

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

**BARBARA ANN WISNEWSKI and
GERALD WISNEWSKI**

Plaintiffs,

v.

**JENNIFER C. JACKMAN and
ERIC CHAS**

Defendants.

C.A. NO.: 03C-07-015

Submitted: October 22, 2004

Decided: January 28, 2005

On Defendant Eric Chas' Motion for Summary Judgment
DENIED.

Matthew M. Bartkowski, Esquire, Kimmel, Carter, Roman & Peltz, P.A.,
Wilmington, Delaware, Attorney for Plaintiffs.

Thomas P. Leff, Esquire, Casarino, Christman & Shalk, P.A., Wilmington,
Delaware, Attorney for Defendant Jennifer Jackman.

Douglass L. Mowrey, Esquire, Bouchelle & Palmer, P.A., Wilmington, Delaware,
Attorney for Defendant Eric Chas.

SCOTT, J.

I. Statement of Facts

On August 9, 2001, Defendants Jackman and Chas crashed their vehicle into Plaintiff Wisnewski's house on Route 7, in New Castle County, Delaware. At first, Wisnewski believed she was experiencing an earthquake. She testified at the arbitration that the house began to shake. Stricken with fear, she did not move away from the shaking wall. Wisnewski stated that while she was not hit by any object during the accident, she was extremely shaken and nervous.

Wisnewski claims that her teeth were chattering as a result of the fear. In addition, she felt a tenseness, tightness, or nervousness in her chest. Subsequent to the accident, Wisnewski sought medical and psychological help. According to Plaintiff, her daily doses of Xanax and Prozac were increased after the accident. In his affidavit, Plaintiff's psychiatrist, Dr. Jay Weisberg, stated that following the accident, Plaintiff was suffering from hypervigilance and hyperarousal. His ultimate diagnosis is that Plaintiff is suffering from Post-Traumatic Stress Disorder. She also suffers from continuing shaking of the arms and hands. She will require ongoing counseling, medication management and medication for several years.

II. Standard of Review

Summary judgment may only be granted when no genuine issues of material fact exist.¹ The moving party bears the burden of establishing the non-existence of genuine issues of material fact.² If the burden is met, the burden shifts to the non-moving party to establish the existence of genuine issues of material fact.³ “Where the moving party produces an affidavit or other evidence sufficient under Super Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.”⁴ If genuine issues of material 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 inappropriate.⁵ The court must view the facts in the light most favorable to the non-moving party.⁶

Moreover, summary judgment is generally not appropriate for actions based on negligence.⁷ It is rare in a negligence action "because the moving party must demonstrate 'not only that there are no conflicts in the factual contentions of the

¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. Supr. 1979).

² *Id.*

³ *Id.* at 681.

⁴ Super. Ct. Civ. R. 56(3); *Ramsey v. State Farm Mutual Automobile Insurance Co.*, 2004 WL 2240164 *1 (Del. Super.) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986)).

⁵ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Supr. 1962).

⁶ *Lupo v. Medical Center of Delaware*, 1996 LEXIS 46 *5 (Del. Super.).

⁷ *Ebersole*, 180 A.2d at 468.

parties but that, also, the only reasonable inferences to be drawn from the uncontested facts are adverse to the plaintiff."⁸

III. Discussion

To recover under a claim of negligent infliction of emotional distress a plaintiff must provide evidence of a physical injury.⁹ This issue becomes complicated where the plaintiff does not immediately suffer a physical injury from the negligence; rather, the plaintiff is frightened and this leads to physical injury at a later point in time. In *Robb v. Pennsylvania Railroad Company*,¹⁰ the Delaware Supreme Court enunciated a rule to apply where a plaintiff is frightened first:

where negligence proximately caused fright, in one within the immediate area of physical danger from that negligence, which in turn produced physical consequences such as would be elements of damage if a bodily injury had been suffered, the injured party is entitled to recover under an application of the prevailing principles of law as to negligence and proximate causation.¹¹

The *Robb* rule is similar to the *Restatement (Second) of Torts*, §436A, which states the following:

If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance. . . . On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued

⁸ *Upshur v. Bodie's Dairy Market*, 2003 WL 21999598 *3 (Del. Super.).

⁹ *Garrison v. Medical Center of Delaware, Inc.*, 581 A.2d 288, 293 (Del. Supr. 1989).

¹⁰ 210 A.2d 709 (Del. Supr. 1965).

¹¹ *Robb*, 210 A.2d at 714-15.

mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character.

Where the physical phenomena accompanying emotional disturbance are transitory and non-recurring, they do not amount to the physical injury needed for recovery under a negligent infliction of emotional distress claim.¹² In *Lupo v. Medical Center of Delaware*, the court found that the plaintiffs had suffered physical injury.¹³ After the death of their baby, the plaintiffs suffered from recurring episodes of sleeplessness, nightmares, headaches, clinical depression, and mental distress.¹⁴ Relying on the testimony of plaintiff's psychologist, the court found that the plaintiff's injuries were more substantial than transitory, non-recurring physical phenomena, thus, summary judgment was denied.¹⁵

In *Cooke v. Pizza Hut, Inc.*, the court granted summary judgment on plaintiff's claim of negligent infliction of emotional distress after he bit into a roach infested pizza.¹⁶ The court found that mental anguish caused his nausea, thus, there was no physical injury when he ate the pizza.¹⁷ In addition, plaintiff suffered no other physical or mental injuries other than the one-day of nausea.

¹² *Lupo*, 996 LEXIS 46.

¹³ *Id.* at *10.

¹⁴ *Id.*

¹⁵ *Id.* at *11.

¹⁶ 1994 LEXIS 521 *7 (Del. Super. 1994).

¹⁷ *Id.* at *8.

The issue this Court must decide is whether Ms. Wisnewski's nervousness and Post Traumatic Stress Disorder rise to the level of physical injury needed for a claim of negligent infliction of emotional distress.

After reviewing Defendant's Motion and Plaintiff's response, this Court holds that summary judgment is **DENIED**.

In light of *Robb* and the *Restatement (2d) of Torts*, this Court believes there is evidence that, if presented to a jury, could establish that Ms. Wisnewski has suffered non-transitory, recurring episodes of nervousness, anxiety, chest tightness, arm and hand shaking, and other mental distress. Clearly Ms. Wisnewski was in the immediate presence of the negligence as required by *Robb*. She was standing in her living room as the car crashed through her house. The Defendants would like this Court to find that arm and hand-shaking are not physical injuries. The Court believes that this issue is a material fact of the litigation that has not yet been fully determined.

In addition, this Court believes the facts of this litigation to be distinguishable from *Cooke v. Pizza Hut* because Ms. Wisnewski's injuries appear to be more than transitory. Where the plaintiff in *Cooke* only suffered from one episode of nausea, Dr. Weisberg has been treating Plaintiff for three years since the accident and believes her Post-Traumatic Syndrome to be on-going. Therefore, viewing the facts in a light most favorable to Ms. Wisnewski, this Court finds that

her Post Traumatic Stress disorder and arm and hand-shaking are substantial enough to create a material issue of whether or not she suffered physical injury.

Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.