

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

SANDRA FRANCIS in her own right as next of kin and Mother to MARY FRANCIS, and CARLTON DAVY, JR., Minors,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO. 681/1998
	)	
BRINKS PUERTO RICO, INC., and ALBERT RODRIGUEZ,	)	
	)	
Defendants.	)	ACTION FOR DAMAGES
	)	
	)	<u>JURY TRIAL DEMANDED</u>
	)	
	)	<u>NOT FOR PUBLICATION</u>

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MEMORANDUM OPINION
(February 8, 2003)

THIS MATTER is before the Court on a motion for partial summary judgment filed by Defendant Brinks Puerto Rico, Inc. ("Brinks") and Plaintiff's opposition. Brinks argues that there are no genuine issues of material facts warranting submission of Plaintiff's claim for emotional distress to a jury. Defendant Albert Rodriguez (Rodriguez) joins in Brinks' motion. The Court heard oral argument on the motion on May 6, 2002. Plaintiff was represented by K. Glenda Cameron, Esq. and Defendant Brinks' was represented by Joseph B. Arellano, Esq. For the foregoing reasons, the Brinks' motion is denied in part and granted in part.

I. FACTS

The facts, in the light most favorable to Plaintiff, are as follows. On August 8, 1998, the Plaintiff, Sandra Francis, was shopping with her two minor children, Mary Francis, age 15, and Carlton Davy, Jr., age 9. As they were waiting to cross the street in the area where Route 70 meets the entrance into Western Auto, Sandra Francis realized that she had forgotten her sunglasses in a shop. Mary Francis then volunteered to retrieve the sunglasses for her mother and began to walk back down the road. As the plaintiff watched her daughter walk away, she noticed a Brinks truck driving out of the parking lot. An employee of Brinks, Rodriguez, operated the truck. Rodriguez hastily turned onto Route 70 by driving onto the shoulder of the road where the Plaintiff was located with her children. Rodriguez then struck Mary Francis and dragged her down the road. Sandra Francis testified that she screamed and ran towards the truck. She claims that the truck came to a stop, but Rodriguez never turned off the engine. She further testified that she hit the truck door with her hand for Rodriguez to help her, but Rodriguez refused to leave the truck and help her with her daughter. Plaintiff also testified that Mary Francis's head was under the left front wheel and that had the truck moved, her daughter's head would have been crushed. It is undisputed that Mary Francis suffered physical injuries as a result of being struck by the truck. What is disputed is whether Plaintiff and Carlton Davy are entitled to damages for emotional distress for witnessing the Brinks truck strike Mary Francis.

II. ANALYSIS

Defendants argue that no genuine issues of material facts exist for a reasonable jury to grant recovery for emotional distress because Plaintiff and her son were not in the zone of danger, thus precluding recovery pursuant to Section 436 of the Restatement Second of Torts.

Plaintiff counters that the following genuine issues of material facts exist: whether Plaintiff and her son were in the zone of danger and whether the conduct of Rodriguez was extreme and outrageous.

A. Summary Judgment Standard

To grant a motion for summary judgment, the Court must find that there is no genuine issue as to any material fact on the record and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56; *Celotex Corp. v. Cartrett*, 477 U.S. 317 (1986). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The moving party bears the initial burden of informing the Court of the basis for its motion, and identifying the absence of genuine issues of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has satisfied its initial burden, the nonmoving party must introduce evidence beyond the pleadings to create a "sufficient disagreement to require submission to a jury." *Lawrence v. National Westminster Bank of New Jersey*, 98 F.3d 61, 65 (3d Cir. 1996); *Anderson*, 477 U.S. at 251-52. The evidence must be construed in a way that all reasonable inferences are drawn in favor of the nonmovant. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). The extreme remedy of summary judgment "cannot be entered unless the movant has established its rights to a judgment with such clarity as to leave no room for controversy, and the other party is not entitled to recover under any discernable circumstance." *Battle v. Industrious*, 26 V.I. 83, 85 (Terr. Ct. 1991).

B. Emotional Distress

Plaintiff maintains that there are two genuine issues of material fact for trial: (1) whether a reasonable jury could find Rodriguez's conduct extreme and outrageous thereby causing Plaintiff

severe emotional distress pursuant to the Restatement Second of Torts, Section 46(2); and (2) whether Plaintiff and her son were in the zone of danger, thus subjecting Defendants to liability for negligent infliction of emotional distress pursuant to the Restatement Second of Torts, Section 436(2) and (3). Defendant asserts that there are no genuine issues of material facts and claims that partial summary judgment should be awarded to the defendants on Plaintiff's claims for emotional distress.

1. Intentional Infliction of Emotional Distress

Section 46(2) of the Restatement (Second) of Torts provides in relevant part,

(2) Where such conduct (outrageous and extreme) 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 . . .

Restatement (Second) of Torts, § 46(2). The Restatement mandates that the Court first determine whether a defendant's conduct may reasonably be considered extreme and outrageous thus permitting recovery for emotional distress. Restatement (Second) of Torts §46, comment h (1965); *Moolenaar v. Atlas Motor Inns, Inc.*, 616 F.2d 87, 89 (3d Cir. 1980). If Rodriguez's conduct cannot reasonably be considered extreme and outrageous, both Defendants are entitled to summary-judgment as a matter of law.

Extreme and outrageous conduct is defined as conduct that is "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." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. Conduct that falls within societal norms is not actionable, even if it distresses another party. 86 C.J.S. *Trial* § 70; *Sanders v. Rosen, Super.*, 605 N.Y.S.2d 805. To meet the standard, the conduct must be "clearly outrageous" in that it is "both extreme and very offensive to the moral values of society." *Silver*

v. *Mendel*, 894 F.2d 598, 606 (3d Cir. 1990). The plaintiff must establish that Defendant's conduct was considerably more egregious than to be expected in the rough and tumble of everyday life. 86 C.J.S. *Trial* § 70; *Whelan v. Whelan*, 588 A.2d 251. Satisfaction of the extreme and outrageous element is a heavy burden for plaintiffs to meet¹ and has been satisfied in few cases. *Tomasella v. General Motors Corp.*, 2002 WL 407815, *2 (E.D.Pa. March 18, 2002).

The record indicates that Rodriguez was attempting to turn into the flow of traffic. In his attempt to turn into traffic, Rodriguez struck Mary Francis and dragged her down the road. See Plaintiff's Dep., pp. 21, lines 20-21; pp. 29, lines 10-12. Both Defendants and Plaintiff assert that Rodriguez did not see Mary Francis before he hit her. See Rodriguez's deposition beginning on pp. 22; see also, Plaintiff's deposition at pp. 27, lines 3-5.

Unfortunately, traffic accidents are part of the rough and tumble of everyday life. Without more, a driver striking a pedestrian whom he failed to see on the side of the road cannot reasonably be considered "clearly outrageous" or "extreme and very offensive to the moral values of society." Because Rodriguez did not see Mary Francis prior to striking her, the Court cannot find that his conduct was extreme and outrageous. Therefore, the Court grants summary judgment in favor of Defendants and against the plaintiff on her claim for intentional infliction of emotional distress.

2. Negligent Infliction of Emotional Distress

Section 436 of the Restatement (Second) of Torts provides in pertinent part,

¹ The purpose behind the heavy burden is to separate meritorious claims from less meritorious claims and courts are very cautious in permitting recovery for intentional infliction of emotional distress. *Silver v. Mendel*, 894 F.2d 598, 606 (3d Cir. 1990); *Weinstein v. Bullick*, 827 F.Supp. 1193, 1203 (E.D.Pa. 1993) and 86 C.J.S. *Trial* § 68 (1997).

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

(3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

Restatement (Second) of Torts, § 436. Comment f to subsection (3) explains that recovery for emotional disturbance from witnessing harm to an immediate family member is possible when the defendant, by his negligence, has placed the plaintiff in the zone of danger. The Restatement then illustrates the possibility as follows:

A negligently leaves a truck insecurely parked at the top of a hill. Because of this negligence the truck starts down the hill. B and C, her child, are in the street *in the path of the truck*. The truck swerves, misses B, and strikes C. *B, who is watching C, does not see the truck coming, and is not alarmed for her own safety, but suffers severe shock and resulting serious illness at the sight of the injury to C.* A is subject to liability to B for the shock and her illness.

RESTATEMENT (SECOND) OF TORTS, § 436 cmt. f, illus. 3 (emphasis added). This illustration demonstrates that A is subject to liability when B did not see the truck coming, was not alarmed for her own safety, was standing in the path of the truck, and witnessed injury to C.

In the case *sub judice* Defendant directs the Court to Plaintiff's deposition testimony where she testifies that she was not concerned that the Brinks truck would hit her or her son. Defendant then concludes that neither Plaintiff nor her son was ever threatened with bodily harm from the Brinks truck because Plaintiff was not concerned that the truck would hit them. Plaintiff counters by pointing to Carlton's deposition

testimony where he testifies that he was afraid that the truck was going to hit him. Plaintiff also points out that Plaintiff testified that she was not afraid of the truck hitting her or her son, because it had already hit her daughter.

Comment f, illustration 3 clearly demonstrates that whether Plaintiff was alarmed for her own safety is not dispositive. What is important is that Plaintiff was in the path of danger, otherwise referred to as the zone of danger, and that she witnessed the injury to her daughter.

Because it is undisputed that Plaintiff witnessed the injury to her daughter, the only question remaining is whether a reasonably jury could find that Plaintiff and her son were in the zone of danger. A plaintiff is found to be in the zone of danger where they are at risk of bodily harm by immediate impact. Restatement (Second) of Torts, §436(2) cmt. b; *Hennessey v. American Airlines, Inc.*, No. 78-119 (D.C.V.I. October 10, 1979). In *Hennessey*, the district court concluded that plaintiff was in the zone of danger when he was sitting in a bar in the vicinity of the airport and witnessed the wing of an uncontrolled airplane pass the bar. Here, Plaintiff and her children were located on a dirt path on the shoulder of the main road when Rodriguez drove the Brinks truck onto the dirt path. The record indicates that Carlton was standing right next to his mother when Mary Francis began walking back towards a store and was struck by the truck. It is not clear from the record exactly how far away Mary Francis was from Plaintiff and Carlton or how far away the truck was from Plaintiff and Carlton, nor do Defendants specify these distances. What is clear is that all three were standing on the same dirt path where the Brinks truck struck Mary Francis. Because Defendants failed to satisfy their initial burden of identifying the absences of genuine issues of material fact regarding whether

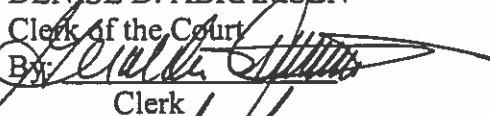
Plaintiff and her son were within the zone of danger, the record is insufficient to award summary judgment.

CONCLUSION

The Court concludes that Rodriguez's conduct after striking Mary Francis cannot reasonably be considered extreme and outrageous, therefore summary judgment is awarded in favor of Defendants and against Plaintiff on the claim for intentional infliction of emotional distress. The Court further finds that because genuine issues of material facts exist as to whether Plaintiff and her son were within the zone of danger, Defendants' motion for summary judgment on the claim for negligent infliction of emotional distress must be denied.


MARIA M. CABRET
Presiding Judge

ATTEST:
DENISE D. ABRAMSEN
Clerk of the Court

By: 
Clerk

Dated: 2/25/03