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Case Number 26,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

TYBOUT, REDFEARN & PELL

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ARGUMENT

I. PLAINTIFF'S NIED CLAIM

A. CCHS OWED A DUTY OF CARE TO PLAINTIFF

CCHS admits that Plaintiff Deborah Wesselman ("Plaintiff" or "Ms. Wesselman") was a patient for purposes of the CT scan it performed on April 26, 2013. Yet it contends that it had no "special relationship" with Ms. Wesselman giving rise to any duty of care; that Plaintiff was owed no duty of care under the circumstances of this case; if it did owe a duty of care to Ms. Wesselman it fully complied with that duty as a matter of law.

CCHS cannot realistically deny that it owed a duty of care to Ms. Wesselman during its encounter with her. Numerous cases have recognized a duty on the part of a healthcare provider to exercise reasonable care toward its patients. See, e.g., *Garrison v. The Medical Center of Delaware Inc.*, 581 A.2d 288 (De. 1989); *Fanean v. Right-Aid Corporation of Delaware, Inc.,* 984 A.2d 812, 819 (Del. Super. Ct. 2009); *Snavely v. The Wilmington Medical Center, Inc.,* 1985 WL 552277 (Del. Super. Ct.); *Greenwald v. Cabellero-Goehringer*, 2014 WL 7008959 (Del. Super. Ct.). In *Fanean*, the Delaware Superior Court recognized a duty owed by a pharmacy to not negligently disclose a patient's private health information to a third party in the context of an NIED claim. Id. at 819. Contrast *Spence v. Achamma Cherian, Pharm. D., RPH,* 135 A.3d 1282, 1290-91 (Del. Super. Ct. 2016) (where

the Superior Court declined to extend the same duty to the **father** of a patient to whom private health information was negligently disclosed). All of these cases were cited in Plaintiff's Opening Brief, but CCHS has made no effort to address them. Moreover, CCHS has cited a case—*Naidu v. Laird*, 539 A.2d 1064, 1070-71 (Del. 1988)—in which this Court went so far as to find a duty on the part of a healthcare provider to protect potential third-party victims of a patient on the basis of the special relationship between the healthcare provider and its patient. In short, CCHS' contention that there is no duty based on the parties' relationship is meritless.

Alternatively, CCHS contends that the Superior Court correctly found no duty of care in the context of this particular case. Initially, it should be noted that CCHS makes no effort to explain or advance the Superior Court's legal analysis on this issue based on premises liability law. Instead, it adopts certain statements made by the Superior Court such as "CCHS owed no duty to wait outside of [the] bathroom or to have a key available to open a door in less than five minutes", or that CCHS had no duty to take Ms. Wesselman's complaints "seriously" since "'seriosity' is not a tort". Answering Brief at 13. Like the trial court, CCHS makes no effort to address the specific elements of an NIED claim or the decisional case law which holds that negligence [including the duty element] in an NIED claim "...must be assumed" for purposes of summary judgment. See, e.g., *Snavely* supra. at *3; *Rinehardt v. Bright*, 2006 WL 2220972 at *4 n 17 (Del. Super. Ct.).

Finally, CCHS contends somewhat quixotically that while the Superior Court did "assume" a duty of care, it "...complied with its duty under the circumstances" as a matter of law. Answering Brief at 12-13. In support of this argument, CCHS points to "undisputed facts" 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". Answering Brief at 13. Respectfully, none of these "facts" are undisputed. Taken in the light most favorable to Ms. Wesselman, she did tell Ms. Jacobson that she felt dizzy and weak; she did report to Ms. Jacobson that she could not walk on her own to the bathroom and required a wheelchair; she did report to Ms. Jacobson that she could not stand up to retrieve her phone from the locker and asked Ms. Jacobson to get it for her; she did inform Ms. Jacobson that she was locked inside the bathroom and could not physically get to the door to unlock it herself; she did request that Ms. Jacobson call 911 for emergency assistance only to have Ms. Jacobson suggest that her boyfriend drive her to the hospital instead; and she was subsequently diagnosed with a serious medical condition requiring admission into the hospital for medical treatment. It is disingenuous for CCHS to claim in light of these disputed facts that Ms. Wesselman "...had no 'obvious medical needs' that required further care". At

this stage of the litigation all facts must be viewed in a light most favorable to Ms. Wesselman on this issue. See *Naidu*, 539 A.2d at 1070.

B. PLAINTIFF HAS NO OBLIGATION TO PRESENT EXPERT TESTIMONY IN THIS CASE

CCHS continues to view this case as a medical negligence action necessitating medical testimony as to Ms. Jacobson's conduct. Answering Brief at 15-16. The Superior Court correctly recognized that this is not a medical negligence action and therefore no expert testimony is needed. Memorandum of Opinion at 3-4. Ms. Wesselman's NIED claim can be simply and fairly summarized as follows: she felt quite ill following a CT scan with contrast; she developed and exhibited signs and symptoms of her illness; she was in fact suffering from a serious medical condition requiring hospitalization; and notwithstanding these circumstances, CCHS ignored or belittled her complaints. There is nothing about these circumstances that lies beyond the ordinary experience of laypersons in the context of an NIED claim. See, e.g., *Weaver v. Lukoff*, 511 A.2d 1044 (Table), 1986 WL 17121 at *1 (Del.) ("An exception to this rule exists, however, when the professional's mistake is so apparent that a layman, exercising his common sense, is perfectly competent to determine whether there was negligence"); *Larrimore v. Homeopathic Association of Delaware*, 181 A.2d 573, 577 (Del. 1962).

C. PLAINTIFF HAS IDENTIFIED SUFFICIENT EVIDENCE OF PHYSICAL INJURY FOR NIED CLAIM

CCHS contends that Plaintiff has failed to satisfy the "physical injury" requirement as a matter of law. But CCHS makes no effort to address the case authorities cited by Plaintiff in her Opening Brief at 14-16. While the physical manifestations of Ms. Wesselman's "fright" or "emotional distress" are admittedly intertwined with the physical symptoms she was suffering as a result of the allergic reaction and lactic acidosis, there can be no real argument that she did not experience them. Moreover, CCHS' contention that Ms. Wesselman's injuries were only transient in nature fails to acknowledge the fact that they ended only because she received necessary medical care from an outside source.

CCHS further argues that Ms. Wesselman's NIED claim fails as a matter of law because she failed to provide any expert testimony as to the causal connection between its negligence and her injuries. It relies upon the case of *Rayfield v. Power,* 840 A.2d 642 (Table), 2003 WL 22873037 (Del.), but that case involved claimed bodily injuries from a motor vehicle accident not an emotional distress claim. CCHS has not cited any authority which holds that a plaintiff must adduce expert testimony as to the physical manifestations of her fright or emotional distress. These are again issues that a jury of laypersons can fully assess for themselves.

II. PLAINTIFF'S IIED CLAIM

CCHS contends that it is entitled to judgment as a matter of law on Plaintiff's IIED claim. It does so by arguing that (1) the conduct of its employee was not sufficiently outrageous to meet the legal threshold; and, (2) that Ms. Wesselman has offered no evidence of "severe emotional distress".

Consider the following scenario. A member of the community goes to a facility to have a medical test performed. While there she falls seriously ill, exhibiting obvious signs of dizziness, weakness, nausea and diarrhea. She is unable to stand or walk on her own. She calls upon her boyfriend to come get her and drive her home. She is locked in a bathroom for a period of time. She eventually asks for emergency assistance. The provider suggests that her boyfriend drive her to the hospital instead. Finally, an ambulance arrives and takes her to the hospital where she is diagnosed with a serious medical condition (allergic reaction and lactic acidosis) for which essential treatment is offered and she is hospitalized overnight. May a jury conclude that CCHS' conduct was both reckless and outrageous? The answer must be in the affirmative. See, e.g., *Mattern v. Hudson*, 532 A.2d 85, 88 (Del. Super Ct. 1987). Can a jury find the same conduct to be particularly outrageous

in the context of a medical provider/patient relationship? Of course it can. See, e.g., *Cummings v. Pinder,* 574 A.2d 843, 845 (Del. 1990).[1]

Nor is there any merit to CCHS' argument as to the element of "severe emotional distress". While Ms. Wesselman's experience lasted for approximately 24 hours, it does not undercut or diminish the outrage and distress she experienced during that time. Central to her outrage is the reasonable belief that something more catastrophic could have happened to her had she not persisted with her complaints. What constitutes "severe emotional distress" is not necessarily temporal or even quantitative in nature, although such factors can certainly be relevant in a specific case. It is for the jury alone to assess the degree of the distress based upon the evidence presented to it.

[1] CCHS argues that the medical provider/patient relationship in this case is not a "special relationship" within the meaning of the *Cummings* case because "this is not a medical negligence claim". Answering Brief at 22. The argument lacks any logic in that it focuses on the nature of the claim and not the relationship itself. No one can reasonably deny that there exists a special professional relationship between a medical facility and a patient undergoing a medical procedure or test. Ms. Wesselman was not a customer in a Dollar Tree Store.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiff/Appellant's Opening Brief, Plaintiff Deborah Wesselman respectfully requests that this Honorable Court reverse the Superior Court's grant of summary judgment.

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