IN THE UTAH COURT OF APPEALS

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Tina Keeney, parent and natural guardian; and Chase Keeney, a minor, Plaintiffs and Appellant, v. Campbell Soup Company, Defendant and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040981-CA F I L E D (December 1, 2005) 2005 UT App 514

Third District, Salt Lake Department, 030920573
The Honorable L.A. Dever

Attorneys: William R. Hadley, Salt Lake City, for Appellant
Scott M. Petersen, David N. Kelley, and Daniel Irvin, Salt Lake City, for Appellee

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Before Judges Davis, Greenwood, and Thorne.

DAVIS, Judge:

Tina Keeney appeals the trial court's grant of summary judgment in favor of Campbell Soup Company (Campbell). We affirm.

In reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn from them in the light most favorable to Keeney, who is the nonmoving party in this case. See Lovendahl v. Jordan Sch. Dist., 2002 UT 130,¶13, 63 P.3d 705. We affirm only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See id. (citing Utah R. Civ. P. 56(c)). We review the trial court's conclusions of law for correctness. See id.

To prove negligent infliction of emotional distress (NIED), a claimant must prove "'illness or bodily harm.'" Harnicher v. University of Utah Med. Ctr., 962 P.2d 67, 69-70 (Utah 1998) (quoting Restatement (Second) of Torts § 313 (1965)). "'[T]he emotional distress suffered must be severe; it must be such that a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the

circumstances of the case.'" Id. at 70 (second alteration in original) (citations omitted). While "illness" encompasses mental illness stemming from the negligent act of another, such illness must be established by expert testimony, Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 975 (Utah 1993), and may not be merely subjective, see Harnicher, 962 P.2d at 71.

Keeney claims that, as a result of her encounter with the tooth in the can of Campbell's soup, she suffered the following illness and bodily harm: (a) loss of twenty to thirty pounds, (b) hyper-vigilance toward prepared foods, (c) abnormal and aberrant behavior associated with food, and (d) teasing by fellow employees for her unusual behavior toward food. Keeney admits in her brief that she never sought medical attention for herself and never contracted any infectious diseases relating to the encounter.

We agree with the trial court that Keeney has not alleged the type of illness or bodily harm sufficient to support an NIED claim. This case is similar to Hansen, where several workers learned they had been exposed to asbestos over the course of a few months. See 858 P.2d at 972. Although the workers suffered respiratory problems at the time of exposure, they had no lasting physical difficulties. See id. at 973. Nonetheless, they filed an NIED claim, alleging that their worries about the exposure had caused general anxiety and sleeplessness. See id. In its review, the Utah Supreme Court focused its analysis on two factors: (1) the duration and nature of the exposure to the dangerous substance and (2) the likelihood that disease will actually occur. See id. at 975. The court concluded that due to the limited exposure and lack of asbestos-related disease, their anxiety was not of a magnitude with which "a reasonable person, normally constituted, would be unable to adequately cope." Id.

Here, where the exposure and the danger of disease is much more attenuated than that in Hansen, we reach the same conclusion. Keeney's distress after the exposure has produced some weight loss, anxiety, and vigilance in preventing future exposure, but the alleged magnitude of these effects is belied by the fact that her exposure never resulted in an infectious disease after three years and that she has never sought medical assistance for herself. Moreover, she has not provided expert testimony that her anxiety is a symptom of mental illness. We recognize that Keeney's experience may have been disturbing, but the resulting anxiety, vigilance, and weight loss is within a reasonable person's power to cope.

Keeney also argues that the trial court should have granted her request for a mental health evaluation. However, she made this request only in her memorandum in opposition to Campbell's

motion for summary judgment and never asserted it as a formal rule 56(f) motion with the required affidavits. See Utah R. Civ. P. 56(f) (requiring party to submit affidavits stating reasons why it could not obtain the evidence requested during discovery). Accordingly, we decline to remand the case to reopen discovery. See Grynberg v. Questar Pipeline Co., 2003 UT 8,¶57, 70 P.3d 1 ("Simply asserting that more discovery is needed and that a proper response to the motion for summary judgment is impossible . . . is inadequate to overcome summary judgment. Parties . . . cannot justify further discovery without providing a viable theory as to the nature of the facts they wish to obtain." (internal quotations and citations omitted)).

We affirm.

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James Z. Davis, Judge

WE CONCUR:

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Pamela T. Greenwood, Judge

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William A. Thorne Jr., Judge