

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

Lashanda Spencer)	
as Administratrix of the Estate of)	
Muriel Stewart, and)	
Lashanda Spencer)	C.A. No. 08C-06-183 RRC
Individually,)	
)	
Plaintiff,)	
)	
v.)	
)	
John Goodill, M.D.,)	
)	
Defendant.)	
)	

Submitted: November 11, 2009
Decided: November 13, 2009

Upon Defendant's Motion for Partial Summary Judgment.
DENIED.

MEMORANDUM OPINION

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for Defendant

COOCH, J.

I. Introduction

This Motion for Partial Summary Judgment arises out of a wrongful death claim brought by Plaintiff, Lashanda Spencer, against Defendant, John Goodill, M.D., alleging that by not providing “informed consent” to Plaintiff’s decedent (her mother) prior to a medical operation, Defendant committed medical negligence that ultimately caused Decedent’s death.¹ Plaintiff has also brought a survival action as Administratrix of Decedent’s estate. At the pretrial conference on November 2, 2009, Plaintiff withdrew her prior allegations of negligence concerning the medical procedure itself performed by Defendant, leaving only the issue of “informed consent” for trial. Pursuant to the Delaware Wrongful Death Statute, Plaintiff has claimed damages for, among other things, “mental anguish” and has not alleged any physical injury suffered by her as a result of her mother’s death.

The issue raised by Defendant’s Motion for Partial Summary Judgment is whether Plaintiff can potentially recover damages related to Plaintiff’s “mental anguish” for the death of her mother under the Delaware Wrongful Death statute where Plaintiff has failed to establish any evidence

¹ This cause of action was brought pursuant to the “Informed Consent” statute, 18 *Del. C.* § 6852.

of a physical injury arising out of that “mental anguish.”² Although a recent decision of this Court has held to the contrary,³ this Court holds that Plaintiff may potentially recover damages for her “mental anguish” under the Delaware Wrongful Death Statute without a showing of physical injury. Accordingly, Defendant’s Motion for Partial Summary Judgment is **DENIED.**

II. Facts

This case stems from the alleged failure to provide Plaintiff’s decedent “informed consent” prior to a medical operation. Plaintiff alleges that on or about July 17, 2007, Defendant provided “negligent medical treatment” to Muriel Stewart, Plaintiff’s mother, by failing to adequately inform her of the risks involved in a “non-emergency surgical procedure.”⁴ Plaintiff further alleges that Decedent required this information in deciding whether to have the procedure and died as a result of not having the information necessary to make an informed decision, thus leaving Plaintiff to suffer “mental anguish.”

² This issue was first raised by Defendant in the pretrial stipulation filed on October 30, 2009 at Paragraph 4 (“Issues any party contends remains to be litigated”). The Court has elected to deem Defendant’s application a motion for partial summary judgment pursuant to Superior Court Civil Rule 56 under the circumstances of this case.

³ *Roberts v. Delmarva Power & Light Co.*, 2009 WL 222985 (Del. Super).

⁴ Neither the complaint nor the pretrial stipulation describes the “non-emergency surgical procedure.” Comp. ¶ 3; Pretrial Stip. ¶ 1.

Plaintiff acknowledges that she suffered no physical injury as a result of her mother's death and has not received any medical treatment from a trained psychologist or other doctor as a result of her mother's death.

III. Contentions of the Parties

Defendant argues in support of his motion that damages based solely on "mental anguish" are barred under the Delaware Wrongful Death Statute. Defendant argues that under the Wrongful Death Statute, Plaintiff is required to produce evidence of a "physical injury" arising from her mental suffering as a prerequisite to recovery. Defendant asserts that the general common law principles defining mental anguish should apply to the Wrongful Death Statute and that these common law principles require independent evidence of a physical injury.

As support for this contention, Defendant relies on the Delaware Supreme Court case of *Mergenthaler v. Asbestos Corporation of America*, a case that held that spouses could not recover medical expenses and related mental anguish due to alleged contact with asbestos in laundering clothes without a showing of physical injury. *Mergenthaler* stated that Plaintiffs in that case could not recover damages for injuries suffered from exposure to

asbestos because “any claim for mental anguish [requires] physical injury.”⁵

Defendant asserts that the *Mergenthaler* Court intended “any claim for mental anguish” to include wrongful death claims.

In response, Plaintiff argues that this Court should not adopt the *Mergenthaler* standard because that case is inconsistent with other cases involving mental anguish claims under the Wrongful Death Statute. Plaintiff argues that the purpose of the statute was to increase the possible remedies associated with the death of a family member. Additionally, Plaintiff asserts that the Wrongful Death Statute allows recovery solely for “mental anguish” based on the plain meaning of “mental anguish,” and that the General Assembly never envisioned a showing of “physical injury” because that requirement was never included in the statute.

IV. Legal Standard For Summary Judgment

In a motion for summary judgment, the moving party bears the burden of proving “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁶ Summary judgment is only appropriate when, after viewing all the evidence in a light most

⁵ *Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647, 651 (Del. 1984); *see also Roberts*, 2009 WL 222985 (applying the *Mergenthaler* holding to a wrongful death claim).

⁶ Sup. Ct. Civ. R. 56(e); *see also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

favorable to the nonmoving party, the Court finds no genuine issue of material fact.⁷ A genuine issue of material fact arises when “any rational trier of fact could infer that plaintiffs have proven the elements of a prima facie case by clear and convincing evidence.”⁸ If Defendant, as the moving party, can establish that there is no genuine issue of material fact, and Defendant is entitled to judgment as a matter of law, the burden will shift to Plaintiff to show the existence of specific facts to support their claim.⁹ However, the parties have implicitly agreed that there are no genuine issues of material fact, in that both sides agree that there is no evidence of any physical injuries sustained by Plaintiff as a result of her mother’s death.

Defendant, as the moving party, bears the burden of demonstrating that Plaintiff, as a matter of law, cannot recover damages solely for “mental anguish,” absent a physical injury, under Delaware’s Wrongful Death Statute.

V. Under the Wrongful Death Statute, Plaintiff Can Recover Damages Solely For “Mental Anguish” Without a Separate Showing of Physical Injury

The only issue before the Court in this motion for partial summary judgment is whether Plaintiff may potentially recover damages for the death

⁷ *Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at * 2 (Del. Supr.).

⁸ *Cerberus Intl. LTD. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1149 (Del. 2002), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

⁹ *Anderson*, 477 U.S. at 248.

of her mother under the Wrongful Death Statute where Plaintiff has failed to establish any evidence of a physical injury arising out of her “mental anguish.”

The Delaware Wrongful Death Statute explicitly provides for recovery for “mental anguish,” but does not provide a definition of that term.¹⁰ Prior to the adoption of the current Wrongful Death Statute in 1982, a plaintiff could only recover damages for “pecuniary loss” in a wrongful death action.¹¹ This rule was construed to mean that a plaintiff could only recover damages for sums of money that the deceased would have contributed to the plaintiff for support had the decedent lived and the amount by which the value of Decedent’s estate diminished as a result of death.¹² In an effort to end the harsh result of the “pecuniary loss rule” and expand the remedies available to potential plaintiffs, the General Assembly enacted the current Wrongful Death Statute in 1982.¹³ This new statute specifically allowed damages for “mental anguish” to compensate the “real injury caused by the death of a [loved one]: the emotional pain of the loss.”¹⁴

¹⁰ 10 *Del. C.* § 3724.

¹¹ See John E. Babiarz, Jr., *A New Wrongful Death Act for Delaware*, Del. Lawyer 20 (Fall 1982).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

In determining whether to award damages solely for “mental anguish” under the Delaware Wrongful Death Statute, absent a showing of physical injury, this Court notes that, with respect to certain torts, many states, including Delaware, require proof of a physical injury resulting from mental suffering, or a physical manifestation of mental anguish.¹⁵ However, various other torts in Delaware, as well as in other states, allow a plaintiff to recover for “mental anguish” without any manifestation of physical injury.¹⁶ In analyzing whether the Wrongful Death Statute should be construed to allow for recovery solely for “mental anguish” without any physical injury, this Court has examined: (1) the statutory language of 10 *Del. C.* § 3724 with specific focus on the plain meaning of “mental anguish” and on the familial relationships enumerated in the statute; (2) Delaware cases opining

¹⁵ See, e.g., Restatement (Second) of Torts § 436A (1965) (stating that to recover for unintended emotional distress a showing of physical injury is required); see *Robb v. Pennsylvania R.R. Co.*, 210 A.2d 709 (Del. 1965) (holding a showing of physical injury is required in an unintentional infliction of emotional distress claim); see also *Moore v. Lillebo*, 722 S.W.2d 683, 684 (Tex. 1986) (stating the “the majority of states . . . require[] proof of a physical injury resulting from mental anguish”); *Payton v. Abbott Labs*, 437 N.E.2d 171, 175 n. 5 (Mass. 1982) (stating that an action for emotional distress caused by Defendant’s negligence cannot exist without physical injury); *Amader v. Johns-Manville Corp.*, 514 F.Supp. 1031 (E.D.Pa. 1981) (holding a showing of physical injury is required to prevail on a claim for unintentional infliction of emotional distress).

¹⁶ See, e.g., *Brett v. Berkowitz*, 706 A.2d 509, 513 (Del. 1998) (“Intentional infliction of emotional distress may warrant a damages remedy in the absence of accompanying bodily harm, provided there is a showing of severe emotional distress caused by extreme and outrageous conduct.”); *Collins v. African Methodist Episcopal Zion Church*, 2006 WL 1579718 (Del Super.) (allowing a claim for intentional infliction of emotional distress without a physical injury); 2 Dan B. Dobbs, *The Law of Torts* 821 (2001) (stating “a number of other torts are constructed mainly for the very purpose of permitting recovery for distress. The tort of assault [is an example]”).

on whether “mental anguish” is allowed as a basis for recovery without proof of “physical injury”; and (3) Superior Court Pattern Civil Jury Instruction § 22.8 (“Damages Recoverable in a Wrongful Death Claim”).

A. Statutory Construction of the Wrongful Death Statute Results in the Conclusion that a Claim Based Solely on “Mental Anguish” Is Allowed

The Wrongful Death Statute provides in pertinent part:

§ 3724. Action for wrongful death.

(a) An action under this subchapter shall be for the benefit of the spouse, parent, child and siblings of the deceased person

(d) In fixing the amount of damages to be awarded under this subchapter, the court or jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death. In determining the amount of the award the court or jury may consider the following:

(5) Mental anguish resulting from such death to the surviving spouse and next-of-kin of such deceased person. . . .

When this Court is required to determine the meaning of certain words in a statute or regulation, this Court must first look to the plain meaning rule.¹⁷ The “plain meaning rule” was defined in the United States Supreme Court case of *Caminetti v. United States* and has been adopted by

¹⁷ *Jordan v. Bd. of Pension Trs. of Delaware*, 2004 WL 2240598, at * 2 (Del. Super.) (upholding a decision by the State Board of Pension Trustees and refusing to read language into a statute); *see also* 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 46:1 (7th Ed. 2007) (discussing the plain meaning rule).

this Court.¹⁸ It stands for the proposition that “the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain, ... the sole function of the courts is to enforce it according to its terms.”¹⁹ The Court must give “the words used in the statute . . . their common, ordinary and accepted meaning, and the plain language of the statute should be afforded its plain meaning.”²⁰ Only when there is ambiguity contained in the words or phrases of the statute that would make the statute reasonably susceptible to different conclusions or interpretations (which the Court does not find in this case) should the Court examine extrinsic evidence to determine the intent of the legislature in drafting the statute.²¹

Although the dictionary definition of a term does not necessarily reflect a legislature’s intent in drafting a statute, such definition of a term can provide a useful starting point to interpret a statute.²² The definition of “mental anguish” in Black’s Law Dictionary refers to the definition of “emotional distress;” that latter term is defined by Black’s Law Dictionary to mean “[a] highly unpleasant mental reaction (such as anguish, grief, fright,

¹⁸ *Jordan*, 2005 WL 2240598, at *2, citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

¹⁹ *Id.*

²⁰ Singer, *supra* note 17.

²¹ See *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63 (Del. 1993); Singer, *supra* note 17, at § 46.1.

²² Singer, *supra* note 17, at § 46.2.

humiliation, or fury) that results from another person's conduct; emotional pain and suffering.”²³ Additionally, Restatement (Second) of Torts states:

Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.²⁴

Neither the dictionary definition of “mental anguish” nor the dictionary definition of “emotional distress” requires “physical injury” as a prerequisite to recovery.

Additionally, Superior Court Pattern Civil Jury Instruction § 22.8²⁵ defines “mental anguish” as “encompass[ing] the grieving process associated with the loss of a loved one[;]” that instruction does not specifically provide that physical injury is required.²⁶

Finally, the phrase “mental anguish” contained in 10 *Del. C.* § 3724(d) cannot be read without reference to other sections of the statute.

²³ Black’s Law Dictionary 563 (8th Ed. 2004).

²⁴ Restatement (Second) of Torts, § 46 cmt. J (1965).

²⁵ This pattern jury instruction is discussed at greater length *infra* Section V(C).

²⁶ Del. P.J.I Civ. § 22.8 (2000).

The Wrongful Death Statute limits the class of possible claimants to spouses, parents, children, and siblings. The General Assembly undoubtedly included an enumerated list of these possible plaintiffs based on the solid premise that these closely related family members would likely suffer particular “mental anguish” as a result of their close familial relationship with the deceased, but without suffering any physical injury.²⁷ This Court concludes that the General Assembly, in enacting 10 *Del. C.* § 3724 into law, did not require a claimant to suffer a physical injury as a prerequisite to seeking damages for “mental anguish” only in a wrongful death claim.

B. Most Delaware Cases Have Allowed Claims for “Mental Anguish” Without Physical Injury

Several Delaware Superior Court cases have recognized, at least implicitly, that no physical injury is required to establish “mental anguish” under the Wrongful Death Statute. Thus, in *Okie v. Owens*, this Court ordered a new trial on the issue of damages and recognized the plaintiff’s entitlement to a monetary damages award arising out of a Wrongful Death

²⁷ See Babiarz, *supra* note 11 (“With the availability of mental anguish as a measure of damage for the death of a child, courts may come to regard evidence of lost estate values as too speculative under the standard doctrine that damages must be proven with some specificity. At the same time, the court or jury will be able to address the real injury caused by the death of a child: the emotional pain of the loss.”); R. Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L.Rev. 435, 448 (1980) (“The nature of the relationship between two people may in itself provide convincing proof that a defendant’s conduct in causing injury or death to one will cause genuine emotional distress to the other.”).

claim where Plaintiff “[had not] received any medical, psychological or other professional help following [Decedent’s] death, nor [had Plaintiff] taken any medication or other treatment on account of his claimed mental anguish.”²⁸ The Court stated that “common sense tells us that the grieving process accompanied by its physical and its emotional upheaval will be experienced differently by different people both as to its intensity and as to its duration.”²⁹ The Court upheld the monetary damages for the “daily feelings of physical sadness . . . associated with the loss”³⁰

Defendant attempts to distinguish *Okie* by stating “that the [*Okie*] court was only focused upon the reasonableness of the damages awarded, not ‘the jury’s application of a principal of substantive law to the facts of the case.’”³¹ Despite this argument, this Court finds *Okie* persuasive on the issue of whether a physical injury is required to claim damages for “mental anguish” under the Wrongful Death Statute. Notably, nowhere did *Okie* state a requirement of physical injury as a prerequisite to recovery and, instead, chose to recognize that the loss of a close family member inherently gave rise to intense, mental suffering.

²⁸ *Okie v. Owens*, 1985 WL 189292, at *3 (Del. Super.).

²⁹ *Id.* at * 4.

³⁰ *Id.*

³¹ Def. Mot. for Partial Summ. J. at 3.

Likewise, in *Daniels v. Daniels*, this Court, in an inquisition hearing, allowed an award of damages for “mental anguish” under the Wrongful Death Statute absent a showing of physical injury.³² In *Daniels*, the Court noted that Plaintiff suffered emotionally by “crying every day for a month, and being unable to go to the farm where [Plaintiff and Decedent] were going to move and where Decedent was killed.”³³ Plaintiff also had testified about the difficulty of raising a daughter after Decedent’s death.³⁴ Plaintiff had never sought professional help nor produced an expert opinion, but was allowed to testify as to her emotional pain and was ultimately allowed to recover.³⁵

Similarly, in *West v. Maxwell*, Plaintiff was allowed to proceed with a wrongful death claim even though Plaintiff did not receive any long-term care, and there was no evidence that Plaintiff had been “either psychologically or physically impaired”³⁶ The *West* Court acknowledged that Plaintiff suffered emotionally and observed that “now he is alone.”³⁷ In upholding the jury’s finding, the *West* Court held that

³² *Daniels v. Daniels*, 1990 WL 74338 (Del. Super.).

³³ *Id.* at *3.

³⁴ *Id.*

³⁵ *Id.* at *3-4.

³⁶ *West v. Maxwell*, 2001 WL 789654, at *5 (Del. Super.).

³⁷ *Id.*

Plaintiff “suffered a large, permanent emotional and financial loss when his wife and friend died[.]”³⁸

Finally, in *Shurr v. Delaware Transit Corporation*, this Court, in a very recent bench ruling at a pretrial conference, allowed Plaintiff to proceed on a claim for “mental anguish” without showing a physical injury.³⁹ In that ruling, the Court stated:

With regard to the mental anguish motion, I am going to deny that motion, because in my view [*Roberts v. Delmarva Power & Light Company*] is not correctly decided. [*Roberts*] relies on the *Mergenthaler* ruling of the Supreme Court of Delaware going back to the mid ‘90s, mid ‘80s and *Mergenthaler* was not a wrongful death case. It simply has no applicability. And if you read the text of the wrongful death statute, the whole purpose of it was to allow mental anguish as a basic claim to preclude what had occurred in the past, namely testimony as to what a deceased infant might have earned, saved up and left to his estate.⁴⁰

However, and in contrast to *Okie*, *Daniels*, *West*, and *Shurr*, this Court has recently held that “mental anguish” under the Delaware Wrongful Death Statute does require some accompanying physical injury as a prerequisite to recovery. Thus in *Roberts v. Delmarva Power & Light Company*,⁴¹ this Court granted Defendant’s motion for summary judgment, and denied

³⁸ *Id.*

³⁹ *Shurr v. Delaware Transit Corp.*, C.A. No.: 06C-11-234 (Bench Ruling) (Sept. 4, 2009). Commendably, this bench ruling was brought to the Court’s attention by Defendant’s counsel.

⁴⁰ *Id.*

⁴¹ 2009 WL 222985 (Del. Super) (mot. for rearg. denied by *Roberts v. Delmarva Power & Light Co.*, C.A. No.: 05C-09-015, slip op. (May 6, 2009). No appeal to the Delaware Supreme Court was taken.

potential recovery for “mental anguish” damages under the Delaware Wrongful Death Statute absent a showing of physical injury.

The *Roberts* Court construed the statement in *Mergenthaler*, “[i]n any claim for mental anguish, whether it arises from witnessing the ailments of another or from the claimant’s own apprehension, an essential element of the claim is that the claimant have a present physical injury[,]” as encompassing a wrongful death claim.⁴² Notably, however, *Mergenthaler* did not involve a wrongful death claim under the Wrongful Death Statute, but instead addressed the issue before it of whether spouses could recover medical expenses and related mental anguish due to alleged contact with asbestos in laundering clothes, in the absence of showing “physical injury.”⁴³

Although *Roberts* recognized the contrary reasoning and conclusion of *Okie* that a Plaintiff could proceed with a “mental anguish” claim under the Wrongful Death Statute absent a physical injury, the *Roberts* Court declined to follow *Okie*, construing *Mergenthaler* to bar the claim because of *Mergenthaler*’s broad “any claim for mental anguish” language. *Roberts* held that “Plaintiffs must present evidence of physical injury to recover for mental anguish or mental distress.”⁴⁴ Finally, in its decision denying

⁴² 480 A.2d 647, 651 (Del. 1984) (emphasis added).

⁴³ *Id.*

⁴⁴ *Roberts*, 2009 WL 222985, at * 9.

Plaintiffs' Motion for Reargument, the *Roberts* Court affirmed its holding by stating:

In *Mergenthaler*, the Delaware Supreme Court defined “mental anguish” as a basis for a damage claim when, but only when, it was accompanied by some physical manifestation. That decision did not indicate that the definition applied only in a limited number or categories of cases. If there is such an intent, then that is a matter for the Supreme Court to declare.⁴⁵

Although this Court recognizes the importance of *stare decisis*, which holds “when a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside[,]”⁴⁶ this Court does not find *Roberts* the kind of “precedent” that should be followed in this case. Rather, this Court accepts the rationales and conclusions of *Okie*, *Daniels*, *West*, and *Shurr*, as well as the secondary authorities noted elsewhere in this opinion, and declines to follow the reasoning or the conclusion of *Roberts*. The holding in *Roberts* was based on a single phrase (“any claim for mental anguish”) from *Mergenthaler*.⁴⁷

⁴⁵ *Roberts v. Delmarva Power & Light Co.*, C.A. No.: 05C-09-015, slip op. (May 6, 2009) (citations omitted).

⁴⁶ *Stenta v. General Motors Corp.*, 2009 WL 1509299, at * 8 (Del. Super.) (citing *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del.1955)).

⁴⁷ This Court notes that the word “any” does not necessarily mean “all.” According to the American Heritage Dictionary, “any” can mean, among other definitions, “[o]ne or some, regardless of kind, quantity, or number.” American Heritage College Dictionary (1991).

This Court does not believe that the Supreme Court intended that broad statement to include wrongful death cases.⁴⁸

C. Superior Court Pattern Civil Jury Instruction § 22.8 Demonstrates that a Plaintiff May Recover for “Mental Anguish” in a Wrongful Death Action Absent a Physical Injury

This Court has also considered the import of Superior Court Civil Jury Instruction § 22.8 (“Damages Recoverable in a Wrongful Death Claim”). Significantly, this instruction includes no requirement of physical injury in connection with “mental anguish.” That jury instruction reads as follows:

WRONGFUL DEATH

The law recognizes that when a person dies as the result of another's wrongful conduct, there is injury not only to the deceased but also to immediate family members . . . In determining a fair compensation, you may consider the following:

- (1) the loss of the expectation of monetary benefits that would have resulted from the continued life of [*decedent's name*]; that is, the expectation of inheritance that [*name of family beneficiaries*] have lost;
- (2) the loss of the portion of [*decedent's name*]'s earnings and income that probably would have been used for the support of [*names of family beneficiaries*];

⁴⁸ If *Mergenthaler* truly meant “all claims for mental anguish require a physical injury,” many torts recognized under Delaware Law would be eliminated because these torts allow for recovery of damages for mental anguish absent a physical injury. *See, e.g., Tekstrom, Inc. v. Savla*, 2006 WL 2338050 (Del. Super.) (allowing a claim for intentional infliction of emotional distress without a showing of physical injury); Del. P.J.I Civ. § 22.11 (“Damages Recoverable for Malicious Prosecution) (allowing damages for “emotional distress” without a showing of physical injury).

- (3) the loss of [*decedent's name*]'s parental, marital, and household services, including the reasonable cost of providing for the care of minor children;
- (4) the reasonable cost of funeral expenses, not to exceed \$2000; and
- (5) the mental anguish suffered by [*names of eligible family beneficiaries*] as a result of [*decedent's name*]'s death.

The term "mental anguish" encompasses the grieving process associated with the loss of a loved one. You may consider that the grieving process, accompanied by its physical and emotional upheaval, will be experienced differently by different people, both in its intensity and in its duration. The ability to cope with the loss may be different for each person.

There is no fixed standard or measurement. You must determine a fair and adequate award through the exercise of your judgment and experience after considering all the facts and circumstances presented to you during the trial. . . .⁴⁹

In this instruction, the jury is asked to weigh both the physical and emotional damage and compensate Plaintiff accordingly. Therefore, it is entirely reasonable that a jury could hear the evidence, determine no physical manifestation of any injury as a result of mental anguish, but still award Plaintiff damages based on "emotional upheaval" alone.⁵⁰ In fact, the instruction asks the jury to consider both the physical and emotional components of the grieving process. To hold that a physical injury is required as a component of "mental anguish" in a wrongful death claim is contrary to Superior Court Pattern Civil Jury Instruction § 22.8.

⁴⁹ Del. P.J.I Civ. § 22.8 (2000).

⁵⁰ Compare Superior Court Civil Jury Instruction § 14.3 (Unintentional Infliction of Emotional Distress), which specifically requires a showing of physical injury as a prerequisite to recovery.

Lastly, the Court notes that *Okie* is among the “sources” listed at the conclusion of this instruction; *Mergenthaler* is omitted. It is reasonable to assume that the drafters of this instruction did not anticipate that *Mergenthaler* would apply to a wrongful death action. The *Roberts* Court did not address this jury instruction in its analysis of this issue.

VI. Conclusion

For all the reasons stated above, Defendant’s motion for partial summary judgment on the issue of whether damages for “mental anguish” are permitted under the Wrongful Death statute absent a showing of physical injury is **DENIED**.

Richard R. Cooch

oc: Prothonotary