IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| JENNIFER JOHNSON and | : | CIVIL ACTION |
| DANA JOHNSON | : | NO. 05-6018 |
| | : | |
| v. | : | |
| | : | |
| LOWE'S COMPANIES, INC. | : | |

O'NEILL, J. MARCH 14, 2007

**MEMORANDUM**

I. INTRODUCTION

On June 2, 2006, plaintiffs Dana Johnson and Jennifer Johnson filed an amended complaint against defendant Lowe's Companies, Inc. alleging that defendant and its employees discriminated against African-American customers in violation of 42 U.S.C. § 1985(3) and asserting Pennsylvania state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy (intrusion upon seclusion), and loss of consortium. In an Order dated August 9, 2006, I granted defendant's motion to dismiss plaintiffs' § 1985(3) and intrusion upon seclusion claims. Presently before me is defendant's motion for summary judgment on the remaining claims, plaintiffs' response and defendant's reply thereto. For the reasons stated below, I will grant defendant's motion for summary judgment.

II. BACKGROUND

Plaintiffs Dana and Jennifer Johnson are an African-American married couple. On July 23, 2004, plaintiffs purchased about four or five shopping carts of merchandise at defendant's store located at 2002 Chemical Road in Plymouth Meeting, Pennsylvania. Upon first reaching

the cash register, plaintiffs realized that they forgot an item. Because defendant's cashier, Sadiyah Bynum, did not want to hold up the line or void the sale, she decided to save plaintiffs' sale on her cash register until plaintiffs returned with their forgotten item. Because Bynum did not know plaintiffs' names, she typed "Black Lady" in the field designated for the customer's name. In her affidavit, Bynum stated that she used the term "Black Lady" because she rarely received black customers at her register and using this designation would make plaintiffs easy to remember. Bynum did not find the term "black" to be derogatory or degrading, nor was she aware that the words "Black Lady" would print on plaintiffs' receipt. When plaintiffs returned home, they noticed that the sales receipt said, "THANK YOU BLACK LADY FOR SHOPPING LOWE'S." As a result, plaintiffs claim to have "suffered embarrassment, humiliation, emotional distress and mental anguish . . . affect[ing] every aspect of their lives, including their marriage."

Plaintiffs simultaneously filed two complaints on November 16, 2005 against defendant arising out of the above-described incident. Plaintiffs filed the first action in this Court alleging that defendant and its employees, acting in the course and scope of their employment, discriminate against African-American customers in violation of 42 U.S.C. § 1985(3) and claimed a loss of consortium. Plaintiffs filed the second action in the Philadelphia Court of Common Pleas asserting claims under Pennsylvania law for the intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy (intrusion upon seclusion), and loss of consortium. The second action was removed to this Court. After I denied plaintiffs' motion to remand with respect to the second action, the parties filed a stipulation to consolidate both actions and I dismissed plaintiffs' second action without prejudice.

Plaintiffs then filed an amended complaint in this Court on June 2, 2006 again alleging

that defendant and its employees violated 42 U.S.C. § 1985(3) and asserting claims under Pennsylvania law for intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy (intrusion upon seclusion), and loss of consortium. In an Order dated August 9, 2006, I granted defendant's motion to dismiss plaintiffs' § 1985 and intrusion upon seclusion claims. I granted defendant's motion to dismiss with respect to plaintiffs' intrusion upon seclusion claim because defendant's employee provided plaintiffs with the receipt at its open and public store. I granted defendant's motion to dismiss with respect to plaintiffs' § 1985(3) claim because employees acting in the course and scope of their employment cannot conspire with their employer.

## III. STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, the moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact." Fed. R. Civ. P. 56(c) (2007); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of illustrating for the court the absence of a genuine issue of material facts. See Celotex, 477 U.S. at 323. I must view the facts in the light most favorable to the non-moving party, and the non-moving party is further entitled to all reasonable inferences drawn from those facts. See Anderson, 477 U.S. at 248. However, the non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion, and cannot survive by relying on unsupported asserts, conclusory allegations, or mere suspicions. Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989). The nonmoving party still must

establish the existence of each element of its case. See Celotex, 477 U.S. at 323.

## IV. DISCUSSION

### A. Intentional Infliction of Emotional Distress

Plaintiffs claim that defendant through its employees engaged in a concerted effort to embarrass and humiliate African American customers, including but not limited to plaintiffs, causing plaintiffs to suffer severe emotional distress, anxiety, humiliation and physical and emotional injury. Plaintiffs may recover against "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1274 (3d Cir. 1979), quoting Restatement (Second) of Torts § 46 (1965); see also Hoy v. Angelone, 720 A.2d 745, 753-54 (Pa. 1998) ("[C]ourts have been chary to allow recovery for a claim of intentional infliction of emotional distress. Only if conduct which is extreme or clearly outrageous is established will a claim be proven."). Under Pennsylvania law, "expert medical confirmation that the plaintiff actually suffered the claimed distress" is also required. Kazatsky v. King David Mem'l Park, Inc., 527 A.2d 988, 995 (Pa. 1987) (failure to prove existence of alleged emotional distress by competent medical evidence barred recovery).

Defendant's behavior must be "'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 society.'" D'Ambrosio v. Pa. Nat'l Mut. Cas. Ins. Co., 431 A.2d 966, 971 n.8 (Pa. 1981), quoting Restatement (Second) of Torts § 46 cmt.d; see, e.g., Chuy, 595 F.2d at 1275-76 (citing the Restatement (Second) § 46 and holding that a person of ordinary sensibility

would suffer extreme mental anguish if a physician released to the press information that plaintiff was suffering from a fatal disease when that physician knew such information was false); Papieves v. Kelly, 263 A.2d 118, 121 (Pa. 1970) (recognizing the Restatement (Second) § 46 and permitting recovery for mental or emotional distress caused by defendants' intentional and wanton acts of mishandling of a deceased relative's body). "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 defiantly inconsiderate and unkind." Kazatsky, 527 A.2d at 991-92, citing Restatement (Second) of Torts § 46 cmt. d. Therefore, "liability clearly does not extend to mere insults, threats, annoyances, petty oppressions, or other trivialities." Id. at 991.

In racial discrimination cases, "[i]nvidious discrimination is not alone sufficient to support an intentional infliction of emotional distress claim." Lane v. Cole, 88 F. Supp. 2d 402, 406 (E.D. Pa. 2000); see, e.g., Coney v. Pepsi Cola Bottling Co., 1997 WL 299434, at *2 (E.D. Pa. May 29, 1997) ("highly provocative racial slurs and other discriminatory incidents do not amount to actionable outrageous conduct"); EEOC v. Chestnut Hill Hosp., 874 F. Supp. 92, 96 (E.D. Pa. 1995) (racial discrimination in employment decision insufficient to sustain claim). For example, the Pennsylvania Superior Court found that, absent other aggravating circumstances, no cause of action for infliction of emotional distress was stated when plaintiff was called a "nigger" in the midst of a dispute. Dawson v. Zayre Dept. Stores, 499 A.2d 648, 649 (Pa. Super. Ct. 1985). In Dawson, plaintiff alleged that defendant's employee called plaintiff a "nigger" during a dispute over a layaway ticket. Id. The Court held that "[a]lthough this word is insulting and abusive, taken in this context it does not amount to the type of extreme and outrageous conduct which

gives rise to a cause of action." Id. "The law does not invoke liability in a situation where, without other aggravating circumstances, one hurls an epithet at another during the course of a disagreement." Id. at 650.

The use of the designation "Black Lady" does not qualify as extreme and outrageous behavior sufficient to establish liability for intentional infliction of emotional distress. Defendant's employee Bynum, a black woman, testified that she did not find the term "black" to be derogatory or degrading. Plaintiffs also testified in arbitration that they did not believe Bynum's actions were intended to cause harm. Even if plaintiffs found the designation "Black Lady" to be insulting, abusive or discriminatory, the designation is at most a mere insult, indignity, or epithet insufficient to support a claim for intentional infliction of emotional distress.[1]

Because they have failed to set forth evidence of extreme or outrageous conduct, plaintiffs may not recover for intentional infliction of emotional distress. Thus, there is no need to address plaintiffs' failure to prove existence of alleged emotional distress by competent medical evidence.

B. Negligent Infliction of Emotional Distress

Plaintiffs allege that they were humiliated and embarrassed as a result of defendant's negligence. In Pennsylvania, to recover for negligent infliction of emotional distress a plaintiff

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[1]Plaintiffs argue that I should consider the context in which the incident took place. In support of this argument plaintiffs cite Ledsinger v. Burmeister, 318 N.W.2d 558, 561 (Mich. Ct. App. 1982). In Ledsinger, defendant threw plaintiff out of his place of business and said that he "did not want or need nigger business." Id. There the Court not only relied on the merchant–customer relationship between the parties but also on the conclusion that defendant rejected "business based on racial considerations and thereby abused the position he stood in." Id. In the present case, nothing in the record indicates that defendant no longer wished to conduct business with plaintiffs because of their race.

must first establish the traditional elements of a negligence claim[2] and "must also establish at least one of the following elements: (1) that defendant had a contractual or fiduciary duty toward him, (2) that plaintiff suffered a physical impact, (3) that plaintiff was in a 'zone of danger' and at risk of an immediate physical injury, or (4) that plaintiff had a contemporaneous perception of tortuous injury to a close relative." Gentile v. Travelers Personal Ins. Co., 2007 WL 576663, at *3 (M.D. Pa. Feb. 21, 2007), citing Doe v. Philadelphia Cmty. Health Alternatives AIDS Task Force, 745 A.2d 25, 27 (Pa. Super. Ct. 2000).

The Pennsylvania Supreme Court has consistently applied the "impact rule," which prohibits recovery for damages for unintentional injuries unless they are accompanied by a physical injury. See Abadie v. Riddle Mem'l Hosp., 589 A.2d 1143, 1145 (Pa. 1991) (plaintiff failed to state actionable claim where she did not allege any physical harm resulting from a rowdy hospital staff birthday celebration during her treatment); Banyas v. Lower Bucks Hosp., 437 A.2d 1236, 1239 (Pa. 1981) (plaintiff who was charged with murder after hospital records were altered to blame him for a death failed to aver physical harm and thus stated no cause of action for negligent infliction of emotional distress); Covello v. Weis Mkts., Inc., 610 A.2d 50, 51-52 (Pa. Super. Ct. 1992) (plaintiff who was unable to extricate a child from a trash compactor could not recover under the impact rule because he failed to allege physical harm to himself).

In Niederman v. Brodsky, the Pennsylvania Supreme Court abandoned the physical contact precondition to permit recovery in those instances where plaintiff was in the "zone of danger" and actually feared physical impact. See Covello, 610 A.2d at 52, citing Niederman, 261

[2]To prove negligence under Pennsylvania law, a plaintiff must show the existence of a legal duty, a breach of that duty, causation, and damages. See Price v. Brown, 680 A.2d 1149, 1154 (Pa. 1996).

A.2d 84, 90 (Pa. 1970). The "zone of danger" exists "where the plaintiff was in personal danger of physical impact because of the direction of a negligent force against him and where plaintiff actually did fear the physical impact." Niederman, 610 A.2d at 90. The "zone of danger" rule also permits recovery when a plaintiff who was outside of the zone danger actually witnessed an accident causing serious injury to a close relative. See Sinn v. Burd, 404 A.2d 672, 677-78 (Pa. 1979).

Under Pennsylvania law plaintiffs may also recover for negligent infliction of emotional distress when plaintiffs' claim "arise[s] from the contemporaneous observance of injury to a family member." Boyer v. LeHigh Valley Hosp. Center, Inc., 1990 WL 94038, at *7 (E.D. Pa. July 2, 1990); see also Brooks v. Decker, 516 A.2d 1380, 1382 (Pa. 1986) (father whose son was struck by an automobile while riding a bicycle could not recover for negligent infliction of emotional distress because he failed to allege that he witnessed the accident or his son's injuries).

In the present case, plaintiffs' allegations do not fall within the contractual or fiduciary duty type of negligent infliction of emotional distress cases. Further, plaintiffs' evidence does not demonstrate the actual, threatened, or vicarious physical impact required to sustain their claim. Plaintiffs have failed to show evidence of physical impact, presence in a "zone of danger" where another suffered physical injury, or a contemporaneous observation of injury to a close relative. Therefore, plaintiffs may not recover for the tort of negligent infliction of emotional distress.

C. Loss of Consortium

Plaintiffs allege that they have been and may in the future be deprived of the companionship and consortium of their spouses as a result of defendant's actions. "Loss of consortium is a loss of services, society, and conjugal affection of one's spouse." Darr Const. Co.

v. Workmen's Comp. Appeal Bd. (Walker), 715 A.2d 1075, 1080 (Pa. 1998); see also Bedillion v. Frazee, 183 A.2d 341, 343 (Pa. 1962); Hopkins v. Blanco, 302 A.2d 855, 856 (Pa. Super. Ct. 1973). "It is well-settled that the claim is derivative, emerging from the impact of one spouse's physical injuries upon the other spouse's marital privileges and amenities." Darr Const. Co., 715 A.2d at 1080; Klein v. Council of Chem. Ass'ns, 587 F. Supp. 213, 226 (E.D. Pa. 1984) ("[T]he recovery rights of the noninjured spouse are derivative of the rights of the injured spouse."). Where an individual's claim for injuries fails, that individual's spouse may not recover for loss of consortium. Little v. Jarvis, 280 A.2d 617, 619-20 (Pa. Super. Ct. 1971) (individual cannot recover for loss of consortium in absence of defendant's liability to spouse); see also Murray v. Union Ins. Co., 782 F.2d 432, 438 (3d Cir. 1986) (same). Because plaintiffs cannot recover for intentional and negligent infliction of emotional distress as discussed above, plaintiffs also may not recover for their derivative claims for loss of consortium.

An appropriate Order follows.

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**ORDER**

AND NOW, this 14th day of March 2007, upon consideration of defendant's motion for summary judgment, plaintiffs' response and defendant's reply thereto, it is ORDERED that defendant's motion is GRANTED. Judgment hereby is entered in favor of defendant Lowe's Companies, Inc. and against plaintiffs Jennifer Johnson and Dana Johnson.

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.