

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

MICHAEL COOPER and, )  
JENNIFER COOPER, individually )  
and as parents and guardian of )  
E.C., a minor, )

Plaintiffs, )

v. )

C.A. No. 08C-09-164 PLA

THE BOARD OF EDUCATION OF )  
THE RED CLAY CONSOLIDATED )  
SCHOOL DISTRICT, )  
an Agency of the State of Delaware; )  
DR. ROBERT J. ANDRZEJEWSKI, )  
Individually and as Superintendent; )  
LINDA ENNIS, in her capacity as )  
principal; and )  
BOULDEN BUSES, INC., )

Defendants. )

UPON PLAINTIFFS' APPLICATION FOR CERTIFICATION  
OF INTERLOCUTORY APPEAL  
**DENIED**

Submitted: September 8, 2009

Decided: September 16, 2009

This 16th day of September, 2009, it appears to the Court that:

1. This case arises from the alleged sexual molestation of an elementary-school student, E.C., by another minor, K.F., during their daily school bus rides. By opinion issued August 20, 2009, this Court dismissed a claim of intentional infliction of emotional distress brought by E.C.'s

parents, Michael and Jennifer Cooper (“the Coopers”), under Count IV of the Complaint.<sup>1</sup> The Court concluded that the Coopers could not proceed with a direct claim for intentional infliction of emotional distress, given that E.C. was more directly targeted by the defendants’ alleged tortious conduct. The Coopers could not satisfy the elements of a third-party claim because they were not present at the time of the alleged tortious conduct, and dismissal was therefore required. Plaintiffs filed this application for certification of an interlocutory appeal from the Court’s decision.

2. Under Delaware Supreme Court Rule 42, an interlocutory appeal will not be certified unless the trial court’s order determines a substantial issue, establishes a legal right, and meets at least one of the five additional criteria set forth in Rule 42(b).<sup>2</sup> Plaintiffs argue that the decision

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<sup>1</sup> 2009 WL 2581239 (Del. Super. Aug. 20, 2009).

<sup>2</sup> The five criteria provided under the rule are as follows:

- (i) *Same as Certified Question*. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
- (ii) *Controverted Jurisdiction*. The interlocutory order has sustained the controverted jurisdiction of the trial court; or
- (iii) *Substantial Issue*. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or
- (iv) *Prior Judgment Opened*. The interlocutory order has vacated or opened a judgment of the trial court; or
- (v) *Case Dispositive Issue*. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

granting Defendants' Partial Motion to Dismiss satisfies the requisite criteria under Rule 42(b)(i) because it perpetuates a conflict in this Court regarding a question of law. In response, Defendants deny that the Court's decision in this case furthers a split in authority.

3. Contrary to Plaintiffs' assertion, there is no conflict in this Court's approach to intentional infliction of emotional distress claims brought by parents for conduct directed at or otherwise involving their minor children. It is well-established that Delaware courts apply § 46 of the Restatement (Second) of Torts in analyzing claims for intentional infliction of emotional distress.<sup>3</sup> Restatement § 46 provides as follows:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct 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, or

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Del. Supr. Ct. R. 42(b).

The reasons for which the Supreme Court will accept certified questions of law under Rule 41 include, in relevant part, that "[t]he decisions of the trial courts are conflicting upon the question of law." Del. Super. Ct. R. 41(b)(ii).

<sup>3</sup> See, e.g., *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990).

(b) to any other person who is present at the time, if such distress results in bodily harm.

4. The cases highlighted in Plaintiffs' application, *Farmer v. Wilson* and *Doe v. Green*, involve different subsections of Restatement § 46. The Court in *Farmer* suggested that a father could maintain an intentional infliction of emotional distress claim against school officials who removed his minor daughter from school premises without his permission and drove her to a medical examination to enable her participation in a sports activity.<sup>4</sup> In *Doe*, the Court disallowed a mother's intentional infliction of emotional distress claim against a neighbor who molested her minor child outside her presence; under Subsection 2(a), the mother could not maintain her cause of action because she was not present at the time the molestation occurred.<sup>5</sup>

5. The *Farmer* and *Doe* cases are entirely consistent as straightforward applications of the two subsections of Restatement § 46. The father's claim in *Farmer* was based upon an alleged violation of his parental rights. The minor child in that case consented to leave school grounds and undergo a routine medical examination and was therefore not the direct target of any tortious conduct. Assuming the other elements of the tort had been satisfied, the father in *Farmer* could have proceeded with a

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<sup>4</sup> *Farmer v. Wilson*, 1992 WL 331450 (Del. Super. Sept. 29, 1992).

<sup>5</sup> *Doe v. Green*, 2008 WL 282319 (Del. Super. Jan. 30, 2008).

*direct* claim of intentional infliction of emotional distress under Subsection 1 of Restatement § 46. By contrast, in both *Doe* and the instant case, parents attempted to bring intentional infliction of emotional distress claims based upon alleged tortious conduct that directly targeted their children. Such third-party claims fall within Subsection 2 and require that the parental plaintiff be able to prove that he or she was present at the time of the litigated conduct. In *Doe*, the Court was asked to depart from the plain language of Subsection 2 and relax the presence requirement for parental third-party claims, but declined to do so.<sup>6</sup> Accordingly, the Court applied its previous holding in *Doe* to bar the Coopers’ claim. The Court’s decision did not conflict with *Farmer* because the *Farmer* Court implicitly—and appropriately—applied Subsection 1 of Restatement § 46, not Subsection 2.

6. Plaintiffs also suggest that “Delaware law does not require the parents to be present as bystanders, as the conduct which is the subject of the Complaint rises to the level of ‘outrageous conduct’ and can therefore form a basis for an intentional infliction of emotional distress claim.”<sup>7</sup> As the Court noted in its previous opinion, however, outrageous conduct is a necessary prerequisite to *any* action for intentional infliction of emotional

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<sup>6</sup> *Id.* at \*2.

<sup>7</sup> Docket 23, ¶ 9.

distress,<sup>8</sup> not a basis for relaxing the requirements set forth for a third-party claim under Restatement § 46(2).

7. The Court is satisfied that its decision to grant Defendants' Partial Motion to Dismiss was based upon settled law. For the reasons discussed in both the Court's original opinion and this order, the Court concludes that no conflict exists between *Farmer* and its later holdings in *Doe* and the instant case. No other basis for granting certification has been presented by the plaintiffs, and the Court does not consider any of the other alternative criteria for certification under Supreme Court Rule 42(b) to be applicable. Therefore, Plaintiffs' Application for Certification of Interlocutory Appeal is hereby **DENIED**.

**IT IS SO ORDERED.**

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**Peggy L. Ableman, Judge**

Original to Prothonotary

cc: Louis J. Rizzo, Esq.  
Timothy S. Martin, Esq.  
Sherry Ruggiero Fallon, Esq.

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<sup>8</sup> See RESTATEMENT (SECOND) OF TORTS § 46 (“One who by *extreme and outrageous conduct* intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . Where *such conduct* is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress . . . to a member of such person's immediate family who is present at the time . . . .” (emphasis added)).