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NY Appellate Division Holds That Negligent Infliction of Emotional Distress Claims Do Not Require Extreme and Outrageous Conduct

Under New York law, courts — including the New York Appellate Division, First Department (the "First Department") — have historically required a showing of extreme and outrageous conduct to sustain a cause of action for negligent infliction of emotional distress ("NIED").[1] In *Brown* v. *New York Design Ctr., Inc.*, 2023 WL 2417772 (N.Y. App. Div. 1st Dep't Mar. 9, 2023), however, the First Department reversed itself on this point, holding 6-0 that NIED claims do not require such a showing. This holding put the First Department in line with the Appellate Divisions for the Second, Third, and Fourth Departments, each of which has eliminated the "extreme and outrageous conduct" requirement in recent years.[2] The First Department's decision in *Brown* also confirmed that plaintiffs asserting an NIED claim may recover for emotional harm, even if they were not physically injured.

I. Factual and Procedural Background

New York Design Center ("NYDC") houses luxury showrooms that display home finishes, fixtures, and furnishings. In April 2014, while using the men's bathroom at one such showroom in Manhattan, an electrician working for NYDC discovered a camera with a recording device pointed through a hole in the wall of the men's bathroom and into a stall of the adjacent women's bathroom. The New York City Police Department ("NYPD") ultimately retrieved the camera, which contained graphic videos of women using the bathroom. The NYPD could not determine whether other videos existed or if any footage had been disseminated to others.

Seventeen women — Mabel Johanna Brown and 16 "Jane Does" — each of whom allegedly used the stall before the NYPD removed the camera, sued NYDC in New York Supreme Court, New York County, for various torts, including NIED and negligence. Some, but not all, of the plaintiffs were able to confirm, based on clothing and other distinguishing characteristics, that they appeared in the videos. All plaintiffs alleged that they experienced "paranoia and/or hypervigilance" following the camera's discovery, with "many engaging in behavior such as habitually checking vents or looking for other spaces where cameras could be hidden."[3]

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[1] *See, e.g.*, *Sheila C.* v. *Povich*, 11 A.D.3d 120, 130-31 (1st Dep't 2004) (holding that "a cause of action for . . . negligent infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community") (citation omitted).

[2] *See Taggart* v. *Costabile*, 131 A.D.3d 243 (2d Dep't 2015); *Doe* v. *Langer*, 206 A.D.3d 1325 (3d Dep't 2022); *Stephanie L.* v. *House of the Good Shepherd*, 186 A.D.3d 1009 (4th Dep't 2020).

[3] *Brown*, 2023 WL 2417772, at *1.

NYDC moved for summary judgment on plaintiffs' NIED claims, arguing that plaintiffs did not satisfy a necessary element for those claims because NYDC's conduct was not "outrageous."[4] NYDC also moved for summary judgment on plaintiffs' negligence claims, arguing that plaintiffs suffered no "legally compensable injuries" and that plaintiffs failed to show NYDC was "on notice of the camera."[5]

In March 2022, the trial court granted NYDC's motion for summary judgment as to plaintiffs' NIED claims but denied the motion as to plaintiffs' negligence claims. With respect to the NIED claims, the court held that plaintiffs did not sufficiently demonstrate that NYDC's conduct was extreme and outrageous, as required under First Department precedent.[6] With respect to the negligence claims, the court held that that plaintiffs suffered legally compensable *emotional* injuries and that that NYDC had sufficient "notice of the hole and or the recording device" because NYDC received various complaints about the hole (even though no complaint mentioned the potential existence of a camera within), the hole itself was the "size of a grapefruit," and because "there was no other explanation" for the hole other than "surreptitious viewing."[7]

Plaintiffs appealed the NIED ruling, and NYDC appealed the negligence ruling.

II. The First Department's Decision

On March 9, 2023, the First Department reversed the Supreme Court's summary judgment decision with respect to the NIED claims and affirmed the decision with respect to the negligence claims.

First, the First Department disagreed with the lower court's dismissal of plaintiffs' NIED claims because the lower court's decision was based on the incorrect premise that "the existence of extreme and outrageous conduct is a necessary element for a claim of [NIED]."[8] While acknowledging that "a number of this Court's past decisions have indicated" that NIED claims require extreme and outrageous conduct, a review of the "authorities relied upon for this stated proposition" demonstrates that those authorities "ultimately rely, either directly or indirectly, upon cases that deal exclusively with intentional infliction of emotional distress or where there are allegations of both."[9] The First Department explained that, because extreme and outrageous conduct is a required element for *intentional* infliction of emotional distress claims, there is "no stated rationale" as to why such conduct "would be a required element for both an intentional act as well as a negligent act."[10]

The First Department recognized that removing the requirement of extreme and outrageous conduct for NIED claims was in line not only with recent decisions from the Second, Third, and Fourth Departments — the Second Department so held in 2015,[11] the Fourth Department did in 2020,[12] and the Third Department followed suit in 2022[13] — but also with the decision of the New York Court of Appeals in *Ornstein* v. *New York City Health &*

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[4] *Id.* at *2.

[5] *Id.* at *2.

[6] *See id.* at *3.

[7] *See id.* at *2.

[8] *Id.* at *3.

[9] *Id.* at *3-4.

[10] *Id.* at *3.

[11] *Taggart* v. *Costabile*, 131 A.D.3d 243 (2d Dep't 2015).

[12] *Stephanie L.* v. *House of the Good Shepherd*, 186 A.D.3d 1009 (4th Dep't 2020).

[13] *Doe* v. *Langer*, 206 A.D.3d 1325 (3d Dep't 2022).

Hosps. Corp., 10 N.Y.3d 1 (2008), which, while not explicitly eliminating the requirement of extreme and outrageous conduct for NIED claims, made no mention of such requirement in crediting the plaintiff's NIED claim.

Second, the First Department affirmed the lower court's denial of NYDC's summary judgment motion as to plaintiffs' negligence claims, and in so doing clarified that "a breach of a duty of care resulting directly in emotional harm is compensable," even where "no physical injury occurred," so long as (i) the mental injury is a "a direct, rather than a consequential, result of the breach," and (ii) the claim possesses "some guarantee of genuineness."[14] The plaintiffs in *Brown* met those requirements because their "psychological traumas" were "readily and unquestionably understandable," given the lack of clarity as to "whether additional copies of the videos exist, who may be in possession of the videos and whether the videos may ultimately be posted on any number of Internet sites."[15]

III. Implications

The court's decision in *Brown* is significant because, with all four Appellate Division departments in agreement, barring any contrary holding by the Court of Appeals, it is now settled law in New York that NIED claimants need not demonstrate extreme and outrageous conduct. Furthermore, a contrary ruling by the Court of Appeals seems unlikely, given that, as the First Department recognized, *Brown* accords with the Court of Appeals' 1961 decision in *Battalla* v. *State of New York*, which found that a "rigorous application of [the] rule [prohibiting recovery for negligently caused emotional distress] would be unjust, as well as opposed to experience and logic."[16] While only time will tell, the ruling in *Brown* may cause the number of NIED claims in the First Department to increase substantially.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; John MacGregor (Partner) at 212.701.3445 or jmacgregor@cahill.com; or Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com or email publications@cahill.com.

[14] *Brown*, 2023 WL 2417772, at *4.

[15] *Id.* at *2.

[16] 10 N.Y.2d 237, 239 (1961).