SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

January 30, 2008

Bruce L. Hudson, Esquire
Law Office of Bruce L Hudson
800 King Street, Suite 302
Wilmington, DE 19801

Kenneth A. Green
SBI No.
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: Jane Doe, a minor by Brenda Clements, individually and as next friend of Jane Doe v. Kenneth A. Green
C.A. No. 06C-04-005 ESB
Letter Memorandum

Date Submitted: October 2, 2007

Dear Messrs. Hudson and Green:

This is my decision on Defendant Kenneth A. Green's Motion for Partial Summary Judgment in this personal injury case involving allegations of sexual abuse. Plaintiffs Brenda Clements and her now 14-year-old daughter, Jane Doe,[1] allege that Green sexually abused Doe, causing them both extreme emotional distress. I have granted Green's Motion for Partial Summary Judgment because Clements and Doe are unable to satisfy certain elements of their claims.

STATEMENT OF THE CASE

Clements and Doe lived next door to Green. Doe "babysat" for Green's children. Green allegedly had sexual intercourse in his home with Doe a number of times over an eight-month period of time in 2005. Clements was unaware of this until December 18, 2005. On that day, at approximately two in the morning, she saw Doe leave Green's house. Doe was taken to the hospital

[1] A pseudonym is used to protect her privacy.

where she told a nurse that she and Green, who was then 37-years-old, had been engaging in sexual intercourse. Clements then discovered what was going on between Green and Doe. Clements was never present when Green sexually abused Doe.

Clements and Doe filed a complaint against Green alleging the same three claims for each of them: Negligent Infliction of Emotional Distress, Intentional Infliction of Emotion Distress and Outrage. Green filed a Motion for Partial Summary Judgment addressed to Clements' three claims and Doe's Outrage claim.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[2] Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[3] The Court views the evidence in a light most favorable to the non-moving party.[4] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[5] If, after discovery, the non-moving party cannot make a sufficient showing of the existence

---

[2] *Moore v. Sizemore*, *405 A.2d 679, 680 (Del. 1979)*.

[3] *Id. at 681*.

[4] *Id. at 680*.

[5] *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, *477 U.S. 317, 322-23 (1986)*.

of an essential element of the case, then summary judgment must be granted.[6] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.[7]

DISCUSSION

I. Negligent Infliction of Emotional Distress

Clements alleges that Green negligently caused her emotional distress by having sexual intercourse with Doe. In order to prevail on a claim for the negligent infliction of emotional distress, a plaintiff must prove "(1) negligence causing fright to someone; (2) in the zone of danger; (3) producing physical consequences to that person as a result of the contemporaneous shock."[8] Green argues that summary judgment must be entered in his favor on this claim because Clements was not in the zone of danger. The zone of danger is that area where the negligent conduct causes the victim to fear for his or her own safety.[9] Clements acknowledges that she was not in the zone of danger, but argues that there is no zone of danger requirement where the defendant's conduct involves malice, willful indignity or wantonness. Her argument is based on a brief reference in *Mancino v. Webb*[10]

---

[6] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

[7] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

[8] *Rhinehardt v. Bright*, 2006 WL 2220972, at *5 (Del. Super. July 20, 2006).

[9] Restatement (Second) of Torts §313, comment (d). See also *Snavely, et al. v. Wilmington Medical Center, Inc.*, 1985 WL 552277 (Del. Super. March 18, 1985); *Mancino v. Webb*, 274 A.2d 711 (Del. Super. 1971); *Broomall v. Reed*, Del. Super., C.A. No. 79C-SE-16, Walsh, J. (Oct. 21, 1980); *Levine v. New Castle County Vo-Tech School District, et al.*, Del. Super., C.A. No. 81C-AP-14, O'Hara, J.(July 20, 1983).

[10] 274 A.2d 711 (Del. Super. 1971).

to a few old cases that allowed the parents of children to recover for their emotional distress even though they were not in the zone of danger.[11] These out-of-state cases have not been followed by the Court in those Delaware cases[12] decided after *Robb v. Pennsylvania Railroad Company*.[13] Thus, the zone of danger requirement remains an element of this claim and it must be satisfied. Therefore, since Clements was not in the zone of danger, I have granted Green's Motion for Partial Summary Judgment as to her claim for the Negligent Infliction of Emotional Distress.

II. Intentional Infliction of Emotional Distress

Clements alleges that Green intentionally caused her emotional distress by having sexual intercourse with Doe. The Restatement (Second) of Torts § 46 has defined the tort of Intentional Infliction of Emotional Distress as:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
> (A) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm...

Green argues that Clements' claim does not fall within section 1 because Green never intended to cause her harm and it does not satisfy the requirements of section 2(A) because Clements was not present when the sexual abuse occurred. Clements does not dispute that Green did not

---

[11] *Id.* at 714; See *Trimble v. Spiller*, 23 Ky. 394, 7 T.B.Mon. 394, 18 Am.Dec. 189 (1829); *Herrick v. Evening Express Pub. Co.*, 120 Me. 138, 113 A. 16 (Me. 1921): *Magee v. Holland*, 27 N.J.L. 86, 72 Am.Dec. 341 (1858).

[12] See Footnote 9.

[13] 210 A.2d 709 (1965).

intend to cause her harm. She instead argues that her claim should not be dismissed because Green's conduct is so outrageous that a flexible interpretation of the "presence requirement" is appropriate. Her argument is based on the Restatement (Second) of Torts § 46, comment 1, which recognizes the potential for exceptions to the "presence" requirement and several out-of-state cases that have either liberally construed the "presence" requirement or waived it all together.[14]

While the cases cited by Clements do relax the "presence" requirement, many other courts have refused to do so.[15] Moreover, the cases cited by Clements are not particularly persuasive.[16]

---

[14] *Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (App. D.C. 2003); *Shemenski v. Chapiesky*, 2003 U.S. Dist. LEXIS 13177 (N.D. Ill. 2003); *Bishop v. Callais*, 533 So.2d 121 (La.Ct.App 1988), *cert denied*, 536 So.2d 1214 (La.1989); *Delia S. v. Torres*, 134 Cal.App.3d 471, 484, 184 Cal.Rptr. 787, 795 (1982); *Schurk v. Christensen*, 497 P.2d 937 (Wash. 1972); *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987); *Doe v. Montessori School of Lake Forest*, 678 N.E. 2d 1082 (2d Dist. Ill. 1997).

[15] *Manning v. Spees*, 216 Iowa 670, 246 N.W. 603 (Iowa 1933); *Howard v. Bloodworth*, 137 Ga.App. 478, 224 S.E.2d 122 (1976).; *Knox v. Allen*, 4 La.App. 223 (1926)(later discovery of attack on child); *Ellsworth v. Massacar*, 215 Mich.511, 184 N.W. 408 (1921); *Miller v. Cook*, 87 Mich.App. 6, 273 N.W.2d 567 (1978); *Gustafson v. Faris*, 67 Mich.App. 363, 241 N.W.2d 208 (1976); *Calliari v. Sugar*, 180 N.J.Super. 423, 435 A.2d 139 (1980); *Koontz v. Keller*, 52 Ohio App. 265, 3 N.E.2d 694 (1936); *Bennight v. Western Auto Supply Co.*, 670 S.W.2d 373 (Tex.App. 1984).

[16] In *Bettis,* the United States Court of Appeals for the District of Columbia liberally construed the presence requirement in a hostage case, reasoning that hostage cases are unique because they involve a physical separation of the plaintiff from the victim as a result of the outrageous conduct. A plaintiff's lack of presence in such a situation, according to the Court of Appeals, is the exact source of his emotional distress. That is not the case here. Doe was not a hostage and her mother had no reason to believe that anything harmful was happening to her while she was at Green's house babysitting his children. In *Shemenski,* the United States District Court for the Northern District of Illinois also liberally construed the presence requirement in a case where a police officer refused to let a father be with his dying daughter while she was in the hospital with her mother. The police officer suspected that the father had physically abused his daughter. The District Court allowed the wife's claim for intentional infliction of emotion distress to go forward even though she was not present to see her husband's suffering, reasoning that the presence requirement had been liberally construed, citing *Bettis* as an example. *Shemenaski* is somewhat similar to a hostage case in that a police officer did not allow the

Enlarging or relaxing the "presence" requirement, as suggested by Clements, would completely undermine the whole rationale behind it. Prosser and Keeton in The Law of Torts § 12 at 65-66 (5th ed. 1984) stated:

> Presence is a crucial element of the tort because an individual who witnesses outrageous or shocking conduct directed at a third-party has no time in which to prepare himself/herself for the immediate emotional impact of such conduct. Moreover, the actor can reasonably be expected to know of the emotional effect

---

husband and wife to be together while their daughter lay dying in the hospital. Again, that is not the case here. Clements was not involuntarily separated from Doe and she did not believe that anything harmful was happening to Doe while she was at Green's house. In *Bishop,* the Court of Appeal of Louisiana, Fourth Circuit, did not address the presence requirement in a case where parents alleged that their child had been sexually abused while at a psychiatric facility, reasoning that since the parents had met the requirements of a Louisiana statute for such claims there was no need to consider the presence requirement. There is no such statute in this case.

In *Delia,* the Court of Appeal, Second District, Division 1, of California held that cases requiring a plaintiff to be present were inapplicable, reasoning that the defendant's rape of his friend's wife would have a profound and extreme emotional consequences to the friend. This holding was later criticized in a case by the California Supreme Court, which stated that a plaintiff's presence at the time of the outrageous conduct is a required element of a claim for the intentional infliction of emotional distress. *Christensen v. Superior Court*, 820 P2d 181 (Cal. 1991).

In *Schurk,* the Supreme Court of Washington took a relaxed view of the presence requirement, instead looking at: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who 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. Even though it took a relaxed view of the presence requirement, the Supreme Court of Washington still affirmed the trial court's dismissal of a mother's claim for emotional distress because she was not near her daughter when the daughter was raped by the boy living next door who was babysitting her. In *Croft,* the Supreme Court of Alaska allowed a parents' claim to go forward where a husband's co-worker sexually abused the parents' child while riding a "three-wheeler" because the defendant's conduct was outrageous. However, the Court never even addressed the presence requirement.

In *Doe,* the Appellate Court of Illinois, Second District, in a case involving allegations of sexual abuse of children at a school, held that it is universally recognized that parents may pursue an action in their own right for any impairment of parental rights caused by injuries to their children. While such a claim may be universally recognized, there are requirements for such claims which the Court never addressed.

> which his or her conduct is likely to produce where the person is present. By way of comparison, the emotional effects are generally lessened where the individual learns of the outrageous conduct long after its occurrence and by means other than through his or her own personal observations. Presence is therefore an essential element which must be established to successfully set forth a cause of action for intentional infliction of emotional distress.

Given that the "presence" requirement is an essential element of this claim and is still followed by most jurisdictions, I will follow it as well. Clements was not in Green's house at the time of the alleged sexual abuse. She also did not know about the alleged sexual abuse until after it had occurred. Therefore, I have granted Green's Motion for Partial Summary Judgment as to Clements' claim for Intentional Infliction of Emotion Distress.

III. Outrage

Clements and Doe allege that Green's conduct was outrageous and caused them severe emotional distress. Green argues that the two outrage claims should be dismissed because they are identical to the two claims of intentional infliction of emotional distress. As I discussed previously, the Restatement (Second) of Torts § 46 states that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results, for such bodily harm." Clements and Doe argue that the claims should not be dismissed because even though "outrage" and "intentional infliction of emotional distress" are used interchangeably, the tort of outrage can also be established by reckless conduct alone.

The tort of outrage "is better known as intentional infliction of emotional distress."[17] "Since

[17] *McCulley v. Home Indemnity Company,* 1987 WL 19727 at * 5(Del. Super. Nov. 4, 1987).

this is another name for the tort of intentional infliction of emotional distress,"[18] the allegations are repetitive. Plaintiffs' argument that outrage can be established through reckless conduct alone fails because the tort of intentional infliction of emotional distress may also be proven through reckless conduct. Therefore, I have granted Green's Motion for Partial Summary Judgment as to both of the Outrage claims.

CONCLUSION

Green's motion for partial summary judgment is granted, leaving only Doe's claims of Intentional and Negligent Infliction of Emotion Distress for trial.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Robert K. Pearce, Esquire

[18] *Jones v. McCarnan*, 1993 WL 19675 at *5 (Del. Super. Jan. 13, 1993).