply contracts. In 1991 the United States began an investigation into allegations that APOTI was substituting non-conforming material in a contract to supply helicopter windows for Operation Desert Storm. Following investigation by the government, Plaintiff and two other APOTI employees not parties to this cause of action were identified by the investigating authorities

as having primary responsibility for the contract non-conformance. In 1992, a settlement was entered wherein APOTI paid approximately $300,000.00 in fines and restitution, and agreed that Plaintiff and the two other employees identified would not work on government contracts for APOTI for two years.

After the settlement was executed, APOTI was dissolved and Plaintiff was terminated from his employment by Defendants Wolfe and McNab. Plaintiff and the two other APOTI employees identified by the government were subject to proceedings for disbarment from future government contract work, but Plaintiff was not disbarred.

Plaintiff originally filed suit against EAI and AAI in 1993 for retaliatory discharge and outrageous conduct, and later amended his complaint to include additional claims against Wolfe and McNab individually, and against the other corporate Defendants as subsidiaries of EAI. After extensive pre-trial litigation, the Trial Court acted on separate Motions for Summary Judgment filed by each Defendant, dismissing all claims against API, ARBI, Wolfe, and McNab. Claims for outrageous conduct against EAI and AAI were also dismissed, with surviving claims for common law and statutory retaliatory discharge against EAI and AAI. Plaintiff moved for reconsideration or, in the alternative, T.R.A.P. Rule 9 appeal of the Summary Judgment. The Trial Court granted the Rule 9 appeal, with a limitation of the issues. Gloria M. Wolfe was substituted as Defendant as executrix of the estate of James A. Wolfe following Wolfe's death August 3, 1999. We granted the Rule 9 appeal limited to those issues designated in the Trial Court's order granting the motion for Rule 9 appeal.

DISCUSSION

The standard of review on appeal of a Trial Court's grant of Summary Judgment is well established.

> Our review of the trial court's grant of summary judgment is purely a question of law; accordingly, our review is de novo, and no presumption of correctness attaches to the lower courts' judgments. A summary judgment

> is appropriate only if the moving party shows that no genuine and material factual issue exists and that he or she is entitled to relief as a matter of law. In reviewing the record to determine whether summary judgment requirements have been met, we must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993). A summary judgment may be proper, therefore, only "when there is no dispute over the evidence establishing the facts that control the application of a rule of law." *Id*. at 214-15; Tenn. R. Civ. P. 56.

Eyring v. Fort Sanders Parkwest Medical Center, 991 S.W.2d 230, 236 (Tenn. 1999).

Although the parties raise and argue additional issues in their briefs, we limit our review to the three issues specified by the Trial Court in granting Plaintiff's motion for permissive appeal under T.R.A.P. Rule 9. Those issues are:

> I. Plaintiff's common law and statutory claims pursuant to T.C.A. § 47-50-109 against Defendants Robert B. McNab and James A. Wolfe for unlawful interference with Plaintiff's employment and/or employment contract and conspiracy to interfere with Plaintiff's employment and/or employment contract;
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> II. Plaintiff's common law and statutory claims pursuant to T.C.A. § 47-50-109 against Defendants Aeronautical Plastics, Inc., and Aeronautical Rotor Blades, Inc., for unlawful interference with Plaintiff's employment and/or employment contract and conspiracy to interfere with Plaintiff's employment and/or employment contract;
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> III. Plaintiff's claims of outrageous conduct against Defendants Edwards and Associates, Inc. ("*Edwards*") and Aeronautical Accessories, Inc. ("*Accessories*").

As issues I and II are built upon the same legal foundation, differing only in application to the four Defendants, we will address them together. Stated as concisely as possible, Plaintiff's claims relating to interference with his employment by these defendants fails, even if for no other reason, for want of a third party. As noted above, AAI was Plaintiff's original employer among the corporate Defendants. EAI is the corporate parent of AAI as well as of all of the other corporate Defendants. Defendants Wolfe and McNab are the shareholders, directors, and officers of the entire corporate structure. APOTI was dissolved by Wolfe and McNab after the government contract nonconformity settlement discussed above was reached.

Plaintiff, by Amended Complaint, added Defendants Wolfe, McNab, API, and ARBI under allegations of common law interference with employment or employment contract, violation of T.C.A. § 47-50-109, and conspiracy relating to these allegations.

> It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.
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> T.C. A. § 47-50-109.

The cause of action for violation of the statute consists of the same elements as the common law tort claim, except for the election of treble damages under the statute, or punitive damages under common law.

> The statute is declaratory of the common law except as to the amount of damages that may be recovered against a wrongdoer. [ ] The elements of a cause of action for procurement of the breach of a contract are: there must be a legal contract; the wrongdoer must have knowledge of the existence of the contract; there must be an intention to induce its breach; the wrongdoer must have acted maliciously; there must be a breach of the contract; the act complained of must be the proximate cause of the breach of the contract; and, there must have been damages resulting from the breach of the contract.
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> *New Life Corp. of America v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 926 (Tenn. Ct. App. 1996).

First, we agree with Defendants that Plaintiff was an employee at will. Although Plaintiff's employment with AAI was initially under a two-year written contract, the contract by its terms expired January 15, 1981. Under heading seven, Term, the agreement states:

> This agreement shall be for a period of two (2) years, the commencement date of which shall be January 15, 1979 or such other date as is mutually agreed between Employee and Employer, and said commencement date shall be put in writing as an amendment to this Agreement and executed by the parties hereto.

Although the amendment referenced is not included with the contract, we find

no basis to reject the stated commencement date. The terms of the contract are specific to Plaintiff, including housing allowance while he relocated from his Atlanta home to Tennessee. The contract also specified liquidated damages for early termination "for cause without notice and for any other reason," and has no renewal clause or language contemplating renewal past the term established by agreement of the parties. Based upon our review of the record, we agree with the Trial Court that other than serving as an employee-at-will, Plaintiff had no employment contract with any of the Defendants at the date of his termination.

Plaintiff is correct that this does not, however, end our analysis.

> Subject to a few narrow exceptions, which are not relevant to this case, an employer or an employee may terminate an employment at-will relationship at any time for good cause, bad cause or no cause. However, intentional interference with at-will employment by a third party, without privilege or justification, is actionable.
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> The essential issue in this case was discussed by the Court in *Ladd v. Roane Hosiery, Inc.*, 556 S.W.2d 758 (Tenn.1977).
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> * * * *
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> The Court recognized in that case that the relationship between the employee or officer of a corporate employer to the discharged employee is a significant fact. The Court stated:
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> > It is possible that [the supervisor] would not be liable for procuring the dismissal of the plaintiff if that action was within the scope of his duties at [the corporation]. See, e.g., *Lyon Ford, Inc. v. Ford Marketing Corp.*, 337 F.Supp. 691 (E.D.N.Y.1971); Annot., 26 A.L.R.2d 1227, 1267 (citing cases)....
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> Since, with the exceptions noted, the discharge from employment of an employee-at-will by the employer is not actionable, but the wrongful interference with at-will employment by third persons is actionable, [Plaintiff's] suit against [Defendants] can be maintained only if the proof establishes that they stood as third parties to the employment relationship at the time they performed the acts found to have caused [Plaintiff's] discharge.

Forrester v. Stockstill, 869 S.W.2d 328, 330-331 (Tenn. 1994).

Having established that Wolfe and McNab terminated his employment, and that they are the shareholders, directors and officers of the corporate Defendants, his

employer(s), Plaintiff to prevail in his claim must show that the Defendants acted outside the scope of their duties, thus becoming third parties to the terminated employment relationship.

> Claims that the defendants wrongfully "procured" or "induced," the termination of [Plaintiff's] employment contemplate a three-party relationship--the plaintiff as employee, the corporation as employer, and the defendants as procurers or inducers. The facts alleged show there was no three-party relationship. The defendant Martin was the president and chief executive officer of the corporation and the defendant Gammon was a director. In order for there to be a three-party relationship, there must be a showing that the defendants were acting outside the scope of their duties as officers of the corporation rather than on behalf of the corporation.
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> *Nelson v. Martin*, 958 S.W.2d 643, 647 (Tenn. 1997), citing *Forrester*, 869 S.W.2d 328.

The record contains no evidence to support the allegations against Defendants API and ARBI, other than their corporate affiliation with the other Defendants and that they were named in the settlement agreement with the government. There is absolutely no evidence in this record to support Plaintiff's claim that API or ARBI did anything to procure or induce the termination of Plaintiff's employment.

As to Defendants Wolfe and McNab, even when an individual is not an officer or director of a corporation, but acts in a manner consistent with such duties, this Court has expressed "serious doubts" about whether such a cause of action can be maintained. "[Defendant] is so closely tied to the operations of [the corporation] as either an agent or 'advisor' that he is more akin to a *defacto* officer than a third party." *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 239 (Tenn. Ct. App. 1998)(discussing application of T.C.A. § 47-50-109).

There is no evidence in the record that Wolfe or McNab acted outside the scope of their duties as officers and directors of the corporate Defendants in terminating Plaintiff's employment, or that any corporate Defendant acted to interfere with Plaintiff's employment. Additionally, we find neither evidence in the record, nor basis in law, to support Plaintiff's allegations of related conspiracy to these claims. Even reviewing the

evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in Plaintiff's favor, there is no dispute over the evidence establishing the facts, rather than allegations and conclusions, that control the application of the rules of law on these claims. None of these four Defendants acted as a "third party" as is necessary to Plaintiff's claim pursuant to T.C.A. §47-50-109 as well as his common law claims for unlawful interference with Plaintiff's employment and conspiracy to interfere with Plaintiff's employment. Accordingly, we affirm the Trial Court's judgment as to issues I and II. Issue III concerns allegations of outrageous conduct by Edwards and Accessories resulting in the termination of Plaintiff's employment. The tort of outrageous conduct is also known as intentional infliction of emotional distress. "Intentional infliction of emotional distress and outrageous conduct are not two separate torts, but are simply different names for the same cause of action." *Bain v. Wells*, 936 S.W.2d 618, 626 n.3 (Tenn. 1997) citing *Moorhead v. J.C. Penney Co.*, 555 S.W.2d 713, 717 (Tenn. 1977). In recognizing the tort in Tennessee, our Supreme Court set out the framework for analyzing the factors necessary to establish a cause of action.

> These factors are set out in the Restatement of Torts (2d), Sec. 46, 'Outrageous Conduct Causing Severe Emotional Distress'.
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> '(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm.'
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> Clarification of this statement is found in the following comment:
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> 'd. Extreme and Outrageous Conduct. The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct is characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly untolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'

> 'The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities.'
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> From the foregoing portion of the Restatement, we find the two factors which must concur in order to outweigh the policy against allowing an action for the infliction of mental disturbance: (a) the conduct complained of must have been outrageous, not tolerated in civilized society, and (b) as a result of the outrageous conduct, there must be serious mental injury. Stated another way, there are two valid policies fighting for recognition; the interest in a judicial climate which does not become burdened with trivial lawsuits versus the interest a person has in being free from unreasonable emotional disturbance. The result of this policy conflict has been somewhat of a compromise. The law has developed to the extent that the personal interest in peace of mind is protected from 'outrageous' interference which results in substantial emotional damage, and at the same time the policy of protecting the judicial process from trivial claims has been protected by disallowing claims which are not founded on conduct which can be characterized as 'outrageous.' [See complete annotation in 64 A.L.R.2d 100]. This approach gives limited protection to the interest in emotional tranquility.
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> *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270, 274-275 (Tenn. 1966).

In order to survive summary challenge to the "limited protection" afforded under outrageous conduct, the Plaintiff must set forth more than mere conclusions of law. "It is not enough in an action of this kind to allege a legal conclusion; the actionable conduct should be set out in the declaration." *Gann v. Key*, 758 S.W.2d 538, 544 (Tenn. Ct. App. 1988). "Furthermore, the facts on which the nonmoving party relies must be admissible in evidence." *Brasswell v. Carothers*, 863 S.W.2d 722, 729 (Tenn. Ct. App. 1993)(where "inferences based upon inferences" were insufficient to establish a cause of action).

In response to Defendants' Motion for Summary Judgment and supporting documents, Plaintiff submitted an extensive Memorandum in Opposition to Defendants' Motions for Summary Judgment, with numerous exhibits. Under the heading Evidence Supporting Plaintiff's Claims, Plaintiff sets forth a scenario in which Plaintiff and others were scapegoats for Defendants in the government investigation into the substitution of non-conforming goods in the APOTI contract. Plaintiff apparently argues that the basis for his cause of action against EAI and AAI for outrageous conduct was the circumstances

leading up to and involving his employment termination and its results. It is difficult in reviewing Plaintiff's second Amended Complaint to determine exactly which actions of these two Defendants Plaintiff claims give rise to the cause of action for outrageous conduct. Plaintiff in his second Amended Complaint details a large number of allegations ranging from the fact that he was hired and paid money by one or more of the Defendants to a claim that the Defendants fraudulently, maliciously, and recklessly represented to the U. S. Government that Plaintiff and other employees of the Defendants were the ones responsible for illegally substituting material on the government contract. Unfortunately, Plaintiff's second Amended Complaint is unclear as to which of these allegations he claims gives rise to a cause of action for outrageous conduct. Therefore, the Trial Court was faced, as we are, with the difficult task of trying to sort through those allegations to determine which ones the Plaintiff claims gives rise to outrageous conduct. Ultimately, we hold there is no genuine issue as to any material fact concerning those allegations that could conceivably be relevant to Plaintiff's claim of outrageous conduct against these Defendants. Viewing the evidence in the light most favorable to the Plaintiff as the nonmoving party and drawing all reasonable inferences in Plaintiff's favor, we agree with the Trial Court that the "evidence" proffered by Plaintiff fails to create a genuine issue of material fact that the conduct attributed to these Defendants meets the standards established for application of the rule of law for the tort of outrageous conduct. "And, again, 'genuine issue' as used in Rule 56.03 refers to disputed, material facts and does not include mere legal conclusions to be drawn from those facts." *Byrd,* 847 S.W.2d at 215. Very little of the material referenced in nearly thirty pages set forth as "evidence" relates to Plaintiff's claim of outrageous conduct, and the material that does relate to this claim fails to rise above the level of "inferences based upon inferences." Most of the material presented by Plaintiff as fact is irrelevant to the issues, unsupported allegation, or inferences so remote as to be mere insinuation. "To permit an opposition (to summary

judgment) to be based on evidence that would not be admissible at trial would undermine the goal of the summary judgment process to prevent unnecessary trials since inadmissible evidence could not be used to support a jury verdict." *Byrd*, 847 S.W.2d at 216. This record does not support Plaintiff's claims for the tort of outrageous conduct. We affirm the Trial Court's judgment as to issue III.

CONCLUSION

The judgment of the Trial Court on those limited issues considered in this T.R.A.P. Rule 9 appeal is affirmed, and this cause is remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellant, David W. Kent.

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D. MICHAEL SWINEY, J.

CONCUR:

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HOUSTON M. GODDARD, P.J.

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HERSCHEL P. FRANKS, J.