IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JERRY R. BARNETT and **BRIDGET BARNETT**	)	CIVIL ACTION NUMBER
	)	
	)	06C-02-019-JOH
Plaintiffs	)	
v.	)	
	)	
YMCA OF DELAWARE CENTRAL BRANCH MEMBER, LLC	)	
	)	
	)	
Defendant	)	

Submitted: May 1, 2006
Decided: May 10, 2006

MEMORANDUM OPINION

Upon Defendant's Motion to Dismiss - ***DENIED***

Appearances:

W. Christopher Componovo, Esquire, of Weik Nitsche Dougherty & Componovo, Wilmington, Delaware, attorney for the Plaintiffs

Richard D. Abrams, Esquire, of Heckler & Frabizzio, Wilmington, Delaware, attorney for the Defendant

HERLIHY, Judge

Defendant YMCA of Delaware Central Branch Member, LLC, has moved to dismiss plaintiffs' negligence action. Plaintiff Jeffrey Barnett was painting the exterior of the Central Branch when someone dumped a bucket of urine out of a window onto him. He asserts he then went inside the Central Branch building, discussed what happened with an employee and was told of a tenant known by the YMCA to collect urine in buckets and to dispose of the contents out the window.

Barnett was not injured by the urine being dumped on him, but he makes claims for medical expenses, personal injury, and mental anguish.[1] Fearing exposure to AIDS, he had his doctor prescribe a preventative drug, a drug which, in turn, he contends, has caused loss of appetite, loss of weight, loss of sleep, and sexual dysfunction. As a general rule, Delaware does not recognize a cause of action for mental anguish absent physical injury. Where, however, the physical manifestations arising out of negligently caused emotional distress are more than transitory, there may be a cause of action.

The novel and primary issue presented here is whether there is a cause of action for Barnett's physical ailments, if caused by taking medication as a preventative measure out of concern for exposure to a potentially fatal and incurable disease, and for the accompanying mental distress under the circumstances of the case. The Court holds there is such a cause of action.

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[1] His wife, Bridgette Barnett, makes a claim for loss of consortium.

The secondary issue is whether there is, at this stage, a cause of action against the YMCA. At this procedural point in time there is enough presented to deny the YMCA's current motion.

Factual Background

On February 10, 2004, Barnett was employed by Pastel Painters. He was painting the exterior of the Central Branch of the YMCA. When so engaged, an unknown individual emptied a container of urine from a window above him splashing it on him. In an affidavit supplied with his answer to the YMCA's motion to dismiss, Barnett says he then went inside the building and spoke to a woman (whom he describes a bit further) behind the desk.

This woman told him, he reports, that she was aware that there was a very sick person living in the building who, not being able to make it the bathroom, kept his waste and urine in buckets. This person emptied the contents out of his window. Barnett goes on to report that, in the company of YMCA representatives, he went upstairs to see this person. When they got there, he saw spread around the room various pails and buckets containing urine. Later, he and the representatives went outside where he was shown a brick wall discolored from the urine dumping and a clogged drain with urine backed up in it.

Barnett went to his family physician fearing exposure to AIDS. His doctor prescribed Compuvan as a prophylactic and preventative measure. This medicine, Barnett claims, has caused loss of weight, loss of appetite, and sexual dysfunction.

Parties' Claims

The YMCA argues it is entitled to dismissal of the Barnetts' action on several grounds. It assumes at this stage that Jeffrey Barnett was a business invitee. As a business invitee, the YMCA owed him a duty to be aware of or to take reasonable steps to be aware of negligent acts of third parties and take reasonable steps to prevent such acts or to warn of them. In its motion, the YMCA contends it was unaware the third person was about to throw a container full of urine out the window. The event was sudden and unexpected and Barnett has provided insufficient identification of this third person.

In his response to the YMCA's motion, Barnett provided the information about his conversation with a female at the desk inside the Central Branch, being told of a resident who collected and dumped urine in this fashion, going to that person's room with representatives of the YMCA, seeing the room and containers of urine, and being shown a urine stained exterior wall beneath the window.

He contends this satisfies, at this point, the burden he has to show the YMCA's potential landowner duties and liability. He acknowledges he cannot recover alone for "fear of contracting AIDS." He does argue, however, that his physical conditions, due to taking the AIDS preventative medicine, enable him to maintain this action.

Applicable Standard

The YMCA's original motion was to dismiss. Ordinarily, this would mean the Court examines the Barnetts' complaint and no more. But when an additional paper is

submitted as here, the motion to dismiss is converted to a motion for summary judgment.[2] Summary judgment may only be granted where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[3] The Court is required to view the evidence in the light most favorable to the non-moving party.[4] Where it appears that there is any reasonable hypothesis by which the non-moving party might prevail, the summary judgment motion will be denied.[5]

Discussion

Landowner Duties

As landowner, the YMCA owed a duty to Barnett to keep its premises in a reasonably safe condition for its use. It would be liable for injuries caused only by conditions of which it had actual notice or which it would have discovered by such reasonable inspection as a reasonably prudent landowner would regard as necessary.[6] In its motion to dismiss, the YMCA states:

> In Delaware, if a commercial landowner is aware or should be aware that negligent acts of third parties are occurring or are about to occur, the landowner must take reasonable steps to prevent the acts from occurring or warn invitees on the premises that they are about to occur.

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[2] *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 847 (Del. Super. 1980).

[3] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[4] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. Super. 1990).

[5] *Vanaman v. Milford Mem. Hosp.*, 272 A.2d 718, 720 (Del. 1970).

[6] *Robelen Piano Co. v. DiFonso*, 169 A.2d 240, 244 (Del. 1961).

> RESTATEMENT (SECOND) OF TORTS §344; *Jardel v. Hughes*, 523 A.2d 518 (Del., 1987). "[A possessor of land] is ordinarily under no duty to exercise any care until he knows that the acts of third parties are occurring or are about occur." RESTATEMENT (SECOND) OF TORTS §344, comm.f. However, if the property owner has notice from past experience that such acts are likely to occur, the property owner may be under a duty to prevent them. *Id.*[7]

Based on the affidavit, at oral argument the YMCA virtually conceded the plaintiffs have made a sufficient showing, at this point, of where it may have failed in fulfilling this duty and becoming liable. When the information about Barnett's contact with the YMCA representative at the front desk, what he learned from her, and his observations in the third person's room and the exterior wall is coupled with the last sentence of its own motion, the Barnetts have made a sufficient showing on this issue to survive the YMCA's motion.

Personal Injury Action

Neither the complaint nor Barnett's affidavit injury that he suffered a direct physical injury from the act of the urine splashing on him. Based on that act and maybe other circumstances, he feared being exposed to HIV/AIDS. That fear of exposure, if it were all for which he was seeking damages, would result in dismissal of this action.

In *Brzoka v. Olson*,[8] the Supreme Court held that there could not be an action for assault and battery or negligence for fear of AIDS exposure, absent actual exposure. This is consistent with Delaware law indicating that, "In any claim for mental anguish, whether

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[7] Paragraph 3, Plaintiff's motion to dismiss.

[8] 668 A.2d 1355, 1363-64 (Del. 1995).

it arises from witnessing the ailments of another or from the claimants's own apprehension, an essential element is that the claimant have a present physical injury."[9]

There are some key points in the *Brzoka* case with relevant comparisons to this case. First, a party (a deceased dentist) actually had AIDS. It is unknown in this case whether the third person who dumped the urine was HIV positive or had AIDS. In *Brzoka* there was a touching between dentist and patients but no exchange of fluids, i.e., a means of transmittal of the disease, in other words. That was a key factor in the holding that there was no cause of action.[10] Quite obviously here there was an exposure to a bodily fluid, but this record is too incomplete to determine if what happened here was or could have been a means of transmitting AIDS, assuming the room occupant had it.

But it is unnecessary to rule whether the exposure - assuming, again, the third person was HIV positive or had AIDS - would be enough alone to create a cause of action and survive the dismissal motion. The reason is that Barnett's fear or concerns led him to a physician who prescribed a preventative medication. Barnett attributes his subsequent physical ailments and injuries to the medication.

In *Robb v. Pennsylvania Railroad Co.*,[11] the Supreme Court held:

> We hold, therefore, that where negligence proximately caused fright, in one within the immediate area of physical danger from that negligence, which in

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[9] *Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647, 651 (Del. 1984).

[10] *Brzoka v. Olson*, at 1361-1365.

[11] 210 A.2d 709 (Del. 1965).

> turn produced physical consequences such as would be elements of damage if a bodily injury had been suffered, the injured party is entitled to recover under an application of the prevailing principles of law as to negligence and proximate causation. Otherwise stated, where results, which are regarded as proper elements of recovery as a consequence of physical injury, are proximately caused by fright due to negligence, recovery by one the immediate zone of physical risk should be permitted.[12]

Barnett was not in a zone, he was the zone.

What is not known at this time, however, is the duration of the physical injuries and ailments of which Barnett complains. In *Cooke v. Pizza Hut, Inc.*,[13] the plaintiff ate a piece of pizza which apparently had part of a roach in it. He became nauseous for a period of two days. He was irate, he lost sleep for two days and suffered mental anguish. Acknowledging that a plaintiff can recover for physical injuries, the Court, nevertheless, dismissed the claim. It indicated nausea and rage, which are transitory, are not actionable.

This Court in *Wisnewski v. Jackson*,[14] dealt with a case where a car crashed into the plaintiff's house while she was in it. There was a lot of noise and substantial shaking of a wall. The plaintiff was quite frightened but suffered no physical injury in the crash. She was later diagnosed with Post-Traumatic Stress Disorder. The Court denied the defendant's motion for summary judgment because the plaintiff could establish at trial that her mental condition and accompanying physical ailments were not transitory.[15] The

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[12] *Id* at 714 - 715.

[13] 1994 WL 680051 (Del. Super.).

[14] 2005 WL 406338 (Del. Super.).

[15] Accord., *Lupo v. Medical Center of Delaware, Inc.*, 1996 WL 111132 (Del. Super.).

plaintiff was, of course, in a zone of danger as distinct from the actual touching which occurred here. This case, based on the current record, fits in the niche between *Brzoka* and *Wisnewski*.

As this Court is commanded to view the evidence in a light most favorable to Barnett, what he has shown at this stage is that his injuries stemming from the medicine or even some of his ailments if not caused by it are more than transitory and are, therefore, actionable.

Conclusion

For the reasons stated herein the defendant's motion is **DENIED**.

IT IS SO ORDERED.

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J.