

**IN THE
INDIANA SUPREME COURT
CAUSE NO.**

PHILLIP BLACKWELL, MARCIA BLACKWELL, and MICHELE BLACKWELL, Appellant/Plaintiff Below) On Petition to Transfer) From The Indiana Court of Appeals) Cause No. 64A04-0112-CV-554) Appeal from the Porter Superior Court) Lower Court Cause No.) Cause No. 64D05-9909-CT-2036
v.)
DYKES FUNERAL HOME, INC., and GRACELAND CEMETERY ASSOCIATION, INC., Appellees/Defendants Below.)))) The Hon. Jeffrey L. Thode, Special Judge

**AMICUS BRIEF OF DEFENSE TRIAL COUNSEL OF INDIANA
IN SUPPORT OF PETITION TO TRANSFER**

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I. INTRODUCTION AND STATEMENT OF INTEREST

The Defense Trial Counsel of Indiana, (“DTCI”), by counsel, respectfully submits this brief as *amicus curiae*. DTCI is an association of Indiana lawyers who defend clients in civil litigation, including but not limited to tort actions involving claims for negligent infliction of emotional distress. DTCI has an interest in the outcome of this case given the fact that the outcome could greatly impact the prosecution and defense of claims for negligent infliction of emotional distress.

II. STATEMENT OF ISSUE

Did the court of appeals err by holding Indiana law allows for a claim for negligent infliction of emotional distress when the Plaintiffs’ claims do meet the modified impact rule as expressed in Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991) and do not meet the bystander exception to the modified impact rule created by Groves v. Taylor, 729 N.E.2d 569 (Ind. 2000)?

III. SUMMARY OF ARGUMENT

The court of appeals decision in this case expands the scope of a claim for negligent infliction of emotional distress beyond what is allowed by Shuamber and its progeny. Further, the decision of the court of appeals fails to provide any meaningful standard to limit claims for negligent infliction of emotional distress. The decision is an open invitation to a vast expansion in the number of claims for negligent infliction of emotional distress. Therefore, this Court should grant transfer to prevent a tidal wave of claims for negligent infliction of emotional distress.

IV. ARGUMENT

A. Evolution of the Modified Impact Rule

Prior to this Court's decision in Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991), claims for negligent infliction of emotional distress were governed by the impact rule. Under the impact rule, a claim for negligent infliction of emotional distress had three elements: (1) an impact to the plaintiff; (2) which causes physical injury to the plaintiff; and (3) the physical injury causes the emotional distress to the plaintiff. Shuamber, 579 N.E.2d at 454, *citing* Boston v. Chesapeake Ry. Co., 61 N.E.2d 326, 327 (Ind. 1945). At the time of this Court's decision in Shuamber, the impact rule had been in place for nearly one hundred years. Shuamber, 579 N.E.2d at 454.

In Shuamber, this Court re-examined and modified the impact rule. It first examined the policy reasons underlying the impact rule and stated: "we perceive no reason under appropriate circumstances to refrain from extending recovery for emotional distress to instances where the distress is the result of *a physical injury negligently inflicted on another*." Shuamber, 579 N.E.2d at 455 (emphasis added). This Court adopted the modified impact rule which provides that a plaintiff can bring a claim for negligent infliction of emotional distress when he or she "sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person." Id. However, this modified impact rule does not require that the plaintiff's emotional distress arise out of or be accompanied by any physical injury to the plaintiff. Id.

This Court applied the modified impact rule from Shuamber for the first time in Conder v. Wood, 716 N.E.2d 432 (Ind. 1999), and elaborated on the requirements of the rule. In Conder, the plaintiff brought a claim for negligent infliction of emotional distress due to witnessing her friend

being run over by a truck and fatally injured. This Court stated that “direct physical impact” was still required under the modified impact rule and that “‘direct impact’ was properly understood as the requisite measure of ‘direct involvement’ in the incident giving rise to the emotional trauma.” Conder, 716 N.E.2d at 435. The requisite direct impact existed in this case because the plaintiff banged on the truck which had run over her friend in an effort to stop the incident. Id.

Once again, in Groves v. Taylor, 729 N.E.2d 569 (Ind. 2000), this Court considered the implications of the modified impact rule. The plaintiff in Groves had witnessed her younger brother rolling off the highway after being struck by a vehicle. This Court conceded the sister’s experience did not fit the modified impact rule but found an exception to the modified impact rule should be created to allow for her claim.

The Groves court found the modified impact rule was to prevent spurious claims. However, this Court acknowledged that there must be situations where, even though the plaintiff does not sustain a direct impact, the plaintiff is sufficiently involved in the incident giving rise to the to the emotional distress such that legitimate claims can be distinguished from the spurious. Groves, 729 N.E.2d at 572. This Court created a three part test to govern the situation where a bystander to a violent incident brings a claim for negligent infliction of emotional distress. To receive damages for negligent infliction of emotional distress, the bystander must show: (1) he or she witnessed a fatal or serious injury to (2) a spouse, parent, child, grandparent, grandchild, or sibling and that (3) witnessing the event is an extraordinary experience, distinct from the experience of learning of a loved one’s death or severe injury by indirect means. Groves, 729 N.E.2d at 573.

Thus, the current law in Indiana of negligent infliction of emotional distress adheres to the modified impact rule with the bystander exception. Groves did not abandon Shuamber; it created an

exception to Shuamber. Therefore, unless a plaintiff can establish a direct physical impact so as to satisfy Shuamber's modified impact rule or can fall under the bystander exception in Groves, there is no claim for negligent infliction of emotional distress.

B. The court of appeals decision misapplies Shuamber and its progeny.

In this case, the Plaintiffs do not allege a direct impact or that they fall under the bystander exception. Notwithstanding the failure of the Plaintiffs' claims to meet the requirements of current law, the court of appeals allowed the Plaintiffs' claim for negligent infliction of emotional distress because it found the Plaintiffs' emotional trauma to be "of a kind a reasonable person would experience." Blackwell v. Dykes Funeral Homes, Inc., 771 N.E.2d 692, 697 (Ind. Ct. App. 2002). The court's rationale is found in its penultimate sentences: "[t]he rationale underlying the impact rule that prevents concocted claims of mental anguish, is not implicated here. We are satisfied that the evidence designated to the trial court in this matter is such that the alleged mental anguish suffered by the Blackwells is not likely speculative, exaggerated, fictitious, or unforeseeable." Id.¹ The court of appeals cites no persuasive authority for this new standard for claims for negligent infliction of emotional distress. In doing so, it completely ignores and abrogates the modified impact rule.

The court of appeals compounded its error by failing to recognize that Groves only created one special exception to the modified impact rule for a bystander to a violent incident. Instead, the

¹The court of appeals cites this Court's decision in Bader v. Johnson, 732 N.E.2d 1212, 1221 (Ind. 2000), as authority for this sentence. This citation is misplaced, as Bader applies the modified impact rule, which the court of appeals ignored in the instant case.

court of appeals used Groves as a Trojan horse from which to eliminate the modified impact rule. The only requirement now for a claim for negligent infliction of emotional distress is that the court believe the plaintiff's claim. The concept of "direct impact" on the plaintiff, the core requirement of Shuamber, is now dead. Claims for negligent infliction of emotional distress will now turn on the personal predilections of individual judges to believe claims for negligent infliction of emotional distress.

C. Policy considerations

The court of appeals' decision will spawn a tidal wave of claims for negligent infliction of emotional distress. Free of the impact requirement which had previously anchored these claims, claims for negligent infliction of emotional distress will depend only upon finding a judge likely to believe such claims. Over one hundred years of jurisprudence requiring some type of impact for a claim of negligent infliction of emotional distress is now replaced by individual judges making decisions about which claims are "worthy" of damages for emotional distress. Under the nebulous standard established by the court of appeals, plaintiff's attorneys will be bound by their professional duty to their clients to pursue claims for negligent infliction of emotional distress in scores of cases which previously would not have included such a claim. Unless this Court addresses this case, the murky standard established by the court of appeals for such claims will become one of the most frequently litigated and confusing rules of Indiana's jurisprudence.

V. CONCLUSION

The prior decisions of this Court establish clear guidelines for claims of negligent infliction of emotional distress. The court of appeals' decision in this case has made those prior decisions irrelevant and replaced those guidelines with ad hoc decisions of trial judges as to what claims for

negligent infliction of emotional distress are legitimate and what are spurious. This Court should grant transfer to prevent this uncertain future for claims of negligent infliction of emotional distress.

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