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IN THE
COURT OF APPEALS OF INDIANA

Faye E. Hunter and James E. Hunter,

Appellants,

v.

J & M Displays, Inc.,

Appellee.

January 31, 2023

Court of Appeals Case No. 22A-CT-1454

Appeal from the Johnson Superior Court

The Honorable Kevin M. Barton, Judge

Trial Court Cause No. 41D01-2007-CT-110

Opinion by Judge Brown
Judges Bradford and Pyle concur.

Brown, Judge.

[1] Faye E. Hunter and James E. Hunter appeal the trial court's order granting a motion for partial summary judgment filed by J & M Displays, Inc. ("J & M"). We affirm.

Facts and Procedural History

[2] On February 27, 2019, J & M and the Lamb Lake Lot Owners Association, Inc., entered into a Fireworks Display Agreement related to a July 5, 2019 display. At 8:00 p.m. on July 5, 2019, Faye went to bed. At approximately 10:00 p.m., J & M commenced the fireworks display. While Faye was asleep, a firework shell mortar launched by J & M penetrated the roof of the Hunters' home ultimately resulting in a fire. Faye's "bed shook," and she heard "dishes rattling" and thought "what in the world." Appellants' Appendix Volume II at 116. She then heard someone pounding on her door. When she opened the door, a man "took ahold of [her] arm" and asked: "Is there anyone else in your house?" *Id.* at 66. She answered in the negative, and the man walked her down the sidewalk and into the cul-de-sac. Faye then observed smoke coming out of her garage.[1] She did not have any physical injuries that night as a result of the fire in her garage or report any injuries to the fire department. The Hunters' garage was damaged as a result of the fire.

[1] The designated evidence reveals Faye testified there was no indication from the time she woke up to the time she made it to the front door that her house was on fire.

[3] On July 30, 2020, the Hunters filed a Complaint and Jury Demand against J & M alleging Count I, negligence, and Count II, negligent infliction of emotional distress to Faye. On January 17, 2022, J & M filed a motion for partial summary judgment alleging that the Hunters had failed to state a claim on which relief could be granted as a matter of law because their claim for negligent infliction of emotional distress was "based solely on an economic loss and not on some injury suffered by them." *Id.* at 45. On January 26, 2022, the Hunters filed a response and objection to J & M's motion and designated evidence. On February 2, 2022, J & M filed a Reply in Support of Its Motion for Partial Summary Judgment.[2]

[4] On March 18, 2022, the court held a hearing. On March 21, 2022, the court entered an order granting J & M's motion for partial summary judgment. The order states:

> 18. Here, Faye Hunter was not physically impacted. The modified impact rule does not apply. The loss was to property and was purely economic. She does not come under [the] bystander rule as the loss was to property and not to a person standing in closes [sic] relation to her. The facts are not within the exception created by K.G. v. Smith[, 178 N.E.3d 300, 304 (Ind. 2021)].
>
> 19. The Court concludes that the case of Ketchmark v. N. Ind. Publ. Serv. Co., 818 N.E.2d 522 (Ind. Ct. App. 2004)[,] is

[2] On February 2, 2022, J & M also filed a Supplemental Designation of Evidence in Support of Summary Judgment. The trial court's March 21, 2022 order found that it was "unable to consider any facts designated in [J & M's] Reply Brief and Supplemental Designation as such submission is beyond the period of thirty (30) days from [the] date of [the] motion." Appellants' Appendix Volume II at 13.

> controlling. Indiana does not recognize a cause of action for negligent infliction of emotional distress for economic loss. The court does not find the presence of Plaintiff at the time of loss distinguishes the case from *Ketchmark* so as to create a cause of action.

Id. at 17.

Discussion

[5] We review a trial court's order granting summary judgment de novo. *Clifton v. McCammack*, 43 N.E.3d 213, 216 (Ind. 2015). "The standard is the same on appeal as in the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

[6] The Hunters argue that the holdings in *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991), and *Conder v. Wood*, 716 N.E.2d 432 (Ind. 1999), require that Faye sustain a "direct impact" in order to pursue her claim for negligent infliction of emotional distress. Appellants' Brief at 21. They assert that the designated evidence demonstrated there was a genuine issue of material fact regarding whether Faye sustained a direct impact including her statements that her "bed shook" and she was "upset" and "shocked" *Id.* (quoting Appellants' Appendix Volume II at 117-118). They contend "[t]he designated evidence shows that the physical impact experienced by Faye was caused by the mortar striking her home and shaking [her] awake from a sound sleep." *Id.* at 23.

[7] The Indiana Supreme Court has recently observed that "[o]ur common-law rules governing claims for the negligent infliction of emotional distress reflect a jurisprudence of incremental change." *K.G. by Next Friend Ruch v. Smith*, 178 N.E.3d 300, 304 (Ind. 2021) (bold omitted). In discussing the history of jurisprudence in Indiana, the Court observed that Indiana previously applied the Impact Rule. *Id.* at 305. In 1991, the Court noted in *Shuamber v. Henderson* that "Indiana has a long-standing and well-established rule that damages for mental distress or emotional trauma may be recovered only when the distress is accompanied by *and* results from a physical injury caused by an impact to the person seeking recovery." 579 N.E.2d 452, 454 (Ind. 1991). It observed that "[t]he mental injury must be the natural and direct result of the plaintiff's physical injury." *Id.* The Court observed that "[t]his rule is known as the 'impact rule' because of the requirement that there be some physical impact on the plaintiff before recovery for mental trauma will be allowed." *Id.* It also held that "[t]he rule, as applied in Indiana, has three elements: (1) an impact on the plaintiff; (2) which causes physical injury to the plaintiff; (3) which physical injury, in turn, causes the emotional distress." *Id.*

[8] The Indiana Supreme Court recently detailed the development of the Modified Impact Rule as follows:

> In 1991, this Court decided two cases that altered the course of our jurisprudence. The first of these two cases, *Cullison v. Medley*, involved the intentional variation of the tort. 570 N.E.2d 27, 30 (Ind. 1991). In disposing of the impact rule to permit recovery for emotional distress "sustained in the course of a tortious trespass," the Court "conclude[d] that the rationale for this rule,

whatever its historical foundation, is no longer valid." *Id.* "The mere fact of a physical injury, however minor," the Court reasoned, "does not make mental distress damages any less speculative, subject to exaggeration, or likely to lead to fictitious claims." *Id.* Finding a jury no less "qualified to judge someone's emotional injury" than "to judge someone's pain and suffering or future pain and suffering," the Court concluded, "and the presence or absence of some physical injury does nothing to alleviate the jury's burden in deciding whether the elements of mental suffering are present." *Id.*

Less than six months later, this Court found "no reason under [the] appropriate circumstances to refrain from extending" the rule in *Cullison* to cases "where the distress is the result of a physical injury negligently inflicted on another." *Shuamber*, 579 N.E.2d at 455. *Shuamber* involved a mother and daughter who suffered physical injuries from a car accident in which an immediate relative died. *Id.* at 453. The survivors sued, seeking to recover for their mental anguish, not based on emotional trauma resulting from their own physical injuries, but, rather, "as a result of observing a member of their immediate family sustain mortal injuries in an automobile collision." *Id.* The defendant moved for partial summary judgment on grounds that, under the factual circumstances there, Indiana recognized no right of recovery for the negligent infliction of emotional distress. *Id.* The trial court agreed, and the Court of Appeals affirmed. *Id.* at 453-54.

In reversing summary judgment, this Court deemed the traditional policy concerns behind the impact rule—avoiding excessive litigation, preventing fraudulent claims, and ensuring causality—as "no longer valid" in claims involving the negligent infliction of emotional distress. *Id.* at 455. Under the Court's new modified-impact rule, a plaintiff may recover damages when he or she, having suffered no physical injury, "sustains a direct impact by the negligence of another and," because "of that direct involvement sustains an emotional trauma" serious enough to

> affect a "reasonable person." *Id.* at 456. The modified rule still requires "direct physical impact," we clarified in a subsequent opinion, but "the impact need not cause a physical injury to the plaintiff and the emotional trauma suffered by the plaintiff need not result from a physical injury caused by the impact." *Conder v. Wood*, 716 N.E.2d 432, 434 (Ind. 1999).

K.G., 178 N.E.3d at 305-306.

[9] The Indiana Supreme Court also observed the development of the Bystander Rule in which a bystander may show "direct involvement" in a traumatizing incident by proving that he or she "actually witnessed or came on the scene soon after the death or severe injury" to "a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tort[i]ous conduct." *Id.* at 306 (quoting *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000)).

[10] In *K.G.*, the Court carved out an exception to the Bystander Rule in a situation when a caretaker assumes responsibility for a child, and when that caretaker owes a duty of care to the child's parent or guardian, a claim against the caretaker for the negligent infliction of emotional distress may proceed when the parent or guardian later discovers, with irrefutable certainty, that the caretaker sexually abused that child and when that abuse severely impacted the parent or guardian's emotional health. *Id.* at 308. The Court observed that "[o]ur carve-out exception to the bystander rule's proximity requirement, we believe, includes sufficient protections against the public-policy concerns

underlying an emotional-distress claim: spurious claims and open-ended liability."[3] *Id.*

[11] With this background in mind, we turn to examining *Gorman v. I & M Elec. Co., Inc.*, 641 N.E.2d 1288 (Ind. Ct. App. 1994), *trans. denied*, which discussed the sufficiency of an impact. In *Gorman v. I & M Elec. Co.*, James and Delores Gorman were awakened on May 15, 1992, by neighbors who found the Gormans' house on fire. 641 N.E.2d at 1289. The Gormans gathered their children and escaped the residence unharmed. *Id.* Once outside, Delores mistakenly concluded that her five-year-old son was still in the house. *Id.* James re-entered the residence to search for the son while Delores remained outside, fearing for the safety of her child. *Id.* After discovering that the child was not in the house, James fell down the stairs in the home, injuring his back and left big toe. *Id.*

[12] After the fire, Delores experienced emotional distress, manifested by an outbreak of hives, and had been diagnosed as agoraphobic. *Id.* Her doctors attributed her problems, in part, to the experience of the fire. *Id.* Delores brought a claim for her emotional damages. *Id.* The trial court granted a

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[3] Justice Slaughter authored a dissent, joined by Justice Massa, in which he wrote that "[u]nder prevailing law, the mother's claim for her own emotional-distress damages fails, as the trial and appellate courts correctly held" and that "[o]nly time will tell whether today's watershed rule is so narrow and fact-specific that it proves to be a one-way ticket for this ride only—or whether, as I suspect, it is the proverbial camel's nose under the tent, with the rest of the camel soon to follow." 178 N.E.3d at 314-315 (Slaughter, J., dissenting).

motion for summary judgment on her claim due to her inability to satisfy Indiana's impact requirement for negligent infliction of emotional harm. *Id.*

[13] On appeal, we observed that Delores asked that we find that she sustained an impact for the sole purpose of allowing her claim to be presented to the jury. *Id.* at 1291. She proposed "that an impact could be found in her entire experience with the fire: being awakened during the night by the fire, fleeing her home, watching her husband re-enter the house, and fearing for the safety of her son." *Id.* We held that "[t]he trial court correctly determined that these facts do not demonstrate that she sustained a direct physical impact." *Id.*

[~~14~~] In light of the designated evidence, which included that Faye's bed merely shook and she was awakened from a sound sleep, we conclude that such evidence does not constitute a direct physical impact under the Modified Impact Rule. *See id.*

[15] We also note *Ketchmark v. N. Ind. Pub. Serv. Co.*, 818 N.E.2d 522 (Ind. Ct. App. 2004), which was relied upon in the trial court's order in the present case. In that case, NIPSCO employees went to the home of Paul and Joan Ketchmark to repair the residence's gas meter and pipes. 818 N.E.2d at 522. As the workers were performing the repairs, the Ketchmarks noticed a strong odor of gas and complained to a NIPSCO employee present at the house. *Id.* The Ketchmarks left their home to go out to dinner. *Id.* at 523. While the Ketchmarks were at dinner, a natural gas explosion destroyed their house and all its contents. *Id.* As the Ketchmarks were driving back to their home after

dinner, they noticed that their street was barricaded by emergency vehicles. *Id.* They exited their car and were approached by a neighbor who informed them of the incident. *Id.* Joan became distraught and had to rest in a passerby's vehicle. *Id.* The Ketchmarks filed a multi-count complaint against NIPSCO alleging negligent infliction of emotional distress. *Id.* NIPSCO filed a motion for summary judgment on this count, which the trial court granted. *Id.*

[16] On interlocutory appeal, we held:

> The Ketchmarks construe the negligent infliction of emotional distress precedent cases to require only "direct involvement" without the requirement of impact upon or the threat of injury to a person. This argument misses the mark.
>
> We have generally refused to allow these damages where there has been only an economic loss. In *Comfax Corp. v. North American Van Lines, Inc.*, 587 N.E.2d 118, 127 (Ind. Ct. App. 1992), we concluded that an economic loss and its resulting emotional trauma is not "sufficiently serious" to warrant the imposition of liability. While we recognized that an economic loss may cause emotional distress, the loss of a loved one cannot be compared to the loss of an investment. Even if a person is directly involved in a property loss, we decline to extend liability for negligent infliction of emotional distress to those cases involving purely property loss and the concomitant emotional distress caused by that loss.
>
> We are not alone in generally refusing to allow recovery for negligent infliction of emotional distress arising out of property loss. Several cases from other jurisdictions establish that there is no recovery for negligent infliction of emotional distress arising from only the damage or loss of property. . . . While we certainly sympathize with the tremendous loss that the Ketchmarks have suffered as a result of this explosion—heirlooms, photos, and a

> long-standing family home—the cause of action for negligent infliction of emotional distress does not extend to the loss of property because of the obvious and substantial difference between property and people.

Id. at 524-525 (citations and footnote omitted).

[17] We later relied upon *Ketchmark* in *Lachenman v. Stice*, 838 N.E.2d 451 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. In that case, Sean T. Lachenman, as the personal representative of the estate of Chere Lachenman ("Lachenman"), filed a complaint against Mitchell and Josephine Stice alleging "[e]motional distress due to the violent death of the [Lachenman]'s pet" and "[e]motional distress and fear for [Lachenman's] own safety and the safety of her pets and the safety of her visitors, especially children." 838 N.E.2d at 455. The trial court granted summary judgment to the Stices with regard to Lachenman's claim of negligent infliction of emotional distress. *Id.* at 455, 457.

[18] On appeal, this Court observed that the designated evidence construed in the light most favorable to Lachenman revealed no direct physical impact to her, Lachenman appeared to concede in her appellant's brief that she did not sustain any bodily injury, and she testified in her deposition that no one was bitten or injured during the attack which resulted in her dog's death. *Id.* at 460. We concluded that she failed to meet the requirements of the Modified Impact Rule. *Id.* We also observed that, although many pets are beloved by their owners, they remain property. *Id.* at 461. We cited *Ketchmark* for the proposition that "we have generally refused to allow recovery for emotional

distress where there has been only an economic loss." *Id.* (citing *Ketchmark*, 818 N.E.2d at 524-525).

[19] Based on the designated evidence, we cannot say that the trial court erred in granting summary judgment with respect to the Hunters' claim of negligent infliction of emotional distress.

[20] For the foregoing reasons, we affirm the trial court.

[21] Affirmed.

Bradford, J., and Pyle, J., concur.