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**Zella Gygi, As Administratrix of the EState of David Alan Gygi v.
Lois Storch and the Travelers Insurance Company : Appellant's
Brief**

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

ZELLA GYGI, as Administratrix
of the Estate of DAVID ALAN GYGI,
Plaintiff-Appellant,

vs.

LOIS STORCH and THE TRAV-
ELERS INSURANCE COMPANY, a
corporation, *Defendants-Respondents.*

Case No.
12834

APPELLANT'S BRIEF

Appeal from Summary Judgment of the
Third Judicial District Court in and
for the County of Salt Lake, State of Utah

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STATEMENT OF NATURE OF CASE

The appellant claims that the respondent, Lois Storch, maliciously, knowingly and intentionally subjected the appellant's son, David Alan Gygi, to such mental and emotional anguish that Mr. Gygi took his own life. Appellant contends that such actions by the respondent are actionable and should be proscribed as violative of public policy. Respondent denies improper conduct with relation to Mr. Gygi and claims she is entitled to the proceeds of a life insurance policy on the life of Mr. Gygi inasmuch as she was named the beneficiary.

DISPOSITION OF THE LOWER COURT

The Lower Court, Judge James S. Sawaya, granted respondent Lois Storch's Motion for Summary Judgment finding that there existed no genuine issue of fact or law and ordered the insurance proceeds from a life insurance policy to be paid by respondent, The Travelers Insurance Company, to respondent, Lois Storch, and that appellant's complaint be dismissed with prejudice. (R. 100)

RELIEF SOUGHT ON APPEAL

Appellant contends that the Lower Court erred in granting respondent Lois Storch's Motion for Summary Judgment. There were sufficient material facts upon which reasonable minds may differ to warrant a denial of respondent's motion and therefore the aforesaid Summary Judgment should be set aside and the action should be remanded to the Lower Court for a trial on the merits.

STATEMENT OF FACTS

The defendant, Lois Storch, a divorced woman having custody of five minor children first met one David Alan Gygi in November, 1970. The defendant at the time she met Mr. Gygi was approximately thirty-seven years old and Mr. Gygi was approximately twenty-seven. The defendant had just been granted a decree of divorce from a very unhappy marriage in January, 1970. (See deposition of Lois Storch, P. 5-7). A relationship developed between the defendant and Mr. Gygi from the

time of their first meeting until the untimely death of Mr. Gygi on July 5, 1971, whereon he took his life with his own hand.

In March of 1971 Mr. Gygi secured through his employer Group Life Insurance with defendant, The Travelers Insurance Company, as the insurer. There was no designated beneficiary listed at the time Mr. Gygi made application for the insurance, however subsequently the defendant, Lois Storch, was listed as the beneficiary under the description of "friend."

The defendant, Lois Storch, has made a claim for the insurance proceeds and the Administratrix of the Estate of David Alan Gygi, his mother, Mrs. Zella Gygi, also made a claim. The defendant, The Travelers Insurance Company, has tendered to the court the proceeds of the life insurance policy.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT INASMUCH AS THERE EXISTED SUFFICIENT DISPUTED FACTS UPON WHICH REASONABLE MINDS COULD DIFFER AND UPON WHICH JUDGMENT FOR THE APPELLANT COULD BE FOUNDED.

There has been over the past decade an ever-increasing recognition of the so called "right" to emotional or mental tranquillity. The Supreme Court of the United States has recently expanded this "right" in several "right of privacy" decisions. The growth of this particular phase of jurisprudence has been slow. (See

Magruder, Calvert, "Mental and Emotional Disturbance in the Law of Torts," 49 Harvard L. Rev. p. 1058.) No longer does the law of torts hold religiously to the precept that redress can only be found where some physical damage has been perpetrated.

"Under circumstances considered in subsequent sections, a limited recognition has been accorded by law to the interest in mental or emotional tranquility, and in some causes the right to maintain an action has been regarded as permissible, although the only actual harm or damage suffered consisted of a mental or emotional disturbance, unconnected with any bodily injury to the plaintiff." 52 Am.Jur. "Torts" §46

A close look at the dynamics of the law of torts will reveal the necessity for growth brought about by the automobile. With mounting economic and sociological problems incurred by increased motor vehicular transportation there was a need for protection under the law of torts. The need for protection produced the negligence, contributory negligence, last clear chance, guest or passenger, and unavoidable accident theories of tort law.

Today our institutions are over crowded with individual who suffer some mental or emotional problems. The loss of human resources is overwhelming, not to mention the tremendous economic burden incurred as a result of the growing mental instability of our society. Naturally not all of these problems are a result of direct inter-relationship of one being with another. Many prob-

lems are social or environmental in scope and social reform through its proper method is a continuing process. Why then has the law been so slow to afford protection where one person by his actions causes another to suffer severe emotional or mental distress?

In the Third Cause of Action in Plaintiff's Second Amended Complaint the plaintiff sets forth facts sufficient to bring the plaintiff within this ever expanding recognition of one's *right* to emotional and mental tranquility. This cause of action should not have been dismissed.

The compilers of the Restatement of Torts 2d in Section 46 set out the general pattern for development in this area of law:

“§46 Outrageous Conduct Causing Severe Emotional Distress

“(1) One who by the extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

“(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress.

“(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

“(b) to any other person who is present at the time, if such distress results in bodily harm.”

The editors of Caveat and Comments indicate the perplexing state of this facet of tort law. However it is generally concluded that "extreme and outrageous conduct" that directly results in emotional or mental distress is actionable at law.

"Caveat:

"The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress.

"Comment:

"a. This Section is concerned only with emotional distress which is inflicted intentionally or recklessly. As to the negligent infliction of emotional distress, see §§ 312, 313, 436, and 436A.

"b. As indicated in Chapter 47, emotional distress may be an element of damages in many cases where other interests have been invaded, and tort liability has arisen apart from the emotional distress. Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone. It is only within recent years that the rule stated in this Section has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like. This Section may be regarded as an extension of the principle involved in the rules stated in §§21-34 as to the tort of assault.

“c. The law is still in a stage of development, and the ultimate limits of this tort are not yet determined. This Section states the extent of the liability thus far accepted generally by the courts. The Caveat is intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed.

“d. Extreme and outrageous conduct. The cases thus far decided have found liability only where the defendant’s conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’

“The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to

intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, Mental and Emotional Disturbance in the Law of Torts, 47 Harvard Law Review 1033, 1053 (1936). It is only where there is a special relation between the parties, as stated in §48, that there may be recovery for insults not amounting to extreme outrage."

Sections 312 and 313 delve into the less demanding areas of the tort law where emotional distress is actionable where "intended" or "unintended." The latter is a theory based upon conventional negligence theory.

"§312. Emotional Distress Intended

"If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause,

"(a) although the actor has no intention of inflicting such harm, and

"(b) irrespective of whether the act is directed against the other or a third person.

"Comment:

"a. The rule stated in this Section does not give protection to mental and emotional tranquility in itself. In general, as stated in §436A, there is no liability where the actor's conduct inflicts only emotional distress, without resulting bodily harm or any other invasion of the other's interests.

The emotional disturbance is important only in so far as its existence involves a risk of bodily harm, and as affecting the damages which may be recovered if the bodily harm is sustained. See §905.

“b. There is a considerable degree of duplication between the rule stated in this Section and that stated in §46, which deals with the intentional or reckless infliction of emotional distress by extreme and outrageous conduct. In most of the cases in which the intentional infliction of emotional distress results in foreseeable bodily harm, the known risk of such bodily harm is sufficient in itself to make the act one of extreme outrage and to bring the case within §46. This is true, for example, where the actor screams threats and violent abuse at a person whom he knows to be at death’s door with a weak heart. The action may be maintained, and the damages for the bodily harm may be recovered, on the basis of the intentional tort. (See §46, Comment j.) This Section permits the alternative of a negligence action in such a case. The rule stated here extends, however, somewhat further than the rule of §46. It permits the negligence action in any case where it may be found that the conduct, although intended to inflict emotional distress, amounts to something less than extreme outrage, but nevertheless involves an unreasonable risk, which the actor should recognize, that bodily harm will result. As stated in §313, there may be a similar liability where the emotional disturbance is not inflicted intentionally, but negligently.”

“§313. Emotional Distress Unintended

“(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to

the other for resulting illness or bodily harm if the actor

“(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

“(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

“(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.”

Plaintiff's third cause of action claims that the defendant, Lois Storch, knowingly and with malice inflicted emotional distress upon Mr. Gygi to the extent that her actions resulted in Mr. Gygi's death. Certainly there are sufficient facts upon which men might differ in reference to the actions of the defendant; whether such actions are legally actionable.

1. The defendant knew the emotional instability of Mr. Gygi at a very early state in her relationship with him.

2. The defendant knew that Mr. Gygi was deeply in love with her and spent many hours discussing marriage with him. (See deposition of Lois Storch, P. 27) Defendant admits that she was aware of Mr. Gygi's

complete infatuation even to the point where, "I knew I could take advantage if I wanted to."

3. Mr. Gygi's deep love for the defendant was recognized as such by them in the early Spring of 1971. (See deposition of Janet Rider, P. 20) Knowing of Mr. Gygi's most secret intentions, the defendant continued to encourage the deceased to repose in her trust and confidence.

4. On July 5, 1971, the defendant, having encouraged a serious relationship with Mr. Gygi for more than 8 months in which they were together about three or four times per week (See deposition of Janet Rider, P. 16) suddenly and with knowledge of probable consequences told Mr. Gygi that she had no intention of marrying him and now desired to completely terminate the relationship. (See deposition of Lois Storch, P. 39)

CONCLUSION

It is difficult to establish a policy of law in the area of emotional and mental distress as is evident from a reading of the Restatement of Torts 2nd. However the editors of that work and many courts in this country have been motivated to set forth some protection from conduct that is extreme in nature. Where that line dividing extreme conduct from other forms of conduct exists is highly problematical. We would contend that under the circumstances as set forth herein the conduct and actions of respondent, Lois Storch, should be considered as highly detrimental to society and in violation of public policy.

If ever there existed a case wherein the results demanded a ruling to ameliorate a flaw in the fabric of our jurisprudence, the case herein supplies just such an opportunity.

Respectfully submitted

THOMAS A DUFFIN AND
GARY HOWE