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Peephole Cam Case Lowers The Bar On NY Negligence Claims

By **Joel Kurtzberg, John MacGregor and Jason Rozbruch**
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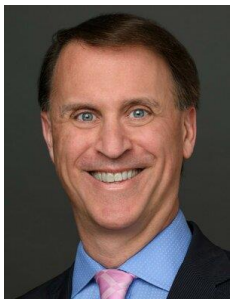
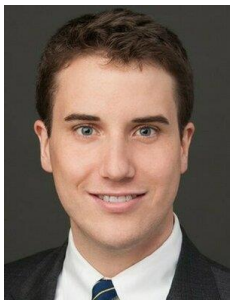
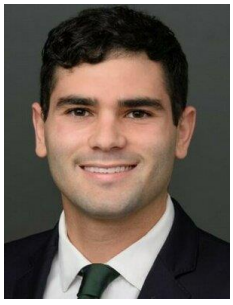


Joel Kurtzberg



John MacGregor



Jason Rozbruch

Under New York law, courts — including the New York Appellate Division, First Judicial Department — have historically required a showing of extreme and outrageous conduct to sustain a cause of action for negligent infliction of emotional distress, or NIED.[1]

In this year's Brown v. New York Design Center Inc. decision, however, the First Judicial 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 Judicial Departments, each of which has eliminated the "extreme and outrageous conduct" requirement in recent years.[2]

The First Judicial 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.

Factual and Procedural Background

New York Design Center 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 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" — who each allegedly used the stall before the NYPD removed the camera, sued NYDC in the Supreme Court of the State of New York, County of New York, 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]

NYDC moved for summary judgment on the plaintiffs' NIED claims, arguing that the 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 the plaintiffs' negligence claims, arguing that plaintiffs suffered no "legally compensable injuries" and that the 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 Judicial Department precedent.[6]

With respect to the negligence claims, the court held that that plaintiffs suffered legally compensable emotional injuries and 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]

The plaintiffs appealed the NIED ruling, and NYDC appealed the negligence ruling.

The First Judicial Department's Decision

On March 9, the First Judicial Department **reversed** the state court's summary judgment decision with respect to the NIED claims and affirmed the decision with respect to the negligence claims.

First, the First Judicial Department disagreed with the lower court's dismissal of the 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 Judicial 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 Judicial 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 Judicial 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 2008 decision of the New York Court of Appeals in Ornstein v. New York City Health & Hospitals Corporation.

Ornstein, while not explicitly eliminating the requirement of extreme and outrageous conduct for NIED claims, made no mention of such a requirement in crediting the plaintiff's NIED claim.

Second, the First Judicial 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 the mental injury is a "a direct, rather than a consequential, result of the breach," and 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]

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 of the State of New York, 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 Judicial Department to increase substantially.

New York Gov. Kathy Hochul, meanwhile, recently vetoed S.B. S74A, the Grieving Families Act, which would have amended New York's wrongful death statute to "permit the families of wrongful death victims to recover compensation for their emotional anguish."[17]

Moreover, the bill, which was intended to "deter the negligent ... behavior that leads to needless deaths,"[18] set forth no requirement that any negligently caused emotional distress be the product of extreme and outrageous conduct.

Gov. Hochul, in vetoing the bill, penned an op-ed explaining her decision, which noted that "[e]xperts have highlighted concerns that the unintended consequences of this far-reaching, expansive legislation would be significant ... [including] driv[ing] up already-high health insurance premiums."[19]

According to an analysis by the actuarial firm Milliman, the legislation had the potential to increase automobile liability and general liability insurance by as much as $2.2 billion.[20]

It is possible that the decisions of the four Appellate Division departments to remove the requirement of "extreme and outrageous" conduct for NIED claims could ultimately have a similar effect on insurance premiums.

Any such effect, however, would be more likely to occur following significant increases in the number of

New York NIED claimants and in overall dollar amounts awarded to such claimants seeking recovery for purely emotional injuries.

Similar effects were in fact predicted by the New York Court of Appeals in its 1896 decision in Mitchell v. Rochester Railway, wherein Judge Celora Eaton Martin denied the plaintiff the recovery she sought for her negligently caused emotional distress.[21]

Judge Martin wrote that permitting such recovery would "naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation."[22]

While it remains to be seen whether New York courts should expect the "flood of litigation" predicted by Judge Martin, this important area of New York tort law will be one of particular interest in the coming months and years.

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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.

[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).

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

[15] Id. at *2.

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

[17] 2021-2022 Legislative Session NY Senate Bill S74A, "Purpose of Bill," available at https://www.nysenate.gov/legislation/bills/2021/S74.

[18] Id., "Justification."

[19] Op-Ed, Gov. Kathy Hochul, ICYMI: Governor Hochul's Op-Ed in the New York Daily News: Let's Agree on Helping Grieving Families Before Today's Midnight Deadline (Jan. 30, 2023), available at https://www.governor.ny.gov/news/icymi-governor-hochuls-op-ed-new-york-daily-news-lets-agree-helping-grieving-families-todays. Governor Hochul's op-ed was also published in the New York Daily News. See Op-Ed, Gov. Kathy Hochul, Hochul to Legislature: Let's agree on helping grieving families before today's midnight deadline, New York Daily News (Jan. 30, 2023), available at https://www.nydailynews.com/opinion/ny-oped-lets-agree-on-helping-grieving-families-today-before-midnight-deadline-20230130-jim7ltxwofdm3nwurnidmi6mvi-story.html.

[20] Andrew G. Simpson, New York Waits to See If Bill to Expand Wrongful Death Damages Becomes Law, Insurance Journal (July 7, 2022), available at https://www.insurancejournal.com/news/east/2022/07/07/675013.htm.

[21] 151 N.Y. 107, 110 (1896).

[22] Id.