

Barnhart v. Morton

ROBIN G. BARNHART, individually and as mother and natural guardian and Trustee Ad Litem for the Estate of Timothy N. Sipes, a minor, now deceased, Plaintiff, v. JACK H. MORTON, a/k/a JACK H. MORTON, SR., and/or JACK H. MORTON I, and MARY JANE MORTON, his wife, and JACK H. MORTON II, Defendants  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Fulton County Branch  
Civil Action - Law, No. 248-2004-C

*Demurrer to claim of negligent infliction of emotional distress*

1. A cause of action for negligent infliction of emotional distress exists if certain criteria are met: (1) plaintiff was located near the scene of an accident, as opposed to being a distance away; (2) the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observation of the accident, as opposed to learning of the accident from others after its occurrence; and (3) plaintiff and the victim were closely related, as opposed to there being an absence of any relationship or only a distant relationship between the two.

2. Aural perception can also constitute sensory and contemporaneous observation, but standing alone, it rarely gives rise to a sufficient awareness of the nature and import of the event to cause severe emotional injury.

3. Where plaintiff only heard her son's cries for help after being injured on defendant's dairy farm, and where she had no prior or subsequent visual observation of the accident, but only saw her son after he had been taken to the hospital, plaintiff had only limited aural awareness of the accident when it happened via a telephone connection and therefore did not meet the criteria for pursuing a claim of negligent infliction of emotional distress.

Appearances:

Christian Earl Eaby, Esq.

Gregory S. Hirtzel, Esq.

Kevin L. Connors, Esq.

OPINION

Walker, P.J., July 15, 2005

The plaintiff filed this complaint on November 8, 2004 and filed an amended complaint on December 7, 2004. Defendants filed preliminary objections on December 9, 2004. The complaint arises because plaintiff's seventeen-year-old son died while working on a dairy farm that was allegedly owned and operated by the defendants. Plaintiff brings the actions under the Pennsylvania Wrongful Death Act, 42 Pa. C.S.A. §8301, and the Pennsylvania Survival Act, 42 Pa. C.S.A. §8302. She also brings a claim for negligent infliction of emotional distress.

Defendants contend, in their preliminary objections, that (1) plaintiff's complaint fails to allege the requisite conduct needed to state a claim for punitive damages; (2) plaintiff's claims for negligent infliction of emotional distress are insufficient; and (3) plaintiff's allegations of defendants' control over the property lack specificity. Defendants' first two preliminary objections are in the form of a demurrer. Pa.R.C.P.

§1028(a)(4). Demurrers are sustained when the complaint is clearly insufficient to establish the pleader's right to relief. County of Allegheny v. Commonwealth, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985). For the purpose of testing the preliminary objection, all well-pleaded, material, and relevant facts are admitted as true. Id. If the pleaded facts state a claim for which relief can be granted under any theory of law, then the preliminary objection must be denied. Id.

Defendants first argue that plaintiff's claim for punitive damages must be dismissed because she did not plead sufficient facts that show that defendants acted in a reckless manner. Pennsylvania has adopted the Restatement (Second) of Torts' rule on punitive damages. The Restatement states that punitive damages are awarded, not to compensate the victim, but to punish the defendant for his outrageous conduct and to deter him and others from similar conduct in the future. Restatement (Second) of Torts, §908. Punitive damages will not be awarded for mere mistake or even gross negligence. Id. "Assessment of punitive damages are [sic] proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct, and are awarded to punish that person for such conduct." SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 493, 587 A.2d 702, 704 (1991). Punitive damages may be awarded due to defendant's evil motive or his reckless indifference to the rights of others. Id. Plaintiff does not allege that defendants acted with an evil motive, so it must be determined if defendants' acts rose to the level of reckless indifference.

In evaluating reckless indifference, the Supreme Court has looked to the Restatement (Second) of Torts §500 and its comments. Id. In order to create a sufficient jury question on the issue of punitive damages, the plaintiff must show that the defendant "knew, or had reason to know of facts which created a high degree of risk of physical harm to another, and deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to, that risk." Restatement (Second) of Torts, §500, Comment A, Id. If the defendant does not actually realize the high degree of risk involved in his actions, even if a reasonable man in his position would, the mental state necessary to award punitive damages is not present. Field v. Philadelphia Electric Co., 565 A.2d 1170, 1182 (Pa. Super. 1989).

In this case, plaintiff alleges that the defendants modified the drill her son was using at the time of his death by removing the third prong on its electrical cord so that the drill could be plugged into the two-prong outlet in the dairy barn. She also alleges that the defendants modified the electrical system in the barn to override the safety fuses by placing pennies behind the fuses in the fuse box. The Court feels that these actions do not rise to the level of reckless indifference to the rights of others because anyone employed at the farm, including defendants themselves, could have used the drill and the electrical system. Defendants obviously did not realize the risk of danger to which their actions gave rise. Because defendants did not know the high degree of risk involved, they did not possess the necessary mental state needed to award punitive damages. All allegations of recklessness are stricken with prejudice.

Defendants' second preliminary objection is the plaintiff's claims for negligent infliction of emotional distress should be dismissed because she does not meet the necessary elements. A cause of action for negligent infliction of emotional distress exists when the following criteria are met:

- 1) Whether plaintiff was located near the scene of the accident as contrasted with one that was a distance away from it;
- 2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;
- 3) Whether plaintiff and the victim were closely related as contrasted with an absence of any relationship or the presence of only a distant relationship.

Neff v. Lasso, 555 A.2d 1304, 1308 (Pa. Super. 1989), quoting Sinn v. Burd, 404 A.2d 672, 685 (Pa. 1979). Under the second criteria, "sensory and contemporaneous observance" is not limited to visual observances. Krysmalski v. Tarasovich, 622 A.2d 298, 303 (Pa. Super. 1993). Aural perception can also meet the criteria; however, "unlike visual observance, aural awareness may rarely, standing alone, give rise to a sufficient awareness of the nature and import of the event to cause severe emotional injury." Neff, 555 A.2d at 1313. "Aural perception when considered together with prior and subsequent visual observance, may produce a full, direct, and immediate awareness of the nature and import of the negligent conduct which may foreseeably result in emotional injury." Id.

In the instant case, plaintiff only heard her son's cries for help while on the phone with Jamie Morton, Jack H. Morton II's daughter. She did not have any prior or subsequent visual observance of the accident. Plaintiff did not see her son until after he had been taken to the hospital.

Plaintiff does raise an interesting question about the effects new technology may have on the tort

of negligent infliction of emotional distress. With the proliferation of cell phones and camera and videophones, it is possible for a person to "witness" an event taking place hundreds of miles away from them. However, it is not the trial court's job to make new law with regards to new technology. Only Pennsylvania's appellate courts can make any necessary changes in the law and how it is applied. As the law stands now, plaintiff does not meet the criteria needed to allege negligent infliction of emotional distress. Plaintiff had only limited aural awareness of the accident when it happened, did not visually observe any acts leading up to or following the accident, and was located many miles away from defendants' farm at the time of the accident.

Defendants' final preliminary objection is in the form of a motion for a more specific pleading. Defendants allege that the plaintiff has failed to provide any factual evidence in her complaint and amended complaint that Jack H. Morton and Mary Jane Morton had any control over the property, tools, and electrical system. A plaintiff is required to state the material facts upon which the cause of action is based in a "concise and summary form." Pa. R.C.P. 1019(a). The plaintiff must disclose material facts sufficient to enable the adverse party to prepare his case. Dept. of Transportation v. Bethlehem Steel Corp., 368 A.2d 888 (Pa. Cmwlth. 1977). Once sufficient facts have been pleaded, discovery procedures are available to the defendants.

It is obvious that the defendants know much more about the control and ownership of the farm, tools, and electrical systems than plaintiff does. The Court is going to allow plaintiff to proceed with discovery. At a later time, the Court will determine whether Jack H. Morton or Jane Morton had control over the property, tools and electrical system on the farm.

#### ORDER OF COURT

July 15, 2005, after a review of the proceedings, the briefs of counsel and the applicable law, the court is going to dismiss the count for punitive damages, dismiss the count for negligent infliction of emotional distress and reserve ruling on the motion for a more specific pleading regarding issue of whether Jack H. Morton and Mary Jane Morton had control over the property, tools, and electrical system until the plaintiff has had the opportunity to conduct discovery.

The defendant must file an answer to the amended complaint.