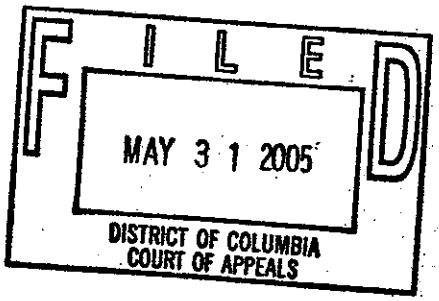
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 02-CV-729

YEATO G. PRALL, APPELLANT,

v. CA-5642-00

STEPHANE R. ALRIVY, APPELLEE.



Appeal from the Superior Court of the
District of Columbia
Civil Division

(Hon. A. Franklin Burgess, Jr., Trial Judge)

(Submitted November 18, 2004 Decided MAY 31 2005)

Before FARRELL, RUIZ, and GLICKMAN, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a bench trial, the court (Judge Burgess) made written findings of fact and conclusions of law and entered judgment for appellee, primarily on appellant's suit for negligence arising from appellee's alleged failure to inform her that he had a disease (HPV) which could be transmitted by sexual contact.[1] Appellant challenges that judgment in several respects, but upon examination of the record we perceive no basis on which to disturb the judge's meticulous findings of fact and application of the law thereto. We accordingly affirm.

I.

Appellant initially contends that Judge Burgess addressed only a portion of her claims in his decision. The judge analyzed appellant's suit as essentially one alleging negligence ("[P]laintiff's contention is that the defendant was negligent"), *i.e.*, that appellee knew or should have known that he had contracted HPV and breached a duty to warn appellee of that fact. Appellant asserts, however, that a key additional part of her suit was an allegation of fraud or deceit, namely, that before beginning his intimate relationship with her, appellee "deliberately and fraudulently misrepresented to appellant that he . . . was single and had been celibate for two years prior to meeting [her]" (Br. for App. at 7). Knowledge of the truth, appellant argues — *i.e.*, that appellee had had a previous history of sexual contacts — "would have put [her] on notice as to the consequences of any sexual

[1] The judge also found against appellant on her separate claim of intentional infliction of emotional distress, which was based upon later conduct by appellee in informing a campus police officer that appellant had threatened to have him killed.

relationship with appellee" (*id.* at 16), regardless of any later negligence (vel non) on his part in failing to disclose his disease.

If properly preserved, appellant's claim would require us to decide, for the first time in this jurisdiction, whether to recognize a cause of action for fraud, deceit, or misrepresentation based upon a plaintiff's allegation that she had sexual relations with the defendant in reliance on his false assertion of recent celibacy. Indeed, so far as we are aware, to recognize such a cause would take us where no court has yet ventured.[2] We conclude, however, that appellant has not adequately preserved either the issue of the trial court's failure to resolve her claim of deceit or the claim itself.

As pointed out, Judge Burgess did not separately address the assertion that appellee had falsely induced appellant to begin a sexual relationship by lying about his celibacy during the two years before they met. The judge's failure to address the claim is understandable. "[C]ommon law fraud is never presumed, and a plaintiff alleging it must do so with particularity and must prove it by clear and convincing evidence." *Hercules & Co v. Shama Rest. Corp.*, 613 A.2d 916, 923 (D.C. 1992) (citation omitted). As *amicus* points out, in her complaint appellant did not allege, with particularity or otherwise, any claim based on appellee's misrepresentation of celibacy before they met. Appellant did advert briefly to such a claim in the joint pretrial statement, and at a pretrial hearing the judge perceived her to be alleging separately that appellee had "in effect lied to you by

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[2] Because of the apparent novelty of the issue, and the fact that appellant appears before us *pro se* (appellee filed no brief), we asked the Legal Aid Society of the District of Columbia to file a brief as *amicus curiae* addressing the deceit issue as well as whether appellant properly presented that claim in the trial court. In its very helpful submission, *amicus* urges against adoption of such a cause of action. It points out that, based on its research, no other court has "allowed a plaintiff to make out a cause of action for fraud against a sex partner who infected her with a sexually transmitted disease when, as here, the defendant did not deceive the plaintiff about his having the disease (*e.g.*, because he did no know or have reason to know that he had it), but did deceive the defendant about something else," here his recent sexual activity (or not). Br. for *Amicus* at 10-11. More basically, *amicus* contends that such a cause would contravene the principle that a "fraudulent misrepresentation is a legal cause of a . . . loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance." RESTATEMENT (SECOND) OF TORTS, § 548A (1977). Ordinarily, *amicus* maintains, causing a sex partner to contract a sexually transmitted disease is not an injury that "might reasonably be expected to result from the reliance" on an assurance of recent celibacy, "at least so long as the person making the misrepresentation, like Mr. Alrivy here, does not know or have reason to know that he has a disease. The mere fact that a person has engaged in sexual relations during the past two years does not make it reasonably foreseeable that the person has a sexually transmitted disease." Br. for *Amicus* at 9. Finally, *amicus* urges great caution in this area because "[t]o recognize a 'sex fraud' cause of action, available to anyone who could claim to have been induced to enter into a sexual relationship by the partner's deception, and to have suffered physical, emotional, or monetary harm as a result, would have far-reaching ramifications for privacy, interpersonal relations, and the workload of the courts." *Id.* at 13 (footnote omitted).

saying he hadn't had any sexual relations with anybody in the last two years [before their relationship began]." At trial, however, in her statements to the court, presentation of evidence, and cross-examination of appellee, appellant barely alluded to the claim of misrepresentation. *Amicus* has accurately summarized the trial record in this regard at pages 15-17 of its brief; we do not repeat that discussion here except to express our agreement with *amicus*'s conclusion that, "[i]n the[] circumstances, the [trial] court could not be expected to recognize that [appellant] was asserting a fraud claim based upon a statement of [appellee's] to which she had made only a fleeting reference at trial." *Id.* at 17.[3] Despite the broad latitude the trial judge gave appellant to present her claims, she did not allege or seek to prove a claim of fraud with anything like the specificity that would, or should, have alerted the judge to the need to make findings relevant to it.[4] And she likewise did not create a record sufficient to obligate this court to decide whether to recognize a claim at once so novel and problematical.

II.

Appellant's remaining arguments can be disposed of summarily. She disputes the judge's conclusion that she was unqualified to offer an expert opinion as to the diagnosis and treatment of HPV. Such determinations may be reversed only for abuse of discretion. *See In re Melton*, 597 A.2d 892, 897 (D.C. 1991) (en banc). The issue, however, is moot in any event because Judge Burgess went on to conclude that "the plaintiff's lack of expertise is not fatal to the gist of her case [alleging negligence] . . . . Plaintiff's argument that the defendant caused her to contract the virus does not depend on a medical diagnosis as to when he became exposed." As the court's ultimate decision did not rest on the issue to which appellant's proffered "expert" testimony was directed, she was not prejudiced by the ruling.

Judge Burgess found that, although it was likely that appellee had HPV and had transmitted it to appellant, appellant did not carry her burden of proving that he had knowledge of the condition (actual or constructive) creating a duty to warn her or to refrain from sexual intercourse with her. Beyond impermissibly faulting credibility determinations which the judge made, *see, e.g., In re P.S.*, 797 A.2d 1219, 1224 (D.C. 2001), appellant offers nothing to persuade us that the judge's findings on that issue were plainly wrong or

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[3] In cross-examining appellee, for example, appellant asked no questions about any representations he had made to her about his previous celibacy. And on repeated occasions the judge expressed his understanding that the issues before him revolved about negligence, *i.e.*, whether appellee "knew he had [the disease, whether] he gave it to you, [and whether] he knew he had it or should have known he had it." [Tr. 2/14/02 at 110; *see also id.* at 74 ("[Y]ou know the issues here are . . . whether he's negligent in not telling you about the disease if he had it.").] Appellant said nothing to correct the judge's understanding of her claim.

[4] As *amicus* points out, appellant "did not testify, or offer other evidence, as to whether [appellee's] misrepresentation concerned material fact, whether she relied on the misrepresentation in deciding to engage in sexual relations with him, and whether such reliance was the cause-in-fact of her contracting HPV." Br. for *Amicus* at 16.

without evidence to support them. *See* D.C. Code § 17-305 (a).[5] Additionally, Judge Burgess did not abuse his discretion in vacating the default he had previously entered because of appellee's grudging compliance with mediation. *See* Super. Ct. Civ. R. 55 (c);[6] *Arthur v. District of Columbia*, 857 A.2d 473, 485 (D.C. 2004) ("[T]he decision whether to vacate the entry of default is committed to the sound discretion of the trial court."). Finally, appellant's suggestion that the trial judge "concealed evidence," and that he was bound to recuse himself for that reason, has no support in the record.

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk

Copies to:

Hon. A. Franklin Burgess, Jr.

Clerk, Superior Court

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[5] The same holds with regard to the judge's rejection of appellant's claim for intentional infliction of emotional distress.

[6] The judge made clear that the default had been entered, not as a judgment, but pursuant to Rule 55 (a) ("[I]t's easier to get a default removed than it is to get a default judgment removed.").