

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

JOYCE MIKOLAWSKI AND	:	
DENNIS MIKOLAWSKI,	:	
Plaintiffs	:	
v.	:	No. 12-2311
CURTIS ANTHONY YOUNG, JAROD BROWN,	:	
WELLINGTON MAYO AND YOUTH SERVICES	:	
AGENCY OF PENNSYLVANIA,	:	
Defendants	:	

Civil Law - Negligence - General Duty of Care - Foreseeable Risks of Injury - Liability for the Criminal Conduct of a Third Party - Negligent Infliction of Emotional Distress - "Zone of Danger" - Requisite Nexus with Defendant's Tortious Conduct.

1. The elements of a negligence based cause of action are a duty, a breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss.
2. Absent the existence of a special relationship between the plaintiff and the defendant, the only duty owed by a defendant to a plaintiff is the general duty imposed on all persons not to place others at risk of harm through their actions. The scope of this duty is limited to those risks which are *reasonably foreseeable* by the defendant in the circumstances of the case.
3. In general, a person is not liable for the criminal conduct of another in the absence of a special relationship imposing a pre-existing duty owed to the party harmed.
4. For a private landowner to be held civilly liable under a negligence theory for the foreseeable criminal conduct of others, the owner must have known or reasonably should have known of the dangerous propensities of such third parties and that its negligence would afford such third parties an opportunity to engage in intentionally tortious or criminal conduct or increase the risk that harm of the type which did occur, would occur.
5. The "zone of danger" exception to the "impact rule" for negligent infliction of emotional distress affords a cause

of action for emotional distress in the absence of physical injury or impact where the plaintiff was in personal danger of physical impact and where the plaintiff was in actual fear of physical impact.

6. Claims for negligent infliction of emotional distress are restricted to breaches of duty which directly result in emotional harm and where the defendant's conduct involves an unreasonable risk to cause such harm. A claim for negligent infliction of emotional distress does not exist where the defendant's conduct was only negligent and the foreseeability of causing emotional distress only to a third party was remote from the "wrongful" act forming the basis of the defendant's negligence.
7. Where the record is barren as to what criminal acts juvenile offenders committed prior to their placement at a residential facility owned, operated and maintained by the Defendant, their propensity for violence, or whether, if they escaped, there was a foreseeable likelihood of resulting physical or violent behavior from which severe fright or other emotional disturbance to others might be anticipated, Defendant breached no duty to Plaintiff homeowners for negligent infliction of emotional distress alleged to have occurred when the juvenile offenders escaped from Defendant's youth services camp, broke into the homeowners' home, and, brandishing a piece of firewood, threatened the homeowners with physical injury if the homeowners did not submit to the juveniles' demands.

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Marvin O. Schwartz, Esquire	Counsel for Plaintiffs
David E. Heisler, Esquire	Youth Services Agency of Pennsylvania

MEMORANDUM OPINION

Nanovic, P.J. - December 30, 2016

As a matter of law, can a defendant be held legally responsible for negligent infliction of emotional distress where the emotional harm claimed was directly caused by the intentional or criminal conduct of third parties. That is the issue underlying the pending Motion for Summary Judgment filed by Defendant Youth Services Agency of Pennsylvania.

FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2010, the above-named individual defendants, all minors at the time (hereinafter "Juvenile Offenders"), escaped from Camp Adams located in Penn Forest Township, Carbon County, Pennsylvania, where they had been committed pursuant to court order in juvenile proceedings under the Juvenile Act, 42

Pa.C.S.A. §§ 6301-6375.¹ This Camp was owned, operated and controlled by the Defendant, Youth Services Agency of Pennsylvania (hereinafter "YSA"). In accordance with the orders of commitment, the Juvenile Offenders were under the care, custody and control of Defendant YSA and restricted from leaving its facility without authorization.

Shortly after their escape, the Juvenile Offenders broke into the home of Joyce and Dennis Mikolawski (hereinafter "Plaintiffs") during the early morning hours of October 30, 2010, and threatened the Plaintiffs with physical bodily harm before taking their money and stealing their car. Plaintiffs, who are married to one another, live across the street from Camp Adams. (Dennis Mikolawski Deposition, 4/22/14, pp.39-40). None of the Juvenile Offenders struck or had physical contact with either Plaintiff, and the Plaintiffs were not physically injured as a result of this incident. However, both Plaintiffs claim to have sustained severe mental anguish and emotional distress caused when one of the Juvenile Offenders brandished a piece of firewood over his head and threatened the Plaintiffs with physical injury if they did not submit to the Juvenile Offenders' demands.

¹ Camp Adams is an ACT (Adventure Challenge Treatment) Boys Camp, a form of residential placement; it is not a juvenile detention center.

In their complaint filed on October 25, 2013, Plaintiffs assert claims of intentional infliction of emotional distress, assault, false imprisonment, trespass and civil conspiracy against each of the individual defendants. Plaintiffs also allege that YSA was negligent for allowing the Juvenile Offenders to escape and should be held accountable for Plaintiffs' injuries since it knew or should have known that the Juvenile Offenders possessed dangerous and violent propensities and would likely cause harm to others if they escaped.

On March 31, 2016, YSA filed a Motion for Summary Judgment alleging Plaintiffs failed to produce sufficient evidence to support their negligence claim. Plaintiffs argue their complaint sets forth a cause of action for negligent infliction of emotional distress against YSA and that the evidence is sufficient to support this cause of action.²

DISCUSSION

To maintain a claim for negligent infliction of emotional distress, a plaintiff must demonstrate one of four factual scenarios: (1) where the defendant owed a contractual or

² A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. See Fine v. Checcio, 870 A.2d 850 (Pa. 2005); Pa.R.C.P. 1035.2. To meet this standard, "a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense." Petrina v. Allied Glove Corp., 46 A.3d 795, 798 (Pa.Super. 2012) (quoting Chenot v. A.P. Green Servs., 895 A.2d 55, 61 (Pa.Super. 2006)).

fiduciary duty to the plaintiff; (2) where the plaintiff suffered a physical injury that caused the emotional distress; (3) where the plaintiff was in the "zone of danger" of the defendant's tortious conduct and at risk of immediate physical injury; or (4) where the plaintiff witnessed a serious injury to a close family member. Doe v. Phila. Cmty. Health Alt. AIDS Task Force, 745 A.2d 25, 27 (Pa.Super. 2000), *aff'd*, 767 A.2d 548 (Pa. 2001). Of these scenarios, only the third is applicable and it is this scenario upon which Plaintiffs rely. Specifically, Plaintiffs argue that once the piece of firewood was brandished as a weapon and Plaintiffs threatened with battery if they did not comply with the Juvenile Offenders' demands, Plaintiffs were placed in personal danger of physical impact.

For purposes of its Motion for Summary Judgment, YSA concedes the sufficiency of the evidence to support a finding of negligence on its part which allowed the Juvenile Offenders to escape from Camp Adams, but argues that for liability to exist, the defendant's negligence must have been the immediate and direct cause of placing the plaintiff in the "zone of danger," rather than a remote, indirect and unforeseen cause as occurred here. For example, in Niederman v. Brodsky, 261 A.2d 84 (Pa. 1970), which recognized the "zone of danger" exception to the

"impact rule," it was defendant's reckless and negligent operation of a motor vehicle which caused the vehicle driven by him to skid and nearly strike the plaintiff which gave rise to plaintiff's "right to recover damages for his physical injury (the heart attack), even though he was not 'impacted' by the defendant's vehicle, since this injury resulted from the plaintiff's fear of impact (mental anguish)." Schmidt v. Boardman Company, 11 A.3d 924, 948 (Pa. 2011) (recognizing Niederman's adoption of the "zone of danger" rule, which affords a cause of action for negligent infliction of emotional distress "where the plaintiff was in personal danger of impact because of the direction of a negligent force against him and where plaintiff actually did fear the physical impact").

In contrast, as argued by YSA in the instant case, YSA's alleged negligence was not having in place sufficient safeguards at the Camp to prevent the escape of the Juvenile Offenders, whereas the direct source of the "danger" giving rise to Plaintiffs' claim for negligent infliction of emotional distress was the intentional and immediate threatening of physical force upon the Plaintiffs by the Juvenile Offenders. In essence, YSA contends that any assumed negligence by it which resulted in the escape of the Juvenile Offenders from its facility cannot be the basis of liability for Plaintiffs' claim of damages for

emotional distress which was caused directly by the unexpected and intervening conduct of the Juvenile Offenders. YSA's Motion, in effect, questions whether under such circumstances, YSA owed and/or breached a duty to Plaintiffs not to engage in conduct which created an unreasonable and foreseeable risk of injury to Plaintiffs' emotional well-being.

In Minnich v. Yost, 817 A.2d 538 (Pa.Super. 2003), *appeal denied*, 827 A.2d 1202 (Pa. 2003), the Court stated:

It is axiomatic that the elements of a negligence-based cause of action are a duty, a breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss. When considering the question of duty, it is necessary to determine whether a defendant is under any obligation for the benefit of the particular plaintiff ... and, unless there is a duty upon the defendant in favor of the plaintiff which has been breached, there can be no cause of action based upon negligence.

Id. at 541 (citations and quotation marks omitted).

Unless a special relationship exists between the plaintiff and the defendant, the only duty owed by the defendant to the plaintiff is the general duty imposed on all persons not to expose others to reasonably foreseeable risks of injury. Schmoyer by Schmoyer v. Mexico Forge, Inc., 649 A.2d 705, 708 (Pa.Super. 1994).

Duty, in any given situation, is predicated upon the relationship existing between the parties at the relevant time. Zanine v. Gallagher, 345 Pa.Super. 119, 497 A.2d 1332, 1334 (1985). Where

the parties are strangers to each other, such a relationship may be inferred from the general duty imposed on all persons not to place others at risk of harm through their actions. *Id.* The scope of this duty is limited, however, to those risks which are *reasonably foreseeable* by the actor in the circumstances of the case. *Id.*

J.E.J. v. Tri-County Big Brothers/Big Sisters, 692 A.2d 582, 584 (Pa.Super. 1997) (citations and quotation marks omitted) (emphasis added). In general, a person is not liable for the criminal conduct of another in the absence of a special relationship imposing a pre-existing duty. Feld v. Merriam, 485 A.2d 742, 746 (Pa. 1984); Mascaro v. Youth Study Center, 523 A.2d 1118, 1124 (Pa. 1987); Restatement (Second) Torts, Sections 315 and 448.

"Under our case law and the Restatement of Torts, Second, [the Pennsylvania Supreme Court has] held landowners liable for failing to take precautions against *unreasonable* risks that stem directly and indirectly from the property including the contemplated acts of third parties, whose crimes are facilitated by the condition of the property." Mascaro, 523 A.2d at 1122 (emphasis added); see also Restatement (Second) Torts, Sections 315, 365 and 448.³

³ Section 315 of the Restatement (Second) Torts provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

In Mascaro, the Court held that plaintiffs had stated a cause of action in negligence at common law against a juvenile detention center whose alleged negligent maintenance of its facility allowed a juvenile to escape. Once at large, the juvenile and an accomplice burglarized plaintiffs' home and, while inside the home, raped and beat a mother and her daughter. The detention center knew or should have known of the juvenile's dangerous propensities since the juvenile had "at least fourteen arrests and five convictions, including three other rapes, four burglaries and three robberies, and that he had escaped from detention centers three other times." *Id.* at 1122. Given these known propensities to commit crime, the center knew, or should have known, that the juvenile would take advantage of the

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Section 365 provides, in pertinent part:

A possessor of land is subject to liability to others outside of the land for physical harm caused by the disrepair of a structure.... if the exercise of reasonable care ... would have made it reasonably safe by repair or otherwise.

Section 448 provides:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct should have realized the likelihood that such a situation might be created thereby and that a third person might avail himself of the opportunity to commit such a tort or crime.

security defects at its facility and upon escaping would likely commit additional burglaries and rapes, including those at issue in Mascaro. See also Anderson v. Bushong Pontiac Co., 171 A.2d 771 (Pa. 1961) (imposing liability on the owner of a used car lot for damages which were caused when a car which was stolen and negligently driven by minors hit the plaintiff, a pedestrian; the Court found that it was reasonable for the lot owner to foresee not only that the car, which was not secured or otherwise protected after its keys had been stolen two days earlier, would be stolen, but also that it was likely to be stolen and operated by minors who frequented the area and, because of their youth and immaturity, driven by them in a careless and unsafe manner).

For a private landowner to be held civilly liable under a negligence theory for the foreseeable criminal conduct of others, the owner must have known or reasonably should have known of the dangerous propensities of such third parties and that its negligence would afford such third parties an opportunity to engage in intentionally tortious or criminal conduct or increase the risk that harm of the type which did occur, would occur. Here, the record is barren of what criminal acts the Juvenile Offenders committed prior to their placement at Camp Adams, their propensity for violence, or whether, if

they escaped, there was a foreseeable likelihood of threatened or violent behavior by them from which severe fright or other emotional disturbance to others might be anticipated. Cf. Moore v. Department of Justice, 538 A.2d 111, 114 (Pa.Cmwlth. 1988) (holding that a state prison could not be held liable for its release of an inmate convicted of armed robbery, and who following his release shot plaintiff five times, for failing to properly diagnose, treat or recognize the inmate's psychiatric condition before he was released on a two-day home furlough since the prison did not have the expertise to enable it to foresee that the inmate's psychiatric deficiencies would cause him to harm and injure others).

In Ford v. Jeffries, 379 A.2d 111 (Pa. 1977), the owner of a dilapidated dwelling house with holes in the outside walls and foundation through which access to the interior could be gained, which was located five to six feet from plaintiff's home and which was a continuing fire hazard - a fire having occurred in this structure two months earlier - was held responsible for the destruction of plaintiff's home when a fire in the dilapidated structure, possibly caused by an arsonist, spread to plaintiff's nearby home. In noting that "even if the superseding force of an arsonist was the cause of the fire, it would not insulate the

[defendant] from liability," the Pennsylvania Supreme Court stated:

If one engages in negligent conduct toward another, such as unreasonably increasing the risk that that person will suffer a *particular kind of harm*, it cannot be said, as a matter of law, that the actor is not liable simply because the foreseeable plaintiff suffered the *foreseeable harm* in a manner which was not foreseeable. [The owner's] conduct in this case could have increased the risk that [the plaintiff's] house would be damaged by fire. Such harm in fact occurred. Given these circumstances, it was for the jury to determine whether the [owner's] conduct, if it was negligent, was superseded by the intervening force.

Ford, 379 A.2d at 115 (emphasis added).

In this case, due to YSA's negligence in its maintenance of Camp Adams and supervision of the Juvenile Offenders, the foreseeability of the Juvenile Offenders' escape from Camp Adams is apparent. This notwithstanding, the record fails to reflect any prior knowledge or notice to YSA from which it could foresee that if the Juvenile Offenders escaped, there was a realistic probability of a criminal break-in or assault. That this was a possible consequence does not mean it was a probable or legally foreseeable consequence. Jamison v. Philadelphia, 513 A.2d 479, 481 (Pa.Super. 1986), appeal denied, 527 A.2d 541 (Pa. 1987). See also Liney v. Chestnut Motors, Inc., 218 A.2d 336 (Pa. 1966) (finding that even if an automobile repair garage which allowed a car delivered to the garage for repairs to remain parked

outside on the street in an area with a high rate of car thefts with the keys in the ignition should have foreseen the likelihood of theft of the vehicle, it had no notice or reason to believe that the thief would be an unsafe driver and, therefore, it could not be held liable when the vehicle was driven carelessly, striking the plaintiff-pedestrian on a sidewalk); Roche v. Ugly Duckling Car Sales, Inc., 879 A.2d 785 (Pa.Super. 2005) (affirming the trial court's grant of summary judgment to defendants, finding that because the evidence was insufficient to support a finding that defendants knew or should have known vehicles would be stolen by juvenile offenders from defendant's unfenced parking lot which had a history of car thefts, or that the vehicles would be driven in a negligent or reckless manner, there was, therefore, no duty of care owed to plaintiff since, while the theft may have been foreseeable, that the vehicles would be stolen by juveniles who would drive incompetently or carelessly was not), *appeal denied*, 901 A.2d 499 (Pa. 2006).

One reason for judicial caution and doctrinal limitations on recovery for emotional distress is the "perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act." Toney v. Chester

County Hospital, 36 A.3d 83, 97-98 (Pa. 2011) (Baer, J., Opinion in Support of Affirmance) (quoting *Prosser and Keeton on the Law of Torts*, § 54 at 360-61). Consistent with this concern, claims for negligent infliction of emotional distress appear to be restricted to breaches of duty which directly result in emotional harm and where the defendant's conduct involves an unreasonable risk to cause such harm. See Restatement (Second) Torts, Section 436 (comment).

While a wrongdoer should clearly be held accountable for the natural and proximate consequences of his misconduct, the record before us fails to support a finding that a breach of YSA's duty to confine the Juvenile Offenders to its facility created an obvious and objectively articulable increased risk of violence or physical harm to innocent parties if the Juvenile Offenders escaped the confines of Camp Adams. Even if YSA was negligent in allowing the Juvenile Offenders to escape, it cannot be said to have been negligent *vis-à-vis* Plaintiffs whose injuries were not a foreseeable consequence of the Juvenile Offenders' escape.

CONCLUSION

Having concluded that YSA could not foresee the harm claimed by Plaintiffs in the event the Juvenile Offenders escaped from Camp Adams, YSA breached no duty to protect

Plaintiffs against negligent infliction of emotional distress caused by the alleged criminal and intentionally tortious conduct of the Juvenile Offenders. As no duty has been established, no recovery is possible under a negligence theory. Accordingly, YSA's Motion for Summary Judgment will be granted.

BY THE COURT:

P.J.

