

KOHLER V. SELLERS, C.P. Franklin County Branch, No. A.D.
1983 - 373

*Trespass and Assumpsit - Intentional and Emotional Infliction of emotional distress -
Sections 868 and 46 Restatement of Torts*

1. A course of action for emotional distress requires extreme and outrageous conduct.
2. Extreme and outrageous conduct may arise where the actor knows that the other person is peculiarly susceptible to emotional distress.
3. In cases involving mishandling of a body, Plaintiffs need not be present in order to maintain an emotional distress suit based on intentional or negligent infliction.

John Wills Beach, Esquire, Attorney for Plaintiffs

Robert E. Graham, Jr., Esquire, Attorney for Defendants

OPINION AND ORDER

KELLER, J., April 23, 1983:

Plaintiffs, Elaine R. Kohler, Alan R. Kohler, and Karen Sue Kohler filed their complaint in trespass and assumpsit against defendants, William F. Sellers, Robert G. Sellers Funeral Home, Inc., and Robert G. Sellers alleging intentional and negligent infliction of emotional distress to which defendants filed preliminary objections in the nature of a demurrer to Counts, I, IV, and VI and a motion for more specific pleadings with regard to paragraphs 38 (d) and (e).

In 1979 the Pennsylvania Supreme Court in *Sinn v. Burd*, 486, Pa. 146, 404 A.2d 672, 673-74 (1979) held that:

It is axiomatic in the law of pleading that preliminary objections in the nature of a demurrer admit as true all well and clearly pleaded material, factual averments, and inferences fairly deducible therefrom. (Citations omitted). Conclusions of law and unjustified references are not admitted by the pleading. (Citation omitted). Starting from this point of reference the complaint must be examined to determine whether it sets forth a cause of action which, if proved, would entitle the party to the relief sought. If such is the case, the demurrer may not be sustained.

The factual allegations in the complaint can be summarized as follows. Plaintiff Elaine R. Kohler is the widow of J. Richard

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LEGAL NOTICES, cont.

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NOTICE

TO ALL PARTIES IN INTEREST AND CLAIMANTS: A SCHEDULE OF DISTRIBUTION OF SALE WILL BE FILED BY THE UNITED STATES MARSHAL WITH THE CLERK OF COURT, SCRANTON, PA., ON SEPTEMBER 9, 1983. ANY CLAIMS OR EXCEPTIONS TO SAID DISTRIBUTION MUST BE FILED WITH THE CLERK OF COURT WITHIN TEN (10) DAYS THEREAFTER.

Matthew Chebal, Jr.
U.S. Marshall
Middle District of Pennsylvania

8-5, 8-12, 8-19

NOTICE

Court of Common Pleas of the 39th Judicial District, Pennsylvania, Franklin County Branch, Miscellaneous Docket Volume Y, Page 301

NOTICE IS HEREBY GIVEN that on July 12, 1983, the Petition of Gretchen Elizabeth Jamison and Rebecca Louise Jamison, minors, by Janine E. Lehman, their natural mother, was filed in the above-named Court, praying for a decree to change the names of said minors to Gretchen Elizabeth Lehman and Rebecca Louise Lehman.

The Court has fixed Thursday, the 11th day of August, at 3:00 P.M., in Court Room No. 3 as the time and place for the hearing on said Petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of said Petition should not be granted.

Edward I. Steckel, Esq.
406 Chambersburg Trust Bldg.
Chambersburg, Pa. 17201

7/15, 7/22, 7/29, 8/5

Kohler who died suddenly and unexpectedly of a heart attack on August 18, 1982. She contacted the defendant Sellers Funeral Home, Inc. concerning the funeral arrangements and was assured the defendant funeral home could fulfill the written requests of decedent for a funeral with military honors as well as additional services requested by the plaintiffs. Mrs. Kohler and defendant entered into a written contract on August 18, 1982. Prior to the signing of the contract, plaintiffs were undecided as to whether or not there should be a viewing. On the recommendation and assurance of the defendant that such a viewing would be advisable and could be provided by the defendant, plaintiffs agreed a viewing would be held at the defendant funeral home at 10:00 a.m. on August 21, 1982. The plaintiffs notified family and friends of the time, date and place of the viewing. On Friday, August 20, 1982 at approximately 4:00 p.m. a representative of defendants notified plaintiffs that a military funeral could not be arranged and that plaintiffs would have to make arrangements for their own pall bearers because the funeral home could not do so on such short notice.

The plaintiffs learned from family and friends, that when they arrived at the funeral home on Saturday, August 21, 1982 the premises were dark and unprepared for a viewing; no casket and flowers were set out; no arrangements for the viewing were evident; and no help was in attendance. Defendant, William Sellers, dressed in a yellow tee-shirt and dungarees, ushered the relatives and friends into a room with children's caskets. Decedent's casket was wheeled out, light turned on, and the lid of the casket opened to reveal the improperly prepared and unshaven body of plaintiffs' decedent slumped in the casket. The defendants were unable to locate or account for the flowers which had been sent by family members and friends. When plaintiff questioned defendant concerning the lack of preparation for the viewing and the fact that the body had not been properly prepared, defendant, William Sellers remarked, "Well, at least we had him dressed."

At the church funeral services held on August 21, 1982, defendant failed to have sufficient personnel present to set up and prepare for the funeral services and failed to have proper flower arrangements at the church. Upon arrival at the gravesite, plaintiff discovered that there would be no honor guard or military ceremony.

As a result of such occurrences, plaintiff Elaine Kohler alleges that she has suffered and will continue to suffer in the future serious emotional and mental distress, embarrassment,

and feelings of guilt, together with physical distress manifested by certain symptoms and bodily ailments including but not limited to nervousness, despondency, and depression, loss of appetite, inability to sleep, and inability to conduct normal daily routine and personal affairs. As of the filing of such complaint she had expended \$62.00 for medical care and treatment and alleges that she may incur similar expenses in the future. She also alleges that she spent \$20.13 for telephone calls to relatives and friends of the family to apologize for the mishandled funeral arrangements. Mrs. Kohler claims general and punitive damages for the acts of the defendants in excess of \$10,000.

Plaintiff Alan Kohler alleges that as a result of defendants' conduct he has suffered and in the future will continue to suffer serious emotional and mental distress, embarrassment and feelings of guilt. He also alleges that he suffered aggravation of his existing hypertensive condition resulting in severe elevation of his blood pressure requiring medical attention. He alleges that he has spent \$51.95 for medical care and treatment and that it may be necessary to expend additional sums for medical treatment in the future. He too claims general and punitive damages in excess of \$10,000.

Plaintiff Karen Sue Kohler claims that she has suffered and in the future will continue to suffer serious emotional and mental distress, embarrassment and feelings of guilt, together with aggravation of her cerebral palsy. She alleges the expenditure of unspecified sums for medical care and treatment and in the future will have to expend additional sums. She claims general and punitive damages in excess of \$10,000.

Plaintiffs rely on section 868 and 46 of The Restatement of Torts 2d which provide:

Sec. 868. Interference with Dead Bodies

One who intentionally, recklessly or negligently removes, withholds, mutilates, or operates upon the body of a dead person, prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

Sec. 46. Outrageous Conduct Causing Severe Emotional Distress

(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

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HINES, Hazel M.	75 Burlington	1,163.32
KENDALL, Daryl	77 Shultz	725.16
KENDALL, Wilbur E.	65 Starr	365.74
HOPKINS, Raymond	73 Concord	553.59
POOLE, Ronald R. & Cindy	73 Monterey	581.85
RANDK, Norman S. & Patricia	80 Liberty	626.76
SMITH, Sidney	75 Rosemont Chalet	669.79
STEPLER, Jeffrey	73 Mark IV	523.02
SOUTHAMPTON TOWNSHIP		
RHONE, Charles Est.	N-20-17 1 Ac. Shbg.-Fay Road	146.68
STATUM, Pinkie	N-20-15 Mainsville to White Church Road	143.78
STATUM, Pinkie & Joseph	70 Rembrandt	313.18
WASHINGTON TOWNSHIP		
BEELER, Paul E. & Jane	Q-17-44 14647 Wayne Highway	79.74
CARBAUGH, Frances	Q-19-B-98 12128 Broad St. Rouzerville	284.27
EAST, David A.	Q-8-67 Rt. 378 1 Ac. Glen Furney	2,095.40
GIFT, Kenneth L. & Nancy	Q-7-53A 11538 Anthony Highway	1,034.45
GREEN, Lester C., Jr. & Judy	Q-13-M-6B Beartown	232.12
HARBAUGH, Harry R. & Alice	Q-20-P-22 15121 Dutrow Ave.	772.27
HULL, Edward H. & Patricia A.	Q-19-A-84 11478 Buchanan Trail East	1,145.51
MIM Three Properties	Q-20-Q-5 Norwood Ave. 2 Ac. Blue Ridge Summit	2,704.83
SCHULTZ, David A. & Patsy	Q-7-165 8394 Sheffield Manor Blvd.	1,352.38
WETZEL, Amos F.	Q-13-R-20 Beartown	612.25
BEELER, Paul E. & Jane	56 Homemaker	178.36
BEELER, Paul E. & Jane	63 Atlas	357.71
CAUFFMAN, Rodrick L. & Joanne	77 Supreme	152.09
DAVIS, Joseph	72 Mark IV	546.26
HARBAUGH, Timothy L. & Beulah	72 Atlantic	543.24
MILLER, Kenneth	68 Pacemaker	324.63
WAYNESBORO BOROUGH		
EYLER, Ernest S. & Estella	409 W. 5th Street	641.74
GUYER, Larry G. & Mary	121 N. Potomac	773.03
MONN, Paul E.	807 W. Main St.	788.23
PEARSON, Jamie	N. Franklin St.	111.86
WAGAMAN, Paul	Land on Cleveland Ave. & 5th St.	1,331.52
WALTER, Gary L.	225 Cleveland Ave.	512.88
W. END SHIPPENSBURG		
GREINER, Arthur K.	6A-48-2A Rt. 11	259.56
GREINER, Arthur K.	6B-25-28 Lurgan Ave.	57.59
GREINER, Arthur K.	6B-25-29 45 Lurgan Ave.	358.89
GREINER, Arthur K.	6B-17-38 120 Cumberland Ave.	311.82

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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, or

(b) to any person who is present at the time, if such distress results in bodily harm.

Defendants contend that a cause of action does not exist because the conduct was not outrageous and extreme. However, Comment d to Sec. 46 provides inter alia:

"Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'Outrageous!'"

The extreme and outrageous character of the conduct may arise from the position of authority or apparent authority of the actor over the other or from the actor's knowledge that the other is peculiarly susceptible to emotional distress due to the mental condition of the other. In the case at bar, we are persuaded that an average member of the community might exclaim "outrageous" or some similar exclamation if the allegations of plaintiffs' complaint were read to him.

The defendants also contend that plaintiffs have failed to state a cause of action because they were not physically present when the alleged conduct occurred. They cite Comment 1 of Sec. 46, supra, and the Pennsylvania Supreme Court cases of *Sinn v. Burd*, supra, and *Yandrich v. Radic*, 495 Pa. 243, 433 A.2d 459 (1981). The Restatement Comment observes that cases thus far decided have limited liability to plaintiffs who were present. In *Sinn*, a mother who saw her daughter run down by a negligent driver was permitted to recover because although she was outside of the zone of danger, her emotional distress was foreseeable from her observation of her daughter being killed, whereas in *Yandrich* a father who was not present when his son was injured was denied recovery.

We do not find defendants arguments persuasive. Restatement Comment 1 also states,

"The caveat is intended, however, to leave open the possibility

of situations in which presence at the time may not be required.”

The cases cited by the defendants are distinguishable from the instant case, for here the issue is the handling of the body of a deceased relative rather than the infliction of injury upon a relative. In *Papieves v. Kelly*, 437 Pa. 373, 263 A.2d 118 (1970) the Supreme Court of Pennsylvania held that the impact rule was not applicable in cases involving emotional distress arising from the mishandling of a deceased relative. It is not a property right but the right of a decedent's nearest relative to protection against intentional, outrageous and wanton conduct peculiarly calculated to cause serious mental or emotional distress. The Court observed that although such a cause of action had not previously been considered by a Pennsylvania Appellate Court, recovery was not precluded. See also, *Sincovich v. Peterson*, 7 D&C 3d 371 (1978).

The averments of plaintiffs' complaint also state a cause of action for the negligent infliction of emotional distress. Plaintiffs rely upon Sec. 436A, Restatement of Torts Second:

Sec. 436A. Negligence Resulting in Emotional Disturbance Alone

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 emotion disturbance.

In *Sinn v. Burd*, supra, the Court abandoned the zone of danger rule and substituted an analysis based upon the concept of foreseeability. The plaintiffs contend that the defendants could have foreseen the emotional and mental distress that would result from their actions.

In *Banyas v. Lower Bucks Hospital*, 293 Pa. Super. 122, 437 A.2d 1236 (1981), the Court held that physical injury was a requirement for negligent infliction of emotional distress but that physical presence was not a requirement. In the instant case the plaintiffs were not present at the time of the alleged conduct. However, all of them alleged physical injury. The plaintiffs cite Sec. 313 Restatement of Torts Second:

Sec. 313. Emotional Distress Unintended.

(1) If the actor unintentionally causes emotional distress to

another, he is subject to liability to the other for the resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from the facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

In our judgment the facts alleged by plaintiffs state a cause of action. The defendants' demurrer will be dismissed.

Defendants' second preliminary objection is a motion for more specific pleading with regard to paragraphs 38 (d) and (e). The test for a more specific pleading is whether the complaint informs the defendant with accuracy and completeness of the specific basis upon which recovery is sought so that defendant will be able to prepare his defense. *Commonwealth, Environmental Pollution Strike Force v. Jannette*, 9 Cmwlth. 306, 305 A.2d 774 (1973). It is a question of whether the allegation is so vague or indefinite as to render it difficult or impossible for defendant to answer the same or to prepare his defense. 2 Anderson Pa. Civil Practice, p. 489.

Paragraphs 38 (d) and (e) allege:

38. The aforesaid acts complained of by plaintiffs, Elaine R. Kohler, Alan R. Kohler, and Karen Sue Kohler, are the direct and proximate result of the negligence of defendant, Robert G. Sellers, in the following particulars:

(d) In otherwise failing to observe the regulations of the State Board of Funeral Directors of the Department of State of the Commonwealth of Pennsylvania and the laws of the Commonwealth of Pennsylvania;

(e) In otherwise failing to assure that the funeral arrangements were conducted in a professional and reverential manner in a manner otherwise consistent with the ordinary standard of care and practices of other funeral directors in the state of Pennsylvania.

Paragraph (d) fails to aver which regulations were not observed. Paragraph (e) fails to state with specificity in what respects the funeral arrangements were not handled in a professional and reverential manner or how they were inconsistent with the standard of care and practices of other funeral directors in Pennsylvania.

Plaintiffs argue that discovery is not complete and therefore their pleadings need not be more specific. This Court held in *College v. Gothie*, 4 Frank. C. Leg. J. 58 at 61 (1980):

“However, in our judgment, the fact that that right (discovery) exists in the defendant improperly ignores the basic issues whether the defendant is required to plead . . . with more specificity for:

1. The purpose of fact pleading as it is mandated in Pennsylvania not only is intended to inform the contesting parties of the issues which they will be required to meet at the ultimate trial of the matter, but it is also intended to provide the Court with a trial format establishing the parameters of the issues. The discovery procedures do not serve this second purpose.

2. The Rules of Civil Procedure are based on the fact pleading system. It is therefore necessary that the pleadings set forth the facts specifically even though the facts could also be determined by discovery. Thus the fact that discovery procedures are available does not excuse the plaintiff from more specifically pleading the material facts on which its cause of action is based.

Procedure should not be made unnecessarily complicated by requiring the defendant to resort to discovery proceeding to obtain information which the plaintiff could properly plead in his complaint when such information constitutes the basis on which his cause of action is based.’ 2 Anderson Pa. Civil Practice Rule 1017.11, page 490.”

See also *Caleco v. Wilson College and Squires Appliances*, No. A.D. 1982 - 79 (Jan. 10, 1983) and *Smuro v. Gsell*, No. A.D. 1982 - 359, (Mar. 1, 1983).*

Defendants’ second preliminary objection in the nature of a motion for more specific pleading will be sustained.

ORDER OF COURT

NOW, this 28th day of April, 1983, the defendants preliminary objection in the nature of a demurrer is dismissed. The preliminary objection in the nature of a motion for a more specific pleading is sustained.

*Editor’s Note - *Caleco v. Wilson College and Squires Appliances* has not been reported in this Journal. *Smuro v. Gsell* is reported at 6 Franklin 52 (1983).

The plaintiffs are granted leave to file an amended complaint within twenty (20) days of the date hereof.

Exceptions are granted plaintiffs and defendants.

McDONALD V. DAYWALT, C.P. Franklin County Branch, No. F.R. 1982-986

Support - Statute of Limitations - 42 Pa. C.S.A. Sec. 6704 - Constitutionality

1. The purchase of several food items, volunteer labor to lay a floor and a gift of a rifle to a child do not amount to voluntary contribution of support under 42 Pa. C.S.A. Sec. 6704.

2. Pennsylvania law relies on the prevention of stale and fraudulent claims as a legitimate state interest in child paternity cases.

3. Due to scientific advances in the area of blood testing in paternity cases, problems of proof after the elapse of time have been alleviated.

4. Since support for a legitimate child may be sought at any time during minority and support for an illegitimate child may be sought only within six (6) years after birth or two (2) years after support or acknowledgement, a disparity of treatment in violation of the equal protection clause of the U.S. Constitution exists.

5. 42 Pa. C.S.A. Sec. 6404(b) is unconstitutional insofar as it imposes a two-year statute of limitations upon actions brought to establish the paternity of a child born out of wedlock.

John R. Walker, District Attorney, Attorney for the Plaintiff

Timothy W. Misner, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., July 26, 1983:

This support action was commenced by the filing of a complaint for support on November 24, 1982 in the Court of Common Pleas of Clinton County, and the certification and order by that court transmitting the complaint to the Clerk of this court