IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEBORAH WESSELMAN,	)	No. 26,2017
	)	
Plaintiff Below,	)	Court Below
Appellant,	)	C.A. No. N15C-04-127 CEB
	)	
v.	)	
	)	
CHRISTIANA CARE HEALTH SERVICES, INC.,	)	
	)	
Defendant Below,	)	
Appellee.	)	

DEFENDANT BELOW, APPELLEE CHRISTIANA CARE HEALTH SERVICES, INC.'S ANSWERING BRIEF ON APPEAL

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DATED: 3/27/17

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NATURE OF PROCEEDINGS

Deborah Wesselman ("Ms. Wesselman" or Plaintiff") filed a claim for both intentional and negligent infliction of emotional distress against Christiana Care Health Services, Inc. ("CCHS" or "Defendant"). In particular, Plaintiff alleged that CCHS failed to respond to her complaints appropriately when she became sick after undergoing a CT scan with contrast at one of CCHS' radiology facilities on April 26, 2013. (A-13-16) With regard to her negligent infliction of emotional distress claim, Ms. Wesselman claimed physical injuries including "stress, lightheadedness, weakness, nausea, rapid heartbeat, and a dangerous drop in blood pressure." (A-16) With regard to her intentional infliction of emotional distress claim, Ms. Wesselman claimed that CCHS' employees acted "intentionally or recklessly in a manner . . . which was outrageous and extreme and beyond the bounds of decency." (A-16) CCHS denied both claims. (A-17-21)

Thereafter, the parties engaged in discovery. Discovery closed on September 30, 2016. (B-1) Ms. Wesselman did not identify any expert witnesses to establish a causal connection between any claimed physical injuries and the alleged misconduct of CCHS, nor did she identify any expert in support of her claim that any of CCHS' employees acted inappropriately. (A-127)

On October 11, 2016, CCHS moved for summary judgment on all claims. (A-22-141) Plaintiff filed her opposition on November 4, 2016. (A-142-287)

On December 16, 2016, the Superior Court granted CCHS' motion for summary judgment. (Exhibit to Amended Opening Brief of Appellant) Ms. Wesselman filed an appeal to the Supreme Court on January 13, 2017, and she filed her Opening Brief with Appendix on February 27, 2017. (D.I. 7) She thereafter filed an Amended Opening Brief and Amended Appendix on March 13, 2017. (D.I. 9) This is Defendant Below, Appellee Christiana Care Health Services, Inc.'s Answering Brief on Appeal.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court granted summary judgment to Christiana Care Health Services, Inc. properly because Plaintiff failed to offer any evidence during discovery that established a *prima facie* case of negligent infliction of emotional distress.

II. Denied. The Superior Court granted summary judgment to Christiana Care Health Services, Inc. properly because Plaintiff failed to offer any evidence during discovery that established a *prima facie* case of intentional infliction of emotional distress.

STATEMENT OF FACTS

A. Facts Related to Incident[1]

Ms. Wesselman presented to CCHS' outpatient radiology facility on April 26, 2013 for purposes of obtaining an abdominal CT scan for potential lactose intolerance and abdominal pain. (A-13, A-39) Before arriving, she also had a medical history of anxiety. (A-38) CCHS' employee, Nancy Jacobson, a certified CT technologist, assisted Ms. Wesselman with the scan. (A-41) Before the scan, Ms. Wesselman did not report to CCHS or Ms. Jacobson any suspected IV contrast allergy or possible reaction, nor did she report any concerns with CCHS' conduct. (A-38-39)

During the CT scan, Ms. Wesselman reported that she did not feel well but did not object to the test being completed. (A-42) Thereafter, Ms. Jacobson took Ms. Wesselman's blood pressure, assisted her into a wheelchair, and wheeled her to the changing room. (A-43) From the changing room, Ms. Wesselman walked to the bathroom on her own and did not have any expectation that Ms. Jacobson would remain with her. (A-43-44)

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[1] CCHS' staff disputed much of Ms. Wesselman's version of events. Nonetheless, because CCHS filed a motion for summary judgment, it accepted Ms. Wesselman's version of events as true for purposes of its motion for summary judgment. *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

In the bathroom, Ms. Wesselman developed chills, diarrhea and pain, although she denied nausea (despite her claim to the contrary in her Complaint). (A-16, A-44) Ms. Wesselman exited the bathroom on her own and told Ms. Jacobson that she did not feel well and had diarrhea. (A-44-46) Ms. Wesselman then returned to the bathroom a second time and locked the door, but she did not ask Ms. Jacobson for any assistance or to stay nearby. (A-47) And, although Ms. Wesselman developed additional complaints, she did not call for Ms. Jacobson, seek any assistance or report any additional complaints to Ms. Jacobson. (A-47-48)

About 20 minutes later, Ms. Wesselman's boyfriend, Michael Lamplugh, arrived. (A-48) During this time, Ms. Wesselman was unable to get off the toilet due to not feeling well, but she remained conscious and did not report any medical emergency to anyone. (A-47-49) Mr. Lamplugh asked Ms. Wesselman to open the door, but she reported that she was unable to get off the toilet to get to the door. (A-48) Mr. Lamplugh then asked for a key, but the staff were unable to locate a key immediately to open the bathroom door. (A-48, A-106) Ms. Wesselman, however, never asked for the staff to get to her immediately, and she was able to open the door on her own within five (5) minutes after Mr. Lamplugh asked for a key. (A-48) After the door was opened, Ms. Jacobson suggested that Mr. Lamplugh transport Ms.

Wesselman to the hospital, but Mr. Lamplugh insisted that she be transported by emergency transport. (A-49, A-105-107) 911 was then called. (A-49)

The EMT personnel arrived within fifteen-to-twenty minutes. (A-49, A-108) Ms. Wesselman did not ask to be seen by any medical personnel at the CCHS facility before EMT personnel arrived. (A-49-50) In any event, EMT personnel transported Ms. Wesselman to Wilmington Hospital, where she was diagnosed with lactic acidosis. (A-52-53) At the hospital, Ms. Wesselman reported that she had similar symptoms on "Easter" (*i.e.*, in the past). (A-269)

Ms. Wesselman never made any reports of any issues with CCHS' or Ms. Jacobson's conduct to the EMT staff, Wilmington Hospital personnel, or any physicians. (A-54, A-60-61) She has likewise never treated for any claimed fright or mental issues, nor does she plan to do so. (A-59) Likewise, Ms. Wesselman denied any physical symptoms from the incident and has never discussed any claimed distress with her boyfriend. (A-59, A-63, A-111) Finally, during discovery, Ms. Wesselman never produced any evidence as to the alleged "rapid heart rate" or a "dangerous drop in blood pressure" while at CCHS' radiology facility as claimed in the Complaint. (A-16, A-51)

B. Litigation and Discovery

Based on this incident, Ms. Wesselman made two claims: negligent infliction of emotional distress and intentional infliction of emotional distress, both of which CCHS denied. (A-13-21) No special relationship between CCHS and Ms. Wesselman was alleged in the Complaint. (A-13-16)

In addition to engaging in written discovery, the parties deposed Ms. Wesselman, Michael Lamplugh, Nancy Jacobson, Doneen Stanek, Bradley Sandella, D.O., David Simpson, M.D., Phyllis Stawicki, R.N., and Julian Bradley, EMT. (A-3-7) Ms. Wesselman also inspected CCHS' facility on January 6, 2016. (A-7)

On May 31, 2016, Ms. Wesselman identified CCHS' employee, David Simpson, M.D., her attending physician at Wilmington Hospital, as her sole trial expert to testify in accordance with his records and deposition. (A-127) At his deposition, however, Dr. Simpson did not offer any expert opinions regarding: (1) the reasonableness of Ms. Jacobson's conduct, (2) the causal relationship between Ms. Wesselman's claimed physical injuries and Ms. Jacobson's conduct or CCHS' alleged negligence, (3) whether Ms. Wesselman's claimed emotional distress or injuries would have been different had Ms. Jacobson acted differently, (4) whether Ms. Wesselman had an allergic reaction at CCHS' radiology facility, or (5) whether

Ms. Wesselman suffered any type of physical (or non-physical) injury as a result of CCHS' conduct on April 26, 2013. (A-128-136) In fact, the only expert identified by any party to address CCHS' conduct and its effect, if any, on Ms. Wesselman's condition was Dr. Jeffrey Newhouse, who was designated by CCHS to opine that CCHS' personnel acted appropriately at all times and that the IV contrast administered to Ms. Wesselman did not cause her symptoms or subsequent diagnosis of lactic acidosis. (B-7-9) Discovery closed on September 30, 2016. (B-1)

C. Motion for Summary Judgment and Opinion

On October 11, 2016, CCHS moved for summary judgment on the basis that Ms. Wesselman failed to raise a *prima facie* case of negligent infliction of emotional distress and intentional infliction of emotional distress. (A-22-141) Ms. Wesselman opposed the motion on November 4, 2016. (A-142-287)

On December 16, 2016, the Superior Court granted CCHS' motion for summary judgment. (Exhibit to Amended Opening Brief of Appellant) The Superior Court emphasized that Ms. Wesselman presented claims that sounded in ordinary (not medical) negligence and that merely occurred on the premises of a medical facility. *Id.* at 2-3. The Court held that CCHS did not breach any duty owed to Ms. Wesselman, and that some of the claimed duties raised by her were not legally cognizable. *Id.* at 4-6. Likewise, Ms. Wesselman failed to identify any "outrageous"

conduct at any point during discovery that would establish a *prima facie* case of intentional infliction of emotional distress. (Exhibit to Amended Opening Brief of Appellant, at 6-7) The Court further held that Ms. Wesselman's claimed injuries were "too amorphous" to be considered as legally cognizable injuries, that they were not linked to the claimed misconduct, and that she failed to identify anything beyond "theoretical" damages. *Id.* at 5-8.

ARGUMENT

I. THE SUPERIOR COURT GRANTED SUMMARY JUDGMENT TO CHRISTIANA CARE HEALTH SERVICES, INC. PROPERLY BECAUSE PLAINTIFF FAILED TO OFFER ANY EVIDENCE THAT ESTABLISHED A *PRIMA FACIE* CASE OF NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

A. Question Presented

Did the Superior Court err when it granted summary judgment in favor of CCHS upon concluding that Plaintiff failed to establish a *prima facie* case of both negligent infliction of emotional distress and intentional infliction of emotional distress after discovery closed? CCHS preserved this issue when it filed its motion for summary judgment. (A-22-141)

B. Scope of Review

This Court reviews a decision to grant summary judgment *de novo*. *Bershad v. Curtiss-Wright, Corp.*, 535 A.2d 840, 844 (Del. 1987). When reviewing a lower court's grant of summary judgment, this Court must "examine the record to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991). Where the plaintiff, after discovery, fails to make a showing sufficient to establish an essential element of her

claim and on which she will bear the burden of proof at trial, there is "no genuine issue as to any material fact," and the defendant is entitled to summary judgment. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Separately, this Court may also affirm "on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

C. Merits of Argument

1. Plaintiff failed to establish a *prima facie* case of negligent infliction of emotional distress, thereby entitling Christiana Care Health Services, Inc. to judgment as a matter of law with regard to that claim.

A claim of negligent infliction of emotional distress ("NIED") requires the plaintiff to prove: (1) that the defendant was negligent; (2) that the negligence proximately caused fright to one in the immediate "zone of danger" of that negligence; and (3) that the negligence caused the plaintiff physical consequences that would qualify as an element of bodily injury damages. *Fanean v. Rite Aid Corp. of Del., Inc.*, 984 A.2d 812, 819 (Del. Super. Ct. 2009) (citing *Robb v. Pennsylvania Railroad*, 210 A.2d 709, 714-15 (Del. 1965)). As discussed below, Ms. Wesselman failed to make a *prima facie* case that CCHS was negligent, that any alleged negligence proximately caused her any physical harm, or that Ms. Wesselman

suffered any physical harm at all from the alleged misconduct. Therefore, this Court should affirm the Superior Court's grant of summary judgment to CCHS.

a. Plaintiff failed to establish that Christiana Care Health Services, Inc. breached its duty of ordinary care.

Ms. Wesselman agrees that she did not make a medical negligence claim, meaning that there was no claim that CCHS caused her lactic acidosis, that its staff was medically negligent, or, more importantly, that she was in a special "patient-provider" relationship. (Amended Opening Brief of Appellant at 8) Instead, she agrees that her claim is based on ordinary negligence, meaning that she needs to establish that the defendant (in this case, CCHS, through its employee Ms. Jacobson) breached a duty owed to the Plaintiff that proximately caused her damages. *Id.* at 9-10; *Fanean*, 984 A.2d at 823 (negligence action requires evidence of duty, breach, proximate causation and damages). As recognized by the Superior Court, Ms. Wesselman failed to identify how CCHS breached any duty owed to her or how any breach proximately caused her identifiable harm. As Ms. Wesselman failed to offer sufficient evidence of essential elements of her claim (negligence and proximate cause), the Superior Court properly entered judgment in CCHS' favor.

Though the Superior Court did assume that CCHS owed Ms. Wesselman a duty of ordinary care, it concluded that CCHS complied with its duty under the

circumstances. (Exhibit to Amended Opening Brief of Appellant, at 4-6) The undisputed facts demonstrated that Ms. Wesselman did not ask for any assistance, did not expect Ms. Jacobson to stand by the bathroom, did not report anything to CCHS beyond not feeling well and having diarrhea, and did not request that CCHS break down the door or otherwise obtain a key more quickly than five minutes. (A-44-48) Thus, the record was clear that CCHS complied with its duty of ordinary care under the circumstances, as Ms. Wesselman had no "obvious medical needs" that required further care. On appeal, Ms. Wesselman neither identifies any facts adduced during discovery nor identifies any contrary law to suggest that the Superior Court misapprehended the duties owed or misapplied the undisputed facts.

The Superior Court also determined that CCHS did not owe certain claimed duties by Ms. Wesselman. (Exhibit to Amended Opening Brief of Appellant, at 4-6) Specifically, the Court held that CCHS owed no duty to wait outside of Ms. Wesselman's bathroom or to have a key available to open a door in less than five minutes. *Id.* As to Ms. Wesselman's claim that CCHS failed to take her claims "seriously," the Superior Court concluded correctly that this was not a cognizable claim because "seriosity" is not a tort. (Exhibit to Amended Opening Brief of Appellant, at 5-6) Ms. Wesselman again fails to identify any basis to suggest that this conclusion was erroneous. But again, as noted *supra*, the factual record was

clear that CCHS did take the claims of which she told them seriously, as CCHS summoned emergency personnel within 15-20 minutes. (A-49, A-108) Likewise, Ms. Wesselman offers no basis whatsoever to suggest that the Court erred in concluding that there was no evidence that CCHS responded unreasonably, nor does she identify any law to suggest that contacting emergency personnel to arrive in 20 minutes constitutes a breach of the duty of ordinary care. Indeed, "there is no general duty to avoid causing someone emotional distress." *Spence*, 135 A.3d at 1291. Simply, as there was (and is) no genuine issue of material fact, CCHS was entitled to judgment as a matter of law on Ms. Wesselman's NIED claim.

Ms. Wesselman's claim that the Superior Court should not have considered whether she alleged negligence, even if not raised by the moving party, is incorrect. It is the court's obligation to determine, in the first instance, whether a duty exists such "that the community will impose a legal obligation upon one for the benefit of the other[.]" *Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988) (citing W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON TORTS § 37, at 236 (5th ed. 1984)); *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007) (trial court has duty to determine if duty exists in negligence case); *Spence v. Cherian*, 135 A.3d 1282, 1290 (Del. Super. Ct. 2016) (Court has duty to determine if duty exists in NIED case). While a court is required to accept all facts in a light most favorable to the non-

moving party, it is not required to accept all theories of negligence on a dispositive motion. Instead, when a dispositive motion is filed, the party with the burden of proof needs to "make a showing sufficient to establish the existence of the essential elements of her negligence claim." *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008). Ms. Wesselman failed to meet that burden, entitling CCHS to judgment. *Pipher*, 930 A.2d at 892.

b. Plaintiff failed to offer expert testimony that Christiana Care Health Services, Inc. acted inappropriately.

Separately, CCHS was entitled to summary judgment because Ms. Wesselman was required, but failed, to offer any expert testimony that Ms. Jacobson, a certified CT technician, acted negligently.[2] Ms. Wesselman's claim, in essence, was that Ms. Jacobson failed to suspect an allergic reaction and respond appropriately. To determine if Ms. Jacobson's response was negligent (or "outrageous"), a jury would need to understand what Ms. Wesselman's complaints meant medically, whether she did, in fact, exhibit signs of an allergic reaction, how a reasonable CT technician should have responded, and why Ms. Jacobson's

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2 Although not addressed explicitly by the Superior Court, this issue was raised by CCHS in its motion for summary judgment and can be considered as an alternative basis for affirmance. (A-26-27); *Unitrin, Inc.*, 651 A.2d at 1390 (Supreme Court can rule on issue fairly presented to lower court even if lower court failed to address it). Ms. Wesselman fails to rebut CCHS' argument on appeal, despite it being raised below.

response was not only allegedly inappropriate but "outrageous."[3] *Greenwald v. Caballero-Goehringer*, 2014 WL 7008959, at *3 (Del. Super. Ct. Nov. 25, 2014) (citing *Kerr v. OB/GYN Associates of Savannah,* 723 S.E.2d 302, 304 (Ga. Ct. App. 2012) (requiring expert testimony for claims involving medical questions, which are "those concerning highly specialized expert knowledge with respect to which a layman can have no knowledge at all"); *Weaver v. Lukoff*, 511 A.2d 1044, 1986 WL 17121, at *1 (Del. Jul. 1, 1986) (failure to offer expert testimony as to professional standard warrants dismissal of claim). Because Ms. Wesselman offered no expert testimony as to Ms. Jacobson's conduct at any time, she failed to establish an essential element of her claim (negligence). This Court should therefore affirm the entry of judgment in favor of CCHS.

c. Plaintiff failed to present any evidence of a physical injury, supported by expert testimony, as required for a negligent infliction of emotional distress claim.

Even assuming that Ms. Wesselman had offered a sufficient basis to establish negligence, her NIED claim still fails because she offered no evidence of proximate

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3 Ms. Wesselman agrees that she is not asserting a claim for medical negligence, yet she asserts a special relationship because Ms. Jacobson was a medical provider to her. She cannot have it both ways. If Ms. Wesselman's claim was based on a patient-provider relationship (*i.e.*, a claim of medical negligence), she needed an expert to address the standard of care and causation under Delaware law. *See* 18 *Del. C.* § 6853(e). Otherwise, CCHS owed no special duty beyond that of ordinary care, which was met in this case.

cause and physical injury as required by law. *See Fanean*, 984 A.2d at 819-20. In the context of NIED, the physical symptoms alleged must be non-transitory and recurring to be a legally sufficient physical injury. *Lupo v. Med. Ctr. Of Del., Inc.*, 1996 WL 111132, at *3 (Del. Super. Ct. Feb. 7, 1996) (citing Restatement (Second) of Torts § 436A(c) (1965)). Symptoms of nausea, dizziness, and the like "do[] not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm." *Id.* at *3.

Here, the Superior Court ruled correctly that Ms. Wesselman's claims of physical injury were "too amorphous." (Exhibit to Amended Opening Brief of Appellant, at 5) Crucially, Ms. Wesselman herself denied any physical symptoms from the incident at any time, contradicting the claims herein that she had a physical injury. (A-59, A-63, A-111) But even if her claimed symptoms were, in fact, physical symptoms, Ms. Wesselman agreed that her complaints of dizziness and weakness were transient and resolved shortly after this incident. (A-59) Without evidence of "substantial bodily harm," the Superior Court determined correctly that these "transient" complaints were insufficient as a matter of law to sustain an NIED claim. *Lupo*, 1996 WL 111132 at *3. In her Opening Brief, Ms. Wesselman identifies nothing in the record to rebut the Superior Court's reasoned conclusions.

But even if this Court were to accept her "amorphous" claims of physical injury, CCHS was still entitled to judgment as a matter of law because Ms. Wesselman was required to present expert testimony to establish proximate cause.[4] (Exhibit to Amended Opening Brief of Appellant, at 5) It is axiomatic that, in a negligence claim for personal injuries, evidence of the causal connection between alleged physical injuries and the alleged negligence must be supported by competent medical expert testimony. *Rayfield v. Power*, 840 A.2d 642, 2003 WL 22873037, at *1 (Del. Dec. 2, 2003). As noted by the Superior Court, Ms. Wesselman failed to identify what harm she suffered from the alleged lack of "immediacy" of CCHS' response. (Exhibit to Amended Opening Brief of Appellant, at 6) And, expert testimony was especially critical in this case as there were multiple potential causes of her claimed physical injuries, including: (1) her underlying abdominal issues for which she was having a CT scan at CCHS (A-39), (2) prior medical problems, since she reported "similar symptoms" in the past, including anxiety (A-38, A-269), (3) her subsequent diagnosis of lactic acidosis (A-53), (4) an underlying medical

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[4] This was raised by CCHS in its underlying motion. (A-26-27) Ms. Wesselman, however, fails to address it on appeal. Therefore, Ms. Wesselman has waived any objection to this argument. *Murphy*, 632 A.2d at 1152.

condition like dehydration, which would be consistent with her diarrhea,[5] or (5) CCHS' alleged conduct. On appeal, Ms. Wesselman does not dispute that she lacks expert testimony to suggest that her outcome would have been different in any way had CCHS acted differently.[6] *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991) (proximate cause exists where event would not have occurred but for defendant's conduct). Absent medical expert testimony causally linking CCHS' alleged negligence to her claimed injuries, she lacked evidence on proximate cause, an essential element of her NIED claim. *Fanean*, 984 A.2d at 820. This Court should therefore affirm the Superior Court's ruling. *Unitrin, Inc.*, 651 A.2d at 1390.

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[5] This was the opinion of CCHS' expert, Dr. Jeffrey Newhouse, the only medical expert who offered any causation opinion to a reasonable degree of medical probability. (B-7-9); *Mammarella v. Evantash*, 93 A.3d 629, 638 (Del. 2014) (medical expert opinion is only admissible if offered to reasonable degree of medical probability or certainty).

[6] Although not raised in the lower Court or in this Court (and therefore waived), Ms. Wesselman cannot avoid expert testimony by arguing that the alleged physical injuries were temporally associated with CCHS' alleged conduct without expert medical testimony to differentiate the multiple potential causes discussed *supra*. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . ."); *Minner v. Am. Mortg. & Guar. Co.*, 791 A.2d 826, 855 (Del. Super. Ct. 2000) (expert causation opinion based solely on temporal relationship is inadmissible).

2. Plaintiff failed to establish a prima facie case of intentional infliction of emotional distress, thereby entitling Christiana Care Health Services, Inc. to judgment as a matter of law with regard to that claim.

a. Plaintiff failed to offer any evidence of outrageous conduct by Christiana Care Health Services, Inc.

CCHS was also entitled to judgment as a matter of law on Ms. Wesselman's claim of intentional infliction of emotional distress (IIED). To present a *prima facie* case of IIED, the plaintiff must offer, *inter alia*, evidence that the defendant engaged in intentional or reckless conduct that caused severe emotional distress. *Mattern v. Hudson*, 532 A.2d 85, 86 (Del. Super. Ct. 1987) (*citing* Restatement (Second) of Torts § 46(1) (1965)). Ms. Wesselman, however, failed to offer any evidence to suggest that Ms. Jacobson's conduct was so improper that it would lead an average member of the community to exclaim, "Outrageous!" *Id.* (*quoting* Restatement (Second) of Torts § 46 cmt. d (1965)).

In an IIED claim, the conduct of which a plaintiff complains must be "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." *Mattern*, 532 A.2d at 86 (*quoting* Restatement (Second) of Torts, § 46 cmt. d (1965)). A plaintiff cannot recover for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" as the law cannot

"intervene in every case where some one's feelings are hurt." *Id.* Moreover, a plaintiff only has a claim where she can prove that the distress inflicted "is so severe that no reasonable man could be expected to endure it." *Id.* (*quoting* Restatement (Second) of Torts § 46 cmt. j (1965)). The determination of whether the conduct is sufficiently outrageous to permit a recovery is for the Court. *Hunt v. State*, 69 A.3d 360, 367 (Del. 2013) (*quoting* Restatement (Second) of Torts § 46(h) (1965)). In making that determination, the Court should consider the distress's intensity and duration. *Mattern*, 532 A.2d at 86.

In this case, there is simply no evidence that Ms. Jacobson engaged in any outrageous conduct that would be regarded "as atrocious, and utterly intolerable in a civilized community." *Mattern*, 532 A.2d at 86 (citation omitted). To the contrary, the evidence adduced during discovery demonstrated that Ms. Jacobson responded to Ms. Wesselman's known complaints and, when requested, dialed 911. (A-47-49) That Ms. Jacobson may have suggested to Ms. Wesselman's boyfriend that he take her to the hospital, before calling 911, does not indicate an "I don't care" attitude as claimed by Ms. Wesselman, nor could any reasonable person conclude that. (Amended Opening Brief of Appellant at 17) Likewise, while Ms. Wesselman may believe that an ambulance should have been called immediately, calling an ambulance so that it arrived in 15-20 minutes with a stable patient "is [not] so severe

that no reasonable man could be expected to endure it." *Mattern*, 532 A.2d at 86 (*quoting* Restatement (Second) of Torts § 46 cmt. j (1965)). Because Ms. Wesselman identified no evidence that CCHS' conduct was "so outrageous, . . . as to go beyond all possible bounds of decency," judgment in CCHS' favor was proper. *Id.* (*quoting* Restatement (Second) of Torts § 46(1) (1965)).

Contrary to Ms. Wesselman's claim, this case does not involve a special relationship. Ms. Wesselman has made clear that this is not a medical negligence claim. (Am. Op. Br. at 8-10); (Exhibit to Amended Opening Brief of Appellant, at 2-3) Instead, this incident just "happened to have occurred" at a medical facility. (Amended Opening Brief of Appellant at 10) Without a special relationship alleged (let alone proven during discovery), there is no basis to "lower the bar[.]" (Amended Opening Brief of Appellant at 17). *Compare Cummings v. Pinder*, 574 A.2d 843 (Del. 1990) (discussing IIED claim that arose from and was directly related to special relationship between attorney and client). But even if this Court were to find that a special relationship existed, Ms. Wesselman's claim still falls "so short of the mark" without evidence of any outrageous conduct. (Exhibit to Amended Opening Brief of Appellant, at 7 n.7).

b. Plaintiff failed to offer any evidence of severe emotional distress as required by law.

Finally, putting aside the lack of sufficient evidence of outrageous or reckless conduct, Ms. Wesselman offered no evidence of severe emotional distress (an essential element of her claim).[7] *Mattern*, 532 A.2d at 86. Ms. Wesselman made clear that she never sought any treatment for her claimed distress, that she has no plans to do so, and (most importantly) that she has never mentioned this incident to any physicians. (A-54, A-59-61, A-63, A-111) Indeed, she never mentioned this to the EMT personnel, Wilmington Hospital personnel, or even her boyfriend. (A-59, A-63, A-111) Without any complaints of any distress that was intense or ongoing, there was nothing to suggest distress, let alone severe distress as required by law. *Mattern*, 532 A.2d at 86. The Superior Court therefore granted summary judgment to CCHS properly.

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[7] This issue was raised with, but not addressed explicitly by, the Superior Court. (A-27) This Court can therefore affirm on this basis. *Unitrin, Inc.*, 651 A.2d at 1390.

CONCLUSION

At its core, Ms. Wesselman's claim is that CCHS' conduct was "pretty frustrating" and that it "bothered her." (A-111) But, without more, these "hurt" feelings do not give rise to an actionable claim for negligent infliction of emotional distress or intentional infliction of emotional distress. *Mattern*, 532 A.2d at 86 (*quoting* Restatement (Second) of Torts, § 46 cmt. d (1965)). Ms. Wesselman failed to demonstrate that CCHS breached any duty owed to her, or that she suffered any non-transient physical injuries that would be legally cognizable. Likewise, she failed to identify an expert to opine that CCHS was negligent or that the alleged negligence proximately caused her claimed injuries. And, Ms. Wesselman failed to identify any conduct by CCHS that was outrageous and failed to offer any evidence of severe emotional distress. The record is clear that Ms. Wesselman has identified nothing to rebut the Superior Court's sound conclusion that she failed to offer a *prima facie* case of her claims of negligence and infliction of emotional distress. CCHS was therefore entitled to judgment as a matter of law, and this Court should affirm the Superior Court's grant of summary judgment to it.

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Respectfully submitted,

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Services, Inc.

DATED: 3/27/17

CERTIFICATE OF ELECTRONIC SERVICE

I, Joshua H. Meyeroff, hereby certify that on this 24th day of March, 2017, I have caused the following documents to be served electronically on the parties listed below:

DEFENDANT BELOW, APPELLEE CHRISTIANA CARE HEALTH SERVICES, INC.'S ANSWERING BRIEF ON APPEAL

APPENDIX TO DEFENDANT BELOW, APPELLEE CHRISTIANA CARE HEALTH SERVICES, INC.'S ANSWERING BRIEF ON APPEAL

Online service to:

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750 Shipyard Drive, Suite 400
P.O. Box 2092
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Joshua H. Meyeroff (#5040)

7752557/