TRACY M. GIANNETTINO Appellant v. iPLAY AMERICA, LLC, JOHN DOES 1-10 AND ABC CORPS. 1-10 Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. **A-000850-24T4** CIVIL ACTION **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION DOCKET NO. MID-L-003267-24** **SAT BELOW: HONORABLE ALBERTO RIVAS, J.S.C.**

BRIEF ON BEHALF OF RESPONDENT IPLAY AMERICA LLC

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PRELIMINARY STATEMENT

The trial court properly granted Respondent, iPlay America LLC's motion to dismiss Appellant's First Amended Complaint for failing to state a claim upon which relief may be granted pursuant to R. 4:6-2(e). Appellant alleges that she suffered damages under theories of negligence due to Respondent's employee not allowing Appellant on a ride because the attendant did not believe Appellant met the height requirement. Appellant also claims that it was negligent for Defendant not to prevent children waiting for the ride from making rude comments to Appellant.

Appellant's allegations regarding negligence have no basis as there is no duty to allow Appellant to ride an attraction when there are safety concerns due to height restrictions. Moreover, Respondent had no control over the conduct of third-party patrons sufficient to breach any duty owed to the Appellant. It was not foreseeable that denying access to a ride for safety concerns would cause either embarrassment or humiliation. Neither embarrassment nor humiliation are injuries that are recoverable under a theory of negligence and no other personal injuries are claimed.

PROCEDURAL HISTORY

Appellant filed the Complaint in this matter on June 3, 2024. (Da01). On June 27, 2024, Appellant filed her First Amended Complaint. (Pa04). Respondent filed a Motion to Dismiss the First Amended Complaint on July 17, 2024. (Pa12). On September 16, 2024, Appellant filed a Letter Brief in Opposition to Respondent's Motion to Dismiss. (Pa31). Respondent responded to Appellant's opposition on September 23, 2024, with the filing of a Reply Brief in further support of their Motion to Dismiss. (Da07). Oral argument was heard by The Honorable Alberto Rivas, J.S.C., on the Respondent's Motion to Dismiss Plaintiff's First Amended Complaint on October 11, 2024. (1T). On that same date, Judge Rivas granted Respondent's Motion to Dismiss Plaintiff's First Amended Complaint and filed an order indicated for reasons stated forth on the record following oral arguments. (Pa01; 1T:13:3-19:4). Notice of Appeal was filed with this Court on November 22, 2024. (Pa40).

STATEMENT OF FACTS

On October 9, 2022, Appellant was at Respondent's amusement park with her two children for a birthday party. (Pa04).[1] During the day Appellant had been given access to the IPA Speedway Go Kart ride on several occasions. (Pa04). When Appellant attempted to get access to the ride one last time, an employee of Respondent denied her access based on height restriction applicable to the ride. (Pa05). Appellant alleges that the employee was mistaken and that she did meet the height requirements established by the Commission or Community Affairs. (PA05). Appellant was advised by a manager and the employee that Appellant could not use the Go Karts and that her ten-year-old daughter could not operate the Go Karts. (Pa05).

Children waiting on the Go Kart line were getting upset at the delay and started yelling at Appellant don't let "Karin" on the ride and "white bitch." (Pa05). Appellant was embarrassed and humiliated by these events and because children on the line were yelling discriminatory things at her, in the presence of her two minor children. (Pa05). It has been alleged that Respondent was responsible not only for denying Appellant access to the ride but also for not

[1]Respondent, without admitting the truth of Appellant's allegations, summarizes the factual allegations in the First Amended Complaint, solely for purposes of this Opposition to Appeal of the Order granting Respondent's Motion to Dismiss Plaintiff's First Amended Complaint. (Pa04-Pa06)

preventing or eliminating the comments being made by the children waiting in line. (Pa06).

LEGAL ARGUMENT

POINT I

Appellant's Allegations Do Not Give Rise To A Legal Remedy Under New Jersey Law.

New Jersey Court Rule 4:6-2(e) allows a Defendant to move, in lieu of an Answer, to dismiss the Complaint for failure to state a claim upon which relief can be granted. In reviewing a motion to dismiss, courts look to "whether a cause of action is 'suggested' by the facts."' *Teamsters Local 97 v. State*, 434 N.J. Super. 393, 412 (App. Div. 2014) (quoting *Printing Mart-Morristown v. Sharp Elecs. Corp.,* 116 N.J. 739, 746 (1989)). For a claim to survive a dismissal motion, the Plaintiff must allege sufficient facts and not just conclusory allegations. *Schiedt v. DRS Technologies, Inc.,* 424 N.J. Super 188, 193 (App. Div. 2012). [A] court must dismiss the Plaintiff's complaint if it has failed to articulate a legal basis entitling Appellant to relief." *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 270 (App. Div. 2005) (quoting Ca*mden County Energy Recovery Assocs., L.P. v. New Jersey Dep't of Envtl. Prot.*, 320 N.J. Super. 59, 64 (App. Div. 1999)). "Obviously, if the complaint states no basis of relief and discovery would not provide one, dismissal is the appropriate remedy." *DeBenedetto v. Denny's, Inc*., 421 N.J. Super. 312, 318 (Law Div. 2010) (quoting *Banco Popular,* 184 N.J. 161, 166 (2005)). A motion to dismiss

"may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for Plaintiff's claim must be apparent from the complaint itself." *Edwards v. Prudential Prop. & Cas. Co.*, 357 N.J. Super. 196, 202 (App. Div. 2003) (quoting *Camden County Energy Recovery Assocs. v. N.J. Dep't of Envtl. Prot.*, 320 N.J. Super. 59, 64-65 (App. Div. 1999)).

POINT II

Appellant's First Amended Complaint Does Not Suggest Sufficient Facts That Would Satisfy the *Prima Facie* Elements of Either a Claim for Negligence or Negligent Infliction of Emotional Distress

Appellant argues the trial court erred in its determination that there was no failure to state a claim for negligence as alleged in the First Count of the First Amended Complaint. *1T: 15:20-16:24*. Appellant further indicates that there was an error in determining that there was a failure to state a claim for negligent infliction of emotional distress in the Second Count of the First Amended Complaint. *1T: 16:25-17:2*5. No demonstration of what the error in these determinations was given by the Appellant beyond blanket statements.

The trial court did not error in granting the relief requested by Respondent. Appellant's negligence claims should be dismissed because Respondent did not owe Appellant a duty of either 1) allowing her to ride on an attraction after the attendant determined she did not meet the height requirement or 2) controlling the comments made by the children waiting on the line. Further, Appellant's allegations of damages regarding the children making the "Karin" and "white bitch" comments were not proximately caused by Respondent's conduct and Respondent cannot be responsible for the children's rude comments.

Appellant's negligence claim is fundamentally a claim for negligent infliction of emotional distress. "Under New Jersey law, "[i]n order to sustain a common law cause of action in negligence, a plaintiff must prove four core elements: "(1) [a] duty of care, (2) [a] breach of [that] duty, (3) proximate cause, and (4) actual damages [.]" *Polzo v. County of Essex*, 196 N.J. 569, 584 (2008) (citing *Weinberg v. Dinger*, 106 N.J. 469, 484 (1987)) (alterations in original). Similarly,

> [T]he elements of the tort of negligent infliction of emotional distress are: (1) defendant owed a duty of reasonable care to plaintiff; (b) defendant breached that duty; (c) plaintiff suffered severe emotional distress; and (d) defendant's breach of duty was the proximate cause of the injury. Whether the defendant has a duty of care to the plaintiff depends on whether it was foreseeable that the plaintiff would be seriously, mentally distressed.

Dello Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003) (citing *Decker v. The Princeton Packet, Inc.,* 116 N.J. 418, 429 (1989)).

To assert a claim for negligence or negligent infliction of emotional distress, the plaintiff must first establish that the defendant owed a duty to them. Whether there is a legal duty under tort law is a matter for the court to decide. *Gupta v. Asha Enterprises, LLC*, 422 N.J. Super. 136 (App. Div. 2011), *citing Clohesy v. Food Circus Supermarkets*, 149 N.J. 502 (1997). Respondent plainly did not owe Appellant a duty to allow her on a ride when there was a question regarding whether she met a height restriction.

The Carnival-Amusement Rides Safety Act, N.J.S.A. 5:3-31 et seq., enables the Commissioner of Community Affairs to "adopt and promulgate rules and regulations for the safe design, manufacture, installation, repair, maintenance, use, operation and inspection of all carnival-amusement rides as the department may find necessary for the protection of the general public…" N.J.S.A. 5:3-36(a). The Commissioner adopted N.J.A.C. 5:14A-11.1 et seq., titled "Go Kart Operations" setting forth "specific rules applicable to go-kart operations." N.J.A.C. 5:14A-11(c).

If an employee of Respondent advised Appellant that she did not meet the height requirement, that employee would be following the regulations governing the go-kart operations. Even if the employee was mistaken about whether Appellant met the height requirement, this was not a violation of any duty that Respondent owed to Appellant. *See Morris v T.D. Bank*, 454 N.J. Super. 203, 210 (App. Div. 2018)(bank was not liable in bank customer's negligence action for bank employee's mistake in identifying the customer as the person who robbed bank). "Considerations of fairness and policy" must also be examined to determine if the court should impose a duty. *Gupta, supra* at 151. Certainly, there would be a chilling effect on amusement parks efforts to keep patrons safe if a mistake evaluating whether a patron's height met the

State's requirement could expose the park to liability under a negligence theory.

Nor did Respondent owe Appellant a duty to prevent the children waiting to go on the ride from calling her a "Karin" or a "white bitch." Appellant's allegations at best demonstrate possible rude behavior by children who are not employed by Respondent waiting to get on a ride at an amusement park. Respondent had no duty to control rude comments made by children waiting to get on an amusement park ride.

Further, whether a defendant owed a duty is based on foreseeability, meaning that "liability should depend on the defendant's foreseeing fright or shock severe enough to cause substantial injury in a person normally constituted." *Zelnick v. Morristown-Beard Sch.,* 445 N.J. Super. 250, 266-267 (App. Div. 2015) (citing *Decker v. Princeton Packet, Inc*., 116 N.J. 418, 429 (1989). In addition, the defendant's negligent conduct must have "placed the plaintiff in reasonable fear of immediate personal injury, which gave rise to emotional distress that resulted in substantial bodily injury or sickness." *Jablonowska v. Suther*, 195 N.J. 92, 104 (2008) (citing *Falzone v. Busch,* 45 N.J. 559, 569 (1965) (emphasis added). This type of claim usually involves a plaintiff who narrowly escaped 'a reasonably apprehended physical impact' as a result of a defendant's negligent conduct." *Muniz v. United Hospitals Med.*

Ctr., 153 N.J. Super. 79, 81 (App. Div. 1977) (citing C*aputzal v. Lindsay Co.,* 48 N.J. 69, 73-74 (1966)). Severe emotional distress in the context of a direct negligent infliction of emotional distress claim means that the plaintiff suffered bodily injury or sickness "resulting from fright or apprehension of danger." *Dello Russo v. Nagel,* 358 N.J. Super. 254, 270 (App. Div. 2003) (*citing Falzone*, 45 N.J. at 569). For the conduct to be actionable, "the emotional distress must be 'so severe that no reasonable [person] could be expected to endure it.'" *Clark v. Nenna*, 465 N.J. Super. 505, 511-12 (App. Div. 2020) (*citing Buckley*, 111 N.J. at 366-67 (quoting Restatement (Second) of Torts § 46 cmt. j (Am. Law Inst. 1965)).

In *Decker*, the Court observed that "complaints amount[ing] to nothing more than aggravation, embarrassment, an unspecified number of headaches, and loss of sleep... as a matter of law, could not constitute severe mental distress sufficient to impose liability." *Id.* at 430 (quotation marks omitted). Even assuming, arguendo, that the Respondent owed Appellant some sort of duty and breached it by failing to allow her to ride the Go Karts, a shock severe enough to cause substantial injury due to her failure to ride the Go Karts was not foreseeable. It was also not foreseeable that children would be rude to Appellant while they waiting to go on the ride, or that the rude comments would cause her substantial injury. Moreover, the Respondent's

actions were not in any way "outrageous" or "shock the conscience of civilized society."

Under New Jersey law, negligence claims require the plaintiff to have suffered a physical injury. "Mere allegations of 'aggravation, embarrassment, an unspecified number of headaches, and loss of sleep,' are insufficient as a matter of law to support a finding of severe mental distress that no reasonable person could be expected to endure." *Turner v. Wong,* 363 N.J.Super. 186, 200, (App.Div.2003). "The emotional distress must be sufficiently substantial to result in either physical illness or serious psychological sequelae." *Ibid.* (citing *Aly v. Garcia,* 333 N.J.Super. 195, 204, (App.Div.2000), *certif. denied,* 167 *N.J.* 87 (2001)).

Appellant has not alleged any physical injury suffered during the subject incident. Rather, Appellant pleads embarrassment and humiliation. (Pa06). This is not sufficient to state a negligence claim.

There are no facts which demonstrate that Appellant was in reasonable fear of immediate personal injury because of their interactions with any Respondent employees or the children waiting to go on the ride. Indeed, the Respondent's attendant's action in enforcing the height restriction, was to protect patrons from injury. If she made an error regarding whether Appellant fell within the restriction this was not "egregious or purposeful." When the

conduct is not "egregious or purposeful," but merely inadvertent, and serious or substantial distress is not particularly foreseeable, compensation is not appropriate. *See Decker*, 116 N.J. at 431.

Whether Respondent's employee was mistaken regarding determining that the Appellant was not tall enough to ride the subject attraction becomes irrelevant in the face of the fact that there is no cause of action for either a claim of negligence or for emotional distress. Appellant has argued multiple times that there was a duty owed to the Appellant to verify her heigh and that duty was breached in the failure to check the Appellant's height to verify whether she met the height requirement. However, at no time does Appellant cite or refer to the regulation upon which Appellant is basing this purported duty nor demonstrates how not verifying Appellant's height gave rise to a claim of negligence. Nor does Appellant provide her actual height. The denial of a patron to ride an attraction at an amusement park rather than potentially allow someone to ride where it may be unsafe is an argument that flies in the face of all prevailing public policy and is in direct opposition to the purpose of the regulations established under the Carnival-Amusement Rides Safety Act, N.J.S.A. 5:3-31 et seq. and adopted by the Commissioner of Community Affairs under N.J.A.C 5:14A-11(c) – which ultimately are in place to keep patrons of amusement parks safe.

Furthermore, even assuming for purposes of this appeal that the Appellant can establish that Respondent's ride attendant was incorrect regarding Appellant meeting the height requirement, Appellant cannot establish that it was foreseeable 1) that to deny Appellant access to ride would cause her extreme emotional distress or 2) that children waiting to go on the ride would call Appellant a "Karin" and a "white bitch" or 3) that she suffered the requisite extreme emotional distress simply because she was embarrassed by not being permitted access and the children being rude to her. Accordingly, the subject appeal should be denied.

Courts have the responsibility to determine the scope of tort liability. *Kelly v. Gwinnell*, 96 N.J. 538, 552 (1984). Thus, the issue of whether a defendant owes a legal duty, as well as the scope of the duty owed, are questions of law for the court to decide. *Carvalho v. Toll Bros. & Developers,* 143 N.J. 565, 572 (1996); *Kelly, supra,* 96 N.J. at 552. "The imposition of a duty to exercise care to avoid a risk of harm to another involves considerations of fairness and public policy implicating many factors." *Olivo v. Owens–Illinois, Inc*., 186 N.J. 394, 401 (2006) (citing Carvalho, supra, 143 N.J. at 572, 675 A.2d 209). This inquiry has been described as one that "turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." *Hopkins v.*

Fox & Lazo Realtors, 132 N.J. 426, 439, (1993) (citing *Goldberg v. Hous. Auth.*, 38 N.J. 578, 583 (1962)).

Although not pled, to establish a *prima facie* case for intentional infliction of emotional distress under New Jersey law, a plaintiff must show that:

> the defendant acted intentionally or recklessly, both in doing the act and producing emotional distress; the conduct was so outrageous in character and extreme in degree as to go beyond all bounds of decency; the defendant's actions were the proximate cause of the emotional distress; and the distress suffered was so severe that no reasonable person could be expected to endure it.

Turner v. Wong, 363 N.J.Super. 186, 199 (App.Div.2003) (citing *Buckley v. Trenton Sav. Fund Soc'y,* 111 N.J. 355, 366 (1988)); See also Restatement (Second) of Torts, § 46. The defendant's conduct must be "regarded as atrocious, and utterly intolerable in a civilized community." *Buckley supar,* 11 N.J. at 366. "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *49 Prospect St. Tenants Ass'n v. Sheva Gardens, Inc.,* 227 N.J.Super. 449, 472, (App.Div.1988) (quoting Restatement (Second) of Torts, § 46 cmt. d.)

The First Amended Complaint does not adequately demonstrate that Appellant suffered severe emotional distress because of Respondent not allowing her to on the ride because of safety concerns. Appellant neither

alleges the nature of the injuries she sustained nor that she sought medical treatment for her alleged injuries. The First Amended Complaint's conclusory statement that Appellant "was caused to suffer great embarrassment and humiliation," Pa06, without explaining the extent of or treatment sought for those injuries is insufficient to state a claim.

Upon additional review of the whole record, Appellant, whose argument begins with the fact that there was a breach of duty to properly determine if she met the height requirement and thereby honor their own policy, morphs into an argument how the Appellant should have control over the actions third-party patrons in the line who were calling the Appellant "less than pleasant things…" T1: 6:25-7:20. When asked about whether it was Respondent's fault for the language being used by these other patrons/children or whether they had control over the other patron's language, Appellant admitted that there was no control over the language being used by the other patrons. 1T: 7:21-8:8. Appellant's admission that there was no control over the actions of the other patrons in line is ultimately the lynch pin in whether there is or is not a cause of action. The actions of the third-party patrons are ultimately the crux of the argument for both the claims of the negligence and emotional distress, would indicate that even under a *de novo* review of the record there is nothing to support the negligence claim as the Respondent lacked the requisite control

over the cause of the alleged distress, namely the children who were yelling at the Appellant. There is no cause of negligence based upon embarrassment nor humiliation and, even if there were, there is no inherent cause of embarrassment nor humiliation when being denied access to a ride or attraction for safety purposes. The potential cause for embarrassment or humiliation resides with the patrons in line who were yelling at the Appellant while she was being denied access to the ride. Patrons who the Appellant agrees the Respondent had no control over. *Id.*

Without control over the children in line, there is no breach of a duty owed. Furthermore, beyond the lack of control over the children in line, there is no foreseeability regarding the actions of third-parties not under the control of the Respondent. 1T:10:21-11:12. In addition, there is no injury or fear of imminent danger of injury upon which to base the claim of negligence upon. 1T:12:8-13:2. These elements are crucial to a claim of negligence and they are not met, neither as alleged in the complaint nor as argued in the underlying Motion to Dismiss. See Pa04; Pa46 and 1T.

The actions of the third parties (children) and the Respondent's lack of control over them is then further discussed as the premise of the negligent infliction of emotion distress claim. 1T: 8:14-21. There is no question regarding whether the Respondent had control over the children who were

waiting in line. *Id.*; 1T:7:21-8:8; and 1T:11:1-18. With no control over the other patrons the emotional distress claim cannot stand on its own.

The Appellant cannot cite to any conduct by the Respondent which would satisfy the elements of a *prima facie* case for negligent infliction of emotional distress. The only actions that are cited that would cause any kind of distress are those of the third-party patrons (children) waiting in line behind the Appellant. Actions which it has been categorically agreed, the Respondent had no control over. See 1T: 8:14-21; 1T:7:21-8:8; and 1T:11:1-18 The First Amended Complaint and the underlying argument against the Motion to Dismiss do not adequately demonstrate that Appellant suffered severe emotional distress because of Respondent not allowing her to on the ride because of safety concerns – the only action over which the Respondent had control over. Appellant neither alleges the nature of the injuries she sustained nor that she sought medical treatment for her alleged injuries. The Complaint's conclusory statement that Appellant "was caused to suffer great embarrassment and humiliation," Pa06, without explaining the extent of or treatment sought for those injuries is insufficient to state a claim.

CONCLUSION

Based upon the above, there is no error made by the Trial Court in granting the underlying Motion to Dismiss Plaintiff's First Amended Complaint and thus the appeal should be denied in its entirety.

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Dated: May 16, 2025