

IN THE COURT OF APPEALS OF IOWA

No. 2-645 / 12-0286
Filed September 19, 2012

**IN RE THE MARRIAGE OF GENE C. LUKEN
AND TINA M. LUKEN**

**Upon the Petition of
GENE C. LUKEN,**
Petitioner-Appellant,

**And Concerning
TINA M. LUKEN,
n/k/a TINA M. EDWARDS,**
Respondent-Appellee.

Appeal from the Iowa District Court for Dickinson County, Nancy L. Whittenburg, Judge.

A husband appeals the denial of a motion to vacate a dissolution decree on grounds of extrinsic fraud. **AFFIRMED.**

Stephen F. Avery and Andrea M. Smook of Cornwall, Avery, Bjornstad & Scott, Spencer, for appellant.

Randall G. Sease of Sease Law Firm, Hartley, and Matthew G. Sease of Kemp, Sease & Dyer, Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

Gene Luken appeals the denial of a motion to vacate a dissolution decree on grounds of extrinsic fraud.

I. Background Facts and Proceedings

Gene and Tina married in 2001 and divorced in 2010. In a detailed opinion, the district court classified and valued the couple's assets, distributed them, and granted Tina short-term rehabilitative alimony.

Several months after the decree was filed, Gene petitioned to have it vacated. He alleged and argued that he discovered a journal maintained by Tina, which documented surreptitious recordings of his telephone conversations. He further asserted that Tina intercepted discussions of trial strategy, preventing him from reaching an out-of-court settlement. He requested the entry of a new decree transferring to him all the assets except Tina's retirement fund and her personal effects.

The district court reopened the record to accept evidence on this issue and, following a hearing, denied the petition. This appeal followed.

II. Analysis

Iowa Rule of Civil Procedure 1.1012 states that a court may vacate or modify a final judgment or order, or grant a new trial on such judgment or order if, among other things, there was "[i]rregularity or fraud practiced in obtaining it." Iowa R. Civ. P. 1.1012(2). "Proving fraud is a difficult task." *In re Marriage of Cutler*, 588 N.W.2d 425, 430 (Iowa 1999). It requires proof of several factors by clear and convincing evidence. *Id.* (referring to the traditional elements of fraud). Those elements are:

(1) [the] defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in [justifiable] reliance on the truth of the representation . . . , (7) the representation was a proximate cause of [the] plaintiff's damages, and (8) the amount of damages.

Dier v. Peters, 815 N.W.2d 1, 7 (Iowa 2012) (citation omitted).¹

Gene does not cite or apply the fraud elements because, in his view, opinions involving “the modification or retrial of divorce decrees have not required the analysis of these factors.” Gene overlooks *Cutler*, which was a challenge to a divorce decree based on allegations of fraud and which specifically applied the traditional fraud factors. 588 N.W.2d at 429–30. In light of *Cutler*, we find the traditional common law fraud test applicable to this factual scenario. *Cutler* also disposes of Gene’s related argument that Tina’s actions should constitute fraud per se.

We turn to an application of the elements. As a preliminary matter, it is unclear what “representation” Gene is challenging.² Based on a review of Gene’s petition and testimony, we will assume without deciding that he is challenging Tina’s representation that the recordings only picked up Gene’s side of the conversation precluding her from overhearing third-party statements about trial strategy. We will also assume without deciding that he is challenging Tina’s failure to disclose her decision to record his conversations. See *Cutler*, 588

¹ The court noted that *Cutler* referred to six elements of fraud but stated that the court has also sometimes divided one of those elements, to come up with a seventh required element. *Dier*, 815 N.W.2d at 7 n.3.

² Gene was asked to explain to the court what fraud he thought had been practiced. He responded, “Well, she was illegally listening to my phone conversations, my strategy, both with my attorney, family and friends. And, you know, the information that she gained, she gained by fraudulent means. And, you know, I—I don’t think that’s right.”

N.W.2d at 430 (referring to a failure to disclose when under a legal duty to do so).³

With respect to Tina's representation that she did not overhear third-parties, the district court agreed, finding no evidence that Tina used technology capable of recording people on the other end of the line with Gene. Substantial evidence supports this finding. Tina testified that she used standard recording devices and not technology that could be attached to cell phones. Her friend seconded this assertion. The only evidence Gene introduced to challenge this testimony was a printout from a spyware website. He conceded he had no information tying the equipment described in the printout to his cell phone and he also conceded he did not have a professional examine his cell phone to determine whether it had been altered. Based on this evidence, we conclude Gene cannot prevail on a fraud claim premised on this representation.

Remaining is Gene's challenge to Tina's secret recording of him. The district court made several pertinent fact findings. First, Tina conceded, and the court found, that she "purchased or obtained numerous digital hand-held recorders to record [Gene's] telephone conversations during the pendency of the parties' dissolution of marriage proceedings and in fact did record numerous such conversations." Second, the court found that Tina made these recordings

³ See Iowa Code § 808B.2 (2009) (making it unlawful to "[w]illfully intercept[] . . . a wire, oral, or electronic communication"). However, this provision also states,

It is not unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Id. § 808B.2(2)(c).

by hiding “voice activated recorders in the marital home in several places, including but not limited to [Gene’s] desk.” Third, the court found that “some of the digital recordings made by [Tina] occurred with [Gene’s] knowledge and some did not.” Finally, the court found that Tina took notes from the digital recordings which made reference to conversations that Gene did not know were being recorded.

These findings are again supported by substantial evidence in the form of testimony from Tina, her friend, and the notes of the conversations. There is simply no question that Tina recorded Gene’s side of telephone conversations without his knowledge.

The real question is whether this conduct was the proximate cause of Gene’s damages. See *Dier*, 815 N.W.2d at 7. Proximate cause “address[es] the question whether the losses that in fact resulted from the reliance were connected to the misrepresentation in a way to which the law attaches legal significance.” *Id.* at 9 (citation omitted).

The district court essentially considered this question and made the following findings:

Despite the fact that [Tina] digitally recorded [Gene’s] telephone conversations, both with and without [his] knowledge, [Gene] could not identify any evidence that he was prevented from introducing at trial nor demonstrate how [Tina’s] conduct prevented a fair submission of this case to the trial court and affected the trial court’s judgment.

We agree that the record does not contain substantial evidence of proximate cause. The only concrete evidence that Gene contends Tina garnered through

the secret recording process was his discussion of a conspiracy theory⁴ with his attorney. He maintains his attorney intended to use this theory as a bargaining tool during settlement negotiations but when Tina secretly gained knowledge of this strategy she was afforded an advantage in those negotiations.

Gene's own testimony undermines this assertion. Specifically, he admitted his attorney wrote to one of Tina's first attorneys about his conspiracy theory. Because the information was already in the hands of Tina's attorney, the secretly recorded conversation about this theory could not have placed Tina at a strategic advantage in settlement negotiations. Additionally, as the district court concluded, Gene's argument that the recordings allowed Tina to "obtain insight into his trial strategy which then prevented [him] from reaching an out-of-court settlement" was not supported by legal authority showing an entitlement to an out-of-court settlement.

More to the point, as the district court found, Gene did not identify any financial evidence that he was unable to present, that was not fully presented, or that was called into question by virtue of the secret recordings. He proffered a premarital agreement which, he asserted, governed the distribution of most of the assets, and he introduced a host of additional financial exhibits which the district court carefully considered in its dissolution decree.⁵ Therefore, he could not prevail on his fraud claim premised on the secret recordings.

⁴ Gene testified that he and his attorney discussed the possibility of bringing a suit against Tina alleging that she and another man entered into a conspiracy to defraud Gene. In this scheme, Tina was to marry Gene for his money, divorce him, and run away with the man that she had been seeing before she and Gene married.

⁵ He also introduced an exhibit itemizing cell phone calls by Tina to a man. It is unclear from the record whether this exhibit was introduced to advance his conspiracy theory or for some other purpose.

In reaching this conclusion, we have considered Gene's argument that he has no other means of seeking redress for Tina's conduct. We are not persuaded by this argument, as he acknowledges several other avenues for relief, including a cause of action for invasion of privacy. See *In re Marriage of Tigges*, 758 N.W.2d 824, 830 (Iowa 2008).

We affirm the district court's denial of Gene's petition to vacate the dissolution decree.

AFFIRMED.