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**STATE OF MINNESOTA
IN COURT OF APPEALS**

**Filed December 11, 2007
Affirmed
Minge, Judge**

Anoka County District Court
File No. C2-06-3947

Roger E. Meyer, Robert J. Hajek, Hajek, Meyer & Beauclaire, 3433 Broadway Street N.E., Suite 110, Minneapolis, MN 55413 (for appellants)

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Considered and decided by Hudson, Presiding Judge; Willis, Judge; and Minge, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellants challenge the dismissal of their complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief may be granted. Because we conclude that appellants' complaint was legally insufficient to support their claims, we affirm.

FACTS

In March 2000, Gordon Weaver, a fugitive charged with the murder of his wife in Minnesota, began renting part of appellant Jaime Jaramillo's home in

Oregon under the alias “David Carson.” Over the next four years, Weaver gained the friendship and trust of appellants. At one point, Jaime Jaramillo took steps to name Weaver a successor trustee of the Jaramillo family trust.

Gordon Weaver’s parents, respondents Lawrence and Delores Weaver, maintained two forms of contact with their son while he was living in appellants’ home. First, the Weavers provided their son with a credit card in the name of David Carson, with statements being mailed to him at Jaime Jaramillo’s home. Second, Delores Weaver, posing as David Carson’s “Aunt Rita,” called Jaramillo’s home about once a month to speak to her son. When Jaime Jaramillo answered the phone, “Aunt Rita” would ask how David was doing. In response, Jaime Jaramillo made small talk, sharing personal details about his life and health. Appellant told “Aunt Rita” that David was a great help to him and invited “Aunt Rita” and her husband to visit.

Weaver was apprehended in May 2004. In April 2006, appellants initiated the present lawsuit, claiming that respondents’ phone contact and financial support of their fugitive son constituted actionable invasion of privacy, negligence, and negligent infliction of emotional distress. The complaint alleges that the specific acts of respondents set forth in the complaint constituted this wrongful conduct. The district court granted respondents’ rule 12.02(e) motion to dismiss, concluding that appellants’ detailed complaint failed to state a claim on which relief may be granted. This appeal followed.

DECISION

Review of a case dismissed for failure to state a claim on which relief may be granted is limited to whether the complaint sets forth a legally sufficient claim for relief. *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005) (citing *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003)). Appellate courts review a claim's legal sufficiency de novo, accepting the facts of the complaint as true and construing all reasonable inferences in favor of the nonmoving party. *Id.* A dismissal must be affirmed if it is clear that no relief can be granted under facts that can be proved consistent with the allegations. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 454 (Minn. 2006). Here, because appellants pleaded facts with great specificity and claim that those facts are adequate to support the relief requested, we consider the appeal based on those specific facts.

I.

The first issue is whether appellants pleaded sufficient allegations to support a tort claim for invasion of privacy by intrusion on seclusion.

The Minnesota Supreme Court first recognized the tort of invasion of privacy in *Lake v. Wal-mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998). In *Lake*, the court stated that intrusion on seclusion occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a

reasonable person.” *Id.* at 233 (quoting The Restatement (Second) of Torts § 652B (1977)).

A. Intentional Intrusion On Seclusion

The first question is whether, accepting the facts in the complaint as true, the respondents intentionally intruded on appellants’ seclusion. Appellants’ complaint identifies in detail two forms of contact between respondents and the Jaramillo household: the phone calls from “Aunt Rita” and the credit-card statements that respondents arranged to have mailed to “David Carson.”

The intentional interference with one’s seclusion must be substantial. *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 745. The Restatement suggests that the “invasion may be by physical intrusion . . . as when the defendant . . . insists over the plaintiff’s objection in entering his home.” Restatement (Second) of Torts § 652B cmt. b (1977). Or the invasion may be more surreptitious, such as by eavesdropping on the plaintiff’s private affairs, looking into his windows, or tapping his telephone. *Id.*

Here, appellants state that respondents intended to contact their son, the appellants’ houseguest, by telephone and mail. But contrary to the claim in the complaint, the facts set forth do not support a conclusion that respondents (as opposed to Gordon Weaver) intended to intrude or invade on appellants’ solitude or seclusion. The complaint indicates that although various members of the Jaramillo household answered the phone when respondent Delores Weaver called,

Delores asked only to speak to her son. And when Jaime Jaramillo attempted to engage Delores Weaver in small talk, her response was to ask “how David was doing.” The complaint states that respondents obtained personal information relating to appellants’ lives and health during these calls. But there is no claim that Delores Weaver, posing as “Aunt Rita,” sought to engage Jaime Jaramillo in conversation or inquire into his private family affairs. There is no claim that the calls were annoying or that appellants asked Delores Weaver to cease calling. Jaime Jaramillo volunteered the personal information that was conveyed. Similarly, there is no allegation that the occasional receipt of a credit-card statement in the mail was highly offensive.

Given the limited contact between the parties and Delores Weaver’s apparent reticence when speaking with appellants, we agree with the district court that appellants failed to state a claim that the telephone calls and the credit-card statements in the mail rose to the level of a substantial, intentional interference with appellants’ seclusion. Finally, speculation that, if either of the appellants died of his serious health problem, respondents’ actions would help position Gordon Weaver to appropriate that appellant’s identity is too attenuated to sustain a cause of action.

B. Intrusions Highly Offensive to a Reasonable Person

There can be no liability for an intrusion unless the conduct would be highly offensive to a reasonable person. *Swarthout*, 632 N.W.2d at 745. The

Restatement elaborates on this standard, particularly with regard to telephone calls. *See* Restatement (Second) of Torts § 652B cmt. d (1977). For example, when calling to demand payment of a debt, privacy is not invaded unless the “calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff[] that becomes a substantial burden to his existence.” *Id.* The Restatement also recognizes that a cause of action may lie for past offensive conduct. Illustrations of § 652B note that it would be an intrusion to tap telephone wires, use a telescope to peer through a bedroom window, or forge a court order to fraudulently gain access to account information. Restatement (Second) of Torts § 652B cmt. B., illus. 2-4 (1977). Presumably, a plaintiff in such a case would not bring an action until learning of the intrusion.

But here, we agree with the district court that, unlike the Restatement illustrations, the facts in the complaint do not portray the calls as offensive. As already observed, appellants were not only aware of the contacts, but also welcomed them and even invited respondents to visit their home. Granted, if appellants had realized that a fugitive murderer was living in their home, they would likely have been less welcoming to monthly telephone calls from the fugitive’s parents. But the standard is not whether a reasonable person would welcome the contact; the test is whether the telephone or mail contacts would be highly offensive intrusions to a reasonable person. Delores Weaver called once a month to speak to her son, Gordon. When Delores Weaver spoke first to appellant

Jaime Jaramillo, the conversations, as detailed in the complaint, were not threatening, even in retrospect. Such contact is far different than the hounding creditor or stealthy voyeur. There is no allegation that respondents were offensive or scary persons. Similarly, the arrival of routine credit-card statements addressed to a guest is benign; they would not be highly offensive to a reasonable person. A contrary conclusion would expand privacy torts far beyond their intended scope.

We recognize that appellants were unwitting hosts to a murderer. However, Gordon Weaver, not respondents, established the relationship with appellants. Because neither the telephone calls nor the credit-card statements constitute an intentional intrusion that would be highly offensive to a reasonable person, we affirm the district court's decision that the contacts attributed to respondents are too attenuated to support appellants' right-of-privacy claim.

C. Legitimate Expectation of Privacy in the Home

Because we agree with the district court that respondents' conduct did not constitute a highly offensive intrusion, it is unnecessary for this court to consider appellants' legitimate expectation of privacy. We note, however, that a defendant is liable "only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." Restatement (Second) of Torts § 652B cmt. c (1977). When a plaintiff volunteers information, he or she is no longer protecting the seclusion of his person or affairs. *See* Restatement (Second) of Torts § 652B cmt. c (1977). To the extent that

appellants shared sensitive information about their health, they did so without any coaxing from respondents.

II.

The second issue is whether the district court erred in dismissing appellants' claim for negligence. A threshold determination in any negligence action is whether the defendant owed a legal duty to the plaintiff. On appeal, appellants attempt to characterize the alleged duty owed to them in different ways. They asserted that respondents had a duty to be truthful in their communications, a duty to inform appellants that an indicted murderer was living in their household, and a duty not to commit actions allowing Gordon Weaver to maintain his fugitive status. We agree with the district court that appellants' theory of liability was predicated on a duty of respondents to warn appellants or to control Gordon Weaver.

Essential elements of a negligence claim include the existence of a duty of care and the breach of that duty. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001). A person generally has no duty to control the conduct of a third person to prevent that person from causing injury to another. *Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984) (citing Restatement (Second) of Torts § 315 (1965)).

A limited exception to the general rule that one has no duty to control others is based on the parent-child relationship. *Silberstein v. Cordie*, 474 N.W.2d 850,

855 (Minn. App. 1991) (citing Restatement (Second) of Torts § 316(b) (1965)).

This duty is narrow—at the very most, the duty arises when the parent has both the opportunity and ability to control the child. *Id.* at 855-56. In *Silberstein*, the court found that a duty existed where stepparents had control of the day-to-day care of a 27 year old with the mental condition of a child. *Id.* at 856. The court noted that the man lived with his stepparents and they knew he was not taking his medication, could not sleep, and was nonverbal. *Id.*

Here, Gordon Weaver was an adult. His elderly parents lived in Minnesota. Although appellants were apparently assisting Gordon financially, appellants do not allege that respondents had any influence over the conduct of their son. We agree with the district court that paying credit-card bills is not enough to establish that Lawrence and Delores Weaver had the opportunity and ability to control their fugitive son while he lived in Oregon.

The district court also determined that respondents had no duty to warn appellants of potential risks posed by Gordon Weaver. Although such a general duty does not exist, an exception applies where the harm is foreseeable and a special relationship exists between the actor and the person seeking protection. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989). The existence of a special relationship is a threshold question, and the issue of foreseeability need not be reached if no relationship is found. *Errico v. Southland Corp.*, 509 N.W.2d 585, 587 (Minn. App. 1993). Traditionally, the common law imposed a duty to

warn on common carriers, innkeepers, certain land owners, and people who had custody of another under circumstances in which the other person was deprived of normal opportunities of self-protection. *Whittemore*, 552 N.W.2d at 708 (quoting *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993)). Special relationships may arise where people entrust their safety to others and that entrustment is accepted. *Erickson*, 447 N.W.2d at 168.

Here, appellants explicitly alleged that the relief sought was supported by the facts in the complaint. However, the facts pleaded and reasonable inferences are not sufficient to support the finding of a special relationship. Respondents are simply the parents of an adult fugitive who lived with appellants for four years. None of the traditional relationships creating a duty to warn or protect are present. Appellants do not allege that based on the telephone conversations or mailed statements, an actionable trust relationship was established or was accepted by respondents. There was no special relationship directly between appellants and Lawrence and Delores Weaver.

We are not insensitive to the allegation that respondents helped their son remain a fugitive, which could have enabled Gordon Weaver to commit further harmful conduct at a future date. However, other than winning appellants' friendship and confidence and enjoying their hospitality, there is no claim that Gordon Weaver acted abusively or that respondents believed their son was acting abusively toward the Jaramillo family.

We ultimately agree with the district court that in these unique circumstances, the respondents had no legal duty to control Gordon Weaver or warn appellants of any danger he may have posed, and we therefore affirm the dismissal of appellants' negligence claim.

III.

The third issue is whether the district court erred in dismissing appellants' claim for negligent infliction of emotional distress. In order to state such a claim, a plaintiff must allege actionable negligence, as well as the additional elements specific to that tort. *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005); *see also K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995).

Because we have already concluded that appellants' negligence claim was properly dismissed, it is unnecessary to reach appellants' claim for negligent infliction of emotional distress. *See Doan v. Medtronic*, 560 N.W.2d 100, 107 (Minn. App. 1997) (affirming a grant of directed verdict on plaintiff's negligent infliction of emotional distress claim where plaintiff had no other valid defamation or tort claim involving an invasion of rights); *see also Oslin v. State*,

543 N.W.2d 408, 417 (Minn. App. 1996) (finding that such a claim failed after dismissal of defamation and battery claims).

Affirmed.

Dated: