

NO. A06-1403

State of Minnesota
In Court of Appeals

Arnold M. Johnson,

Appellant,

vs.

Shannon Peterson,

*Defendant,*Bankers Life and Casualty Company
and Richard Groom,*Respondents.*

RESPONDENTS' BRIEF, APPENDIX AND ADDENDUM

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I. Concise Statement of the Legal Issue Involved¹

DID THE DISTRICT COURT CORRECTLY CONCLUDE THAT PLAINTIFF FAILED TO ALLEGE ACTUAL OR THREATENED PHYSICAL, BODILY INJURY AS REQUIRED TO SUPPORT CLAIMS OF NEGLIGENT HIRING AND SUPERVISION?

The District Court granted Respondent Bankers Life and Casualty Company's ("Bankers") Motion to Dismiss pursuant to Rule 12.02(e) and Richard Groom's ("Groom") Motion for Judgment on the Pleadings pursuant to Rule 12.03 because Plaintiff's Amended Complaint did not support causes of action for negligent hiring or retention because it did not allege actual or threatened physical, bodily harm, a requisite element of the claims.

The most apposite cases include:

Semrad v. Edina Realty, Inc., 493 N.W.2d 528 (Minn. 1992);

Bruchas v. Preventative Care, Inc., 553 N.W.2d 440 (Minn. Ct. App. 1996);

Piper Jaffray Co. v. National Union Fire Ins. Co., 967 F. Supp. 1148 (D. Minn. 1997).

¹ Plaintiff failed to provide a Concise Statement of the Legal Issue Involved. Consequently, Defendants provide this Statement pursuant to Minn. Civ. App. P. 128.02 subd. 2.

II. Statement of the Case and Facts²

This case was heard by the Honorable Terrance C. Holter, District Court Judge of the Ninth Judicial District, County of Beltrami, State of Minnesota. Plaintiff Arnold Johnson (“Plaintiff”) filed his original Complaint solely against Defendant Shannon Peterson (“Peterson”). Plaintiff’s action alleged a fraud claim against Peterson, who was previously an insurance agent for Bankers. Plaintiff alleged that Peterson “made various false representations” to him which caused him to wrongfully transfer \$104,000 to her.

On January 5, 2006, Plaintiff served Defendants with an Amended Complaint alleging negligent hiring and negligent supervision. (Appendix of Defendants (“AD”) pp. A-1 – A-4). Plaintiff alleged that Defendants “negligently failed to properly screen [Peterson] for employment shortly before the theft from [Plaintiff], and failed to properly train or supervisor [her].” (AD pp. A-2 – A-3, ¶¶ II, VIII). Notably, Plaintiff asserted that Defendants’ alleged negligent hiring and supervision caused (or contributed to) the same monetary loss stemming from Peterson’s purported fraud. (See AD pp. A-2 – A-3, ¶ VIII).

Groom, who was initially represented by counsel retained by his insurance carrier, filed a Separate Answer. (See AD pp. A-5 – A-7). Bankers, which elected not to file an Answer, immediately moved to dismiss the lawsuit pursuant to Rule

² Plaintiff’s “Statement of Facts” does not inform the Court of the relevant facts and fails to conform to the requirements of Minn. Civ. App. P. 128.02 subd. 1(c). Consequently, Defendants offer their Statement of the Case and Facts pursuant to Minn. Civ. App. P. 128.02 subd. 2.

12.02(e). (See AD pp. A-8 – A-11). Subsequently, Bankers agreed to represent Groom in this lawsuit by its same counsel, which brought a Rule 12.03 motion, substantively identical to Bankers’ Rule 12.02(e) motion, on his behalf. (See AD pp. A-12 – A-13).

Plaintiff failed to timely file a responsive brief opposing Defendants’ Motion, and Defendants filed a Supplemental Memorandum alerting the District Court of this deficiency. (AD pp. A-14 – A-15). In response to Defendants’ Supplemental Memorandum, Plaintiff filed a two-page Memorandum opposing the motions. (AD pp. A-16 – A-17). On May 10, 2006, the District Court conducted a hearing on Defendants’ motions. On June 2, 2006, the District Court granted Defendants’ motions and ordered that judgment for Defendants be immediately entered.³ (Appendix of Plaintiff (“AP”), p. A-5). Judgment was entered on June 6, 2006, (AP p. A-6), and it is from this Judgment that Plaintiff appeals.

III. Standard of Review

On appeal, this Court must determine “whether the complaint sets forth a legally sufficient claim for relief.” *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (applying Rule 12.03(e)); *see also Trusts v. Hormel*, 543 N.W.2d 668, 671 (Minn. Ct. App. 1996) (applying the same standard in the review of a successful motion pursuant to Rule 12.03). “The standard of review is therefore *de novo*.” *Id.* The Court “must consider only the facts alleged

³ Presumably, Plaintiff’s action against Peterson continues in the District Court.

in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Id.*

In his brief, Plaintiff misstates the procedural posture of this case, wrongfully characterizing the dismissal of his Amended Complaint as being done pursuant to Rule 56 of the Minnesota Rules of Civil Procedure. As a result, he inappropriately discusses at great length various “facts” not found in the Amended Complaint and complains about his alleged inability to uncover additional facts through the course of discovery. Because Defendants’ motions were brought pursuant to Rule 12, however, Plaintiff’s discussion of this case beyond the four corners of the Amended Complaint must be disregarded.

IV. Argument

A. Negligent Hiring and Negligent Supervision Claims Require Proof of Actual or Threatened Physical, Bodily Injury.

At issue on appeal is whether Plaintiff’s Amended Complaint alleges actual or threatened physical, bodily injury. The District Court properly held that it did not, and ordered that judgment be entered for Defendants. The District Court’s determination that Plaintiff’s causes of action for negligent hiring and supervision failed to allege the requisite physical, bodily harm or threat thereof was exceedingly correct, and its judgment should be affirmed.

In Minnesota, it is well-established that the torts of negligent hiring and negligent supervision require proof of actual or threatened physical, bodily injury. *See e.g. Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440, 443 (Minn. Ct. App.

1996) (requiring “physical injury”); *Ivers v. Church of St. William*, No. C2-98-519, 1998 WL 887536 at *5 (Minn. Ct. App. Dec. 22, 1998)⁴ (same); *Ludwig v. Northwest Airlines, Inc.*, 98 F.Supp.2d 1057, 1072 (D. Minn. 2000) (requiring “bodily injury”); *McKenzie v. Lunds, Inc.*, 63 F.Supp.2d 986, 1007 (D. Minn. 1999) (requiring “physical harm”); *Willis v. Centennial Mortgage & Funding, Inc.*, No. Civ. 03-3641, 2004 WL 229076 at *12 (D. Minn. Feb. 2, 2004) (requiring “physical injury”); *Plaintiff, His Parent, On Behalf of J.M. v. Hopkins School Dist.*, No. Civ. 01-2124, 2003 WL 41639 at *12 (D. Minn. Jan. 3, 2003) (same); *Madrid v. Amazing Pictures*, No. Civ. 99-1565, 2001 WL 837922 at *13 (D. Minn. July 23, 2001) (same).

The torts of negligent hiring and supervision have been reserved for lawsuits in which a plaintiff sues an employer as a result of having suffered a physical injury (or threat thereof) at the hands of the employer’s agent, usually as a result of violent conduct. *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983) is a classic example of the conduct necessary to meet the physical-injury requirement. In *Ponticas*, a property management company hired a felon convicted of armed robbery and burglary to serve as a residential property manager. *Id.* at 909. The manager subsequently raped a resident at knifepoint. *Id.* The Court held that this violent conduct supported a negligent hiring claim against the property management company. *Id.* at 911; *see also Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 424 (Minn. Ct. App. 1993) (involving a employee who was

⁴ All unpublished cases are reproduced in the Addendum hereto.

fatally shot by a co-employee); *Oslin v. State*, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996) (listing employment-based negligence cases involving rape, assault and battery, assault, sexual abuse, and shooting).

It is equally well-settled that actual or threatened economic harm is insufficient to sustain claims for negligent hiring and supervision. *See Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992); *Equico Sec., Inc. v. Wang*, Nos. C5-00-1424, C8-00-1675, 2001 WL 267335 at *2 (Minn. Ct. App. March 20, 2001); *Piper Jaffray Co. v. National Union Fire Ins. Co.*, 967 F. Supp. 1148, 1157 (D. Minn. 1997).

B. Plaintiff Has Not Alleged, and Cannot Allege, Actual or Threatened Physical, Bodily Injury.

Plaintiff's Amended Complaint fails to set forth any facts alleging actual or threatened physical, bodily injury. Instead, Plaintiff simply asserts,

The Defendant Bankers Life and Casualty Company and Richard Groom negligently failed to properly screen Defendant Shannon Peterson for employment shortly before the theft from Plaintiff, and failed to properly train or supervise Defendant Shannon Peterson, which said acts contributed to the embezzlement and theft of money from Plaintiff.

(AD pp. A-2 – A-3, ¶ VIII). Although Plaintiff fails to set forth any specific causes of action in the Amended Complaint, Defendants and the District Court interpreted this statement as alleging negligent hiring and negligent supervision claims, and Plaintiff has not argued otherwise.⁵

⁵ To the extent that Plaintiff also alleges negligent training, Minnesota does not recognize such a cause of action. *See M.L. v. Magnuson*, 531 N.W.2d 849, 856

Assuming that Plaintiff's allegation against Defendants is true for the purposes of this appeal, his claims of negligent hiring and negligent supervision fail nonetheless. Plaintiff does not allege that Bankers' insurance agent, Peterson, caused or even threatened physical, bodily injury; nor could he given the nature of this lawsuit and the underlying facts as set forth in the Amended Complaint. To the contrary, Plaintiff alleges that as a result of Peterson's fraudulent scheme he suffered \$104,000.00 in economic harm. (See AD pp. A-1 – A-3, ¶¶ I, VIII, Demand for Judgment). Peterson's alleged fraud undeniably did not threaten or cause physical, bodily harm to Plaintiff. Consequently, the District Court appropriately dismissed these claims and entered judgment for Defendants. This Court must affirm that judgment.

C. **Plaintiff's Allegation of Emotional Distress Stemming from Peterson's Fraud is Insufficient to Support Negligent Hiring and Supervision Claims.**

Conceding that negligent hiring and supervision claims require actual or threatened physical, bodily harm, Plaintiff points to Paragraph IX of his Amended Complaint, which states "that as a result of the stress and anxiety of these events Plaintiff has developed medical complications including heart problems and anxiety related disorders." (AD p. A-3). However, as Minnesota case law makes

(Minn. Ct. App. 1995) (recognizing only three negligence causes of action against an employer based on its employee's conduct: negligent hiring, retention and supervision); *McKenzie v. Lunds, Inc.*, 63 F.Supp.2d 986, 1007 (D. Minn. 1999) (no cause of action for negligent training); *Mandy v. Minnesota Mining & Mfg.*, 940 F. Supp. 1463, 1473 (D. Minn. 1996) (same); *Hermeling v. Montgomery Ward & Co.*, 851 F. Supp. 1369, 1381 n.11 (D. Minn. 1994) (same).

clear, this plea for emotional distress damages falls woefully short of the physical-harm requirement.

As stated in numerous cases above, negligent hiring and supervision “may not be predicated upon economic loss.” *Piper Jaffray Co. v. National Union Fire Ins. Co.*, 967 F. Supp. 1148, 1157 (D. Minn. 1997). In fact, courts faced with negligent hiring and supervision claims unsupported by physical injury beyond emotional distress have routinely dismissed these claims. In *Plaintiff, His Parent, On Behalf of J.M. v. Hopkins Sch. Dist.*, No. Civ. 01-2124, 2003 WL 41639 at *12 (D. Minn. Jan. 3, 2003), the plaintiff asserted that the school district had a duty to prevent its employees from “falsely prosecut[ing] and/or suspend[ing]” a student. The District Court noted that “negligent supervision claims require proof a physical injury,” and held that “Plaintiff has not presented evidence addressing the above criteria and *only seeks emotional distress damages.*” *Id.* (emphasis added). Thus, the plaintiff’s “evidence [was] insufficient to raise a factual issue,” and the cause of action was dismissed. *Id.*

Similarly, in *Ludwig v. Northwest Airlines, Inc.*, 98 F.Supp.2d 1057, 1072 (D. Minn. 2000), the plaintiff alleged negligent hiring and supervision along with intentional infliction of emotional distress collectively based on alleged sex discrimination. Despite the emotional distress allegation, the District Court held that “Ludwig’s negligent hiring and supervision claims likewise fail because she has not alleged the type of injury necessary to maintain such claims, namely, bodily injury or the threat of bodily injury.” *Id.*; see also *Madrid v. Amazing*

Pictures, No. Civ. 99-1565, 2001 WL 837922 at *13 (D. Minn. July 23, 2001)

(dismissing negligent hiring, retention and supervision claims for lacking threatened or actual physical injury despite a concurrent claim for emotional distress).

Ultimately, as recognized repeatedly by the federal courts of Minnesota, emotional distress stemming from an economic harm does not change the fact that the tort at issue, fraud, is economic (and not physical) in nature. Fundamentally, the (mis)conduct itself must be physical in nature; an arguably physical response to an economic harm, no matter how genuine, does not suffice. Given plaintiffs' proclivity to liberally attach emotional distress and related damages claims to their complaints, any other reading would dramatically increase the scope of negligent hiring and supervision claims beyond the Minnesota Supreme Court's intent. *See Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992) (these doctrines are limited to a "duty to prevent an employee from inflicting personal injury upon a third person on the master's premises or to prevent the infliction of bodily harm by use or misuse of the employer's chattels").

In sum, courts have considered and rejected the argument that emotional distress meets the physical injury requirement of negligent hiring and supervision. Because the underlying tort at issue in this case, fraud, undeniably caused economic and not physical, bodily harm, the District Court correctly dismissed Defendants from this case and entered judgment in their favor.

V. **Conclusion**

Plaintiff's Amended Complaint alleges fraud against Peterson and asks for the return of \$104,000.00. This economic harm does not support negligent hiring and supervision claims against Defendants as a matter of law. Consequently, this Court must affirm the District Court's entry of judgment in favor of Defendants Bankers Life and Casualty Company and Richard Groom.

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Dated: September 25, 2006.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).