18-P-1014 Appeals Court

KIANDRA CALDERON[1] vs. ROYAL PARK, LLC.

No. 18-P-1014.

Essex. February 7, 2019. - September 10, 2019.

Present: Vuono, Wolohojian, & McDonough, JJ.

Child Trespasser. Negligence, Child trespasser, Emotional distress, Duty to prevent harm, One owning or controlling real estate, Railroad: child on tracks, Duty to prevent harm, Proximate cause. Proximate Cause. Emotional Distress. Practice, Civil, Dismissal, Motion to amend.

Civil action commenced in the Superior Court Department on March 28, 2016.

A motion to dismiss was heard by Richard E. Welch, III, J., and entry of judgment as to one count was ordered by him; a motion for leave to amend the complaint was considered by Elizabeth M. Fahey, J.; and a second motion to dismiss was heard by James F. Lang, J., and entry of judgment as to the remaining count was ordered by him.

Thomas J. Gleason for the plaintiff.

Gail M. Ryan for the defendant.

Albert L. Farrah, Jr., & Louis J. Farrah, II, for Thomas Fuentes & another, amici curiae, submitted a brief.

[1] By and through her next friend, Luis Calderon, who is her father.

WOLOHOJIAN, J. It is alleged that, because of holes and gaps in a fence owned and negligently maintained by the defendant, thirteen year old Kiandra Calderson found herself in harm's way on adjacent railroad tracks. The questions presented here are whether the plaintiff's claim under G. L. c. 231, § 85Q (the child trespasser statute), and her claim for negligent infliction of emotional distress were properly dismissed. We conclude that the complaint sufficiently stated both claims.

Allegations of the complaint.[2] The defendant owns a multi-building apartment complex located at 8 Inman Street in Lawrence. The defendant's property abuts railroad tracks owned by the Massachusetts Bay Transportation Authority (MBTA), from which it is separated by the defendant's fence. For most, if not all, of the ten years during which the defendant has owned the property, there have been large holes and gaps in the fence through which adults and children pass on a daily basis in order to reach nearby shopping plazas and the Lawrence High School.[3] The defendant has known that children frequently use the gaps

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[2] Because this appeal stems from the dismissal of a complaint under Mass. R. Civ. P. 12, 365 Mass. 754 (1974), we accept and recite as true the facts alleged in the complaint, and draw reasonable inferences from them in the plaintiff's favor. See Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995).

[3] Students at the Lawrence High School use the holes and gaps in the fence to cross over the tracks on their way to and from school.

and holes in the fence in order to cross over the railroad tracks, and that the condition of the fence creates a high risk of harm to them. Despite this knowledge, the defendant has failed to take reasonable steps to inspect and maintain its fence, or to prevent or dissuade individuals from using its property to cross onto the railroad tracks.

Kiandra Calderon was best friends with Jenaira Fuentes, and both girls were thirteen years old as of October 31, 2014. They had crossed back and forth frequently over the railroad tracks, passing through the gaps and holes in the defendant's fence and through the defendant's parking lot. On this particular day, Kiandra and Jenaira crossed the defendant's property and through the fence in order to go to the Plaza 114 Shopping Center to buy Halloween costumes. After shopping, the girls used the same route in reverse in order to return home. But as they were together running across the tracks to reach the defendant's fence, Jenaira was fatally struck by an MBTA train. Kiandra, who was not struck by the train, tried to perform life saving measures on her friend and then remained close by as rescue personnel unsuccessfully tried to save Jenaira's life.

Kiandra alleges that the defendant's failure to inspect, repair, and maintain the fence caused her "severe physical injury, severe emotional and psychological distress, loss of wages and a diminished earning capacity, a future loss of wages

and benefits, [and] expenses for medical treatment and care." Physical manifestations of her harm include "anxiety, depression, sleeplessness, night terrors, nightmares, diminished appetite and food intake, bouts of extreme anger, behavioral problems at home and school, poor educational performance, and self-harm."

Procedural background. Based on the allegations we have set out above, the complaint asserted two causes of action: violation of G. L. c. 231, § 85Q (the child trespasser statute) (count I), and negligent infliction of emotional distress (count II). The defendant moved to dismiss the complaint on three grounds: first, that Kiandra's relationship with Jenaira was not sufficient to entitle her to recover as a bystander to Jenaira's death; second, that the defendant owed no duty to Kiandra because she was trespassing; and third, that the defendant's failure to maintain its fence was not the proximate cause of Kiandra's harm. The motion judge declined to dismiss count I (violation of the child trespasser statute), "given the allegation of physical injury to the plaintiff and this judge's reasoning in the case of Fuentes vs. Royal Park."[4] The parties have not provided any information regarding Jenaira's suit

[4] Presumably, a related action brought on behalf of the decedent against the defendant.

against the defendant or otherwise provided any further explanation of the judge's ruling. In any event, we understand the judge's reference to physical harm as reflecting the judge's view that count I sufficiently stated the elements of a claim resulting in physical injury. As to the negligent infliction of emotional distress claim (count II), the motion judge dismissed it, reasoning that "the minor plaintiff only claims that the 13 year old victim was her 'best friend' . . . . Allowing anyone who claims to be a 'best friend,' with no further allegations detailing the relationship, would radically expand this theory of tort liability well beyond developed case law. This appears unwise -- although the appellate courts will get the final say on this issue." The plaintiff's appeal from the dismissal of count II is properly before us.[5]

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[5] The defendant contends that because the plaintiff did not file a notice of appeal within thirty days of the "judgment on motion to dismiss" that entered on count II as a result of the judge's order, the appeal is untimely. "Although dubbed a 'judgment,' that document was not one in legal effect, because it disposed of only [one count] of the complaint. [The other count] remained then undecided. There was no 'express determination that there [was] no just reason for delay' nor an 'express direction for the entry of judgment' [as required by] Mass. R. Civ. P. 54 (b), 365 Mass. [820] (1974)." Bank of Boston v. Haufler, 20 Mass. App. Ct. 668, 675 (1985). See Mass. R. A. P. 3 (a) (2), as amended, 378 Mass. 927 (1979). Accordingly, the defendant is incorrect when it argues that the plaintiff was required to file a notice of appeal within thirty days of this so-called "judgment." Identifying the ruling within the notice of appeal filed within thirty days of the judgment was all that was required. See Mass. R. A. P.

In response to the judge's dismissal of count II, the plaintiff filed a motion for leave to amend the complaint to expand upon the depth and nature of her friendship with Jenaira:

> "The plaintiff and Jenaira were best friends. They first met in the 4th [g]rade at the Robert Frost School. They became friendly and socialized with each other during the school day. During the 6th [g]rade they became closer. They continued to socialize daily at school, but began seeing each other frequently outside of school, approximately every other day. They would visit at each other's houses or socialize together out in the community. They developed a close personal bond and did many activities together, such as playing video games, studying for school, shopping and general socializing. The plaintiff considered Jenaira to be her best and closest friend."

In a margin endorsement, the judge "[d]enied [the motion] on the ground of futility." We understand this to mean that, even accepting the new factual allegations as true, the judge concluded that the relationship between the plaintiff and Jenaira was too distant to maintain a negligence claim as a bystander. The plaintiff has timely appealed the denial of her motion to amend.

After discovery, the defendant moved for summary judgment on count I on three grounds.[6] First, the defendant argued that

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3 (c) (1), as appearing in 430 Mass. 1602 (1999), and Mass. R. A. P. 4 (a) (1), as amended, 464 Mass. 1601 (2013).

[6] Because the grounds of the motion are not identified in it, and the memorandum in support of the motion is not included in the record, we rely on the judge's recitation of the issues raised by the defendant in its summary judgment motion. We note that the better practice is to identify the grounds for a motion

because the plaintiff was not struck by the train, she did not suffer "physical harm" as required by the statute. The judge rejected this argument, reasoning that physical harm in this context is to be understood as it is in the context of claims for negligent infliction of emotional distress. See e.g., Sullivan v. Boston Gas Co., 414 Mass. 129 (1993). This aspect of the judge's ruling is not challenged on appeal.

Second, the defendant argued that it owed no duty to the plaintiff as a trespasser and that the plaintiff could not prove causation since her injuries occurred on MBTA property, not on its own. The judge concluded that duty and causation were fact dependent in this case and that, on the record before him, there were sufficient factual questions as to each to put the issues to the jury. Although the defendant argues that the judge was incorrect, it has not included the summary judgment record in the record on appeal. Therefore, the defendant has given us no basis upon which to disturb the judge's conclusion that there was a sufficient factual basis to put the questions of duty and causation to the jury. See Mass. R. A. P. 18 (a) (1) (v) (b),

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within the motion itself so that there is no question on appeal as to what was, or was not, raised below. See Mass. R. Civ. P. 7 (b) (1), 365 Mass. 748 (1974) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought").

as amended, 425 Mass. 1602 (1997) (requiring "any document, or portion thereof, filed in the case relating to an issue which is to be argued on appeal"); Shawmut Community Bank, N.A. v. Zagami, 411 Mass. 807, 810-811 (1992).

Third, the defendant argued that the plaintiff could not satisfy her burden to prove that, because of her age, she did not realize the risk involved in passing through the holes in the fence and across the railroad tracks. The judge rejected this argument, ruling that it was up to the jury to determine whether, "at age thirteen, the plaintiff truly understood the dangers to which she subjected herself by cutting through the gap in the defendant's fence to cross and recross the railroad tracks." See Tyron v. Lowell, 29 Mass. App. Ct. 720, 722-723 (1991) (capacity of a "reasonable twelve year old" is "a question of fact, not law"); Puskey v. Western Mass. Elec. Co., 21 Mass. App. Ct. 972, 974 (1986) ("Whether a teenager actually appreciated a particular hazard is a question of fact"). The defendant does not challenge this aspect of the judge's ruling on appeal.

After the denial of its motion for summary judgment, the defendant moved for reconsideration, arguing for the first time that the child trespassing statute does not create an independent cause of action but only establishes a standard of care. Since the plaintiff's negligent infliction of emotional

distress claim had earlier been dismissed on the ground that the plaintiff could not recover as a bystander, the defendant argued, there was therefore no negligence claim to which the child trespasser statute applied. The court denied the motion for reconsideration because the argument had not previously been raised. See Audubon Hill Condominium Ass'n v. Community Ass'n Underwriters of America, Inc., 82 Mass. App. Ct. 461, 469-470 (2012) (judge did not abuse discretion in denying motion for reconsideration that raised new argument). At the same time, recognizing the importance of the issue and wishing to give the plaintiff an opportunity to respond, the judge allowed the defendant leave to file a supplemental motion to dismiss count I, allowed the plaintiff to respond, and heard argument.[7] The judge thereafter dismissed count I, and this appeal followed.

Discussion. On appeal, the plaintiff argues (1) that count I should not have been dismissed because she is entitled to maintain a negligence claim under the child trespasser statute, (2) that her negligent infliction of emotional distress claim should not have been dismissed, and (3) that her motion to amend the complaint should have been allowed. The first two arguments are interdependent, and we accordingly discuss them together. Because we conclude that the unamended complaint should not have

[7] Neither party has appealed the judge's ruling on the motion for reconsideration.

been dismissed, we need not (and do not) reach the plaintiff's third argument.

Count I of the complaint asserts a claim under G. L. c. 231, § 85Q, which was enacted in 1977 in order to soften the "Draconian" common-law rule that tortfeasors had no duty to child trespassers except to refrain from wanton and willful misconduct. See Soule v. Massachusetts Elec. Co., 378 Mass. 177, 180 (1979). In specific circumstances, the statute creates liability sounding in negligence to a child trespasser for artificial conditions (sometimes called "attractive nuisances") for which a landowner is responsible. See Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 261-262 (1991). General Laws c. 231, § 85Q, states:

> "Any person who maintains an artificial condition upon his own land shall be liable for physical harm to children trespassing thereon if (a) the place where the condition exists is one upon which the land owner knows or has reason to know that children are likely to trespass, (b) the condition is one of which the land owner knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, (d) the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the land owner fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

Although it created a statutory entitlement to relief, the statute did not foreclose parallel relief under the common law.

See Soule, 378 Mass. at 181-182 (statute did not foreclose Supreme Judicial Court "from announcing compatible changes in the common law of torts"). See also Schofield v. Merrill, 386 Mass. 244, 255 (1982) (Liacos, J. dissenting). Accordingly, not long after the statute's enactment, the Supreme Judicial Court modified the common-law rule to harmonize with it and held that "there is a common law duty of reasonable care by a landowner or occupier to prevent harm to foreseeable child trespassers," Soule, supra at 182, where the child "would fail to appreciate his peril because of his youth," McDonald v. Consolidated Rail Corp., 399 Mass. 25, 28-29 (1987). Thus, the common-law rule has become "indistinguishable in its elements from the statute," id. at 29, and "[t]he common law and statutory exception are co-extensive, each embodying the 'rule of § 339 of the Restatement (Second) of Torts [(1965)],'"[8] Jad v. Boston & Maine Corp., 26

[8] The statute's language is "practically identical" to the Restatement (Second) of Torts § 339, which has since been replaced with Restatement (Third) of Torts § 51 (2012). See id. at comment l, at 252-253. With the exception of "flagrant trespassers," who are covered by Restatement (Third) of Torts § 52, § 51 provides:

> "[A] land possessor owes a duty of reasonable care to entrants on the land with regard to:
>
> "(a) conduct by the land possessor that creates risks to entrants on the land;
>
> "(b) artificial conditions on the land that pose risks to entrants on the land;

Mass. App. Ct. 564, 567 (1988), quoting Soule, supra at 184. See Puskey, 21 Mass. App. Ct. at 973.

The motion judge accepted the defendant's argument that § 85Q is not a "standalone" cause of action and therefore the plaintiff could not maintain a claim directly under it. No case has confined the statute in this manner, and we decline to do so here. It seems clear to us both from the language of the statute, and from the cases we set out above, that a claim may be brought directly under § 85Q, but that the elements of that claim are co-extensive with our common law. As a practical matter, therefore, it matters not how the claim is labeled in the complaint. See Ahern v. Warner, 16 Mass. App. Ct. 223, 226 n.2 (1983), citing Gallant v. Worcester, 383 Mass. 707, 709-710 (1981). A plaintiff may choose to proceed either directly under the statute or by asserting a common-law negligence claim; either way, the elements to be proved and the available defenses will be the same. See Mathis, 409 Mass. at 261 (because § 85Q "creates liability based on negligence principles, the comparative negligence defense is available to defendants"); Jad, 26 Mass. App. Ct. at 570. Thus, we conclude that the

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"(c) natural conditions on the land that pose risks to entrants on the land; and

"(d) other risks to entrants on the land when [certain affirmatives duties are] applicable."

plaintiff was entitled to assert a claim directly under the statute. However, we also conclude that where, as here, the theory of the claim is negligent infliction of emotional distress, the statutory claim is co-extensive with that common-law cause of action and subject to the same defenses. As a practical matter, this means that the two claims are duplicative, with § 85Q providing the standard for the duty of care.[9]

It is on this basis that we consider the defendant's three arguments why the plaintiff failed to state a common-law claim for negligent infliction of emotional distress: if any one of the three is correct, then the plaintiff's claim under § 85Q also cannot be sustained. The defendant's three arguments are first, that the plaintiff (as merely a "best friend") is not the type of bystander who can recover for her emotional distress; second, that the defendant owed no duty to maintain its fence to prevent child trespassers from accessing adjacent railroad tracks; and third, that the failure to maintain the fence was not the proximate cause of the plaintiff's injuries.

In order to recover for negligently inflicted emotional distress, a plaintiff must prove (1) negligence; (2) emotional

[9] On remand, the judge need not submit the two claims separately to the jury since the elements of proof for both are the same.

distress corroborated by objective evidence; (3) causation; and (4) that a reasonable person would have suffered emotional distress under the circumstances of the case.[10] See Sullivan, 414 Mass. at 132, 137; Payton v. Abbott Labs, 386 Mass. 540, 557 (1982). The plaintiff must show "objective corroboration of the emotional distress alleged." Sullivan, supra, quoting Payton, supra. All the requisite elements were pleaded in the complaint with sufficient factual support. Specifically, the complaint alleged that for many years the defendant, despite knowing that children used the gaps in the fence to cross onto the adjacent railroad tracks, failed to repair or maintain its fence to protect children from that unreasonable danger, that the plaintiff and her best friend were drawn onto the tracks as a result, that she suffered physical injury and emotional distress as a result of being together on the tracks when her best friend was killed, and that objective manifestations of her emotional distress include "anxiety, depression, sleeplessness, night terrors, nightmares, diminished appetite and food intake, bouts of extreme anger, behavioral problems at home and school, poor

[10] In this case, the element of negligence is to be determined with reference to the elements of the child trespasser statute because, as we noted supra, the common law and statutory claims are co-extensive, with § 85Q providing the standard of care.

educational performance, and self-harm." Nothing more was required at the pleading stage.

Nonetheless, the defendant argues that the plaintiff, not having been struck by the train herself, was therefore a bystander who could not recover for her harm. Labeling the plaintiff a "bystander" does not make her so. A bystander is one who herself was never in danger from the defendant's negligence, but instead merely observed or later came upon the effects of the defendant's negligence upon another. See Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 340 (1983) (third-person bystander recovery allowed "in some circumstances even though the plaintiff was not within the 'zone of danger' created by the defendant's negligent conduct"); Dziokonski v. Babineau, 375 Mass. 555, 563-568 (1978) (bystander recovery doctrine more expansive than zone of danger rule and "reasonable foreseeability" liability). A person who, as alleged here, is herself placed within the zone of danger created by the defendant's negligence is not a bystander and may "recover for emotional distress and injuries caused by witnessing injuries negligently inflicted on another." Cimino v. Milford Keg, Inc., 385 Mass. 323, 333 (1982). Such a person is better understood as a "primary victim of the alleged negligence, and not one who merely experiences 'distress at witnessing some peril or harm to another'" (citation omitted), Kelly v. Brigham & Women's Hosp.,

51 Mass. App. Ct. 297, 310 (2001), and her emotional distress, therefore, is "a separate cause of action which arose at the time of the defendant's negligence," Miles v. Edward O. Tabor, M.D., Inc., 387 Mass. 783, 789 n.8 (1982).

Bystanders who are not within the zone of danger must have "substantial physical injury and proof that the injury was caused by the defendant's negligence. Beyond this, the determination whether there should be liability for the injury sustained depends on a number of factors, such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person." Rodriguez v. Cambridge Hous. Auth., 443 Mass. 697, 700 (2005), quoting Dziokonski, 375 Mass. at 568. But this rule has never been applied to a plaintiff who was within the zone of danger herself -- let alone one who, as here, was placed there by the defendant's alleged negligence. See Migliori v. Airborne Freight Corp., 426 Mass. 629, 637-638 (1998) (bystander doctrine applied where rescuer plaintiff came upon injured victim after accident had occurred); Stockdale v. Bird & Son, Inc., 399 Mass. 249, 252-253 (1987) (bystander doctrine applied where plaintiff mother did not learn of accident until several hours after it occurred and did not see injuries to son until later); Cohen, 389 Mass. at 342-344 (bystander doctrine applied

where plaintiff mother did not learn of victim's death until seven hours after accident and did not observe accident or victim); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 517-519 (1980) (bystander doctrine applied where plaintiff wife and children neither saw the accident nor arrived at the scene); Dziokonski, 375 Mass. at 555, 568 (bystander doctrine applied where plaintiff mother went to scene of accident after it had occurred); Barnes v. Geiger, 15 Mass. App. Ct. 365, 366-369 (1983) (bystander doctrine applied where plaintiff mother went to scene of accident).

Instead, "[w]hen a plaintiff has been subjected to the risk of serious bodily harm from an automobile or other object directed toward his person by the negligent conduct of a defendant, emotional damage may be expected to result, and the requirement of some additional element of satisfactory proof of [emotional distress] has been met." Payton, 386 Mass. at 554. Our law in this regard is consistent with the Restatement (Third) of Torts § 47 (2012), which provides that "[a]n actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct . . . places the other in danger of immediate bodily harm and the emotional harm results from the danger."

For these reasons, we conclude that the complaint asserts a direct claim of negligence, not a derivative bystander claim.

Although it is true that the plaintiff seeks to recover damages for witnessing the death of her best friend, she does so as someone who herself was placed in the zone of danger by the defendant's conduct. Accordingly, she is not subject to the multifactor standard governing bystander recovery, and we need not decide whether being a "best friend" satisfies it.

We turn now briefly to the defendant's remaining two arguments. First, relying on Gage v. Westfield, 26 Mass. App. Ct. 681 (1988), the defendant argues that, as a matter of law, it owed no duty to the plaintiff because she was a trespasser with whom it had no "special relationship," and because she was injured on adjacent land. Gage, though, is a case of municipal liability under the Massachusetts Torts Claims Act, G. L. c. 258, § 2. We have found nothing to suggest that G. L. c. 231, § 85Q (or its parallel common-law rule as we discussed supra), requires a "special relationship"; indeed, to the contrary, the statute is premised on the fact that the child has no such relationship and is a trespasser. Moreover, even overlooking that important distinction, Gage does not help the defendant; as we stated there, "in some situations a landowner's duty to exercise reasonable care does not terminate abruptly at the borders of his property but may extend to include a duty to take safety measures related to known dangers on adjacent property." Id. at 685. We repeated this point in Tryon v.

Lowell, 29 Mass. App. Ct. 720, 722 (1991), in which we stated that "[t]he city's duty could extend to dangers on land adjacent to that which the city owned if the defect on the city land had a causal link to the adjacent danger." That link is alleged here: the defendant is said to have failed to maintain its fence, which therefore served as an invitation to children to pass through it and onto the adjacent MBTA tracks.

Second, the defendant argues that the complaint fails because, as a matter of law, there was no proximate cause between its failure to maintain its fence and the plaintiff's injuries. The defendant appears to be arguing that, because the children had many times before used the holes in the fence without being hit by a train, the train was therefore the sole cause of the plaintiff's injuries on this occasion. But "[t]he question whether it was foreseeable that someone like [the plaintiff] might be hurt because of the hole in the fence is a question of fact, not law." Tryon, 29 Mass. App. Ct. at 722. Likewise, it is a question for the jury to determine whether the defendant's fence "posed an unreasonable risk of causing death or serious bodily injury to the child," Phachansiri v. Lowell, 35 Mass. App. Ct. 576, 578 (1993) (plaintiff children dug under one fence and then climbed over another to reach pool where one then drowned), and whether the plaintiff appreciated the particular hazard here, Puskey, 21 Mass. App. Ct. at 973-974

(whether teenager appreciates a particular hazard is question of fact). We note further that summary judgment was denied on this point and that that ruling is unreviewable given that the defendant has not included the summary judgment record here. We certainly see no reason to reach a different conclusion on the allegations of the complaint, knowing that summary judgment was denied on a fuller factual record that has not been placed before us.

For the reasons set out above, we reverse the dismissal of the complaint. Having reached that conclusion, there is no need to consider whether the plaintiff's motion to amend the complaint was properly denied. The case is remanded for further proceedings consistent with this opinion.

So ordered.