

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001395-MR

NATIONWIDE PROPERTY AND
CASUALTY INSURANCE COMPANY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 06-CI-006049

DANA CAPLE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT AND MOORE, JUDGES, AND BUCKINGHAM,¹
SENIOR JUDGE.

MOORE, JUDGE: Nationwide Property and Casualty Insurance Company appeals from the Jefferson Circuit Court's declaratory judgment in this action involving a claim under an automobile insurance policy issued by Nationwide to Dana Caple.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

After a careful review of the record, we reverse and remand for the circuit court to dismiss Caple's negligent infliction of emotional distress claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

In March 2005, Caple was driving her Jeep Cherokee, in which her four-year-old son Blake and infant son Grant were passengers. The Caple vehicle was struck by a vehicle driven by Daniel Pabst. Caple and Blake were physically injured,² and sadly Grant died the following day from injuries sustained during the accident.

Pabst's automobile insurance carrier was Allstate. Pabst had liability insurance coverage of \$50,000 per person and \$100,000 per accident. Allstate paid \$50,000 in per-person liability coverage to Grant's estate. Thus \$50,000 remained on Pabst's policy. Allstate tendered \$1,000 of that amount to Blake and the remaining \$49,000 to Caple.

At the time of the accident, Caple had underinsured motorist (UIM) coverage with Nationwide for both the Jeep she was driving at the time of the accident and a second vehicle. The UIM coverage limits per vehicle were \$100,000 per person and \$300,000 per accident. Nationwide stacked the insurance coverage for both vehicles, so that there was \$200,000 per person and \$600,000 per accident UIM coverage.

Because Grant died from injuries he sustained during the accident, Nationwide paid \$200,000, reflecting the per-person coverage limit, to Grant's

² The parties did not explain, nor does the record reveal, the types of injuries sustained by Caple and Blake.

estate. Caple requested an additional \$200,000 in per-person stacked UIM coverage for herself, alleging that she suffered the negligent infliction of emotional distress after witnessing Grant's injuries and death. Nationwide denied this claim. Caple then filed her complaint in the circuit court against Nationwide, seeking the \$200,000 in per-person stacked UIM coverage based on her claim of negligent infliction of emotional distress (NIED) resulting from witnessing Grant's injuries and death. In its brief on appeal, Nationwide states that it acknowledged

that \$200,000 of UIM coverage was available for additional claims for [Caple's] personal injuries, including mental and emotional pain and suffering that she endured as a result of those injuries, but that the \$200,000 UIM coverage was not available for claims for negligent infliction of emotional distress resulting from witnessing her child's injuries/subsequent death, because such a claim, if viable at all, was derivative of the estate's claim[,] and that coverage had been exhausted upon Nationwide making the full \$200,000 UIM payment to Grant['s] estate.

(Nationwide's Br. at p. 2).

After filing her complaint, Caple moved for a declaratory judgment stating that her negligent infliction of emotional distress claim was payable under the UIM policy's per accident coverage, and that the claim was not derivative of Grant's claims for "bodily injury and wrongful death." Nationwide opposed the motion, contending that Caple's negligent infliction of emotional distress claim based on witnessing Grant's injuries and death was not payable under the UIM policy, and that the claim was derivative of Grant's claims.

The circuit court made various findings of fact, including that

Nationwide denied coverage for Ms. Caple's claim for NIED, relying upon the policy language under its UIM coverage, which limits loss coverage to "bodily injury." The policy reads:

Our obligation to pay losses to the amounts per person and per occurrence stated in the Declarations. The following conditions apply to these limits:

a. For **bodily injury** for any one person is for all covered damages, including all derivative claims, claimed by anyone arising out of and due to bodily injury to one person as a result of one occurrence.

The per-person limit is the total amount available when one person sustains **bodily injury**, including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims, or any other claims made by anyone arising out of **bodily injury**, including death, to one person as a result of one occurrence.

b. For **bodily injury** for each occurrence is the total limit of our liability for all covered damages when two or more persons sustain bodily injury, including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims, or any other claims arising out of **bodily injury**, including death, to two or more persons as a result of one occurrence. This total limit is subject to the limit for any one person.

The circuit court also found that

[t]he UIM policy further defines “bodily injury” as: a) physical injury; b) sickness; c) disease; d) resultant death of any person which directly results from a motor vehicle accident. The UIM policy “will pay compensatory damages, including derivative claims, because of bodily injury suffered by you or a relative and due by law from . . . an underinsured driver.”

After reviewing the parties’ arguments, the circuit court found that Caple’s interpretation of the insurance contract was “more in line with the Kentucky case law and public policy,” considering that Kentucky follows the “‘impact rule,’ which permits a plaintiff recovery for emotional distress only if the plaintiff experienced a physical impact by the defendant.” Thus, because a successful NIED claim “must be accompanied by some physical ‘impact,’ such claims are treated as bodily injuries,” and this type of an emotional distress claim “should be considered a separate and distinct bodily injury and not derivative or arising out of the bodily injury of another.” Accordingly, the circuit court granted Caple’s motion for a declaratory judgment and found “that Ms. Caple’s NIED claim is payable under the Nationwide UIM policy.” The court also concluded that Caple’s “NIED claim constitutes an additional, independent bodily injury under the policy such that Ms. Caple is entitled to her own stacked \$200,000 per-person limit subject to the stacked \$600,000 per occurrence accident aggregate limit.”

Nationwide now appeals, contending that: (1) Caple’s claim for UIM coverage for emotional distress she suffered after witnessing the death of her son is not compensable under either Kentucky law or the Nationwide policy; and (2) even if Kentucky courts recognized Caple’s right to claim damages for emotional

distress as a result of witnessing her son's death, those claims are derivative of the estate's wrongful death claim and payable only from the "per-person" limits to the estate, which have been exhausted.

II. ANALYSIS

A circuit court's grant of a declaratory judgment is reviewed on appeal for clear error. *See Uninsured Employers' Fund v. Bradley*, 244 S.W.3d 741, 744 (Ky. App. 2007).

CLAIM THAT CAPLE'S NIED CLAIM IS NOT COMPENSABLE UNDER KENTUCKY LAW OR THE INSURANCE POLICY

Nationwide first alleges that Caple's claim for UIM coverage for emotional distress she suffered after witnessing the death of her son is not compensable under either Kentucky law or the Nationwide policy. The Kentucky Supreme Court recently noted: "It is well established in this jurisdiction that an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury." *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 928 (Ky. 2007) (internal quotation marks omitted). "[I]t is necessary that the damages for mental distress sought to be recovered be related to, and *the direct and natural result of*, the physical contact or injury sustained." *Id.* at 929 (internal quotation marks omitted). The Supreme Court found that "[t]he rule . . . is clear: It is not enough that emotional distress be accompanied by contact – it must be *caused by the contact.*" *Id.* The Court stated that "[t]he rationale for the current rule is that . . . negligently caused emotional distress . . . is possibly trivial and

simply too speculative and difficult to measure unless [it is] directly linked to and caused by a physical harm.” *Id.*

In *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), a woman sued her doctor for conducting x-rays and various radiological tests on her without first performing a pregnancy test. After the woman subsequently discovered that she had been pregnant at the time that the x-rays were performed, she became upset because she had read articles explaining that “x-rays administered to a pregnant woman could injure the fetus she carried.” *Deutsch*, 597 S.W.2d at 143. After discussing the situation with various doctors, family members, and her priest, Deutsch decided to terminate the pregnancy by abortion. Deutsch then sued the doctor, contending, *inter alia*, that his negligence had caused her “mental and physical pain and suffering.” *Id.* The Supreme Court, in discussing the “contact requirement” for such claims, noted that “the amount of physical contact or injury that must be shown is minimal. Contact, however . . . slight, trifling, or trivial, will support a cause of action.” *Id.* at 146. The Court further explained that “it is necessary that the damages for mental distress sought to be recovered be related to, and the direct and natural result of, the physical contact or injury sustained.” *Id.*

Subsequently, in discussing the *Deutsch* decision, the Supreme Court noted that “[t]he abortion and loss of the baby were substantial injury,” and that the significance of *Deutsch* was “that harm resulting indirectly as well as directly is compensable so long as the negligent act was a substantial factor resulting in the harm.” *Capital Holding Corp v. Bailey*, 873 S.W.2d 187, 193 (Ky. 1994). Thus,

in *Deutsch*, damages were permitted for the mental distress caused to the woman due to the doctor's negligence because, "[a]lthough there was no proof that the x-rays were actually harmful, the Court found that the negligence indirectly caused harm to the plaintiff and supported her cause of action" because she decided to undergo an abortion due to the exposure to the x-rays. *Wood v. Wyeth-Ayerst Laboratories, Division of American Home Products*, 82 S.W.3d 849, 853 (Ky. 2002).

In the present appeal, Caple argues that *Deutsch* indicates "that the Kentucky Supreme Court intended, and, in fact, did recognize a bystander's right to recover" damages for emotional distress when that emotional distress is "caused by witnessing a negligently inflicted injury to another person." However, Caple's assertion is misplaced. Although the *Deutsch* decision provides that harm directly or indirectly resulting from a negligent act is compensable, the Court in *Deutsch* further explained that "it is necessary that the damages for mental distress sought to be recovered be related to, and the direct and natural result of, the physical contact or injury sustained." *Deutsch*, 597 S.W.2d at 146. Thus, although *Deutsch* was able to recover for the mental anguish she suffered as a result of having an abortion, which was indirectly related to the doctor's negligent act of performing x-rays on her, the abortion, nevertheless, was a physical contact to her own person, *i.e.*, to her own body, not to the body of another.

Our interpretation of *Deutsch* and its progeny is that the physical contact or injury that causes one's subsequent mental anguish or emotional distress

must be personal in nature and, thus, in order for a NIED claim to be successful, the emotional distress must be based on an injury to the person bringing the claim, not on an injury to another. Therefore, we find Caple's interpretation of *Deutsch* to be inaccurate and overreaching.

Moreover, in *Hetrick v. Willis*, 439 S.W.2d 942 (Ky. 1969), the vehicle driven by Hetrick was involved in an automobile accident with a tractor-trailer truck. As a result of the accident, Hetrick was injured and his wife died of the injuries she sustained from the accident. Hetrick sued, and he introduced one psychiatrist who testified that Hetrick was depressed and that he had suffered mental distress due to the fact that his wife was killed in the accident. On cross-examination, the psychiatrist also attested that Hetrick's mental distress could have been caused by his advanced arteriosclerosis. *See Hetrick*, 439 S.W.2d at 943.

On appeal, the Court noted that "damages may be recovered for mental distress which is the direct and natural result of an injury sustained." *Id.* However, the Court stated that "it is clear that the mental distress must be related to the physical injury." *Id.* The Court then stated:

It is true that [Hetrick] did suffer physical injuries in the accident. They were not of a serious nature and there was a prompt recovery. It is evident from this record that [Hetrick's] ensuing mental condition bears no relationship to the injury. It appears principally attributable to advancing age and despondency over the tragic loss of his wife.

Id. Finally, the Court held: "There is simply no proof in this record which, with reasonable probability, connects [Hetrick's] mental suffering with the injuries

sustained in the accident. His depressed condition did not causally flow from defendant's breach of duty *to him*." *Id.* at 944 (emphasis added).

We find *Hetrick* to be on point with the present case. In the present case, as in *Hetrick*, there was a vehicle accident where the driver was injured and the driver's loved one died as a result of injuries sustained during the accident. Also as in *Hetrick*, the driver in this case subsequently suffered mental distress, which the driver claimed was due to the fact that the loved one had died as a result of the accident. Further, as in *Hetrick*, there is no proof in the present case that Caple's mental distress was a result of the injuries she personally sustained in the accident. Indeed, Caple did not even claim that her mental distress was due to her own injuries. Therefore, Caple's emotional distress claim fails, pursuant to the reasoning in *Hetrick*.

Finally, we reiterate that in the Supreme Court's recent decision in *Steel Technologies, Inc.*, the Court stated that "it is necessary that the damages for mental distress sought to be recovered be related to, and *the direct and natural result of*, the physical contact or injury sustained." *Steel Technologies, Inc.*, 234 S.W.3d at 929 (internal quotation marks omitted). The Supreme Court found that "[t]he rule . . . is clear: It is not enough that emotional distress be accompanied by contact – it must be *caused by* the contact." *Id.* Therefore, pursuant to the reasoning in *Steel Technologies, Inc.*, Caple's emotional distress, which was not caused by the physical injury she sustained, cannot form the basis for a NIED claim. Caple's NIED claim alleges that she suffered emotional distress from

witnessing Grant's injuries and subsequent death. While we sympathize deeply with Caple's tragic loss, Kentucky law does not allow for the recovery she seeks.

Because we find that Caple's NIED claim lacks merit under Kentucky law, we need not address Nationwide's alternative assertion that Caple's NIED claim is not compensable under the insurance policy. Furthermore, because we do not recognize Caple's right to claim damages for emotional distress as a result of witnessing her son's death, we need not address Nationwide's other alternative assertion that Caple's claims are derivative of the estate's wrongful death claim and payable only from the "per-person" limits to the estate, which have been exhausted.

Accordingly, the judgment of the Jefferson Circuit Court is reversed and remanded with instructions to dismiss Caple's NIED claim.

ALL CONCUR.

BRIEF FOR APPELLANT:

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