STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-14-94
JDN-YOR-11-07-14

PATRICK F. MUTRIE and
JOHANNA M. MUTRIE, as parents
and next best friend of ETHAN J.
MUTRIE, a minor,

Plaintiffs,

v.

ORDER

ADAM MCDONOUGH and
LINDSAY MCDONOUGH,
individually and in their capacity
as parents, legal guardians, and next
best friend of TYLER MCDONOUGH,
a minor,

Defendants.

I. Background

This is a personal injury suit brought by the parents of Ethan J. Mutrie ("the Mutries") against Adam and Lindsay McDonough, parents of Tyler McDonough ("the McDonoughs"). According to the facts alleged in the complaint, Tyler McDonough placed Ethan Mutrie in a headlock, slammed him into the ground, and injured him while the two were playing in a youth football game between Scarborough and Saco.

Relevant here is Count II, which alleges a claim for Negligent Infliction of Emotional Distress ("NIED"). (Compl. 5-6.) The McDonoughs have filed a motion to dismiss Count II, alleging that the claim is subsumed by the other tort claims, including Count IV (Intentional Infliction of Emotional Distress), and fails to state a claim for which relief can be granted.

II. Motion to Dismiss Standard

In ruling on a motion to dismiss, the court views the facts in the complaint as true and admitted. *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830. The court "examine[s] the complaint . . . to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Doe v. Graham*, 2009 ME 88, ¶ 2, 977 A.2d 391, *quoting Saunders*, 2006 ME 94, ¶ 8, 902 A.2d 830. To dismiss for failure to state a claim, the court must determine it is "beyond doubt that [the] plaintiff is entitled to no relief under any set of facts that might be proven in support of the claim.'" *Dragomir v. Spring Harbor Hosp.*, 2009 ME 51, ¶ 15, 970 A.2d 310, *quoting Plimpton v. Gerrard*, 668 A.2d 882, 885 (Me. 1995).

III. Discussion

The parties' arguments center on whether the Law Court's decision in *Curtis v. Porter*, 2001 ME 158, 784 A.2d 18, mandates dismissal of Count II.

In *Curtis*, the Law Court contrasted NIED with the tort of intentional infliction of emotional distress ("IIED"), noting "the universe of those who may be liable in tort for the *negligent* infliction of emotional distress is much more limited." *Curtis*, 2001 ME 158, ¶ 17, 784 A.2d 18. The Court recognized three circumstances in which a claim for NIED lies: (1) bystander liability actions, (2) where a special relationship exists between the tortfeasor and the injured claimant, and (3) where the tortfeasor has committed another tort in addition to NIED.[1] *Id.* ¶ 19. The Court continued:

> [W]hen the separate tort at issue allows a plaintiff to recover for emotional suffering, the claim for negligent infliction of emotional distress *is usually subsumed in any award entered on the separate tort.*

[1] In other words, unless (1) or (2) are present, there is no standalone NIED tort.

Id. (emphasis added).

At issue in *Curtis* were only two claims: one for IIED and the second for NIED. The Court ultimately held that the plaintiff could not recover on her NIED claim if she failed to prevail on her IIED claim:

> Curtis may recover her emotional distress damages through [her IIED] claim. She cannot, however, in the absence of a special relationship or a claim of bystander liability, press her claim to recover for her emotional distress if she does not prevail on the separate intentional infliction claim. Thus, her negligent infliction claim is subsumed in the intentional infliction claim, and the court appropriately granted summary judgment on that claim.

Id. ¶ 22.

The McDonoughs read *Curtis* to mean NIED claims cannot be brought together with an IIED claim when they arise from the same harm. The Mutries maintain *Curtis* means they cannot recover for the same damages under both NIED and IIED.

The Law Court held that Curtis could not recover on her NIED claim if her IIED claim failed for a simple reason: her only remaining claim would be NIED. Because there is no standalone tort for NIED without a duty (such as in bystander and special relationship cases), Curtis' NIED claim failed as a matter of law. *Curtis*, 2001 ME 158, ¶ 19. This is not the situation in the present case because the Mutries bring separate claims for Negligence (Count I) and Assault and Battery (Count III). Thus even if the Mutries' claim for IIED fails, they can still recover for emotional harm under the NIED theory because they can recover for emotional harm under the other torts pled. *White v. Bishop*, 2003 WL 21919837 at *2 (Me. Super. July 7, 2003) (holding negligent operation of a motor vehicle was a separate tort adequate to support emotional distress claim under

Curtis); *see also Henriksen v. Cameron*, 622 A.2d 1135, 1143 (Me. 1993) (noting plaintiff could recover for emotional injuries from physical assaults).

Curtis did provide some sound advice for pleading practice:

> [A]lthough negligent infliction claims are now routinely added to complaints stating a cause of action in tort, this practice is rarely necessary unless the claim is made by a bystander or against one with a special relationship to the plaintiff.

Id. ¶ 20. While it may not be *necessary* to bring duplicative causes of action in tort cases, electing to do so does not mean a party fails to state a claim. Litigation strategy is not for the court to decide on a motion to dismiss.

Finally, if the Mulries do ultimately recover for emotional distress, they cannot also recover for the same emotional distress on an NIED theory. *Curtis*, 2001 ME 158, ¶ 19, 784 A.2d 18. The McDonoughs may later raise this if there is a risk of duplicative recovery, but a motion to dismiss is not the appropriate vehicle to reduce damage awards that have yet to materialize.

The Defendants Motion to Dismiss is hereby DENIED.

SO ORDERED.

DATE: . . .

11/7/14

John O'Neil, Jr.
Justice, Superior Court

CV-14-94

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