[J-2-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARGARET TAYLOR, PARENT AND NATURAL GUARDIAN OF THE ESTATE OF KA-RIN ALISE TAYLOR, A MINOR, AND KATHY MAPP, ADMINISTRATRIX OF THE ESTATE OF LOUIS T. MAPP, DECEASED,	:	No. 33 E.D. Appeal Docket 1999
	:	Appeal From The Order Of The Superior Court Dated February 19, 1999, Denying Reargument Of Decision Dated December 18, 1998, At No. 3787 PHL 96, Vacating Judgment And Remanding For A New Trial
Plaintiff-Appellees	:	
v.	:	
	:	723 A.2d 1027 (Pa. Super. 1998)
ALBERT EINSTEIN MEDICAL CENTER, PETER TRINKAUS, M.D., JOHN WERTHEIMER, M.D.,	:	ARGUED: January 31, 2000
Defendant-Appellants		
and		
OWEN WILLIAMSON, M.D.		

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: May 17, 2000**

While I agree with much of the analysis in the majority opinion, I write separately to address the following points.

First, although it is certainly true, as the majority notes, that we have never formally adopted § 46(2) of the Restatement (Second) of Torts, I cannot agree with the broader proposition that "we have never expressly recognized a cause of action for intentional infliction of emotional distress." Majority Op. at 4-5. Thirty years ago, this Court recognized

a cause of action for serious mental or emotional distress resulting from intentional or wanton conduct in Papieves v. Kelly, 437 Pa. 373, 263 A.2d 118 (1970). However, Papieves is readily distinguishable from this case, for it involved the mistreatment of a corpse. Id. at 375, 263 A.2d at 199.

The tort recognized in Papieves is *sui generis*; indeed, it is the subject of a different, specific subsection of the Restatement. Papieves relied upon § 868, not the general provisions contained in § 46. Papieves, supra (citing Restatement of Torts § 868 (1939)). See also Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 185 n.1, 527 A.2d 988 n.1 (1987) (holding in Papieves was based on § 868 of Restatement, not § 46 of Restatement (Second)). In support of its holding, the Papieves Court noted that, "[w]hile the decisions in other jurisdictions have frequently spoken of the next of kin's property or quasi-property rights in the body of the decedent, the underlying, and we believe real, issue is the right of a decedent's nearest relatives to protection against intentional, outrageous or wanton conduct which is peculiarly calculated to cause them serious mental or emotional distress." Papieves, supra at 378, 263 A.2d at 120-21. We also recognized, however, that "any extension of legal liability to acts which cause emotional distress is not without its problems" for "the law cannot guarantee all men's peace of mind" and "'a certain toughening of the mental hide is a better protection than the law could ever be.'" Id. at 378-79, 263 A.2d at 121 (citation omitted). Nevertheless, the Court recognized that "[t]here can be little doubt" that mental or emotional disorders may be "every bit as real, every bit as debilitating as ailments which have more obviously physical causes." Id. at 379, 263 A.2d at 121.

A key difference between the mistreatment of a corpse tort recognized in Papieves and the general outrageous conduct/severe emotional distress tort governed by subsection 46(2) at issue here involves the element of presence. As the majority correctly notes, subsection 46(2) requires that the person complaining of emotional distress arising from

outrageous conduct directed at an immediate family member must actually be **present** at the time of the outrageous conduct.[1] The reasons for the presence requirement are accurately set forth in the majority opinion's quotations from Comment L to the Rule and the Superior Court's opinion in Johnson v. Caparelli, 625 A.2d 668, 673 (Pa. Super. 1993), allocatur denied, 647 A.2d 511 (Pa. 1994). The mistreatment of a corpse tort has no such requirement, under either the Restatement or the caselaw. This is not surprising given the nature of the conduct at issue when mistreatment of a corpse is alleged. Such mistreatment is extremely unlikely to occur in the presence of the deceased's family.[2] In short, presence is not required because, as a practical matter, such a requirement would almost always nullify the tort itself.

For the reasons stated by the majority, I agree that presence must be required to pursue the outrageous conduct/severe emotional distress tort that is contemplated by subsection 46(2). The special concerns that animate the mistreatment of a corpse tort are not implicated in such cases.

Second, I would elaborate on the reasons why appellee Margaret Taylor cannot be deemed to have been "present" for purposes of subsection 46(2). I agree that, as in the

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[1] Subsection 46(1), which governs situations where the outrageous conduct is directed at the person who suffered the emotional distress, does not have a presence requirement. Appellees argue that they satisfied this subsection because Margaret Taylor gave consent only for Dr. Wertheimer to perform the surgery; when Dr. Trinkaus performed the surgery instead, appellees claim, that was outrageous conduct aimed at Mrs. Taylor. The viability of a claim under subsection 46(1), however, was not the basis for the Superior Court's opinion, nor was it the subject of the allocatur grant.

[2] In Papieves itself, for example, one of the defendants struck the plaintiffs' teenaged son with his automobile, apparently by accident, removed the boy's body from the scene without seeking medical or police assistance, hid the body in his garage, and eventually, with assistance from Joseph Kelly, buried the body in a nearby field, where it was not found until two months later.

case of negligent infliction of emotional distress torts, presence requires, at a minimum, a contemporaneous sensory perception of the outrageous act. See Mazzagatti v. Everingham, 512 Pa. 266, 279-80, 516 A.2d 672, 679 (1986). Appellees claim that Mrs. Taylor was "present," even though she was not in the room where the surgical procedure occurred, because she could hear the electronic tone of the defibrillator from the nearby waiting room while the surgical procedure was being performed. But, as the majority notes, the outrageous conduct that was alleged to have caused Mrs. Taylor severe emotional distress consisted of Dr. Trinkaus operating on Ka-Rin in violation of the consent to operate provided by Mrs. Taylor to the more experienced Dr. Wertheimer. As distressing as it undoubtedly must have been for Mrs. Taylor to hear the defibrillator alarm sound as Ka-Rin's heart stopped beating, neither that sensory perception, nor her learning the devastating fact that Ka-Rin had died, conveyed the identity of who performed the procedure. There was no way to discern by any sensory perception, from outside the room, which doctor had performed the procedure. The primary tragedy here was Ka-Rin's death. Mrs. Taylor did have time to steel herself to that tragedy before learning the entirely separate and, at least for purposes of this tort, unrelated fact that Dr. Trinkaus performed the procedure. Accordingly, appellees failed to establish that Mrs. Taylor was present when the alleged outrageous conduct occurred.

Finally, the majority does not state one way or other whether it would adopt § 46, noting only that the section sets forth "the minimum elements" necessary to sustain such a cause of action. I must admit to having some reservation about the section, a reservation only heightened by the facts of this case. Although the fact that Dr. Trinkaus performed the procedure may have been distressing to the plaintiffs, I am uneasy with the notion, accepted by the jury here under the Restatement test, that that conduct can be deemed "outrageous" conduct which "intentionally or recklessly" caused "severe emotional distress" to Ka-Rin's mother. The propriety of the jury's findings on these points, however, is not

before us. Thus, I would leave to another day the question of the adoption, and contours, of the tort described in section 46(2).

Mr. Justice Nigro joins this concurring opinion.