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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000379-MR

JAMES WILLIAM CROOK — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE BRIAN W. WIGGINS, JUDGE
ACTION NO. 05-CI-00835

SEAN M. MAGUIRE, M.D.[1] — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

JONES, JUDGE: James William Crook appeals an order of the Hopkins Circuit Court summarily dismissing various causes of action he asserted against Dr. Sean M. Maguire for emotional distress damages. For the reasons more fully explained

[1] Baptist Health Madisonville f/k/a The Trover Clinic Foundation, Inc. was also an appellee, but it was dismissed as a party during the pendency of this appeal.

below, we affirm in part, reverse in part and remand for proceedings consistent with this opinion.

I. Background

In July 2005, Crook received a call from the Madisonville Police Department requesting an interview. Crook voluntarily went to the police station, and the police questioned him for two or three hours regarding a number of controlled substance prescriptions that had been written for Crook by Dr. Maguire, one of Crook's former treating physicians. Over the course of the interview, the police explained they were investigating Dr. Maguire for obtaining controlled substances by writing fraudulent prescriptions. They questioned Crook regarding the level of his involvement with Dr. Maguire's scheme, if any. Crook responded that he was not involved and had no knowledge of the prescriptions Dr. Maguire had written in his name. Thereafter, the police asked Crook if they could contact him later about this matter. Crook told them they could. Crook then left the station. The police contacted Crook again, for the last time, two weeks later in a five-minute phone call in which they asked Crook if he had any medication in his home, and told him they would call if they needed more help or needed any more questions answered.

Crook later asserted that his interview with the police was distressing to him, especially because at one point the interviewing officer informed him that if he had been involved in Dr. Maguire's scheme he could be arrested. On this basis, he filed suit against Dr. Maguire in Hopkins Circuit Court seeking emotional

distress damages based upon negligent infliction of emotional distress (NIED), intentional infliction of emotional distress (IIED), negligence per se, and violation of Kentucky Revised Statute (KRS) 411.210.

After a period of motion practice, the circuit court dismissed Crook's claims because (1) Crook's only source of alleged damage under any of these theories was emotional distress and mental anguish; and (2) in its assessment of the record, the circuit court determined Crook failed to present expert medical or scientific proof supporting that his alleged emotional distress and mental anguish significantly affected his everyday life or required significant treatment.[2]

II. Analysis

On appeal, Crook first argues the circuit court erred because, in his view, Kentucky law only would have required him to produce this type of expert medical or scientific evidence if he was asserting a theory of NIED.[3]

Crook is incorrect. IIED and NIED both require a showing of severe emotional distress. *See Wilson v. Lowe's Home Ctr.*, 75 S.W.3d 229, 238 (Ky. App. 2001) (explaining emotional distress in IIED claim must be severe); *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012) (explaining emotional distress in NIED claim must be severe). Severe emotional distress is only demonstrated through expert medical or scientific proof. In *Osborne*, 399 S.W.3d at 17-18, the Kentucky Supreme Court explained:

[2] The circuit court did not address whether Dr. Maguire's conduct was sufficiently "outrageous" for purposes of an IIED claim, nor do we.

[3] Maguire does not appeal the dismissal of his NIED claim.

> A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiff's everyday life or require significant treatment will not suffice. And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment.

(Internal footnotes omitted). Accordingly, a plaintiff's failure to produce expert evidence or scientific proof of severe emotional distress is fatal to claims of IIED and NIED. *See Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538, 544-45 (Ky. App. 2013).

This brings us to Crook's claim under KRS 411.210. It is with respect to this claim that we disagree with the circuit court. KRS 411.210(1) provides:

> In addition to pursuing any other remedy, anyone who is a victim under KRS 434.872, 434.874, 514.160, or 514.170, shall have a cause of action, either where the victim resides or the defendant resides, for compensatory and punitive damages against anyone who violates KRS 434.872, 434.874, 514.160, or 514.170 and, if successful, shall be awarded reasonable costs and attorneys' fees.

A claim pursuant to KRS 411.210(1) survives so long as the plaintiff demonstrates that he was a "victim" under "KRS 434.872, 434.874, 514.160, or 514.170[.]" *Id*. A plaintiff who has a cause of action under KRS 411.210(1) can recover compensatory damages, punitive damages, and reasonable costs and attorneys' fees.[4] Because Crook's claim under KRS 411.210 is grounded in

[4] The General Assembly's use of the word "shall" means an award of costs and attorneys' fees is mandatory to a plaintiff who prevails under KRS 411.210(1).

statute, we must consider whether *Osborne's* expert evidence requirement applies to all claims or only IIED and NIED claims. Until recently, this was not an easy question to answer, and the federal and state courts considering it often came to inconsistent conclusions.

In *Indiana Insurance Company v. Demetre*, 527 S.W.3d 12 (Ky. 2017), the Kentucky Supreme Court confronted the question of *Osborne's* reach head-on. In doing so, the Court discussed the reasons for adopting the *Osborne* rule. Ultimately, the Court determined that *Osborne* only applied to IIED and NIED claims. *Osborne's* requirement of expert testimony does not attach to emotional damages claimed as part of statutory or contractually based causes of action. *Id.* at 36.

> Accordingly, we hold that *Osborne's* requirement of expert medical or scientific proof is limited to claims of intentional or negligent infliction of emotional distress.
>
> Our conclusion is due in part to the recognition that claims for emotional damages grounded in breach of contract or violation of statute, such as those alleged by Demetre in the case at bar, are less likely to be fraudulent than those advanced under a free-standing claim of intentional or negligent infliction of emotional distress. To evaluate whether emotional damages are appropriate in those cases that do not allege the free-standing torts of intentional or negligent infliction of emotional distress, we have historically relied on our trial courts and the jury system to evaluate the evidence and determine the merits of the alleged claims. *See Curry*, 784 S.W.2d at 178 ("Throughout the history of Anglo-American law, the most important decisions societies have made have been entrusted to duly empaneled and properly instructed juries. Decisions as to human life, liberty and public and private property have been routinely made by jurors and

extraordinary confidence has been placed in this decision-making process."); *Goodson*, 89 P.3d at 417 ("[T]he jury system itself serves as a safeguard; we routinely entrust the jury with the important task of weighing the credibility of evidence and determining whether, in light of the evidence, plaintiffs have satisfied their burden of proof."). We see no compelling reason to depart from this view.

With this standard established we turn to the facts in the case at bar to determine whether there was "clear and satisfactory" proof to support Demetre's recovery of emotional damages. *See Motorists Mut. Ins. Co.*, 996 S.W.2d at 454 (citations omitted). Indiana Insurance claims that any stress Demetre suffered was due solely to his being sued by Harris: "[i]t is not surprising that Mr. Demetre may have been experiencing stress, since a claim had been made against him and he had been sued by Ms. Harris. Those are certainly stress-inducing events." This causal explanation offered by Indiana Insurance for Demetre's stress is self-serving as it purposefully omits any recognition that Demetre endured stress due to Indiana Insurance's lackluster handling of the Harris family's claims and subsequent legal action against Demetre. The jury heard extensive evidence about the totality of the circumstances surrounding the Harris family's claims and Demetre's interactions with his insurer, and it was a factual issue for the jury as to whether Demetre suffered any emotional distress and, if he did, whether Indiana Insurance bore any responsibility on that score.

Contrary to Indiana Insurance's assertions, Demetre presented sufficient evidence to establish his emotional distress during the four years prior to trial, describing the experience in some detail as a "total disaster," and a "nightmare." Additionally, Demetre testified to daily stress wondering what would happen to his family due to his potentially uninsured million-dollar exposure in the *Harris* litigation, a case which would deplete his financial resources and likely force him to declare bankruptcy. Further, Demetre explained that the stress impacted all aspects of his life, from his marital life to his

> business relations and resulted in a perpetual loss of sleep. Lastly, Demetre testified to seeking spiritual comfort from his priest to weather the stress caused by Indiana Insurance's conduct. Based on this evidence, we conclude there was sufficient clear and satisfactory proof presented to sustain the jury's award of emotional distress damages.

Id. at 39–40.

Demetre's claim arose under the Kentucky Consumer Protection Act. Crook's claim arises under Kentucky's Identify Theft Act, KRS 411.210. Much like the Consumer Protection Act, KRS 411.210 provides the victim of identity theft with a private, civil cause of action. Since Crook's claim for emotional damages under KRS 411.210 is grounded in statute, *Osborne's* expert requirement does not attach. *Id. Demetre* makes this clear.

We pause, however, to address a portion of *Demetre* contrasting parasitic emotional distress claims with stand-alone claims. Reading this portion of the opinion in isolation could result in the erroneous conclusion that *Osborne's* expert requirement attaches if emotional damages are the only damages being claimed irrespective of the nature of the claim. Because Crook's claim is primarily composed of emotional distress damages, we have considered the implication of this discussion from *Demetre* at some length.

In *Demetre*, the Court included some discussion of the parasitic damages analysis employed by Tennessee in negligence actions as a way of explaining how the Tennessee courts (whose rule our Court adopted in *Osborne*) had applied the expert testimony requirement when confronted with tort-based

claims in which both emotional distress as well as other types of damages were sought by the plaintiffs.

> Notably, in *Estate of Amos v. Vanderbilt Univ*., 62 S.W.3d 133 (Tenn. 2001), the Tennessee Supreme Court declined to extend *Camper's* (the case relied on by this Court in *Osborne*) heightened standard of proof for the recovery of emotional damages in negligent infliction of emotional distress claims to all claims for emotional damages. In that case, Amos underwent jaw surgery at Vanderbilt University Medical Center and received a blood transfusion, including a unit of blood that had been contaminated with human immunodeficiency virus (HIV). *Id*. At the time (1984), Vanderbilt did not test blood for HIV and did not have a policy mandating patient notification when a blood transfusion had occurred. *Id.* In 1991, Amos gave birth to a daughter who died shortly after birth from HIV. Subsequent testing led to Amos's discovery of her own HIV infection. *Id.*
>
> Amos filed suit against Vanderbilt and recovered at trial on her claims for wrongful birth, negligence, and negligent infliction of emotional distress. *Id*. The Tennessee Court of Appeals reversed the estate's award for emotional injuries, however, "[b]ecause the Amoses failed to present expert or scientific testimony of serious or severe emotional injury, as required under this Court's decision in *Camper*." *Id*. at 136.
>
> On appeal, the Tennessee Supreme Court reversed, declining to extend *Camper's* requirements of expert medical or scientific proof and serious or severe injury to all negligence cases where emotional damages are sought. *Id.* at 134. Specifically, the Court noted that "[t]he special proof requirements in *Camper* are a unique safeguard to ensure the reliability of 'stand-alone' negligent infliction of emotional distress claims." *Id.* at 136-37 (citing *Camper*, 915 S.W.2d at 440; *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999)). While the nature of "stand-alone" emotional injuries creates a risk of fraudulent claims, that risk is reduced "however, in a

> case in which a claim for emotional injury damages is one of multiple claims for damages." *Id.* (citations omitted). "When emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims." *Id.* (citations omitted). As the *Amos* Court reasoned:
>
> > [i]mposing the more stringent *Camper* proof requirements upon all negligence claims resulting in emotional injury would severely limit the number of otherwise compensable claims. Such a result would be contrary to the intent of our opinion in *Camper*—to provide a more adequate, flexible rule allowing compensation for valid "stand-alone" emotional injury claims. *Id.* at 137 (citing *Camper*, 915 S.W.2d at 446).

Demetre, 527 S.W.3d at 38.

Our Supreme Court distinguished *Amos* on two distinct bases, both of which are applicable in this case: 1) the cause of action discussed by the Tennessee court in *Amos* was grounded in negligence; Demetre's action was a statutory bad faith claim; and 2) while the jury in *Demetre* was only asked to award compensatory damages for Demetre's emotional distress, Demetre was seeking to recover the legal fees he incurred litigating with Indiana Insurance Company concerning the initial claim as well as "his other attorney fees, through a fee award from the judge." The *Demetre* court also rejected imposing the stand-alone parasitic damages requirement on other types of claims because extending the requirement beyond IIED and NIED claims would "dramatically limit the otherwise compensable claims that arise in bad faith cases as well as a variety of

other actions . . . [which] would not be conducive to the interests of justice." As such, the Court concluded its analysis of the *Amos* court's parasitic damages discussion by explicitly holding: "*Osborne's* requirement of expert medical or scientific proof is limited to claims of intentional or negligent infliction of emotional distress." *Id*.

Based on *Demetre*, it was error for the circuit court to dismiss Crook's claim under KRS 411.210. While Crook did not have expert medical testimony to support his claim for emotional damage, like Mr. Demetre, Crook testified about the distress the identify theft and related events caused to him. Additionally, Crook's pastor, Rev. Rich, testified that Crook was emotionally upset by these events. This is sufficient; no expert testimony was required for Crook to recover emotional distress damages under his statutory cause of action.

> Demetre presented sufficient evidence to establish his emotional distress during the four years prior to trial, describing the experience in some detail as a "total disaster," and a "nightmare." Additionally, Demetre testified to daily stress wondering what would happen to his family due to his potentially uninsured million-dollar exposure in the *Harris* litigation, a case which would deplete his financial resources and likely force him to declare bankruptcy. Further, Demetre explained that the stress impacted all aspects of his life, from his marital life to his business relations and resulted in a perpetual loss of sleep. Lastly, Demetre testified to seeking spiritual comfort from his priest to weather the stress caused by Indiana Insurance's conduct. Based on this evidence, we conclude there was sufficient clear and satisfactory proof presented to sustain the jury's award of emotional distress damages.

Demetre, 527 S.W.3d at 40.

III. Conclusion

We affirm the Hopkins Circuit Court with respect to all claims except for Crook's claim pursuant to KRS 411.210. We reverse the circuit court grant of summary judgment as to that claim and remand for proceedings consistent with this opinion, and with the Kentucky Supreme Court's opinion in *Indiana Insurance Company v. Demetre*, 527 S.W.3d 12 (Ky. 2017).

NICKELL, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

KRAMER, CHIEF JUDGE: I agree with the well-reasoned opinion of the majority to the extent that it affirms the circuit court's decisions to dismiss Crook's claims of negligent infliction of emotional distress (NIED) and intentional infliction of emotional distress (IIED). I disagree, and respectfully dissent, regarding the majority's disposition of Crook's remaining claim asserted pursuant to KRS 411.210(1). The heart of our disagreement appears to be whether NIED and IIED claims are different from stand-alone claims of emotional injuries asserted under the purview of a statutory violation. I cannot see any meaningful difference, but the majority does: In its view, and solely due to its reading of *Demetre*, the former category of claims must be supported by expert medical or scientific proof supporting the plaintiff suffered severe emotional injury, but the latter category of claims requires only lay testimony to that effect for purposes of summary judgment.

With that said, I believe the majority has taken *Demetre* to a place it does not belong. The extent of *Demetre* referenced in the majority opinion involved the Kentucky Supreme Court's analysis of a *parasitic*-- not *stand-alone*-- claim of emotional injury asserted under the purview of a statutory violation.[5] Moreover, the *Demetre* Court avoided discussing whether a stand-alone claim for emotional injuries asserted under the purview of the statute at issue in that matter qualified as a viable cause of action.[6] The *Demetre* Court's holding was accordingly limited when it explained that its holding was

> due in part to the recognition that claims for emotional damages grounded in breach of contract or violation of

[5] *See Demetre*, 527 S.W.3d at 38-39, holding that:

> It is true that the only compensatory damages that the jury was asked to award in this case were damages for "emotional pain and suffering, stress, worry, anxiety, or mental anguish," but it is further true that Demetre testified to an out-of-pocket loss in the form of the almost $400,000 in attorney fees that he incurred litigating with Indiana Insurance to obtain coverage. Demetre sought to recover these damages, along with his other attorney fees, through a fee award from the judge. *Thus, this case is not one where the only injury identified by the plaintiff is emotional distress*.

(Emphasis added.)

[6] *See id*. at 33-34:

> Indiana Insurance also contends that the trial court erred by not granting its motions for directed verdict and judgment notwithstanding the verdict on the Kentucky Consumer Protection Act claim. Specifically, Indiana Insurance argues that Demetre's emotional distress damages and attorney fees cannot satisfy the Act's requirement of an "ascertainable loss of money or property." *See* KRS 367.220(1) (granting right of recovery to person who "suffers any ascertainable loss of money or property" in conjunction with unfair, false, misleading or deceptive business acts or practices). *We need not reach the question of whether damages for emotional distress could constitute an "ascertainable loss of money or property" under the Act*, given that Demetre's attorney fees incurred in his dispute with Indiana Insurance over the coverage issue were sufficient to submit the Consumer Protection Act claim to the jury.

(Emphasis added.)

> statute, *such as those alleged by Demetre in the case at bar*, are less likely to be fraudulent than those advanced under a free-standing claim of intentional or negligent infliction of emotional distress.

Id. at 39 (emphasis added).

Crook, for his part, cites a number of cases that do involve plaintiffs who supplied lay testimony of emotional distress and were awarded stand-alone compensatory damages representing emotional distress. However, the cases he cites are distinguishable because they involved Kentucky Civil Rights claims, statutory causes of action that specifically authorize damages awards exclusively for humiliation, embarrassment, and personal indignity. *See McNeal v. Armour and Co.*, 660 S.W.2d 957, 958 (Ky. App. 1983) (explaining the Kentucky Civil Rights Act, KRS 344.010 *et seq.*, has been interpreted as allowing "claims for damages for humiliation and personal indignity"); *see also* KRS 344.230(3)(h) (authorizing "[p]ayment to the complainant of damages for injury caused by an unlawful practice including compensation for humiliation and embarrassment, and expense incurred by the complainant in obtaining alternative housing accommodations and for other costs actually incurred by the complainant as a direct result of an unlawful practice"). Requiring the "humiliation and embarrassment" to be "severe" in order to be compensable in the context of these types of claims would add language to the statute authorizing those claims, which the Courts are not at liberty to do. *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004).

Conversely, KRS 411.210(1) does not specifically authorize damages awards exclusively for humiliation, embarrassment, and personal indignity. It generally authorizes "compensatory" damages. Absent further definition of the term, it must be concluded that the General Assembly intended for "compensatory damages," in the context of this type of statutory claim, to be interpreted consistently with Kentucky precedent.

Crook's point about lay testimony being sufficient to prove emotional damages is in my view incorrect under the circumstances presented. In *Osborne*, 399 S.W.3d at 17-18, the Kentucky Supreme Court adopted Tennessee's view with respect to civil claims seeking emotional distress damages. In particular, the Court extensively cited and was persuaded by the Tennessee Supreme Court's decision in *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996).[7] In turn, *Camper* and Tennessee precedent associated with it explain why civil claims solely for emotional distress damages—as opposed to civil claims for several different types of compensatory damages including emotional distress—require expert medical or scientific proof supporting that the alleged emotional distress and mental anguish significantly affects the plaintiff's everyday life or requires significant treatment.

Regardless of how they are characterized, Crook's claims against Maguire are not claims that merely include emotional distress as a "parasitic" element of compensatory damages; rather, they are all stand-alone claims for emotional distress damages only. Under the holding of *Camper*, as adopted by the

[7] *See Osborne*, 399 S.W.3d at 15, n.43; *id*. at 17, n.58; *id*. at 18, n.61, 62 and 63.

Kentucky Supreme Court, I believe Crook was therefore required to produce expert medical or scientific proof supporting that his alleged emotional distress and mental anguish arising from Maguire's violation of KRS 514.160(1)(b)[8] significantly affected his everyday life or required significant treatment-- the same evidence the majority determined Crook was required to produce where he had repackaged this claim as NIED and IIED.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Douglas H. Morris Lea A. Player Louisville, Kentucky	Ronald G. Sheffer Sarah E. Potter Louisville, Kentucky
J. Todd P'Pool Karey L. Roy Madisonville, Kentucky	J. William Graves Thomas L. Osborne Paducah, Kentucky
ORAL ARGUMENT FOR APPELLANT:	ORAL ARGUMENT FOR APPELLEE:
Lea A. Player Louisville, Kentucky	Ronald G. Sheffer Louisville, Kentucky

[8] Crook asserts that Maguire's conduct victimized him within the meaning of KRS 514.160(1)(b) (made civilly actionable by virtue of KRS 411.210(1)), which provides:

> (1) A person is guilty of the theft of the identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:
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> . . .
>
> (b) Obtaining benefits or property to which he or she would otherwise not be entitled[.]