

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Thomas J. Lowery,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,	)	
	)	Case No. 20061086-CA
v.	)	
	)	F I L E D
	)	(March 15, 2007)
Don Cook and the Corporation	)	
of the President of the Church	)	
of Jesus Christ of Latter-day	)	2007 UT App 96
Saints,	)	
	)	
Defendants and Appellees.	)	

-----

Third District, Salt Lake Department, 060905614  
The Honorable Tyrone E. Medley

Attorneys: Thomas J. Lowery, Salt Lake City, Appellant Pro Se  
Daniel S. McConkie and Matthew K. Richards, Salt Lake  
City, for Appellees

-----

Before Judges Billings, Orme, and Thorne.

PER CURIAM:

Thomas J. Lowery appeals from the trial court's dismissal of his complaint. This is before the court on Appellees' motion for summary disposition on the basis that there is no substantial question for review.

Lowery alleged in his complaint that, in connection with an ecclesiastical counseling session, defendant Don Cook breached his fiduciary duty to Lowery and intentionally inflicted emotional distress. The trial court dismissed the complaint, finding the claims barred under Utah case law and insufficient as a matter of law. This court will affirm a trial court's dismissal of a complaint "only if it is apparent that as a matter of law, the plaintiff could not recover under the facts alleged." Franco v. Church of Jesus Christ of Latter-Day Saints, 2001 UT 25, ¶10, 21 P.3d 198 (quotations and citation omitted). "Because we consider only the legal sufficiency of the complaint, . . . we review [the dismissal decision] for correctness." Id. (quotations and citation omitted).

The Utah Supreme Court has held that claims for clergy malpractice or similar claims are not recognized in Utah. See id. at ¶¶17-19. In Franco v. Church of Jesus Christ of Latter-Day Saints, the supreme court determined that a claim for clergy malpractice would require an unconstitutional evaluation of religious philosophy and teachings, contrary to the Establishment Clause. See id. at ¶19. The supreme court also noted that, regardless of the title of a claim, a "claim will not survive constitutional scrutiny if an adjudication of the claim would foster an excessive governmental entanglement with religion in violation of the Establishment Clause." Id. at ¶21. Therefore, where a claim for breach of fiduciary duty in an ecclesiastical setting is, in essence, a claim for clergy malpractice or would otherwise require excessive entanglement with religion, the claim is barred. See id. at ¶¶21-22.

Lowery's claim for breach of fiduciary duty in an ecclesiastical setting is, in essence, a claim for clergy malpractice. He asserts that Cook breached a duty owed as part of his role as a cleric--essentially the same elements as clergy malpractice. Even if not identical to a clergy malpractice claim, Lowery's claim would require the same excessive entanglement in evaluating standards and duties in a religious setting, and would thus lead to the same violation of the Establishment Clause. Accordingly, the trial court correctly dismissed Lowery's claim for breach of fiduciary duty under Franco.

Lowery's complaint also alleged that Cook intentionally inflicted emotional distress on him when the mirror of Cook's truck struck Lowery as Cook was backing up. Lowery's complaint fails to state a claim as a matter of law, however, because he did not allege intentional conduct and the conduct was not outrageous or intolerable so as to warrant relief.

To state a claim for intentional infliction of emotional distress, a plaintiff must allege that defendant

"intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality."

Id. at ¶25 (quoting Jackson v. Brown, 904 P.2d 685, 687-88 (Utah 1995)). The sufficiency of Lowery's complaint "'must be determined by the facts pleaded rather than the conclusions stated.'" Id. at ¶26 (quoting Ellefsen v. Roberts, 526 P.2d 912, 915 (Utah 1974)).

Additionally, "[i]t 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." Schuurman v. Shingleton, 2001 UT 52, ¶23, 26 P.3d 277 (quotations and citation omitted). "To be considered outrageous, the conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair." Franco v. Church of Jesus Christ of Latter-Day Saints, 2001 UT 25, ¶28 (quotations and citation omitted). Also, an act is not necessarily outrageous simply because it is malicious, tortious, or illegal. See id.

The first element of the claim is that a defendant "intentionally engaged in some conduct toward the plaintiff." See id. at ¶25. Lowery does not allege that Cook intentionally struck him in the shoulder with the truck's mirror. Based on Lowery's pleading, Cook's actions appear merely negligent, with no assertion of intentional conduct. Furthermore, Lowery's allegation that the conduct was outrageous is conclusory. There is nothing so shocking in Cook's conduct that evokes outrage or revulsion, or shows that the conduct was extreme. On the contrary, the conduct appears to amount to simple negligence which is insufficient to establish the type of outrageous and intolerable intentional conduct required. In sum, Lowery's claim for intentional infliction of emotional distress fails as a matter of law.

Accordingly, the dismissal of Lowery's complaint is affirmed.

---

Judith M. Billings, Judge

---

Gregory K. Orme, Judge

---

William A. Thorne Jr., Judge

