

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JOHN DOE 1, and)	
JOHN DOE 2,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. 09C-06-262 MJB
)	JURY TRIAL DEMANDED
TIMOTHY R. WILDEY,)	
)	
)	
Defendant.)	

Submitted: December 19, 2011
Decided: March 29, 2012

Upon Defendant's Motion for Summary Judgment,
GRANTED.

OPINION AND ORDER

Michael D. Bednash, Esquire, KIMMEL, CARTER, ROMAN, & PELTZ,
P.A., Newark, Delaware, Attorney for Plaintiffs.

Richard R. Weir, Jr., Esquire, Michelle D. Allen, Esquire, WEIR & ALLEN,
P.A., Wilmington, Delaware, Attorneys for Defendant.

BRADY, J.

INTRODUCTION

This cases arises from Plaintiffs’ allegations that Defendant Timothy R. Wildey (“Defendant”) sexually abused Plaintiffs, who will be referred to individually as “John Doe #1” and “John Doe #2” and collectively as “Plaintiffs,” from the age of seven, into adulthood. Plaintiffs allege the Defendant caused them to suffer negligent and intentional infliction of emotional distress. Plaintiffs have offered no expert’s opinion that the injuries for which they seek damages were proximately caused by Defendant. Before the Court is Defendant’s motion for summary judgment on the basis that expert testimony is required to establish proximate cause between Defendant’s actions and Plaintiffs’ injuries. For the reasons herein, Defendant’s motion is **GRANTED**. Additionally, the Court rules Plaintiffs are not entitled to attorney’s fees under 42 U.S.C. § 1988, as they request in their Complaint.

FACTUAL BACKGROUND

Plaintiffs are twin brothers who were born in 1971. They commenced this matter on June 25, 2009, when they filed a complaint against Defendant Timothy R. Wildey, seeking special and punitive damages and alleging causes of action in negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.¹ The claims stem primarily from allegations that Wildey sexually abused Plaintiffs, beginning in the early 1980’s, when Plaintiffs were in their pre-teens. Plaintiffs’ Complaint alleged that Defendant would pick Plaintiffs up from their home and take them to various places, including Defendant’s home in Wilmington and weekend trailer

¹ Title 10, Section 8145 of the Delaware Code provided victims of child sexual abuse in Delaware who had been barred from filing suit against their abusers due to the statute of limitations a two-year period following July 9, 2007 in which to file claims. 10 *Del. C.* § 8145 (2009).

By the time of this motion, negligent infliction of emotional distress was no longer an issue.

in Buttonwood, Maryland, where Defendant would perform sexual acts upon each Plaintiff or force each Plaintiff to perform sexual acts upon him, while the other had to wait outside the room. The Complaint additionally alleged Defendant would wash Plaintiffs and make sexual contact with them in the shower.

Plaintiffs amplified their allegations in their deposition testimony, claiming that, from a young age, and regularly throughout their teens, they were each coerced into participating in disturbing sexual acts with Defendant, as well as several of Defendant's friends. Both testified that the coercion grew into a sense of custom, and Plaintiffs felt both compelled to continue to yield to Defendant's sexual desires and fearful of physical harm by Defendant and the stigma of homosexuality that could ensue from seeking help. The abuse allegedly continued from June 1978 to July 1990. Neither twin ever discussed his sexual encounters with Defendant, even with the other, until 2008. In his Answer, Defendant denied Plaintiffs' allegations and set forth numerous affirmative defenses.

While Plaintiffs do not claim specific symptoms or manifestations resulting from Defendant's alleged negligent or intentional infliction of emotional distress in their Complaint, Plaintiffs testified more specifically as to their alleged injuries during their depositions. The alleged injuries to John Doe #1 include that he felt terrible, ashamed, fearful, disgusted, and afraid of going to jail or of Defendant hurting him.² John Doe #2 claims that Defendant's actions turned him into a bisexual, cause flashbacks, caused mental damage, and caused feelings of fear, intimidation, and anger.³ Plaintiffs answered the an interrogatory to "[i]dentify each and every separate and distinct immediate and long term injury and condition you allege to have suffered as a result of the alleged

² Letter from Michael D. Bednash, Esq., counsel for Plaintiffs, to Judge M. Jane Brady (June 8, 2011).

³ Pls.' Resp. Br. Ex. D; Letter from Michael D. Bednash, Esq., counsel for Plaintiffs, to Judge M. Jane Brady (June 8, 2011).

actions of Mr. Wildey as referenced in your complaint,” with only “Post traumatic Stress Disorder.”⁴

During their depositions, Plaintiffs testified to multiple, other, traumatic events that have occurred in their lives, including during the span of time in which the acts alleged in their Complaint took place. Plaintiffs were both physically abused by their father on an ongoing basis throughout childhood. John Doe #2 testified that, from his earliest memories, his mother would call their father, who did not live with them, when the twins misbehaved, and then their father would come over and beat each twin with a doubled belt, sometimes on bare skin, about three times a week. He also testified that when he was 13 years old, his father once forced him to eat cigarettes. On one occasion, John Doe #2 testified, his father, unprovoked, doused him in gasoline and attempted to light him on fire. He claims testified he suffered mental damages as a result of that abuse. He describes himself as “probably the most angry person in [his] prison.”⁵

John Doe #1 was assaulted by a police officer, which, he testified, caused him to suffer nightmares, emotional distress, paranoia, and anxiety attacks. He suffered a broken arm and was diagnosed with post traumatic stress disorder after the assault. Each Plaintiff has a criminal history, and John Doe #2 is currently incarcerated. In his deposition, John Doe #1 admitted to drug use and testified he hears voices and sees things which do not exist, which began around the time he began using drugs, about five or six years ago.⁶ Plaintiffs concede in their brief that they do not seek, without an expert, to prove that Defendant’s actions caused Plaintiffs’ psychological disorders, including post-

⁴ Def.’s Mot. for Summ. J. Ex 2.

⁵ *Id.* Ex. 4 at 9.

⁶ Pls.’ Resp. Br. ¶ 8, Ex. D at 26.

traumatic stress disorder, as to John Doe #1,⁷ and manic-depressive disorder, and bipolar disorder, as to John Doe #2.⁸ Rather, they contend a jury does not need the assistance of an expert to understand the pain and suffering that Plaintiffs experienced concurrently at the time of the events they allege.⁹

The Court issued a scheduling order on November 12, 2009, which specified that Plaintiffs provide expert reports to the Defendant by April 9, 2010, that Defendant provide Plaintiffs any expert reports by July 16, 2010, and that all discovery be complete by October 1, 2010.

Plaintiffs did not comply with the scheduling order. Plaintiffs failed to provide Defendant expert reports by April 9, 2010. On August 4, 2010, the Court ordered Plaintiffs to provide full and complete responses to Defendant's requests for interrogatories and production of documents. On June 30, 2010, in his Response to Defendant's Interrogatories, John Doe #1 for the first time identified that he expected to call Dr. Samuel Romirowsky as an expert witness at trial. At that point, John Doe #1 had not provided Defendants a report from Dr. Romirowsky. Dr. Romirowsky met with John Doe #1 just once, on April 9, 2010, the day Plaintiffs' expert reports were due.

On July 12, 2010, John Doe #1 produced the report of Dr. Samuel Romirowsky. Defendant moved to strike that report because it failed to comply with Rule 26(b)(4) because John Doe #1 produced it after Plaintiffs' expert reports were due on April 9, 2010. On September 9, 2010, the Court deferred ruling on the motion to strike and granted Plaintiffs' counsel additional time to supplement Dr. Romirowsky's report. On

⁷ Letter from Richard Wier, Esq., counsel for Defendant, to Judge M. Jane Brady (July 8, 2011) Ex. B, at 124.

⁸ Pls.' Resp. Br. ¶ 8, Ex. D at 26.

⁹ See Pl.'s Resp. Br. at 3.

October 4, 2010, at an office conference, Plaintiff's counsel confirmed that Dr. Romirowsky was not able to express any further opinion beyond those provided in the report. Plaintiffs' counsel conceded, and the Court found, that the report was insufficient to sustain the case. The Court warned Plaintiffs that lack of an expert opinion that causally associated the conditions Plaintiffs claim with Defendant's specific conduct or general pattern of behavior presented a deficiency in their claims.

John Doe #2 did not answer any of Defendant's requests for discovery, including for medical records and documentation of damages, and did not prepare or attempt to prepare an expert opinion to support his claims.

Because John Doe #2 did not submit an expert report, and Dr. Romirowsky could not causally connect Defendant's alleged conduct to damages claimed by John Doe #1, on November 5, 2010, the Court ordered that Samuel Romirowsky be stricken as a witness and/or an expert on any claims alleged by Plaintiffs, and, finding they had not complied with the Scheduling Order and that they intended to provide no further experts, the Court ordered that Plaintiffs shall not present any expert witness or expert testimony at trial or otherwise.¹⁰

Defendant filed a Motion for Summary Judgment and Opening Brief in Support of his Motion on December 6, 2010, requesting that the Court dismiss this matter with prejudice and award Defendant further relief as the Court finds appropriate. Plaintiffs

¹⁰ The Court's order states:

- (1) Any documentary evidence or testimony from any doctors, psychiatrists, hospitals, clinics, psychologist, physical therapist, mental health practitioners, licensed social workers or any other practitioner of the healing arts with whom Plaintiff, John Doe #2, has communicated or consulted with or been treated or diagnosed by at any time is excluded from trial; and
- (2) John Doe #2 shall not present any expert witness or expert testimony at trial or otherwise.

Order of Nov. 5, 2010.

filed their Brief in Response to Defendant's Motion on January 6, 2011. Defendant filed his Reply Brief in Support of his Motion on January 31, 2011. From February 2011 to May 2011, the parties attempted to settle and worked with the Court to revise the Scheduling Order. The parties met with the Court at an office conference on May 9, 2011, at which time the Court directed the parties to provide information as to their current statement of the case with a complete record, including argument by Plaintiffs to support their claim that no expert was needed in this case. Final submissions on the issue were filed on July 26, 2011. In October, 2011, the Court informed the parties it wanted to hear additional arguments before rendering an opinion. On November 8, 2011, the Court scheduled additional arguments. The parties presented additional arguments on December 19, 2011. The following is the Court's decision.

It is the Court's responsibility to conduct proceedings in a manner that prevents suggestion of inadmissible evidence to the jury.¹¹ The jury must reach its findings on reasonable bases and cannot speculate or conjecture where a plaintiff fails to meet his burdens.¹² While the Court has given Plaintiffs every opportunity to present a case and have the issues decided on the merits, the Court must also assure that a jury, which may render a very serious and reprehensible finding against the Defendant – of liability for emotional distress stemming from repeated child sexual abuse and sexual abuse over the span of over two decades – can base that determination on other than speculation and conjecture.

¹¹ D.R.E. 103.

¹² *Henne v. Balick*, 51 Del. 369, 373 (Del. 1958); *Kemp v. Christiana Care Health Services, Inc.*, CIV.A. 10C-07-012RRC, 2011 WL 2623940, at *2-3 (Del. Super. June 27, 2011).

PARTIES' CONTENTIONS

Defendant's Position

Defendant contends he is entitled to judgment as a matter of law because there are no material issues of fact in dispute as to Plaintiffs' failure to prove an essential element of their case.¹³ Specifically, Defendant argues that Plaintiffs cannot show proximate cause¹⁴ for their claims, because expert testimony is required to establish a causal connection between any alleged abuse by Defendant and Plaintiffs' damages.¹⁵ Defendant contends the Court's order of November 5, 2010 that Plaintiffs shall not present any expert witness or expert testimony precludes Plaintiffs from proving proximate cause.¹⁶ Defendant additionally argues that without expert testimony on a causal connection between the behavior and damages Plaintiffs allege, a jury could only speculate and conjecture as to whether actions of the Defendant proximately caused Plaintiffs' alleged injuries.¹⁷

Plaintiffs' Position

Plaintiffs' Complaint included allegations of negligent infliction of emotional distress. However, claims of negligent infliction of emotional distress can only be maintained where a Plaintiff alleges a physical injury.¹⁸ Plaintiffs' Complaint is deficient as to a negligent infliction claim because they do not allege they have sustained

¹³ Def.'s Mot. for Summ. J. i.

¹⁴ Def.'s Op. Br. 9.

¹⁵ Def.'s Mot. for Summ. J. i.

¹⁶ Def.'s Op. Br. 11.

¹⁷ *Id.*

¹⁸ *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984).

recoverable physical injuries.¹⁹ Plaintiffs acknowledged at oral argument that the negligent infliction claim is not viable

In an attempt to delineate out some portion of the case which might be sustained without expert testimony, Plaintiffs contend that expert testimony is not necessary to assert a claim of intentional infliction of emotional distress.²⁰ Plaintiffs additionally contend that expert testimony is “not required to show a causal connection between the [alleged] acts of sexual abuse and the resultant pain and suffering that Plaintiffs experienced,”²¹ to recover for emotional distress and mental anguish.²² Plaintiffs argue that the “physical pain, suffering, and mental distress associated with being sexual [sic] abused as a teenager, continuously and repeatedly for a period of several years, are simply not outside the understanding of a typical juror.”²³

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment a moving party must demonstrate there are no genuine issues of material fact, and that he is entitled to judgment as a matter of law.²⁴

¹⁹ See *Cooke v. Pizza Hut, Inc.*, CIV.A. 93C-03-029, 1994 WL 680051, at *3 (Del. Super. Oct. 3, 1994) (citing RESTATEMENT (SECOND) TORTS § 436A cmt. c & illus. 1). *Cooke* sets forth that an alleged physical injury must be present at the time of the tort, and that transitory, non-recurring physical phenomena, such as nausea and rage, “fall within the category of emotional disturbances which are not recognized as physical illnesses.” *Id.* Plaintiffs do not allege physical injuries in their Complaint. They allege in their depositions that they suffered fear, unenjoyment, feelings of disgust, shame, and embarrassment, all of which are non-recoverable. Furthermore, medical expert testimony would be necessary to show Defendant’s actions caused any physical injuries Plaintiffs allege. *Collins v. African Methodist Episcopal Zion Church*, CIV.A. 04C-02-121, 2006 WL 1579718 (Del. Super. Mar. 31, 2006).

²⁰ Pl.’s Resp. Br. ¶ 6.

²¹ *Id.* ¶ 7.

²² Letter from Michael D. Bednash, Esq., counsel for Plaintiffs, to Judge M. Jane Brady (June 8, 2011).

²³ *Id.*

²⁴ Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

Summary judgment is appropriate where a plaintiff fails to establish a proximate, causal connection between an alleged tort and an alleged injury.²⁵

DISCUSSION

A. Proximate Cause

Proximate cause is a necessary element of any tort claim.²⁶ Delaware defines proximate cause as “direct cause[,] without which an accident would not have occurred.”²⁷ “In other words, a proximate cause is one ‘which in natural and continuous sequence, *unbroken by any efficient intervening cause*, produces the injury and without which the result would not have occurred.’”²⁸

Delaware law has addressed the necessity of expert testimony to a showing of proximate cause for claims of intentional infliction of emotional distress and contemporaneous mental anguish and emotional distress. The Court must consider whether Plaintiffs can show by any standard that Defendant proximately caused their alleged injuries in the absence of expert testimony.

B. Expert Testimony is Necessary to Establish Proximate Cause for Plaintiffs’ Claim of Intentional Infliction of Emotional Distress

Delaware has adopted the definition for intentional infliction of emotional distress found in the Restatement (Second) of Torts: “[o]ne who by 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

²⁵ *Manerchia v. Kirkwood Fitness and Racquetball Clubs, Inc.*, 992 A.2d 1237 (Del. 2010).

²⁶ *See Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995).

²⁷ *Id.* at 829 (quoting *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965)).

²⁸ *Id.* (quoting *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. Super. 1991)).

such bodily harm.”²⁹ The commentary to the Restatement provision includes that “severe emotional distress” occurs where the distress inflicted is so severe that “no reasonable man could be expected to endure it.”³⁰ Whether manifestations of emotional distress like “fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea” are severe emotional distress depends upon the intensity and duration of the distress.³¹ A showing of bodily harm is not necessary to establish a valid claim for intentional infliction of emotional distress where the conduct alleged is outrageous.³²

Plaintiffs seek³³ to have this Court adopt the elements for emotional distress that the Delaware Court of Common Pleas adopted from Virginia.³⁴ Those elements are: (1) “The wrongdoer’s conduct was intentional or reckless;” (2) The conduct was outrageous and intolerable in that it offends against generally accepted standards of decency and morality;” (3) “There was a causal connection between the wrongdoer’s conduct and the emotional distress,” and (4) “The emotional distress was severe.”³⁵ The Court declines to adopt the test set forth in *Castoran*, because Delaware courts’ adherence to the Restatement definitions for intentional infliction of emotional distress and severe emotional distress is too strong to set aside.³⁶ Even if the Court were to follow the

²⁹ *Doe v. Green*, CIV.A.06C-04-005ESB, 2008 WL 282319, at *2 (Del. Super. Jan. 30, 2008) (quoting Restatement (Second) of Torts § 46 (1965)). The restatement definition additionally includes liability for conduct directed toward a third person where a member of the third person’s immediate family is present and suffers consequent emotional distress. *Id.*

³⁰ RESTATEMENT (SECOND) OF TORTS § 46; *see also Ham v. Brandywine Chrysler-Plymouth, Inc.*, CIV. A. 674,1977, 1985 WL 189010, at *3 (Del. Super. 1985) (examining the elements of intentional infliction of emotional distress, including severe emotional distress).

³¹ *Ham*, 1985 WL 189010, at *3.

³² *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990); *Tekstrom v. Savla*, CIV.A. 05A-12-006JTV, 2006 WL 2338050, at *13 (Del. Super. July 31, 2006).

³³ Letter from Michael D. Bednash, Esq., counsel for Plaintiffs, to Judge M. Jane Brady (July 26, 2011).

³⁴ *Castoran v. Otero-Keil*, 1986 Del. C.P. Lexis 1, *2-3 (Del. C.P. Sept. 8, 1986) (citing *Womack v. Eldridge*, 210 S.E.2 145, 215 (Va. 1974)).

³⁵ *Id.*

³⁶ *See Cummings*, 574 A.2d at 845; *Doe v. Green*, CIV.A.06C-04-005ESB, 2008 WL 282319, at *2 (Del. Super. Jan. 30, 2008); *Collins v. African Methodist Episcopal Zion Church*, CIV.A. 04C-02-121, 2006 WL

Castoran approach, proof of proximate cause – prong 3 – would be lacking without expert testimony. Ultimately, prong 4 would also be lacking because the injuries Plaintiffs allege – feelings of fear, unenjoyment, disgust, shame, and embarrassment – can only be considered to be manifestations of severe emotional distress if they meet the high standard that “no reasonable man could be expected to endure” them,³⁷ depending upon the intensity and duration of any distress.³⁸ Without expert testimony, it would be difficult for a jury to discern the intensity and duration of distress arising from the acts Plaintiffs allege, if they are true, from distress Plaintiffs experienced due to other circumstances and events in their lives.

The parties agree that, in Delaware, expert testimony is necessary to establish proximate cause where the issues are beyond the ken of a typical juror.³⁹ However, the parties disagree as to whether understanding the proximate cause between the acts alleged here and the injuries Plaintiffs claim are within the ken of a typical juror.

A majority of jurisdictions in the United States require that psychic and physical injury claims be supported by competent medical opinion as to the injuries’ origin, existence, and causation.⁴⁰ Injuries such as nightmares, anxiety, headaches, stomachaches, nausea, and flashbacks require medical testimony to establish that those injuries derive from defendants’ actions.⁴¹ As the Pennsylvania Supreme Court has said, “[T]he requirement of some objective proof of severe emotional distress will not present

1579718, at *2 (Del. Super. Mar. 31, 2006); *Goode v. Bayhealth Med. Ctr., Inc.*, 931 A.2d 437 (Del. 2007); *Cooper v. Bd. of Educ. of Red Clay Consol. Sch. Dist.*, CIV A 08C-09-164 PLA, 2009 WL 2581239, at *3 (Del. Super. Aug. 20, 2009); *Thomas v. Harford Mut. Ins. Co.*, 01C-01-046 HDR, 2003 WL 21742143, at *2 (Del. Super. July 25, 2003); *Ham v. Brandywine Chrysler-Plymouth, Inc.*, CIV. A. 674, 1977, 1985 WL 189010, at *3 (Del. Super. 1985).

³⁷ RESTATEMENT (SECOND) OF TORTS § 46; *see also* 1985 WL 189010, at *3.

³⁸ *Ham*, 1985 WL 189010, at *3; *see supra* text accompanying notes 28-31.

³⁹ *Collins*, 2006 WL 1579718, at *3; *see* D.R.E. 702.

⁴⁰ *Vallinoto v. DiSandro, et al.*, 688 A.2d 830, 839 (R.I. 1997).

⁴¹ *Id.* (citing to multiple cases from throughout the United States).

an unsurmountable obstacle to recovery. Those truly damaged should have little difficulty in procuring reliable testimony as to the nature and extent of their injuries.”⁴²

A set of facts and allegations similar to those Plaintiffs set forth were before this Court in *Collins v. African Methodist Episcopal Zion Church*.⁴³ In that case, the plaintiff asserted claims of negligent and intentional infliction of emotional distress allegedly stemming from sexual abuse by a reverend for the defendant church.⁴⁴ In addition to psychic injuries, Collins alleged bodily harm resulting from intentional infliction of emotional distress.⁴⁵ Collins, an adult victim, had a neurological disorder that could cause physical symptoms including headache, vomiting, difficulty swallowing, hoarseness, and dizziness, while she alleged her depression, a stroke, headaches, and slurred speech were attributable to emotional distress caused by the defendant, through its reverend.⁴⁶ Collins was additionally physically and sexually abused between the ages of five and thirteen, mentally abused by the father of her one of her children, and physically abused by the father of two other of her children.⁴⁷ The Court found that a layperson would not be able to form an intelligent judgment without the aid of an expert opinion, as to whether a defendant caused the plaintiff’s physical injuries.⁴⁸ Given the circumstances, the Court found it “necessary to have a medical expert’s opinion showing that Collins’ physical complaints were in fact caused by the reverend’s actions and were

⁴² *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988, 995 (Pa. 1987). The court there went on to hold that existence of alleged emotional distress requires competent medical evidence as support. *Id.*

⁴³ CIV.A. 04C-02-121, 2006 WL 1579718 (Del. Super. 2006).

⁴⁴ *Id.* at *4-5.

⁴⁵ *Id.* at *1.

⁴⁶ *Id.* at *5.

⁴⁷ *Id.*

⁴⁸ *Id.* at *4-5.

not caused by the cumulative effect of prior physical and sexual abuse,” and granted the defendant’s motion for summary judgment.⁴⁹

Collins sets forth clear precedent that, under Delaware law, medical expert testimony is necessary to show proximate cause between a defendant’s actions and a plaintiff’s resulting physical injuries for claims of intentional infliction of emotional distress where a plaintiff’s alleged injuries may have been affected by actions, occurrences, and conditions unrelated to alleged sexual abuse.⁵⁰ The Court determined that such matters were not within the ken of typical jurors.⁵¹ Given the impalpable and abstruse nature of psychic and emotional injuries, it surely follows that medical expert testimony is necessary to show proximate cause between a defendant’s actions and a plaintiff’s resulting psychic and emotional harm for claims of intentional infliction of emotional distress resulting from alleged sexual abuse where unrelated actions, occurrences, and conditions may have affected a plaintiff’s alleged injuries.

A Rhode Island court reached a similar conclusion in the case of *Vallinoto v. DiSandro*.⁵² There, a client sued her attorney and his law firm for intentional infliction of emotional distress and other claims,⁵³ alleging the attorney threatened to withdraw as counsel from her divorce action if she did not comply with his sexual demands.⁵⁴ Vallinoto alleged she suffered shame, headaches, fear, terror, crying, nightmares,

⁴⁹ *Id.* Also in *Collins*, the Court denied the defendant’s motion for summary judgment with respect to the intentional infliction of emotional distress claim because a genuine issue of material fact existed as to whether the reverend’s conduct was extreme and outrageous. *Id.* at *3. There, the reverend contended that “his relationship with Collins did not rise to the level of extreme and outrageous conduct.” *Id.* Whether Collins could show whether the reverend’s conduct proximately caused Collins’ injuries with respect to her claim of intentional infliction of emotional distress was not at issue, as it is here. *See id.*

⁵⁰ *See id.* at *4-5.

⁵¹ *Id.* at *4.

⁵² *Vallinoto v. DiSandro, et al.*, 688 A.2d 830 (R.I. 1997). Rhode Island’s standard for intentional infliction of emotional distress is the same as Delaware’s. *See id.* at 838.

⁵³ *Id.* at 833-34.

⁵⁴ *Id.*

flashbacks, and shingles as a result of DiSandro's sexual conduct.⁵⁵ Vallinoto did not produce a medical expert to establish a causal connection between the alleged injuries and DiSandro's conduct.⁵⁶ The court described the plaintiff's lack of expert evidence as fatal to her claim.⁵⁷ The court held that "[a]lthough Vallinoto was competent to testify that she suffered psychic problems and allegedly experienced physical symptomatology therefrom, she was, however, as was her social worker, not qualified to testify that those specifically alleged psychic and physical ills were proximately caused by DiSandro's actions."⁵⁸ Competent medical evidence was necessary for Vallinoto to support that sexual encounters with the defendant proximately caused her claimed injuries.⁵⁹

Plaintiffs cite to *Lewis v. State*⁶⁰ to support the assertion that a plaintiff does not need expert testimony to establish a causal connection between acts of sexual abuse and resultant pain and suffering, as long as that suffering is within a typical juror's understanding.⁶¹ In *Lewis*, a police officer testified regarding the probability he would have suffered serious physical injuries if struck by a knife wielded by the defendant.⁶² *Lewis* can be distinguished, however. The case involved an issue of potential physical injury of a nature within the general experience of all individuals – injuries from a knife. The claims here are for psychological injuries, a field in which far more uncertain and varied consequences result from similar conduct. In short, the consequences of a knife wound to an artery are fairly universal; the consequences of sexual abuse can include a

⁵⁵ *Id.* at 838-39.

⁵⁶ *Id.*

⁵⁷ *Id.* at 839. The court ultimately set aside a jury verdict in Vallinoto's favor for her intentional infliction of emotional distress claim because she lacked expert testimony to support the claim. *Id.* at 841-43.

⁵⁸ *Id.* at 838.

⁵⁹ *Id.* at 839.

⁶⁰ 416 A.2d 208 (Del. 1980).

⁶¹ *Id.* at 209.

⁶² *Id.*

myriad of mental and emotional injuries that vary significantly from individual to individual and are affected by other experiences.

Plaintiffs cite *Tekstrom v. Savla*⁶³ to support that expert testimony is not required when the conduct alleged is outrageous and intolerable in a civilized society.⁶⁴ *Tekstrom* sets forth that a trier of fact must determine whether conduct is sufficiently extreme and outrageous to fulfill the “extreme and outrageous conduct”⁶⁵ requirement for an intentional infliction of emotional distress claim. In *Tekstrom*, the plaintiff alleged he became sick and suffered vomiting, dizziness, and weight loss as a result of the defendant’s threats to deport, sue, file criminal charges against, and sabotage the professional career of the plaintiff.⁶⁶ The plaintiff and his wife, rather than an expert, testified as to the physical effects of the plaintiff’s emotional distress.⁶⁷

Tekstrom differs from this case for several reasons. First, the plaintiff in *Tekstrom* alleged physical harm resulting from his emotional distress,⁶⁸ while Plaintiffs here allege emotional distress without resultant bodily harm. Additionally, the bodily harm in *Tekstrom* occurred contemporaneously with or very shortly after the defendant’s misconduct.⁶⁹ Here, the alleged misconduct and potential resultant, intangible injuries occurred over a span of decades. Further, bodily harm is a quality lay witnesses may observe and then opine upon during testimony, while the existence of emotional harm and its cause is a matter based on specialized knowledge better suited for expert

⁶³ CIV.A. 05A-12-006JTV, 2006 WL 2338050 (Del. Super. July 31, 2006).

⁶⁴ Letter from Michael D. Bednash, Esq., counsel for Plaintiffs, to Judge M. Jane Brady (July 26, 2011); *Tekstrom*, 2006 WL 2338050, at *6.

⁶⁵ See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

⁶⁶ *Tekstrom*, 2006 WL 2338050, at *12.

⁶⁷ *Id.* at *13.

⁶⁸ *Id.* at *12.

⁶⁹ See *id.*

testimony.⁷⁰ Finally, the plaintiff in *Tekstrom* did not suffer the quantity of other mental or physical insults that would complicate a trier of fact's determination of proximate cause as did the Plaintiffs here. Each suffers a number of psychic conditions and has undergone a number of life experiences that could cloud a trier of fact's determination of proximate cause.

There is no question that the Plaintiffs here have each endured a host of traumatic experiences in their lives. The acts they allege Defendant to have committed are reprehensible and repugnant, and, if true, they no doubt add to each plaintiff's cumulative emotional strain. As a result of their life experiences, Plaintiffs suffer such psychological conditions as post-traumatic stress disorder, bipolar disorder, paranoia, and anxiety. However, considering the totality of events and circumstances in Plaintiffs' lives, the Court finds that expert testimony is necessary to prove that Defendant's actions proximately caused harm to Plaintiffs. The causal link between the actions of Defendant and damages Plaintiffs allege is outside the purview of a lay juror, especially where a variety of intervening factors and events have occurred, any one of which might have affected each Plaintiff's condition.

C. Plaintiffs Cannot Prevail on a Claim for Contemporaneous Emotional Distress and Mental Anguish, Because Such Claims Require Allegations of Physical Injury.

Under Delaware law, an essential element for any claim for mental anguish is an alleged present physical injury.⁷¹ An alleged physical injury must be present at the time

⁷⁰ See D.R.E. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.").

⁷¹ *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Roberts v. Delmarva Power & Light Co.*, 05C-09-015, 2009 WL 6667966 (Del. Super. Jan. 30, 2009) ("The Delaware standard for

of the tort.⁷² Not all physical injuries are recoverable. Transitory, non-recurring physical phenomena, such as nausea and rage, “fall within the category of emotional disturbances which are not recognized as physical illnesses.”⁷³

Plaintiffs do not allege physical injuries in their Complaint. In their depositions, Plaintiffs discussed the following physical phenomena: fear, feelings of disgust, shame, anger, and embarrassment.⁷⁴ Plaintiffs’ alleged injuries are within the category not recognized in Delaware as physical illnesses.⁷⁵ Therefore, they are not recoverable and Plaintiffs cannot prevail on claims for contemporaneous emotional distress and mental anguish.⁷⁶ Even if Plaintiffs alleged recoverable physical injuries, medical expert testimony would be necessary to show Defendant’s actions proximately caused those injuries.⁷⁷

PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS’ FEES UNDER 42 U.S.C. § 1988.

In his Opening Brief, Defendant argued that Plaintiffs are not entitled to attorneys’ fees, as Plaintiffs claimed in their Complaint. Plaintiffs did not address this contention in their briefs in opposition to Defendant’s motion for summary judgment. Chapter 42, Section 1988 of the U.S. Code pertains to awarding attorney’s fees for

recovery under mental anguish and emotional distress is *Mergenthaler*. Under the *Mergenthaler* doctrine, Plaintiffs must present evidence of physical injury to recover for mental anguish or emotional distress.”). The only exception to the *Mergenthaler* doctrine is for wrongful death cases. See *Spencer v. Goodill*, CIV. A. 08C-06-183 R, 2009 WL 3823217, at *7 (Del. Super. Nov. 13, 2009).

⁷² *Cooke v. Pizza Hut, Inc.*, CIV.A. 93C-03-029, 1994 WL 680051, at *3 (Del. Super. Oct. 3, 1994).

⁷³ *Id.* (citing RESTATEMENT (SECOND) TORTS § 436A cmt. c & illus. 1).

⁷⁴ See *supra* footnotes 2 & 3 and accompanying text.

⁷⁵ See *Cooke*, 1994 WL 680051, at *3 (citing RESTATEMENT (SECOND) TORTS § 436A cmt. c & illus. 1).

⁷⁶ See *Mergenthaler*, 480 A.2d at 651.

⁷⁷ See *Collins v. African Methodist Episcopal Zion Church*, 04C-02-121, 2006 WL 1579718 (Del. Super. Mar. 31, 2006), *supra* notes 35-43 and accompanying text.

actions or proceedings to enforce specific civil rights statutes.⁷⁸ Therefore, 42 U.S.C. § 1988 does not apply here, and Plaintiffs are not entitled to attorneys fees pursuant to that provision.

CONCLUSION

Because this Court requires expert medical testimony to establish that a defendant's actions were the proximate cause of a plaintiff's injury in an emotional distress claim, and because the complicated and sensitive nature of the facts here renders the knowledge necessary to make an intelligent decision as to liability and damages outside the ken of a lay juror, Plaintiffs cannot fulfill the elements of their claims without expert medical testimony. Further, Plaintiffs' alleged injuries of fear, feelings of disgust, shame, anger, and embarrassment are not recoverable injuries in Delaware. Therefore, Defendants' motion for summary judgment is **GRANTED**. Additionally, Attorneys' fees to Plaintiffs under 42 U.S.C. § 1988 are **DENIED**.

IT IS OS ORDERED.

/s/
M. Jane Brady

⁷⁸ 42 U.S.C. § 1988.