No. 120041

IN THE
SUPREME COURT OF ILLINOIS

Melinda Schweihs, Plaintiff-Appellant, v. Chase Home Finance, LLC, Successor by Merger to Chase Manhattan Mortgage Corporation, Successor by Merger with Chase Mortgage Company – West F/K/A Mellon Mortgage Company, Safeguard Properties, Inc., Todd Gonsalez and Edilfonso Centeno, Defendants-Appellees.	)	On Appeal from the Appellate Court of Illinois First Judicial District, No. 1-14-0683. There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division, No. 10 L 11302. The Honorable Daniel Lynch, Judge Presiding.

BRIEF OF *AMICUS CURIAE*
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This *Amicus Curiae* brief in support of the Defendants will analyze the scope and rationale for the requirement that a plaintiff must allege a contemporaneous impact or injury (the "Impact Rule") to state a claim for negligent infliction of emotional distress ("NIED"). Since the adoption of the zone of physical danger rule in the *Rickey* decision, the status of the Impact Rule has been in question. In that time, courts and commentators have often conflated the pure Impact Rule (which was abrogated in *Rickey*) with the necessity of a physical manifestation of emotional distress required in the zone of physical danger rule, along with the requirement of physical impact to a direct victim contained in that rule's application. Despite the elimination of the Impact Rule for bystander cases, the requirement of a physical impact or physical manifestation of emotional distress has continued to be an important consideration for both direct victim and bystander cases.

This *Amicus Curiae* will analyze the evolution of the claim for NIED in Illinois and will discuss the important practical and policy reasons for the rules requiring physical impact or a physical manifestation of emotional distress in NIED claims. Ultimately, NIED claims should not permit recovery for emotional distress alone in cases where the right to recovery is premised on a wrongful entry to lands, because the legal framework for such claims in view of NIED principles and the law regarding trespass are more appropriately

handled in Intentional Infliction of Emotional Distress ("IIED") claims where courts have flexibility to effect the policy concerns against the undesirable proliferation of pure emotional distress claims by screening cases involving conduct that is not extreme and outrageous.

I. Standard of Review.

In regard to Plaintiff's NIED claim (Count V, as amended), which was dismissed for failure to state a claim by the Circuit Court, a motion to dismiss pursuant to § 2-615 of the Code of Civil Procedure challenges the legal sufficiency of the complaint by alleging defects on the face of the complaint. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). All well-pleaded facts in the complaint and reasonable inferences drawn therefrom are accepted as true. *Vitro*, 209 Ill. 2d at 81. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff are sufficient to state a cause of action upon which relief may be granted. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). An order granting a § 2-615 motion to dismiss is reviewed *de novo*. *Wakulich*, 203 Ill. 2d at 228.

With regard to Plaintiff's IIED claim (Count IV), the Appellate Court's affirmance of the Circuit Court's order granting summary judgment is also reviewed *de novo*. *Majca v. Beekil*, 183 Ill. 2d 407, 416 (1998). Summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the non-moving

party, reveal there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

In general, an appellate court's judgment may be affirmed on any basis supported in the record. *Schultz v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 201 Ill. 2d 260, 281 (2002).

II. All Jurisdictions Place Limits on the Right to Recover for Emotional Distress Damages Based on Negligence.

While nearly all of the states, Illinois among them, have recognized a right to recover for NIED in some cases, no jurisdiction allows recovery for all emotional harms resulting from another's negligence. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544-5 (1994). Since the right to recover for NIED was first recognized, significant limitations in the form of "tests" or "rules" have been placed on the right to recover. *Id.*

Numerous policy considerations have been identified for limiting the right to recovery in NIED claims. The United States Supreme Court in its *Gottshall* opinion summarized those policy considerations as follows:

> Because the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned . . . that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act." *Maloney v. Conroy*, 208 Conn. 392, 397-398, 545 A. 2d 1059, 1061 (1988). The last concern has been particularly significant. Emotional injuries may occur far removed in time and space from the negligent conduct that triggered them. Moreover, in contrast to the situation with physical injury, there are no necessary finite limits on the number

> of persons who might suffer emotional injury as a result of a given negligent act. The incidence and severity of emotional injuries are also more difficult to predict than those of typical physical injuries because they depend on psychological factors that ordinarily are not apparent to potential tortfeasors.

Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 545 (1994).

Other reasons given by courts for limiting recovery in emotional distress cases include the discouragement of frivolous and fraudulent claims, the difficulty of ascertaining and measuring damages, and the unforeseeability of emotional injuries. *Rickey v. Chi. Trans Auth.*, 98 Ill. 2d 546, 555 (1983). Thus, the reason courts have placed substantial limitations on the right to recover for emotional injuries due to negligence is to ward against the very real possibility of nearly infinite and unpredictable liability for defendants. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994).

As the United States Supreme Court has observed, there have been three major tests which the states have adopted to limit the right to recovery on claims for NIED. *Id.* The first is the physical impact test. The second is the zone-of-danger test, and the third is the relative bystander test. *Gottshall*, 512 U.S. at 546-7. Illinois is adherent to the zone-of-danger test. See *Rickey*, 98 Ill. 2d 546 (1983). When the *Gottshall* opinion was rendered, most states (including Illinois) had abandoned the "physical impact" test, while five states, including Georgia, Indiana, Kansas, Kentucky and Oregon continued its use. *Gottshall*, 512 U.S. at 547, note 7. The *Gottshall* court described the zone-of-danger test as one that ". . . limits recovery for emotional injury to those

plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-8. Notably, the zone-of-danger test incorporates a physical impact requirement, despite the fact the physical impact test (or Impact Rule) is treated as a separate rule and has been abandoned by a majority of jurisdictions. *Id.* at 547. In *Gottshall*, the United States Supreme Court adopted the zone-of-danger test for the purposes of evaluating claims brought under the Federal Employers' Liability Act (FELA), identifying the test as a well-established common law concept of negligence. *Id.* at 555. In rejecting the relative bystander test, the United States Supreme Court observed that most jurisdictions adhering to it limit recovery to persons who witness the severe injury or death of a close family member. *Id.* at 556.

III. Direct Victims of NIED Must Plead Either a Physical Impact or Physical Manifestation of an Emotional Injury to Survive Dismissal in Illinois.

Despite the recognition by courts and commentators that the Impact Rule has been eliminated by a majority of jurisdictions, the prerequisite of a physical impact or physical manifestation of an emotional injury has remained central to the analysis of a plaintiff's right to recover in an NIED case. Since this Court first recognized the Impact Rule in *Braun v. Craven*, 175 Ill. 401 (1898), this Court's opinions have continued to prioritize a physical impact or injury as a prerequisite for recovery under an NIED theory. See *Rickey*, 98 Ill. 2d 546, 555 (1983).

The *Braun* case concerned a plaintiff who became severely frightened when the defendant intruded into her abode without invitation and surprised her with angry yelling and gesticulation. Despite evidence showing the plaintiff's resulting nervous excitement and fright created a "diseased physical condition," the *Braun* court held that without a physical impact, a plaintiff could not recover in an NIED case. *Braun*, 175 Ill. 401, 420 (1898). At the time *Braun* was decided, the distinction between a direct victim and bystander in NIED cases did not exist, so consistent with *Braun*'s holding, physical impact to a plaintiff was required even where a physical injury resulted from emotional distress. *Id.*

An exception to the general rule of *Braun* requiring physical impact was first adopted by this Court in *Rickey*, 98 Ill. 2d 546 (1983). In *Rickey*, this Court adopted the "zone of physical danger rule" which was described by the *Rickey* court as follows:

> That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence.

Rickey, 98 Ill. 2d at 555.

Thus, while the pure Impact Rule recognized by *Braun* was eliminated, the *Rickey* holding makes clear that the zone-of-physical danger rule still requires an impact to the direct victim *and* physical injury to the bystander resulting from the bystander's emotional distress in order for a bystander to properly allege a claim for NIED. *Id.* Consequently, the presence of physical impact and physical injury resulting from emotional distress have remained considerations of significant importance in evaluating NIED claims post-*Rickey*.

Later, in *Corgan v. Muehling*, 143 Ill. 2d 296 (1991), this Court held that the zone-of-physical danger rule adopted in *Rickey* did not apply to direct victim cases. In so doing, this Court in *Corgan,* expressly held that "*Rickey* did not . . . define the scope of negligent infliction of emotional distress as it applies to direct victims." *Corgan*, 143 Ill. 2d at 304. Notably, however, *Corgan* did not specifically address the requirement of physical impact in the opinion, presumably because the defendant's conflicting argument in *Corgan* was ". . . that the court completely abandoned the impact rule in *Rickey* and, thereby, expanded the zone-of-physical-danger rule to include direct victims." *Corgan*, 143 Ill. 2d at 305. *Corgan* explicitly rejected that argument, holding that *Rickey* applied only to bystanders. *Corgan*, 143 Ill. 2d at 306. The specific question this Court considered in *Corgan* was ". . . whether the complaint should be dismissed because the plaintiff did not allege that she suffered a physical injury or illness as a result of her emotional distress." *Id.* at 308.

Hence, the issue of whether a physical impact is required to support an NIED claim for a direct victim of psychological malpractice was never considered in *Corgan*.

Further, the *Corgan* opinion does not discuss or address any argument concerning whether the sexual contact between the plaintiff and her psychotherapist could be considered a physical impact, and no argument concerning a physical impact contemporaneous with her psychotherapist's negligence was argued or discussed. Similarly, the Appellate Court in *Corgan*, 167 Ill. App. 3d 1093 (1st Dist. 1988), did not consider the physical impact issue but instead focused on the patient/psychotherapist relationship, by referring to the "transference phenomenon" peculiar to the patient/psychotherapist relationship. *Corgan*, 167 Ill. App. 3d at 1098-9. Indeed, this Court's holding in *Corgan* was specific to the conduct involved, holding ". . . that the plaintiff can allege a cause of action for negligent infliction of emotional distress as a direct victim of defendant's psychological malpractice . . .," and declining to entertain a broader construction which might incorporate other kinds of negligent conduct. *Corgan*, 143 Ill. 2d at 308.

Corgan simply is not a case that considered the necessity of contemporaneous physical impact in the context of an NIED claim. Instead, it considered the necessity of physical injury resulting from emotional distress in a psychological malpractice case, and found it was unnecessary in that limited context. *Id.* Similarly, the Supreme Court of Florida has recognized an

exception to its general application of the impact rule for a psychiatrist's breach of fiduciary duty which caused emotional injury of a non-physical nature. *Gracey v. Eaker*, 837 So. 2d 348, 356 (Fla. 2002).

While the opinion in *Pasquale v. Speed Prod. Eng'g*, 166 Ill. 2d 337 (1995), states *Corgan* eliminated the "impact rule", a close inspection of the opinion suggests *Pasquale* was considering the concept of physical impact with reference to the broader idea of physical harm necessary for recovery in strict liability cases. *Id.* at 346. In *Pasquale*, the plaintiff's wife was killed and partially decapitated by flying debris resulting from the failure of a clutch mechanism on a racecar. When the mechanism failed, the plaintiff's wife was physically impacted by the flying debris, while the plaintiff was physically impacted only by his wife's body parts. *Id.* at 350. The *Pasquale* court found the plaintiff to be a bystander and not a direct victim because his emotional distress did not result directly from the failure of the racecar parts. *Id.* at 347. As the court noted, "There was no evidence that he greatly feared for his safety beyond that experienced as a result of his wife's accident." *Id.* Likewise, he could not recover as a bystander because he did not establish a physical harm as a result of his emotional distress. *Pasquale* noted that although the plaintiff "…claimed that he 'incurred a physical impact' when he was struck by his wife's body parts . . . the evidence at trial did not establish that he suffered 'physical harm' as that element is commonly understood." *Id.* at 350.

Importantly, *Pasquale*'s discussion of *Corgan* occurred in the context of the procedural posture of *Pasquale*, which did not concern the allegation of facts necessary to state a claim. *Pasquale* instead considered the necessity of establishing a physical harm through evidence at trial. Because *Rickey* has been held to apply only to bystander cases and because *Corgan* did not specifically address the necessity of a physical impact as prerequisite to a direct victim's NIED claim, the legacy of *Braun*'s physical impact requirement persists.

Thus, while *Corgan* clearly holds that allegations of physical manifestation of emotional distress are not necessary in a psychological malpractice case, it is a bridge too far to contend there are no direct victim cases that require neither a physical impact nor a physical manifestation of emotional distress to recover. The requirement that a direct victim suffer a physical impact or physical injury is disjunctive. One or the other is required, not both. *Jarka v. Yellow Cab Co.*, 265 Ill. App. 3d 366, 372 (1st Dist. 1994), *appeal denied* at 157 Ill. 2d 503 (1994). This analysis is consistent with the rule in Florida which requires some physical impact to a claimant or demonstrable physical injury caused by psychological trauma to permit recovery under an NIED theory. See *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 850 (2007). See also *Zell v. Meek*, 665 So. 2d 1048, 1050 (Fla. 1995).

IV. General Abrogation of the Requirement of a Physical Impact and Physical Manifestation of an Emotional Injury in All Circumstances Involving Direct Victims Would Have Far Reaching Consequences.

Because the zone-of-physical danger test announced in *Rickey* depends upon an impact or physical injury resulting from emotional distress to permit recovery for bystanders, the wholesale elimination of a requirement of physical impact in direct victim cases would further blur the line between direct victim and bystander claims. If no physical impact is required to establish a claimant as the direct victim of negligent conduct, then the bystander distinction would seem to become nearly if not entirely unnecessary. See generally, *Rickey v. Chi. Transit Auth.*, 98 Ill. 2d 546 (1983). Stated another way, if a direct victim need not show either a physical impact or a physical injury resulting from emotional distress, then the only concept distinguishing a bystander from a direct victim is whether the bystander's emotional distress resulted from the injury to another person (bystander) or from the defendant's negligence itself (direct victim). Such a distinction, while theoretically plausible, similarly "encourages extravagant pleading and distorted testimony" in the same way *Corgan* identified as a reason for rejecting the necessity of requiring physical manifestation of emotional distress in psychological malpractice cases. *Corgan v. Muehling*, 143 Ill. 2d 296, 310 (1991).

Had the intent of *Corgan* been to generally eliminate the physical impact requirement from its longstanding importance in limiting the circumstances under which NIED claims will lie, the opinion would expressly

so state or would have adopted one of the several prominent tests for determining the propriety of NIED claims or at least have provided some standards upon which emotional distress can be compensated in the absence of physical impact or physical injury flowing from the emotional distress.

It does not take much effort to imagine the expansion of liability that could occur if emotional distress alone is compensable on the basis of the regular elements of duty, breach, causation, and damages. Would every traffic infraction which results in fear and apprehension to someone who observes it be actionable even though there is no collision or physical injury? As discussed in the famous case of *Palsgraf v. Long Island R. Co.,* 162 N.E. 99 (N.Y. 1928), liability for negligent conduct must have limits. To expand liability to a near infinite degree would add a tremendous amount of uncertainty into the risk occasioned by questionable conduct. The *Corgan* case should be accepted for what it is, an exception from the general rule requiring physical impact or physical injury resulting from emotional distress, in the case where psychological malpractice resulting from sexual relations has occurred. *Corgan v. Muehling*, 143 Ill. 2d 296, 308 (1991). Such an interpretation is consistent with the views of other states providing similar exceptions and with the policy of avoiding the potential for infinite liability. See *Gracey v. Eaker*, 837 So. 2d 348, 356 (Fla. 2002).

The construction of *Corgan* urged by Plaintiff suffers from the concerns evident in the following passage from the Restatement (Second) of Torts § 436A (1965):

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

As this Court explained in *Rickey* when it rejected the so-called "relative bystander test" set out in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), ". . . we would be adopting a standard that is too vaguely defined to serve as a yardstick for courts to apply, and one that is excessively broad in that it would permit recovery for emotional disturbance alone." *Rickey v. Chi. Trans Auth.*, 98 Ill. 2d 546, 554 (1983). The expansive reading Plaintiff ascribes to *Corgan* suffers from the same vague breadth.

V. Cases of NIED Based on Fear and Anxiety Premised on Wrongful Entry to Land Are Analogous to Fear of Contraction of AIDS Cases and Should Require Exposure to Actual Threat of Physical Injury in the Absence of a Requirement of a Physical Impact and Physical Manifestation of an Emotional Injury.

Plaintiff's emotional injuries are described as fear and anxiety. Another line of cases that addresses the potential for an NIED recovery are those in which plaintiffs seek damages for the fear of contracting AIDS for the time period between a possible exposure to HIV and the receipt of reasonably conclusive HIV negative test results. In *Majca v. Beekil*, 183 Ill. 2d 407 (1998), this Court held that a plaintiff must demonstrate exposure to HIV to succeed

on an NIED case based on the fear of contracting AIDS. The court held that without proof of actual exposure to HIV, a claim for fear of contracting AIDS is too speculative to be legally cognizable. *Id.* at 420. In other words, it is unreasonable for a person to fear infection when that person has not been exposed to a disease. The Court observed that a requirement of actual exposure to HIV would distinguish claims based on conjecture and speculation from those that are based on a genuine fear of contracting AIDS. *Id.* The Court also favored this objective standard which would insure stability, consistency and predictability in the disposition of such claims. *Id.* at 421.

Despite Plaintiff's emotional distress which has produced fear and anxiety, Plaintiff was never in any actual physical danger. There are no allegations that Defendants intended her physical harm or that she might have been physically harmed by Defendants entry into her house. There is nothing to suggest that Plaintiff's house became any less safe or secure than it was before the Defendants entered it, and there is nothing to suggest that Plaintiff's house was any more likely to be entered into on a subsequent occasion. There is nothing in the record to suggest the Plaintiff's house or the men who entered it posed any actual physical threat or danger to Plaintiff. In line with this Court's analysis in *Majca*, Plaintiff's fear is not objectively reasonable because it is based on conjecture and speculation, since she was never actually exposed to a risk of physical harm. See *Majca*, 183 Ill. 2d at 420. Even if *Corgan* is viewed as having rejected all necessity of physical impact or

physical manifestation of emotional distress in direct victim cases where psychological malpractice is at issue, this Court should follow a similar analysis to that required under *Majca* in dealing with NIED fear and anxiety cases based on wrongful entry to property by requiring exposure to an actual threat of physical injury.

VI. An Independent Claim for NIED Is Dependent on *Rickey*, While Non-*Rickey* Claims Are Technically Negligence Claims Asserting Emotional Distress as an Element of Damages and Are Therefore Either Barred Under Tort Theories Premised on Trespass or Subject to the Requirement of Physical Harm.

Even if *Corgan* is viewed as standing for the proposition that claims for NIED must be resolved on general negligence standards of duty, breach, causation and damages, there is no general duty recognized in the law to not negligently inflict emotional distress on someone. See *Clark v. Children's Mem'l Hosp.*, 2011 IL 108656, ¶¶106-109. As recognized in *Clark*, the special restrictions of *Rickey* are intended to apply to situations in which ". . . the claim of emotional distress is freestanding and not anchored to any other tort against the plaintiff . . . ." As this Court recognized in *Clark*:

> However, these special restrictions have no logical bearing on a wrongful-birth claim, where a tort has already been committed against the parents. Wrongful-birth plaintiffs do not assert a freestanding emotional distress claim, but merely assert emotional distress as an element of damages for a personal tort. "For these reasons, the physical manifestation and zone-of-danger rules offer no occasion to reject mental distress damages in wrongful birth cases any more than they would do so in the case of libel or invasion of privacy. 2 Dan B. Dobbs, Law of Remedies § 8.2, at 414 (2d ed. 1993).

Clark, 2011 IL 108656, ¶107. The parents in *Clark* were not regarded as bystanders, but as direct victims of a claim for wrongful birth. Id at ¶101. Thus, in order to take the position that the Plaintiff in the case at bar is entitled to recover emotional distress damages of the sort found permissible in *Corgan* and *Clark*, her claim must flow from some other recognized tort and not the freestanding NIED claim referenced in *Clark*. See *Clark*, 2011 IL 108656, ¶107. Such a tort, based on the Plaintiff's allegations, is what is generally referred to as trespass to land or invasion of the interest in the exclusive possession of land.

While trespass to land can be either negligent or intentional, only the intentional variety can serve as the basis of recovery purely on the basis of the tort of trespass itself. *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 553 (1980). As this Court observed in *Dial*:

> The conduct which today forms the basis of liability for the invasion of the interest in the exclusive possession of land may be of three general types: (1) conduct intended to cause an intrusion on the plaintiff's premises; (2) negligent conduct that causes an intrusion; and (3) conduct that is ultrahazardous and causes an intrusion, so that liability is said to be strict or absolute. The second type of invasion listed above is now governed by the general principles of negligence, and the third is thought of as included in the principles governing extrahazardous conduct, leaving only the first type of invasion wherein recovery may be sought purely on the basis of the tort of trespass. 1 F. Harper & F. James, Torts sec. 1.4, at 11-12 (1956).

Dial, 81 Ill.2d at 553. In other words, there must be an independent basis for the duty owed to a plaintiff apart from the duty not to invade land in order to support a recovery premised in negligent trespass to land. Plaintiff cannot

properly establish such a duty here because she alleges her emotional distress was caused by the Defendants' entry into her house.

Alternatively, if Plaintiff is seeking recovery for NIED not bound up in some other tort, then she must plead some physical impact or physical manifestation of emotional distress as contemplated in *Rickey* and its progeny as *Clark* suggests. *Clark*, 2011 IL 108656, ¶¶105-107. In the further alternative, Plaintiff cannot state a claim for NIED based on negligent trespass to land because the facts alleged clearly show the intent of the Defendants was to enter Plaintiff's house regardless of whether the actions that led them to do so resulted from negligent conduct. The difference between an intentional trespass to land and a negligent one focuses on the act of entry itself, meaning that a negligent trespass to land is one in which the act of entry is not intended. *Dial v. City of O'Fallon*, 81 Ill.2d 548, 553-4 (1980). In the case at bar, the act of entering the house clearly was intended. As Restatement (Second) of Torts § 162 (1965) provides:

> A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, or to the land or to his things, or to members of his household or to their things, caused by any act done, activity carried on, or condition created by the trespasser, irrespective of whether his conduct is such as would subject him to liability were he not a trespasser.

Thus, trespasser liability in the case of an intentional trespasser extends to "physical harm" to the possessor at the time of the trespass, but there is no provision for pure emotional distress. Since intentional trespass is analogous

to strict liability (if you enter the land, you're a trespasser), the use of the concept of "physical harm" correlates identically with the decision in *Pasquale* which held that elimination of the impact rule did not extend to the requirement of the "physical harm" necessary to recover in strict liability cases under Restatement (Second) of Torts § 402A (1965). *Pasquale v. Speed Prod. Eng'g*, 166 Ill. 2d 337, 347 (1995).

In synthesis, there is no mechanism for Plaintiff to recover on an NIED theory premised upon the tort of trespass to land, and there is no independent cause of action known as NIED, save those recognized by *Rickey*, requiring a physical injury or physical manifestation of emotional distress or physical harm (as referenced in the Restatement and *Pasquale*, which Plaintiff has not alleged. Consequently, Plaintiff's claims for emotional injury must be had under an IIED claim, or not at all. Such an analysis avoids an otherwise, seemingly incongruous result which could permit emotional distress damages in cases where there is only an unintended, negligent entry into lands, but deny emotional distress damages in cases where there is an intentional entry into lands occasioned by conduct that is purposefully threatening but does not rise to the level of extreme and outrageous.

VII. Because the Requirement for Proving an Impact Has Been Relaxed in Intentional Infliction of Emotional Distress Cases, It Is Important for Courts to Reject Cases Not Dealing with Extreme and Outrageous Conduct.

When this Court decided in *Knierim v. Izzo*, 22 Ill. 2d 73 (1961), to permit recovery for emotional disturbances not accompanied with consequent

bodily injury, this Court remained cognizant that every emotional upset should not constitute the basis for an action. The Court observed that "Indiscriminate allowance of actions for mental anguish would encourage neurotic overreactions to trivial hurts, and the law should aim to toughen the psyche of the citizen rather than pamper it." *Id.* at 85. This Court also recognized ". . . a line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility." *Id.* While this Court was confident in jurors' abilities to apply the "reasonable man" or "man of ordinary sensibilities" standards, this Court also expressed confidence ". . . that the trial judges in this State will not permit litigation to enter the field of trivialities and mere bad manners." *Knierim,* 22 Ill. 2d at 86-7. In that regard, the *Knierim* court concluded that the defendant's conduct in threatening to murder and murdering the plaintiff's husband was outrageous enough to give rise to a claim for IIED even without physical injury. *Id.* at 87.

Successfully pleading a claim of intentional infliction of emotional distress requires allegations of (1) conduct of an extreme and outrageous character, (2) the occurrence of severe emotional distress and (3) reckless conduct from which the actor knows severe emotional distress is certain or substantially certain to result. *Pub. Fin. Corp. v. Davis*, 66 Ill. 2d 85, 89-90 (1976). As this Court observed in *Pub. Fin. Corp.*, conduct which is extreme and outrageous, ". . . does not extend to mere insults, indignities, threats,

annoyances, petty oppressions or trivialities." *Id.* Further, it is not enough that the defendant acts ". . . 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." *Pub. Fin. Corp.,* 66 Ill. 2d at 90. The Court notes that liability is only found where ". . . the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. . ." *Id.*

In the *Pub. Fin. Corp.*, case, the debtor claimed emotional distress arising from the creditor's efforts to collect an account which stemmed from the creditor harassing her with multiple phone calls per day, sending agents to her home one or more times a week, calling her at the hospital while she was visiting her severely ill daughter, and again calling her after having been asked to refrain from doing so because she was sick and nervous, inducing the debtor to write a check and promising her it would not be processed, phoning an acquaintance of the debtor and informing that person she was writing bad checks, and entering her home and refusing to leave until her son arrived. *Pub. Fin. Corp.,* 66 Ill. 2d at 91. Such conduct was found to not be extreme or outrageous such to the point it could support a claim for intentional infliction of emotional distress. *Id.* at 91-2.

In the case at bar, the actions of Defendants when construed in the light most favorable to Plaintiff could not be held by any reasonable finder of fact to

be extreme and outrageous such that they lack any social utility. There is no evidence which disputes the fact the Defendants were acting under a color of right to enter to make repairs, as contained in the foreclosure order, to secure property they believed to be abandoned. Plaintiff's arguments suggesting conspiracy and forcible eviction lack any evidentiary support. Defendants made a mistake in concluding there was abandonment, but based upon the facts of record, in the context of a mortgage foreclosure, it cannot be said the entry, after which Defendants left and never returned, is conduct so extreme and outrageous that it goes beyond all possible bounds of decency. Such a finding is consistent with decisions which have found that negligent activities, although onerous to those at whom they are directed, do not rise to the level of extreme and outrageous conduct sufficient to sustain a claim for IIED. *Hayes v. Ill. Power Co.*, 225 Ill. App. 3d 819, 827 (4th Dist. 1992) (negligent failure to properly insulate and ground a guy wire, causing electrocution was not extreme and outrageous). *Duffy v. Orlan Brook Condo. Owners' Ass'n*, 2012 IL App (1st) 113577, ¶39-41 (holding condo association's conduct not extreme and outrageous in improperly refusing to make proper repairs, resulting in displacement of plaintiff from her home).

CONCLUSION

For each of the foregoing reasons, the Illinois Association of Defense Trial Counsel prays that the Appellate Court's decision as contained in its opinion will be affirmed.

DATED: June 7, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.

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No. 120041

IN THE
SUPREME COURT OF ILLINOIS

Melinda Schweihs, Plaintiff-Appellant, v. Chase Home Finance, LLC, Successor by Merger to Chase Manhattan Mortgage Corporation, Successor by Merger with Chase Mortgage Company – West F/K/A Mellon Mortgage Company, Safeguard Properties, Inc., Todd Gonsalez and Edilfonso Centeno, Defendants-Appellees.	)	On Appeal from the Appellate Court of Illinois First Judicial District, No. 1-14-0683. There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division, No. 10 L 11302. The Honorable Daniel Lynch, Judge Presiding.

PROOF OF SERVICE AND NOTICE OF FILING

R. Sean Hocking, one of the attorneys for the Illinois Association of Defense Trial Counsel, certifies under oath that on June 7, 2016, the foregoing "Brief of Amicus Curiae, Illinois Association of Defense Trial Counsel" was filed with the Clerk of the Supreme Court of Illinois, electronically, using the I2file system. The undersigned further certifies that on the 7th day of June, 2016, three (3) copies of the foregoing instrument were served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope

addressed to such attorneys at their business address as disclosed by pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Box in Mattoon, Illinois, to the following:

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