INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

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The tort of intentional infliction of emotional distress ("IIED") arises when a defendant (1) engages in "extreme and outrageous" conduct that (2) intentionally or recklessly (3) causes (4) severe emotional distress to another. *Creel v. I.C.E. Assoc., Inc.*, 771 N.E.2d 1276, 1282 (Ind. Ct. App. 2002). In the past, a claim for IIED could not stand alone and the plaintiff had to prove a host tort. *Williams v. Tharp*, 889 N.E.2d 870, 879 n.6 (Ind. Ct. App. 2008). However, Indiana now recognizes a separate cause of action for IIED without the need for an accompanying tort. *Id*.

In regards to the alleged emotional distress in IIED claims, a plaintiff must satisfy the "impact rule" or its progeny. The requirements to prove this tort are "rigorous." *Id*.; *Ledbetter v. Ross*, 725 N.E.2d 120, 124 (Ind. Ct. App. 2000). Using *Cullison* as a guide, Indiana courts have been very reluctant to recognize the tort of intentional infliction of emotional distress, and in fact, the Indiana Supreme Court has never been faced with a set of facts that states a claim for intentional infliction of emotional distress. *Hamilton v. State Farm Mut. Inc. Co.*, 2002 U.S. Dist. LEXIS 7148 (S.D. Ind. Mar. 13, 2002). There is no recovery where there has been only economic damage or loss. *Ketchmark v. Northern Ind. Pub. Serv. Co.*, 818 N.E.2d 522, 524 (Ind. Ct. App. 2004).

Intentionally and Recklessly

The intent to harm emotionally constitutes the basis for IIED. *Creel*, 771 N.E.2d at 1282; *Ledbetter*, 725 N.E.2d at 124. In an appropriate case, the question can be decided as a matter of law. *See Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 523 (Ind. Ct. App. 2001). "It may be noted that a demonstrated intent to harm seems inconsistent with mere reckless conduct." *Lachenman v. Stice*, 838 N.E.2d 451, 457 n.5 (Ind. Ct. App. 2005).

However, although intent is a required element, it is not enough that the defendant acted with an intent that is tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct was characterized by "malice," or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. *Creel*, 771 N.E.2d at 1282. Rather, the defendant's conduct must also have been extreme and outrageous. *Id*.

"Extreme and Outrageous" Conduct

Liability for IIED has been found only where the conduct has been 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. *Id*. In general, the case is one in which the recitation of the facts to an average member of the community would arise his resentment against the actor and lead him to exclaim, "Outrageous!" *Id*. "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam." *Gable v. Curtis*, 673 N.E.2d 805, 810 (Ind. Ct. App. 1996). What constitutes extreme and outrageous conduct depends, in part, upon prevailing cultural norms and values and in the appropriate case, the question can be decided as a matter of law. *Creel*, 771 N.E.2d at 1282.

No Outrageous Conduct, as a Matter of Law

No outrageous conduct was found where a security manager of a department store "accused" a lessor's employee of substance abuse, shoplifting, and dishonesty in "a gruff and intimidating manner" while she was detained in an interview room. *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 970 (Ind. Ct. App. 2001). The court found that the security manager's actions occurred in the context of a detainment for the purpose of determining the extent of plaintiff's unauthorized conduct. *Id*. Such actions, taken in context, did not constitute outrageous behavior nor did they exceed all bounds usually tolerated by a decent society. *Id*.

No outrageous conduct found where a woman's dog was injured and consequently died after being attacked by neighbors' dogs. *Lachenman*, 838 N.E.2d at 457. The court found that even though the neighbors may have been negligent in failing to keep their dogs on leashes and otherwise failing to properly supervise their dogs, such actions did not constitute outrageous behavior as contemplated by the narrow definition adopted from the *Restatement*. *Id*. Further, the court found that there was nothing in the records to support a reasonable inference that the neighbors intended to cause the plaintiff emotional distress by their behavior. *Id*.

Issue of Fact Whether Conduct Was Outrageous

A genuine issue of material fact existed as to whether an employee's supervisor engaged in extreme and outrageous conduct by allegedly shouting at the employee, criticizing her work in front of other employees, inquiring about the employee's menopause and whether her husband was sexually impotent from diabetes, and misrepresenting the company's intentions regarding the security of the employee's position. *Bradley v. Hall*, 720 N.E.2d 747, 752 (Ind. Ct. App. 1999).

The court in *Holbrook v. Lobdell-Emery Mfg. Co.*, 219 F.3d 598, 602 (7th Cir. Ind. 2000), did not render an opinion as to whether the acts committed by plaintiff's coworkers and supervisors meet the standard for extreme and outrageous conduct because plaintiff did not sue the proper plaintiffs. However, in dicta, the court stated, "It is not difficult to imagine that a jury would exclaim 'Outrageous!' upon hearing that plaintiff's co-workers taunted him and set him on fire knowing that he had recently been released from a hospital where he was being treated for severe depression and psychosis. We join the district court's assessment that verbally and physically assaulting a mentally disabled man is cruel and inexcusable. Because he sued his employer rather than his co-workers, however, the district court was correct to grant summary judgment in favor of Lobdell-Emery under Indiana law." *Id.*

Severe Emotional Distress to Another

In order to establish a claim for IIED, a plaintiff must satisfy either the "modified impact rule," ("MIR") or the "bystander rule," or "another rule" which has not yet been clearly

formulated in case law to date. *Alexander v. Scheid*, 726 N.E.2d 272, 283 (Ind. 2000). Where the physical impact is slight or the evidence of the physical impact is tenuous, the court will evaluate the alleged emotional distress to determine whether it is not likely speculative, exaggerated, fictitious, or unforeseeable. *Atlantic Coast Airlines v. Cook*, 857 N.E.2d 989, 998 (Ind. 2006).

Originally, Indiana allowed recovery for the infliction of emotional distress only in circumstances involving impact to the plaintiff's person under what was called the "direct impact" rule. *Ketchmark*, 818 N.E.2d at 523. The direct impact rule survives today, although it has been modified extensively, and has three elements: (1) an impact on the plaintiff, (2) that causes physical injury to the plaintiff, and (3) in turn causes emotional distress. *Id*. Therefore, under the direct impact rule, recovery was precluded if a plaintiff did not sustain physical injury. *Id*. However, in 1991, the Indiana Supreme Court expanded the direct impact rule, creating what is known as the "modified impact" rule. *Id*. This modified impact rule holds that:

> When … a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.

Id. (citing *Shaumber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

Further, Indiana also allows damages for infliction of emotional distress when a plaintiff witnesses an injury to the person of a close relative without any physical impact on the plaintiff--the "bystander direct involvement test." *Id*. This test was announced in *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000), which held:

> Where the direct impact test is not met, a bystander may nevertheless establish "direct involvement" by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of 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 tortuous conduct.

Id. at 524. This is the bystander rule.

There is also an exception to the physical impact requirement for claims of intentional torts. *Cullison v. Medley,* 570 N.E.2d 27, 30 (Ind. 1991); *Shaumber*, 579 N.E.2d at 454; *Atlantic Coast Airlines*, 857 N.E.2d at 998. In *Cullison*, the Indiana Supreme Court found that there is no requirement of a physical impact when emotional distress is claimed due to a commission of an intentional tort (*i.e.*, trespass or assault). *Cullison*, 570 N.E.2d at 30.

However, Indiana has further expanded IIED jurisprudence by allowing recovery or by refusing to dismiss claims for failure to state a claim under the direct involvement rationale in several cases:

> Where human remains were lost. *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692 (Ind. Ct. App. 2002);

Where an individual was mistakenly diagnosed with Hepatitis C. *Keim v. Potter*, 783 N.E.2d 731 (Ind. Ct. App. 2003; and,

Where alleged medical malpractice led to miscarriage. *Ryan v. Brown*, 827 N.E.2d 112 (Ind. Ct. App. 2005).

Where alleged medical malpractice led to "a continued pregnancy and the physical transformation [plaintiff's] body underwent as a result." *Bader v. Northeast Ind. Genetic Counseling, Inc.*, 732 N.E.2d 1212 (Ind. 2000).

The *Blackwell* case has been referred to as a "fact-specific expansion of the *Groves* bystander rule." *Lachenman*, 838 N.E.2d at 460. Therefore, it does not appear, in fact, to be an expansion of the MIR. Rather, it can be more properly understood as an anomaly in case law. As for the other cases which did not involve **"**the bystander rule as set forth in *Groves*, the only cases which a direct, physical impact was not a prerequisite for recovery for negligent infliction of emotional distress involve medical malpractice." *Id*.

The Indiana Supreme Court attempted to clarify the confusion caused by these expansion cases in *Atlantic Coast Airlines*, 857 N.E.2d at 989. In this case, the court clarified its position. It explained that the underlying rationale for the rule that damages for mental or emotional distress were recoverable only when accompanied by and resulting from a physical injury was that "absent physical injury, mental anguish is speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there is no rational basis for awarding damages." *Id*. at 998. However, the MIR maintains the requirement of a direct physical impact, although the impact does not need to cause physical injury to the plaintiff. *Id*. In addition, the emotional trauma suffered by the plaintiff does not need to result from a physical injury caused by the impact. *Id.*

Although there have been calls to abandon the impact rule altogether because, among other things, there are concerns that Indiana's impact rule, even as modified, may prohibit some litigants from recovering damages for bona fide emotional injury even though there has been no physical impact. The Indiana Supreme Court's view seems to be that the requirements under Indiana's MIR are modest and a less restrictive rule would raise the potential for a flood of trivial suits, pose the possibility of fraudulent claims that are difficult for judges and juries to detect, and result in unlimited and unpredictable liability. *Id*. The Court therefore reaffirmed that Indiana's impact rule continues to require a plaintiff to demonstrate a direct physical impact resulting from the negligence of another. *Atlantic Coast Airlines*, 857 N.E.2d at 998.

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