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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Jeffrey Jones, Petitioner, v. Pine Creek Hills, LLC, Respondent, McGinley, J. .....Page 1

Easement

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Hannah Richardson, Plaintiff, v. Kon-O-Kwee Spencer a/k/a YMCA Camp Kon-O-Kwee; Young Men's Christian Association of Greater Pittsburgh t/d/b/a YMCA of Greater Pittsburgh t/d/b/a Camp Kon-Kwee Spencer, Defendant,
McGinley, J. .....Page 3

Summary Judgment, Negligent Infliction of Emotional Distress

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Opinions

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JEFFREY JONES, Petitioner, v. PINE CREEK HILLS, LLC, Respondent

Easement

Before the Court was Petitioner Jeffrey Jones' Amended Petition for Confirmation of Expiration of Recorded Easement in Equity (the "Petition"), through which he sought a determination that an easement pursuant to an agreement recorded in the Recorder's Office of Allegheny County (the "Easement Agreement") was abandoned and extinguished. By Order dated January 28, 2022, the matter was to be disposed of pursuant to Pa.R.C.P. 206.7 (Procedure after Issuance of Rule to Show Cause). Following discovery, the parties submitted a joint stipulation of fact and briefs and the Court held argument on the matter. The salient facts were presented as undisputed through stipulation and the outcome of the case was dependent on the interplay of the language of the Easement Agreement and pertinent case law.

Case No.: GD-21-012264. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McGinley, J. September 19, 2023.

OPINION

Before the Court is Petitioner Jeffrey Jones' Amended Petition for Confirmation of Expiration of Recorded Easement in Equity (the "Petition"), through which he seeks a determination that an easement pursuant to an agreement recorded in the Recorder's Office of Allegheny County at Deed Book Volume 10575, Page 633 on or about September 11, 1998 (the "Easement Agreement") is abandoned and extinguished. By Order dated January 28, 2022, the matter was to be disposed of pursuant to Pa.R.C.P. 206.7 (Procedure after Issuance of Rule to Show Cause). Following discovery, the parties submitted a joint stipulation of fact and briefs and the Court held argument on the matter. The salient facts were presented as undisputed through stipulation and the outcome of the case is dependent on the interplay of the language of the Easement Agreement and pertinent case law.

FACTUAL BACKGROUND

The 1998 Easement Agreement involves a sanitary sewer easement granted by Robert J. Jones, as owner of property consisting of approximately three (3) acres (the "Jones Property"), to PARC Development, L.P. ("PARC Development"), the owner of an adjoining property located in Indiana Township, Allegheny County known as and hereinafter referred to as the "Pine Creek Property". (Joint Stipulation, ¶¶ a, c). The easement was sought to allow the land-locked Pine Creek Property with access to a municipal sewer system on Saxonburg Boulevard. (Joint Stipulation, ¶ d). Since the date of execution of the Easement Agreement, Robert J. Jones died, with his sole heir, Petitioner herein, succeeding to his interest in the Jones Property through the probate process in or about 2001. (Joint Stipulation, ¶ e). On or about July 9, 2007, PARC Development sold the Pine Creek Property to Hillcrest Trust, who in turn, sold the Pine Creek Property to Pine Creek Hills, LLC, the current owner. (Joint Stipulation, ¶ f). The prior owners of the Pine Creek Property were developers that planned to subdivide it for construction of multiple residences but that plan has not come to fruition following failure to obtain land use approval. (Joint Stipulation, ¶ h). Neither current nor prior owners of the Pine Creek Property have made use of the easement to date "but neither have they done any affirmative acts inconsistent with the intention to make a future use of the Easement or to make it impossible to use the Easement across the Jones Property." (Joint Stipulation, ¶ i).

Consideration in the amount of $17,500[1] was paid for the grant of easement. The Easement Agreement provides, "The easement and right-of-way hereby granted shall benefit the adjacent property of Grantee" and "[t]he right-of-way easement, rights and privileges herein granted shall be used only for the purpose of placing, constructing, operating, repairing, maintaining, rebuilding, replacing, relocating, and removing a pipeline, manholes, and appurtenances for sanitary sewer purposes." Easement Agreement, pp. 1-2.

The Easement Agreement also provides that the "easement, rights and privileges herein granted shall be for so long as Grantee, its successors and assigns, shall operate a sanitary sewer pipeline within said easement. The easement, rights and privileges herein granted shall terminate when or at such time as the purposes hereof cease to exist, are abandoned by Grantee or become impossible of performance." Easement Agreement, p. 2. The parties agree that at no time since the creation of the Easement Agreement has operation of a sanitary sewer pipeline within the easement occurred. Nor has the easement been used for any other purpose.

The instrument also states, "Grantee shall have the right to assign, convey and dedicate the easement, rights and privileges granted hereunder to the Deer Creek Drainage Basin Authority." Further, the Easement Agreement expressly provides that the "instrument shall be binding on the heirs, executors, administrators, successors and assigns of the parties hereto [Robert J. Jones, Grantor and PARC Development, L.P., Grantee]." Easement, p. 3.

ANALYSIS

Under Pennsylvania law, courts shall apply general contract principles to interpret grants for real property to determine and enforce the intent of the parties. As with any contract, the rights conferred by the grant of an express easement must be ascertained solely from the language of the deed, provided that the deed language is unambiguous. Dowgiel v. Reid, 59 A.2d 115, 117 (Pa. 1948). See also Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 389-390 (Pa. 1986) (stating the paramount consideration in the interpretation of any contract is the determination of the intention of the parties); Fedorko Properties, Inc. v. C.F. Zurn & Assoc., 720 A.2d 147, 149 (Pa. Super. 1998) (when reviewing an express easement, the language of the agreement, unless ambiguous, controls).

Petitioner contends that the easement at issue is one in gross rather than an easement appurtenant. As the Supreme Court of Pennsylvania has explained:

> An easement in gross is defined as a mere personal interest in the real estate of another. The principal distinction between it and an easement appurtenant is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The easement is in gross, and personal to the grantee, because it is not appurtenant to other premises. The great weight of the authorities supports the doctrine that easements in gross, properly so called because of their personal character, are not assignable or inheritable, nor can they be made so by any terms in the grant.
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> . . . .
>
> An easement will never be presumed to be a mere personal right when it can fairly be construed to be appurtenant to some

> other estate. Whether an easement is in gross or appurtenant must be determined by the fair interpretation of the grant or reservation creating the easement, aided if necessary by the situation of the property and the surrounding circumstances.

Lindenmuth v. Safe Harbor Water Power Corp., 163 A. 159, 160-161 (Pa. 1932). As Petitioner concedes, the Easement Agreement initially tracks language consistent with an easement appurtenant with the Jones Property being the Servient Tenement and the Pine Creek Property being the Dominant Tenement and the easement allowing the land-locked Pine Creek Property access to the municipal sewer system. (Stipulation, ¶¶ c, d).

However, Petitioner contends that the easement was personal and limited to Grantee PARC Development unless a sewer was constructed during its period of ownership. In support of this position, Petitioner relies on several paragraphs of the Easement Agreement. First the Paragraph permitting easement rights and privileges to continue "for so long as Grantee, its successors and assigns, shall operate a sanitary sewer pipeline within said easement." Next, the immediate sentence providing "the easement . . . shall terminate when or at such time as the purposes hereof cease to exist, are abandoned by Grantee or become impossible of performance." Petitioner argues that the omission of "successor and assigns" in this second provision is significant. Also significant to Petitioner's position is the language that "Grantee shall have the right to assign, convey and dedicate the easement, rights and privileges granted hereunder to the Deer Creek Drainage Basin Authority." Under Petitioner's interpretation, the easement was personal and limited to PARC unless and until a sewer was constructed so that the easement remaining unripened was an easement in gross. Thus, according to Petitioner, the easement expired and performance was made impossible when PARC never constructed a sewer in the easement area prior to conveyance. Petitioner further argues that any right to assign, convey and dedicate the easement to the Deer Creek Drainage Basin Authority was also specific to PARC development and had to occur before it ended existence.

Petitioner's interpretation fails in several respects. First, the easement is an easement appurtenant and as such it passes with a transfer of the land by operation of law even if not specifically mentioned in the instrument of transfer. Brady v. Yodanza, 425 A.2d 726, 728 (Pa. 1981). The rights granted were in connection with and attached to ownership of abutting land. See, Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646, 649 (Pa. 1930)(explaining why the rights conferred were not determined to be appurtenant). The Jones Property serves as the Servient Tenement and the Pine Creek Property serves as the Dominant Tenement. (Joint Stipulation, ¶ c). Second, even if the Court accepts that the lack of the phrase "successors and assigns" in the second sentence relating to the duration of the easement, rights and privileges creates a limitation to transfer, only the specific event of abandonment by the Grantee would cause limitation during Grantee's term of ownership. No other termination events are referenced as specific to Grantee only.

Third, Petitioner's interpretation ignores the express provision that the "instrument shall be binding on the heirs, executors, administrators, successors and assigns of the parties hereto [Robert J. Jones, Grantor and PARC Development, L.P., Grantee]." Petitioner contends that the prior provisions more specifically delineate the rights of the parties and this final provision simply confirms that those more detailed rights are binding on heirs, executors, administrators, successors and assigns. However, if each of the rights were so carefully crafted and delineated as to which continued and which expired, there would be no need for this final provision. In other words, Petitioner's interpretation would render this final provision meaningless.

The factual record did not demonstrate either that the purpose of the easement ceases to exist or that performance is impossible. (See, Affidavit of James Rohr, Deposition of Jeffrey Jones, pp. 27, 34). Thus, the question becomes whether PARC Development actually abandoned the easement. To support a finding of abandonment, there must be a manifest intention to abandon and permanently give up the right to use the easement through an affirmative act demonstrating this on the owner's part. Sabados v. Kiraly, 393 A.2d 486, 487-488 (Pa. Super. 1978). The factual record does not demonstrate that PARC Development took affirmative steps to abandon the easement.

Finally, the fact that a sanitary sewer pipeline has not been constructed to date does not give rise to relief for the Petitioner, particularly in the context of an easement appurtenant. See, Lindenmuth, at 161-162 ("It is true that . . . the dam was not built at the time the original grantee . . . assigned his interests in the agreement . . . or even at the time he died, but we regard these facts as not controlling."); In re Condemnation of Right of Way for Legislative Route 1876, 636 A.2d 1241, 1244 (Pa. Cmwlth. 1993)(Mere non-use of the right of way, though continued for a long period of years, does not amount to abandonment.); Brady, 493 at 727, n. 2 (Mere non-use, no matter how long extended, will not result in extinguishment of an easement created by deed.)

CONCLUSION

As Petitioner has failed to demonstrate a right to relief, an order denying the Amended Petition for Confirmation of Expiration of Recorded Easement in Equity accompanies this Opinion.

BY THE COURT:
The Hon. Mary McGinley

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[1]It is an elementary principle that the law will not enter into an inquiry as to the adequacy of consideration for a contract. Hillcrest Found v. McFeaters, 2 A.2d 775, 777-778 (Pa. 1938).

HANNAH RICHARDSON, Plaintiff, v. KON-O-KWEE SPENCER A/K/A YMCA CAMP KON-O-KWEE; YOUNG MEN'S CHRISTIAN ASSOCIATION OF GREATER PITTSBURGH T/D/B/A YMCA OF GREATER PITTSBURGH T/D/B/A CAMP KON-KWEE SPENCER, Defendant

Summary Judgment, Negligent Infliction of Emotional Distress

The court concluded that Plaintiff cannot establish her claim for negligent infliction of emotional distress under the impact rule and special relationship theories as a matter of law, however, summary judgment was not appropriate as the Plaintiff may be able to establish the claim based upon the zone of danger exception.

Case No.: GD-20-012833. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McGinley, J. September 25, 2023.

MEMORANDUM OPINION

Before this Court is the Motion for Summary Judgment filed on July 17, 2023 on behalf of Defendants Kon-O-Kwee Spencer a/k/a YMCA Camp Kon-O-Kwee; Young Men's Christian Association of Greater Pittsburgh t/d/b/a YMCA of Greater Pittsburgh t/d/b/a Camp Kon-Kwee Spencer. This Court previously heard arguments and disposed of Defendants' Motion for Judgment on the Pleadings and Motion to Strike by Order dated May 10, 2022, which provided "all legal arguments regarding viability of claims may be re-presented following discovery."[1] Discovery has been ongoing in this matter since that time.

Pursuant to Pa.R.C.P. 1035.2 (1), "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or […]." "Summary judgment may be granted only in those cases where the right is clear and free from doubt. […] [T]he record and any inferences therefrom must be viewed in the light most favorable to the non-moving party, and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Laich v. Bracey, 776 A.2d 1022, 1024 (Pa. Cmwlth. 2001)(internal citations omitted).

BACKGROUND

The instant case stems from a tragic accident that occurred on July 15, 2019 when Plaintiff was attending an overnight camp operated by Defendants in Fombell, Pennsylvania. See Amended Complaint ¶ 9. Plaintiff was one of five campers who accompanied a camp counselor to the base of a cliff where they were planning to climb up and repel down. Plaintiff and three of the other campers were seated and spaced out on a large flat rock located at the base of the cliff where a camper was climbing up the rockface. Plaintiff watched the climb, saw the camper (a friend of Plaintiff) successfully reach the top, and then saw him free falling. As a result of the fall and impact, Plaintiff's friend was killed. Plaintiff testified that she looked away right before her friend impacted with the rock she was seated on. In this regard, Plaintiff estimated at her deposition that when she looked back up after hearing the impact, her friend was 7 to 10 feet from her and bleeding from one of his ears. [See generally Excerpts of Transcript of Deposition of Hannah Richardson on June 19, 2023, Exhibit A to Defendant's Motion for Summary Judgment and Exhibit A to Plaintiff's Response in Opposition.]

Plaintiff's Amended Complaint alleged that Plaintiff had been "physically impacted" or "sprayed" by the decedent camper's blood. [See ¶¶ 29, 36, 40, 51 and 55]. When this Court heard argument on the initial Motion for Judgment on the Pleadings in 2022, no discovery had been conducted regarding the circumstances of the accident. Now, following the exchange of at least some discovery, Plaintiff cites to the following facts of record to support her claim for negligent infliction of emotional distress:

- Plaintiff had a small amount of blood, which she believed to be the decedent's, on the t-shirt and shorts that Plaintiff wore on the date of the tragic accident.
- Plaintiff was not aware of any blood until approached by her mother two or three days after the accident. It was then that Plaintiff's mother showed her the spots. Plaintiff asked her mother to throw the clothes away, which she did.

[See Defendants' Exhibit A to the Motion for Summary Judgment and Plaintiff's Exhibits A, B, and C to the Response.]

DISCUSSION

Pennsylvania recognizes four theories under which a claim for negligent infliction of emotional distress (NIED) can be brought. Toney v. Chester Cnty. Hosp., 36 A.3d 83, 88–89 (Pa. 2011); see also Doe v. Philadelphia Cmty. Health Alternatives AIDS Task Force, 745 A.2d 25, 27 (Pa. Super. 2000), aff'd., 564 Pa. 264, 767 A.2d 548 (2001). In support of her claim, Plaintiff cites three of those theories: (A) that Plaintiff received a physical impact, (B) that Plaintiff was in the zone of danger at the time that the negligent act took place, and (C) that Defendants had a special relationship with her which gave rise to a duty.[2] Each of these theories is addressed below.

A. IMPACT RULE

The impact rule is the earliest recognized in Pennsylvania to support a NIED claim. As the Supreme Court has explained:

> Before 1970, our Court abided by the century-old common law "impact rule" in cases involving emotional distress claims. The impact rule "barred recovery for fright, nervous shock or mental or emotional distress unless it was accompanied by a physical injury or impact upon the complaining party." Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 527 A.2d 988, 992 (1987); see also, Potere v. City of Philadelphia, 380 Pa. 581, 112 A.2d 100, 104 (1955). We acknowledged that the "common law rationale for the impact rule is embodied in the often-quoted statement of Lord Wensleydale in Lynch v. Knight, 9 H.L.Cas. 557, 598, 11 Eng.Rpts. 854, 863 (1861): 'Mental pain or anxiety the law cannot value, and does not [pretend to] redress, when the unlawful act complained of causes that alone.'" Id.; see also, W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 12, at 55 (5th ed.1984).

Toney at 88. A party may still recover for mental suffering from minor bodily injuries or slight impacts, "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, 112 A.2d 100, 104 (Pa. 1955); see also Stoddard v. Davidson, 513 A.2d 419, 422 (Pa. Super. 1986)(where the jostling and jarring of an automobile's occupants when driving over a corpse was a sufficient physical impact to meet the physical impact element of a negligent infliction cause of action).

As explained in Linn v. Duquesne Borough – a case decided when very few instances of independent actions for mental suffering had been recognized[3] – "[the] cases in which mental suffering has been considered as an element of damages are those in which the suffering was caused by the sense of peril at the time of the physical injury, or was incident to the physical pain, and formed a part of the actual injury." Id. at 54 A. 341, 342 (Pa. 1903). It was the physical impact which provided some basis for the genuineness and extent to which a claim was affected by mental suffering. The suffering which was recoverable was limited to that which could be traced directly back to the experience of the injury or impact sustained.[4] Id.

The parties disagree about the application of Stoddard to this matter. In Stoddard, the experience of the impact by Mr. Stoddard when he drove over the corpse of a pedestrian who had been struck and killed by defendant was sufficient to maintain his claim for NIED. Id. at 422, citing Zelinsky v. Chimics, 175 A.2d 351 (Pa. Super. 1961). The critical distinguishing fact in that case from the facts before this Court is that the impact, which gave rise to the emotional distress, took place when plaintiff Stoddard drove over the corpse. The relevant impact was not the one that killed the pedestrian in the first place. But for the negligence of the defendant driver in killing the pedestrian and leaving the body in the road, plaintiff Stoddard would not have experienced the subsequent impact with the corpse and correlating emotional distress.

Here, reviewing the facts in a light most favorable to the non-moving party, Plaintiff's mother discovered spots appearing to be dried blood on the clothes that Plaintiff had been wearing on the date of the accident. This discovery was not made until two or three days after the accident when Plaintiff's mother was doing the laundry. See Plaintiff's Ex. C to the Response in Opposition, Affidavit of Amy Richardson. Plaintiff's deposition also revealed that she had no apprehension of the presence of decedent's blood until her mother made this discovery. Caselaw does not support an instance where discovery of an impact after the traumatic event supported a claim for NIED under the impact rule. Instead in cases reviewed, the individual alleging a NIED claim was aware of the impact at the time of impact, which was due to the negligent action of another.

The impact rule established a basis for causation directly in the suffering experienced at the time of the impact or which came as a natural result from the injury sustained. Here, if Plaintiff could establish that she had been aware of the presence of blood[5] resulting from decedent's fall at the time of the fall, it would be a question for the jury to decide whether some part of mental suffering arose from the impact with decedent's blood. However, this Court concludes that the subsequent discovery of blood on Plaintiff's clothes two to three days after the shocking event does not suffice under the impact rule and would represent a significant expansion of the rule, including the holding in Stoddard.

B. ZONE OF DANGER

Pennsylvania no longer limits recovery to only mental suffering that results from a physical impact. In 1970, Pennsylvania diverged from the impact rule by adopting the zone of danger theory of NIED liability for persons who did not suffer any physical impact that resulted in emotional distress as long as the party "was in personal danger of physical impact because of the direction of a negligent force against him and where plaintiff actually did fear the physical impact." Niederman v. Brodsky, 261 A.2d 84, 90 (Pa. 1970).[6] Whether Plaintiff was in the zone of danger is a triable question of fact for the jury. Bowman v. Sears, Roebuck & Co., 369 A.2d 754, 757 (Pa. Super. 1976)(reversing and remanding summary judgment where there were not sufficient details on the record to show how close a mother was to her adult daughters who were accosted and removed from the store and where she feared that she would be similarly accosted because of the store employees' treatment of her, and she suffered a heart attack).

Here, Plaintiff has provided deposition testimony regarding the location of the campers at the base of the cliff. Plaintiff described that she was closest to the point where the decedent landed, approximately seven to ten feet from where she was sitting. In Plaintiff's Affidavit, she avers that she feared that the decedent might land on her when he was falling. Defendants' counsel argues that Plaintiff's deposition testimony established that she feared for the safety of the falling camper, but this conclusion can only be reached by viewing the evidence in a light most favorable to Defendants. Whether Plaintiff had a reasonable fear of injury to herself on the basis of the events and distances between herself and the others present that day is a question for the jury.

C. SPECIAL RELATIONSHIP

Lastly, the Court addresses the "special relationship" theory that may support a NIED claim in certain circumstances. See Toney. This theory focuses on the duty element in negligence and creates a duty to not cause emotional harm where there is an existing contractual or fiduciary relationship. In Toney, the plaintiff was informed by the defendants who performed a pelvic ultrasound while she was pregnant that no abnormalities were found. However, when she gave birth, she suffered emotional distress from the shock of seeing her son who had several profound physical abnormalities. Id. at 85. The Supreme Court held that while NIED is not available in all cases arising out of a "breach of contract or fiduciary duty," it can be available "where there exists a special relationship where it is foreseeable that a breach of the relevant duty would result in emotional harm so extreme that a reasonable person should not be expected to endure the resulting distress." Id. at 84. In these limited circumstances, it is not necessary to prove physical impact. Id. at 85.

Most of the time contractual breach or breach of a fiduciary duty will not give rise to an NIED claim.[7] When it does, "the special relationships must encompass an implied duty to care for the plaintiff's emotional well-being." Id. at 95. The Supreme Court left "the legal question of whether a sufficient duty exists [up to] trial judges to decide on a case-by-case basis, at some point prior to trial, be it preliminary objections, summary judgment, or the like." The Supreme Court also noted that the following five-factor test from Bilt–Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270, 281 (Pa. 2005) should be utilized in this analysis:

> "The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution."

Bilt-Rite at 281.

To date, no circumstances like those before this Court have been held to give rise to a special relationship. When the relationship has been found, it has been in the context of a physician or therapist relationship. See, e.g., List v. Jameson Mem'l Hosp., No. 1457 WDA 2012, 2013 WL 11256398 (Pa. Super. Aug. 27, 2013)(Non-Precedential Decision); Nicholson-Upsey v. Tuoey, 30 Pa. D & C. 5th 168, 196-198 (Phila. C.C.P. May 7, 2013)(Applying Toney and finding that the hospital-patient relationship was a special relationship in a case where a pregnant mother was told that her child died even when she protested that she could feel movement and the baby was later born alive but suffered from severe hypoxic ischemic encephalopathy.).

Considering the factors from Bilt-Rite, unlike the cases involving healthcare professionals in a professional-patient relationship, the camp counselor's primary role was not to provide care for emotional wellbeing. The relationship in this case is more akin to the relationship examined in Amos v. River Valley Regional YMCA, Williamsport Branch, No. 12-00, 125 (Lycoming C.C.P. April 19, 2012)[8] than it is to the physician-patient relationship sufficient to support the special relationship theory of a NIED claim. Emotional distress was not a foreseeable risk of the activities in which the campers and their counselor were engaged. This Court concurs with Defendants that when examining the other factors, concluding that the camp counselor/camper relationship, which has a high level of social utility, gives rise to a special relationship for purposes of NIED represents a significant expansion of liability and deviation from the evolution of the claim. Therefore, the Court concludes that the special relationship theory may not support a NIED claim in this case.

CONCLUSION

While the Court concludes that Plaintiff cannot establish her claim for negligent infliction of emotional distress under the impact rule and special relationship theories as a matter of law, summary judgment is not appropriate as the Plaintiff may be able to establish the claim based upon the zone of danger exception. An Order of Court follows.

BY THE COURT:
The Hon. Mary McGinley

[1]This case was consolidated for discovery only with Diane Kanczes, Administratrix of the Estate of Nathan Kanczes v. Kon-O-Kwee Spencer YMCA, GD-19-013836 by Order dated February 3, 2022.

[2]Pennsylvania also recognizes bystander recovery in the case where a bystander witnesses tortious injury to a close relative. Toney, at 89; see also Sinn v. Burd, 404 A.2d 672 (Pa. 1979). This theory is inapplicable to this case.

[3]"Mental suffering has not generally been recognized as an element of damages for which compensation can be allowed, unless it is directly connected with a physical injury, or is the direct and natural result of a wanton and intentional wrong. […] Excepting cases in some jurisdictions where recoveries have been had for the failure to deliver telegrams announcing illness or death, or other matters of personal concern, but not of pecuniary importance, the instances are very few in which an independent action has been sustained for mental suffering alone. The decided trend of decision both in this country and in England is against the maintenance of such an action, or the allowance for mental suffering as an element of damages when distinct from physical injury." Linn at 341-342 (emphasis added).

[4]In the Linn case, the damages were limited to the permanent disability which resulted from the injury and the mental suffering that was "a natural incident" of the physical pain, and inseparable from it." Any regret and disappointment arising after the injury was not recoverable. Id. at 342.

[5]Defendants question the sufficiency of evidence regarding whether the spots were, in fact, blood resulting from the decedent's fall. At this stage, the Court must evaluate the facts and make reasonable inferences in a light most favorable to the non-moving party. The reliability and admissibility of this evidence is more properly a determination for the trial judge.

[6]Chief Justice Bell wrote a dissenting opinion in Niederman noting that just a few years earlier the Supreme Court, in a majority opinion also written by him, had continued with strict adherence to the impact rule. Id. at 90-91; see also Knaub v. Gotwalt, 220 A.2d 646 (Pa. 1966), in which Justices Musmanno and Roberts dissented and argued for relaxation of the impact rule.

[7]See for example, the concurring and dissenting opinion of Justice Musmanno in Gefter v. Rosenthal, wherein he concurred with the result of the Majority opinion written by Justice Bell, but dissented as to the absolute foreclosure of any possibility of a breach of contract resulting in actionable emotional damages. Id. at 119 A.2d 250, 251 (Pa. 1956). Justice Musmanno cited Section 341 of the Restatement of Contracts and explained that if a defendant had reason to know when the contract was made, that a breach would cause mental suffering for reasons other than pecuniary loss, the plaintiff may be entitled to recover for that mental suffering. Id. He also cited to the Linn case for the proposition that an intentional and wanton wrong could result in damages for mental suffering in the absence of physical injury. Id. at 252.

[8]The Opinion and Order for Amos was attached by Defendants as Exhibit F to their Reply Brief.