Notice of Erratum

In last week's issue of the Advance Sheets (Vol. 17, No. 13, October 15, 1999), a Court Opinion was published, inadvertently, without notation of the identity of the Judge who rendered the Opinion. Your editor has found it necessary to republish the entire Opinion, because the addition of this small amount of material, nevertheless, threw the entire thing out of format. It resulted, in fact, in the necessary expansion of the printed Opinion, in order to bring it within our ordinary format, to an additional page. We are sorry this happened, but now is the time to fix up errors of that variety, so as to prevent having to make even larger changes, later on. The Opinion is that of *Bricker v. Mt. Zion Cemetery Association*, which ran from page 64 to page 72, as originally published, but now, in the corrected version (which will be the version published in the bound volume, when it is compiled), it runs from page 64 to page 73.

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MRS. DANIEL BRICKER, a/k/a BETTY L. BRICKER, Plaintiff vs. MT. ZION CEMETERY ASSOCIATION, Defendant, C.P. Franklin County Branch, Civil Action, A.D. 1998-427

Bricker v. Mt. Zion Cemetery Association

Intentional Infliction of Emotional Distress - Negligent Infliction of Emotional Distress

1. To prevail in a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant's extreme and outrageous conduct intentionally or recklessly caused the plaintiff severe emotional distress.

2. Extreme and outrageous conduct is more than annoying, bothersome and spiteful conduct.

3. Courts must look to the community's values to determine what constitutes extreme and outrageous conduct.

4. Conduct cannot be considered extreme and outrageous if it is precipitated by notice that would tend to make the conduct less shocking.

5. Pennsylvania recognizes three methods for a plaintiff to successfully recover in an action for negligent infliction of emotional distress: the "bystander rule", the Sinn test and the physical impact rule.

6. The physical impact rule is only applicable where a plaintiff has suffered a direct bodily injury, no matter how trivial.

7. While sleeplessness and chest pains satisfy the physical impact rule, anxiety and depression do not.

Stephen D. Kulla, Esquire, Attorney for Plaintiff
Keith A. Noll, Esquire, Attorney for Defendant

OPINION AND ORDER

WALKER, P. J., July 15, 1999:

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Factual and Procedural Background

After her husband's death in 1993, Plaintiff Betty L. Bricker purchased a cemetery plot from Defendant Mt. Zion Cemetery Association ("Mt. Zion"). After purchasing the plot, the plaintiff placed a monument on the plot which included an area for planting. On April 11, 1997, the defendant mailed her a letter informing her that the lot was not in compliance with the cemetery regulations. As a result, the defendant requested that if she did not remove the flowers, it would be forced to remove them. The plaintiff responded to the defendant's letter, informing it that she believed she was in conformity with the regulations, and further requesting that the defendant not remove the flowers from the monument. Later, in September of 1998, the defendant did remove the flowers from the monument, as well as a portion of the monument that was used to enclose the flowers.

On September 17, 1998, the plaintiff filed a complaint against Mt. Zion setting forth several counts for relief. The defendant responded by filing preliminary objections to all of the counts. Among the objections were Count III and IV of the plaintiff's complaint, alleging intentional infliction of emotional distress and negligent infliction of emotional distress. After hearing arguments from both parties, this court ordered the plaintiff to amend Count IV to specifically allege a physical injury to the plaintiff, and to specifically allege facts that demonstrate the defendant's extreme and outrageous conduct in Count III.

The plaintiff filed an amended complaint on March 5, 1999. The defendant then filed an answer and new matter, followed

by the plaintiff's reply. On May 17, 1999, the defendant filed a motion for judgment on the pleadings. The court heard arguments from both parties on July 1, 1999.

Discussion

A motion for judgment on the pleadings is in the nature of a demurrer. *Kerr v. Borough of Union City*, 150 Pa. Commw. 21, 614 A.2d 338 (Pa. Commw. 1993), *petition for allowance of appeal denied*, 534 Pa. 651, 627 A.2d 181 (1993). All of the non-movant's well-pleaded allegations are viewed as true, and only the specifically admitted facts may be considered against him. *Id.* A motion for judgment on the pleadings will be granted where the law is clear that a trial would be a fruitless exercise. *E-Z Parks, Inc. v. Philadelphia Parking Authority*, 110 Pa. Commw. 629, 532 A.2d 1272 (1987), *petition for allowance of appeal denied*, 519 Pa. 656, 546 A.2d 60 (1988). It is in this light that the issues presented must be resolved.

In filing for this judgment on the pleadings, the defendant argues that plaintiff's counts of intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) are insufficient as a matter of law. The defendant claims that the IIED count is insufficient because the facts in the pleadings do not display the required elements of intent and extreme and outrageous conduct. Secondly, the defendant contends that the facts in the pleadings on the NIED count are insufficient in that they fail to display a physical injury required by the impact rule.

Intentional Infliction of Emotional Distress

To prevail on an IIED claim, a plaintiff must prove that the defendant's extreme and outrageous conduct intentionally or recklessly caused the plaintiff severe emotional distress. The defendant correctly indicates that the gravamen of IIED is the element of extreme and outrageous conduct.

> "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Motheral v. Burkhart, 538 A.2d 1180, 1188 (Pa. Super. Ct. 1990). Given this strong language, it would be perspicacious to first determine if the facts contained in the instant pleadings by the plaintiff satisfy the exacting element of extreme and outrageous conduct.

Upon review of applicable law and commentary focused on this element of IIED, it is clear to this court that historically the element of extreme and outrageous has not been satisfied by pleading conduct that is annoying, bothersome, and spiteful. Restatement (Second) Of Torts §46 cmt. d (1965).

> "The rough edges of society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to

> intervene in every case where some one's [sic] feelings are hurt."

Id. In the thirty-four years following the construction of the above statement, it could be successfully argued that society has yet to be filed down, and that it indeed has most likely added more film to its mettle.

> "Against a large part of the frictions and irritations and clashing of temperments [sic] incident to participation in community life, a certain toughening of the mental hide is a better protection than the law could ever be."

Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harvard Law Review 1033 (1936). So what type of behavior precipitates legal intervention and permits recovery by a disgruntled plaintiff?

The defendant cites a case in which a cause of action of IIED was brought against a cemetery for failure to maintain the gravesite of a young child. *Kazatsky v. King David Memorial Park, Inc.*, 515 Pa. 183, 527 A.2d 988 (1987). The plaintiff parents in *Kazatsky* alleged that a cemetery refused their request to install a marker at the site, refused to allow an unveiling ceremony, and failed to provide care and maintenance of the site. *Id.* at 190. While *Kazatsky* is factually similar to the instant case, the issue of extreme and outrageous conduct was left unresolved. The court there determined that the plaintiff must first present medical evidence of emotional distress. *Id.* at 197. The case does, however, provide a very useful discussion of the vagueness and subjectiveness inherent in analysis of extreme and outrageous conduct. It compares the detection of extreme and outrageous conduct to that of hard

core obscenity in that judges will know it when they see it. *Id.* at 196. The court seems to ultimately conclude that courts will resolve the issue by reflecting on the community's values.

The defendant movant also cites a case in which parents brought an IIED against a defendant that struck their son with his automobile. *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970). The defendant had stored the late son in his garage for five days before eventually burying the boy's corpse in a field. Two months later, the partially decomposed remains were found and returned to the parents for proper burial. *Id.* at 175. The court concluded that those acts were extreme and outrageous, and allowed the plaintiff to recover. The defendant also refers to a case (without a cite) in which a nurse left a patient with an IV needle in his arm to attend a birthday party while on duty. There, the conduct was *not* considered extreme or outrageous.

This court recognizes the reverence many people in society place upon a cemetery lot and the monuments and shrines that are erected upon them. The court is aware of the solemnity of placing a monument as a memorial tribute to a departed loved one. Many visit the gravesite of their loved ones to find a solace, and they are able to work out their remaining grief and anguish in a psychologically therapeutic manner. Many within this county find vandalism of cemeteries to be upon the upper echelon of heinous crimes, and this court is sympathetic to that sentiment. The court also recognizes the symbolism involved in maintaining a resting place in love and homage of the dearly departed. However, this court finds that the defendant's actions in this case were not extreme and outrageous because the plaintiffs had notice. First, the plaintiffs signed the

agreement listed as "Exhibit A" in the complaint. This agreement at the outset gave the plaintiff notice that the existing provisions, conditions, and restrictions must be followed, as well as those rules prospectively prescribed. "Exhibit C" in the plaintiff's complaint contains six such rules regarding flowers. In particular, Rule # 2 explained that future planting of shrubs and flowers was not allowed, unless in an urn or container which is an integral part of the monument. On its face, the rule at least makes the area in front of the plaintiff's marker questionable. But the court need not determine whether the area was "integral," only whether the defendant's conduct was extreme and outrageous. Albeit, the debatable conformity of the plaintiff's monument and lot does oblige this court to perceive less extremity in the defendant's behavior.

Conclusively, the letter sent by the defendant on August 25, 1998, convinces this court that the ensuing removal of the plants and encroachment was not an extreme or outrageous act. The letter, listed as "Exhibit F" in the plaintiff's complaint, straightforwardly explained to the plaintiff that she had fifteen (15) days to bring the lot within conformity to the cemetery's rules. In addition, the defendant relayed the critical fact that it would remove the plants and encroachment if the notice was not observed.

In sum, the court opines that IIED necessitates behavior that would shock an individual. The final resting place of a loved one is a symbolic and sacred location. Vandalism of the site would correctly shock, astound, and flabbergast the remaining family members. But to remove prohibited arrays from such a site with authority, assent, or notice is quite a different scenario. Forthwith, the notice sent to the plaintiff sufficed to

alleviate any foreseeable shock. Because no extreme or outrageous conduct is found, the remaining elements need not be addressed.

Negligent Infliction of Emotional Distress

Presently in Pennsylvania, there are three theories upon which a plaintiff may successfully recover in a NIED action. The "bystander rule," also referred to as the "zone of danger" rule, only requires a plaintiff to be within the area of the defendant's tortious conduct. *Niederman v. Brodsky*, 436 Pa. 401 (1970). The *Sinn* Test requires (1) the plaintiff to be located near the scene, (2) the emotional distress to be a direct sensory result of observing the scene (not second-hand information), and (3) the presence of a close relationship between the plaintiff and the victim. *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). Finally, the "impact rule" requires a direct physical impact on the plaintiff. *Brown v. Philadelphia College,* 449 Pa.Super. 667, 674 A.2d 1130 (1996). The court has already determined, upon deciding preliminary objections, that the bystander rule and *Sinn* test were not apropos to the present factual scenario. The plaintiff was ordered to file an amended complaint to plead sufficient facts under the applicable law, the impact rule.

Both parties have cited *Brown* in favor of their positions. In *Brown*, a woman had a miscarriage and, while recovering in the hospital bed, she was given the bloody fetus to hold. *Id.* at 1132. In an apparent attempt to make the display truly demented, the nurse was directed to take photographs of Mrs. Brown holding the bloody fetus. *Id.* Mrs. Brown brought suit under NIED, and on appeal it was argued that the trial court

incorrectly applied the *Sinn* test as opposed to the impact rule. *Id.* at 1133. Ultimately, the case was remanded to the trial court to determine the issue of damages. *Id.* 1138.

A plaintiff is eligible to recover under the impact rule if,

> "a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff..."

Potere v. City of Philadelphia, 380 Pa. 581, 588, 112 A.2d 100, 104 (1955). It is not clear as to how far the impact rule may be extended. Headaches? Nausea? In the present matter, the plaintiff has averred in her amended complaint that because of the defendant's conduct, she now suffers from anxiety, depression, sleeplessness, and chest pains. In this court's determination, anxiety and depression are too vague under the impact rule. Sleeplessness, however, is closer to physical impact, and the court is willing to conclude that it narrowly satisfies the impact rule. Lastly, the court finds that chest pains are also clear evidence of direct physical impact.

In summary, anxiety and depression do not constitute physical impact, and the plaintiff may not recover for them in a NIED claim. Sleeplessness and chest pains comprise physical impact, and therefore the plaintiff has successfully withstood the defendant's motion for judgment on the pleadings insofar as they are concerned. The court finds all other elements for NIED to be satisfied as well. While sleeplessness and chest pains satisfy the impact rule and the present motion, to prevail beyond the pleadings the plaintiff should be prepared to provide medical documentation of these injuries.

ORDER OF COURT

July 15, 1999, after consideration of the motion for judgment on the pleadings filed by defendant, the arguments by both parties in open court, and the parties' briefs, this court enters the following order:

1. Count III of the plaintiff's amended complaint is dismissed because the plaintiff has failed to plead sufficient facts to support the element of extreme and outrageous conduct.

2. Count IV of the plaintiff's amended complaint successfully pleads the impact rule by alleging sleeplessness and chest pains. The court finds that anxiety and depression do not illustrate physical impact. Count IV is not dismissed, but the plaintiff may not seek damages for anxiety or depression.

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COMPULSIVE GAMBLING

Compulsive gambling is...
a progressive behavior disorder in which an individual has a psychologically uncontrollable preoccupation and urge to gamble.

This results in excessive gambling, the outcome of which is the loss of time and money.

The gambling reaches the point at which it compromises, disrupts or destroys the gambler's personal life, family relationships or vocational pursuits.

If you are concerned that you, a colleague or a family member may be a problem gambler,

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