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

MARY ELIZABETH JORDAN FLICKINGER, O.D., and JAMES BRADLEY FLICKINGER, O.D., Individually and as Parents and Natural Guardians of D.J.F., a minor and J.B.F., a minor,	:	CIVIL ACTION – LAW
Plaintiffs	:	**JURY TRIAL DEMANDED**
vs.	:	
TOYS "R" US- DELAWARE, INC.,	:	JUDGE CAPUTO
Defendants	:	NO: 3:10-CV-00305

Pre-Trial Memorandum on Behalf of Defendant TOYS "R" US-DELAWARE, INC.

Date conference was held by counsel: March 24, 2011.

A. A brief statement as to Federal Court Jurisdiction:

This Court has jurisdiction over this matter by virtue of diversity citizenship under 28 U.S.C. §1332.

B. A summary statement of facts and contents as to liability:

This case arises from an incident on October 28, 2008 at the Toys "R" Us Times Square store. Plaintiff's accident occurred in the portion of the store known

as Candy Land. The Plaintiff claims the accident occurred while attempting to obtain M&M's out of the M&M Color Work display. There are various photographs which depict Candy Land within the Toys "R" Us store. There is a color picture of the M&M Color Work display.

The M&M and/or candy display is, as depicted, a self-serve display for customers to obtain their own M&M's. A plastic bag is placed under the spout of the plastic bin. The black handle is pulled forward and with the assistance of gravity (these bins are also known as gravity bins), the M&M's are to fall into the plastic bag. The M&M's are then taken to the cash wrap where they are weighed, priced and charged to the customer.

As part of its continuing inspection of this display by Toys "R" Us over the years, between 2004 and June of 2008, several of the gravity M&M bins were replaced.

The Plaintiff's version of this incident claims after viewing the various colors of M&M candy for sale, her youngest son, James, then age 5, decided that he wished to purchase the green M&M's. The Plaintiff, herself, pulled on the tap dispenser of the bin which contained the green M&M's, yet no M&M's disbursed from this gravity bin dispenser.

Plaintiff claims an unidentified employee approached the Plaintiff and offered assistance. According to the Plaintiff's testimony, the employee stated

"Ma'am, may I help you, we've been having **trouble** with these." Plaintiff alleges that the employee then lowered the gravity bin from the display via the swing down arm, opened the black lid at the top and manually scooped out green M&M's.

Plaintiff testified that her oldest son Daniel, wanted purchase blue M&M's, which were located on the opposite side of the display stand. The Plaintiff claims that she, Daniel, and her other son James proceeded to the opposite side of the display. Plaintiff has testified that that the Blue M&M bin did not look different than any other bins, and did not look un-sturdy. Plaintiff indicated that as she approached the Blue M&M bin there was no visible defect.

The Plaintiff claims that she pulled on the tap containing the blue M&M's expecting that they would flow down into her bag. Based on the Plaintiff's deposition testimony, however, it appears that the Plaintiff pulled the tap mechanism out (pulling towards her face as demonstrated on the deposition video) as opposed to down.

Plaintiff claims nothing happened after she pulled the tap mechanism. Rather than ask for assistance, Plaintiff ignored the warning she heard from the employee that they had "been having **trouble** with these".

After ignoring the warning, consistent with Plaintiff's deposition, the Plaintiff again pulled the tap mechanism out. Plaintiff did not ask for assistance in

spite of the warning previously offered by the employee. Plaintiff alleges during this second seemingly harder and more forceful pull that the plastic gravity bin dislodged from the swing down arm and/or display, striking the Plaintiff's head.

Deposition testimony offered by, Gislane Morel, provides clarity as Ms. Morel is an eye-witness to the alleged incident, and Plaintiff's own son James has offered testimony consistent with Ms. Morel and contradicting Plaintiff, his own mother.

According to Ms. Morel, the Plaintiff's oldest son, Daniel, was acting "reckless" throughout Candy Land. Ms. Morel indicated that **Daniel** proceeded to the blue M&M dispenser and **pulled** it several times in a **very hard**, uncontrolled manner, and aggressive manner. Ms Morel indicated Daniel pulled inordinately hard, but after Daniel repeatedly pulled on the tap mechanism blue M&M's did not dispense. Ms. Morel saw only Plaintiff and her son Daniel at the site of the incident, and recalls plaintiff warning her son, saying to her son, **"not so hard"** don't pull so hard. (See Deposition transcript of Gislane Morel Page 77, Lines 3-11.)

Before Ms. Morel could make her way over to the display, the Plaintiff placed her hand over Daniel's hand and **both** Plaintiff and Daniel forcefully pulled the tap mechanism. When Plaintiff used both her and her son's strength, weight,

and force on the tap mechanism the gravity bin allegedly dislodged from the display and struck the Plaintiff.

Ms. Morel immediately reported the incident. The incident was responded to first by Mark Anthony Jack, one of the Asset Protection Officers, and then subsequently by Lisa Lozada, one of the second floor assistant managers. Prior to the response of Toys "R" Us employees, namely Ms. Lozada, the **Plaintiff reported that she was not injured; did not wish to wait to complete an Incident Report; and left the store refusing medical attention.** Even though the Plaintiff refused to complete the report, denied medical treatment and said she was not injured, Defendant dutifully completed an incident report on the matter.

Later, the Plaintiff called the store and her information was incorporated into a second hand written Incident Report, that "Guest was there at the blue M&M, her 5-year old pulled the lever and the entire unit crashed on her head." Plaintiff reported that she had a bump on her head.

Later, a typewritten Guest Incident Report was completed by Ms. Lozada that was sent to Risk Management, which contains a description of the incident as the Plaintiff reported it to Guest Services during a cell phone call she made while traveling from New York City to Pennsylvania. The incident at issue in this case occurred at approximately 2:00 p.m.

There was consistent testimony from both Ms. Morel and Plaintiffs son James regarding who was present at the site of the incident. Both Plaintiffs son James and Ms. Morel indicated only Plaintiff and her son James were present at the site of the incident. Thus, Plaintiff's version of events **directly conflicts** with the testimony of eyewitness and even her own child as she avers contrary to her own child's testimony that both of her children were present at the site of the incident.

The Plaintiff's theory of liability initially rests with the application of New York Premise Liability, which Toys "R" Us agrees is applicable to this case. Plaintiffs allege negligence/premise liability and *res ipsa loquitur* as their theories warranting recovery.

The Plaintiffs, allege that the blue M&M dispenser was not properly placed back into position within the M&M display, and thus the bin fell upon the Plaintiff when she pulled on the tap to dispense the blue M&M's.

It is the Plaintiff's position that Toys "R" Us employees were not properly trained in removing the bin from the display, in essence, because they were not provided or required to read the "Installation Instructions" which may have been kept in a binder at the cash wrap area of Candy Land. The Plaintiffs also allege that employees were not properly trained on how to inspect the displays, particularly this display. Moreover, any inspections that were done by employees of Candy Land and the various other departments (Visual Department, Operations

Department, Maintenance Department, and Loss Prevention Department), where done insufficiently.

The Plaintiff argues that if the bin was not properly placed back into position by an employee, the Blue M&M bin would not have been flush with the other gravity bins and would have protruded out several inches and would have been very noticeable to the naked eye upon visual inspection.

Toys "R" Us would point out that the Plaintiff cannot have it both ways in this case; Plaintiffs cannot have their cake and eat it too. Either the bin containing blue M&M's was not flush and visibly protruded, such that the condition was open, obvious and reasonably discernable through the use of one's senses and just as **open, obvious and reasonably discernable to the Plaintiff** as it was to as Toys "R" Us employees.

Or, consistent with the **Plaintiffs testimony**, the Blue M&M bin had **no visible defect** and looked exactly the same as a non-defective bin, and was not situated in a manner which would put Defendant on notice i.e. **the bin was not sticking out.**

If the bin was not displaying an abnormal and visible condition then (1) Defendant is not liable since it cannot be charged with constructive notice of a defect when said condition is not visible, is not apparent and does not exist for a sufficient length of time prior to the happening of an accident to permit the

Defendant to discover and remedy same; or (2) consistent with Plaintiff's observation as to the Bin positions and Defendant's experts, the Bin was defective.

In any event, the Plaintiff is not a typical Plaintiff, as she is well-educated, intelligent, medical professional. Furthermore, she was warned regarding the bins. The Plaintiff has offered testimony that she was very alert and of concerned for her sons' safety while in Candy Land on the day of the incident. As such, Plaintiffs' testimony as to there being **"NO"** visible difference between the Blue M&M bin and all other bins undermines any claim of constructive notice.

Be that as it may, the Plaintiff also had a duty to exercise cautious reasonable care for her own safety, especially in light of the problems encountered with the green M&M display/bin, prior to pulling a first, let alone, a second time. Plaintiff alleges she was aware and cognizant of safety while at the same time admitting she ignored a warning. It is exceedingly clear that no matter what perspective you view the situation from Defendant is not liable.

Because of the fundamental conflict between Plaintiffs story and the mathematic reality of the situation, the Plaintiffs point to the difficulties that Toys "R" Us had with the tap dispenser of the various M&M displays in an attempt to obfuscate the issue of simple negligence contorting basic tort law into an allegation of widespread safety issues.

As learned through discovery, the tap dispenser of the various gravity bins would sometimes either clog wherein no M&M's would come out, or M&M's would be discharged rapidly. The problem could usually be corrected by Gloria Whitehead by adjusting the dispensing mechanism located within the tap dispenser. However, in certain circumstances, if a customer wished to purchase a certain color M&M, and the tap dispenser was clogged, it would be practice for employees to pull the gravity bin down on the swing down arm and scoop M&M's out for sale to customers.

Plaintiffs allege that this practice created an unreasonably dangerous condition because each time the gravity bin was lowered to perform this function, it increased the risk that the bin would not be placed back in proper position which would thereby increase the risk for chances that a customer, such as the Plaintiff, would be injured by a falling or out of place gravity bin.

Notably, The Plaintiff also maintains the contradicting opinion that the Blue M&M bin was not visibly different and as Plaintiff testified did not even move until after multiple pulls were made on the tap mechanism. Based on Plaintiffs testimony as to visible conditions, the defense contends that the pure mathematics of the situation indicates that the Blue M&M bin was defective, and the Defendant's did not have constructive notice because the defect was not visible,

was not apparent and did not exist for a sufficient length of time prior to the happening of an accident.

C. Comprehensive statement of undisputed facts:

Defendant responded to Plaintiff's proposed statement of uncontested facts by letter dated March 28, 2011.

D. A brief description of damages including where applicable:

1. Principle injury sustained:
2. Hospitalization and convalescence:
3. Special liability:
4. Special monetary damages, lost past earnings, medical expenses, property damages, etc,:
5. Estimated value of pain and suffering, etc.:
6. Special damage claims.

Defendants demand that Plaintiffs prove all alleged damages.

E. Names and addressed of witnesses along with specialties and qualifications of experts to be called.

By agreement of counsel, each party will file a pretrial Witness List.

Defendants reserve the right to supplement this witness list up to and including the time of trail.

EXPERT WITNESSES

Include the following individuals:

Defense Experts

a. Liability

Robert Nobilini, Ph.D.
4734 Iroquois Avenue
Feastorville, PA 19053

b. Damages

Michael F. Lupinacci, M.D.
Physicians of Rehabilitation,
Industrial and Spine Medicine, P.C.
P. O. Box 2028
175 Lancaster Boulevard
Mechanicsburg, PA 17055

Michael A. Church, Ph.D.
562 Wyoming Avenue
Kingston, PA 18704

Stephen B. Wilcox, Ph.D.
Design Science
924 Cherry Street, First Floor
Philadelphia, PA 19107-2405

Jon B. Tucker, M.D.
Tucker Independent Medical Experts, Inc.
1082 Bower Hill Road
Suite 100
Pittsburgh, PA 15243

Michael Y. Oh, M.D.
Tucker Independent Medical Experts, Inc.
1082 Bower Hill Road, Suite 100
Pittsburgh, PA 15243

Dr. Harriet Zellner
Integral Research, Inc.
The Silk Building
14 East 4th Street
Suite 408
New York, NY 10012

Carole Fisher, M.S., C.R.C., L.S.W.
538 Spruce Street
Suite 502
Scranton, PA 18503

c. **Damages (Daniel)**

Arnold Terry Shienvold, Ph.D.
Riegler, Shienvold & Associates
2151 Linglestown Road
Harrisburg, PA 17110

F. Summary of just testimony of each expert witness:

Mr. Nobilini will testify regarding the analysis of the case, and his expert report which includes but is not limited to explanation of the mathematics and engineering of the incident at issue.

The following experts will testify regarding damages please refer to enclosed report

1. **Dr. Michael Lupinacci dated November 30, 2010** (See report attached as Exhibit "A")
2. **Dr. Michael Lupinacci dated January 31, 2011** (See report attached as Exhibit "B")
3. **Michael Church, Ph.D. dated November 30, 2010** (See report attached as Exhibit "C")
4. **Michael Church, Ph.D. dated January 2, 2011** (See report attached as Exhibit "D")
5. **Stephen Wilcox, Ph.D. dated January 28, 2011** (See report attached as Exhibit "E ")
6. **Dr. Jon Tucker dated January 28, 2011** (See report attached as Exhibit "F")
7. **Michael Y. Oh, M.D. dated January 28, 2011** (See report attached as Exhibit "F ")
8. **Dr. Harriet Zellner dated February 4, 2011.** (See report attached as Exhibit "G")

9. **Carole Fisher, M.S., C.R.C., L.S.W. dated January 31, 2011** (See report attached as Exhibit "H")
10. **Arnold Shienvold, Ph.D. dated January 6, 2011** (See report attached as Exhibit "I")
11. **Robert Nobilini, Ph.D. dated January 27, 2011** (See report attached as Exhibit "J")
12. **Robert Nobilini, Ph.D. dated January 25, 2011** (See report attached as Exhibit "K")
13. **Robert Nobilini, Ph.D. dated March 14, 2011** (See report attached as Exhibit "L").

G. Special comment about pleadings and discovery including depositions and the exchange of medical reports:

None at this time.

H. A summary of legal issues involved and legal authorities relied upon.

Defendant has filed Motions in Limine all of which are consistent with precedential case law and are entitled as follows:

1. Motion In Limine I to Preclude Presentation of Cumulative Evidence and Testimony
2. Motion In Limine II to Preclude Plaintiffs' Fact Witnesses Not Disclosed Pursuant to Rule 26
3. Motion In Limine III to Preclude Testimony of Dr. Joseph Cronkey, M.D.
4. Motion In Limine IV to Preclude Testimony of Plaintiffs' Experts Not Disclosed Prior to Court-Imposed Deadline
5. Motion in Limine V to To Preclude Expert Opinions/Reports/Testimony Contrary To F.R E. 702, Outside Of Area Of Expertise, And/Or Based On Hearsay Testimony Of Laymen.
6. Motion In Limine VI to Strike Expert Reports and Preclude Trial Testimony of Neal A. Growney and Michael D. Pepe
7. Motion in Limine VII to Strike Expert Report and Preclude Trial Testimony of Dr. Richard Fischbein

Additionally, Defendant has filed comprehensive, pleadings Replies, and Briefs in responses to Plaintiffs Motions which outline the following issues:

Whether pursuant to case law, the testing of exemplars is a reliable method of expert analysis. Rager v. General Electric Co., 2010 U.S. Dist. LEXIS 135449 (M.D. Pa. 2010); David v. Black & Decker (US), Inc., 629 F.Supp.2d 511, 515-16 (W.D. Pa. 2009); Chubb v. On-Time Wildfire Feeders, 2008 WL 4082778 (M.D. Pa. 2008).

[1]**Whether New York substantive and damage law applies when Plaintiff intentionally traveled into New York and New York was the site of the incident with the only relevant contact with Pennsylvania being Plaintiffs resided and received medical treatment in Pennsylvania.** Shuder v. McDonald's Corp., 859 F.2d 266, 270 (3d Cir. Pa. 1988) See also Woodruff v. Sullivan County Rural Elec. Coop., 2008 U.S. Dist. LEXIS 71481 (M.D. Pa. Sept. 17, 2008) **(Opinion by Honorable A. Richard Caputo-** applying law of site of incident)

Whether a party may offer an expert to opine with regard to an alternate theory of causation when said Defense was pled timely. Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 411 (3rd Cir. 2002).

Whether, the Fifth Amendment of the United States Constitution guarantees due process of law and Defendants maintain the unalienable Constitutional Right to present a defense in a Court of law when the Defense was disclosed and identified during the Answer and New Matter filed at the beginning of the litigation. Crossley v. Iroquois Foundry Co., 1992 U.S. Dist. LEXIS 7368 (E.D. Pa. May 18, 1992) *citing* Seciete Internationale Pour Participations

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[1] It should be noted that the Third Circuit Court in Shuder **overturned a jury verdict** reversing the District Court for the Western District of Pennsylvania when the lower court did not apply the law of the site of the incident. Plaintiff had intentionally traveled into Virginia, and Plaintiff alleged a claim of negligence stemming from premise liability against Delaware Company, McDonald's Corporation.

The Third Circuit granted Defendant's Motion For Judgment Notwithstanding the verdict based on an error as to Choice of Law, and ordered the lower court to dismiss the action .

Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958).

Whether a Plaintiff has notice of a causation defense when Defendant's pled the defense in the Affirmative Defenses. Chainey v. Street, 523 F.3d 200, 210, n. 5 (3rd Cir. 2008).

Whether Plaintiffs are allowed to use their own lack and want of diligence as a sword and shield when Plaintiffs *admit* were in possession of documents for several months, and Plaintiffs attempt an 11th hour take-away seeking to bar the use of the documents by the Defense expert. Elcommerce.com, Inc. v. SAP AG, 2010 WL 3421101, at *5 (E.D. Pa. 2010); In re Echostar Comm. Corp., 448 F.3d 1294, 1302 (Fed. Cir. 2006).

Whether Plaintiffs' have failed to set forth a cause of action upon which a claim for punitive damages, may be granted when at all times material, Defendants acted reasonably, prudently, and in a safe manner, and at no time material to the Plaintiffs' claims did the Defendants act in any outrageous, reckless, willful and/or wanton manner. *Longo v. Armor Elevator Co.*, 307 A.D. 2d 848 (1st. Dep't 2003). See. *Reinah Dev. Corp. v. Kaaterskill Hotel Corp.*, 59 N.I.2d 482 (1983) See also *DiDomenico v. Long Beach Plaza Corp.*, 60 A.D.3d 618, 875 N.Y.S. 2d 133 (2d Dep't 2009).

I. Under Choice Of Law, New York Law Applies

When a Plaintiff alleging premise liability voluntarily went to a state and conducted business with a company having a location there although Company was Incorporated under the law s of Delaware, Plaintiffs actions were not fortuitous, and since the accident arose from the use of and condition of property, which are traditionally matters of local control, the law governing the site of the incident controls. Shuder v. M cDonald's Corp., 859 F.2d 266, 272 (3d Cir. Pa. 1988) . In fact, the Third Circuit Court in

Shuder v. McDonald's Corp., 859 F.2d 266, 270 (3d Cir. Pa. 1988) **overturned a jury verdict** reversing the District Court for the Western District of Pennsylvania, and held that The Defendant's Motion For Judgment Notwithstanding the verdict should be granted.

Likewise, this very Court has held consistent with Shuder, and found the law of the site of the incident governs when all activity pertaining to the case took place in the same location; all of the original Defendants had principal places of business in the state that was the site of the location; and the accident was responded to and investigated by companies and services based in the state that was site of the location; even when the injured party was an out-of-state resident. This Court determined that the State of the site of the incident held the most significant relationship to the parties and occurrence at issue. Woodruff v. Sullivan County Rural Elec. Coop., 2008 U.S. Dist. LEXIS 71481 (M.D. Pa. Sept. 17, 2008) **(Opinion by Honorable A. Richard Caputo-** applying law of site of incident)

In a diversity action, the Court must apply choice of law rules provided by Pennsylvania, the forum state in which the Court sits. *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir. 1996).

The choice of law approach provided by the Pennsylvania Supreme Court encourages a review of the policies and interests implicated in the

particular case before the Court to allow the forum state to apply the law and policy of the jurisdiction most closely concerned with the outcome of the pending litigation. *Griffith v. United Airlines, Inc.,* 416 Pa. 1, 21-22, 203 A.2d 796 (1964).

In this review, the Court must determine "the extent to which one state rather than another has demonstrated by reason of its policies and their connection and relevant to the matter in dispute, a priority of interests in the application of the rule of law. *Myers v. Commercial Union Assurance Cos.,* 506 Pa. 492, 485 A.2d 1113 (1984).

The Third Circuit Court of Appeals has held that Pennsylvania's approach to choice of law questions incorporates the contacts analysis of the Restatement (Second) of Conflict of Laws (1971) ("the Restatement") and the interest analysis underlying the policies of the particular states. *Carrick v. Zurich-American Insurance Group,* 14 F.3d 907, 909 (3d Cir. 1994).

Section 145 of the Restatement provides the principles to be applied in choice of law questions involving tort actions and provides that the rights and liabilities of parties to a tort action are determined by the law of the state with the most significant relationship to the parties and the occurrence. Among the factors the Court needs to evaluate are: **the place of injury**, the place **where conduct resulting in the injury took place**, domicile,

residence, nationality, place of incorporation and place of business of the parties, and **the location of where the relationship of the parties is centered.** These contacts are evaluated relevant to the extent they relate to the policies and interest involved in the particular case before the Court. *Cipolla v. Shaposka,* 439 Pa. 563, 565, 267 A.2d 854 (1970).

Pennsylvania courts have not hesitated to apply foreign over domestic law even though they thereby bar claims by their residents. *See, e.g., Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854.

II. Plaintiff's Burden of Proof Pursuant to New York Law

The Plaintiff argues, and Toys "R" Us agrees, that New York Negligence Law and Premise Liability Law will apply in this case. Pursuant to New York Negligence Law, the burden of proof is on the Plaintiff to prove every element of her case by reasonable certainty. Bossio v. Fiorillo, 620 N.Y.S. 2d 596 (3d Dep't 1994). The elements in a negligence cause of action, pursuant to New York Law, requires that the Plaintiff provide: (1) Existence of a duty on the part of the Defendant to the Plaintiff; breach of that duty; and that the breach of duty was a proximate cause of actual injury to the Plaintiff. Atkins v. Glenn Falls City School District, 441 N.Y.S. 2d 644 (1981).

Pursuant to New York Premise Liability Law, a landowner is obligated to maintain his property in a reasonably safe condition. Basso v. Miller, 40 N.Y. 2d

233 (1976). The duty of care of a landowner, pursuant to New York Law, also obligates a landowner to warn against a dangerous condition which the landowner either knows about or could reasonably ascertain via the use of reasonable and ordinary care. Cupo v. Karfunkel, 1 A.D. 3d 48 (2d Dep't 2003).

III. Toys "R" Us Did Not Owe the Plaintiff A Duty Of Care For An Open And Obvious Danger

An owner of premises has no duty to warn against a condition which is open and obvious, *Patrie v. Gorton*, 267 A.D.2d 582 (3d Dep't 1999), or which can readily be observed or perceived by the reasonable or normal use of one's senses. *Moriello v. Stormville Airport Antique Show & Flea Market, Inc.*, 271 A.D.2d 664 (2d Dep't 2000). Under these circumstances, the condition is a warning in itself. *Tarrazi v. 2025 Richmond Ave. Associates, Inc.*, 260 A.D.2d 468 (2d Dep't 1999). Moreover, a readily observable condition does not pose an unreasonable risk of injury, as a defective condition that is apparent to anyone using his or her eyes, there is neither an unnecessary nor unreasonable exposure to danger. *Garthe v. Ruppert*, 190 N.E. 643 (1934). No duty to warn exists if the dangerous condition complained of is open and obvious and reasonably discernable through the use of one's own senses. Orlando v. Audax Construction Corp., 14 A.D. 3d A.D. 3d 500 (2d Dep't 2005).

IV. Toys "R" Us Did Not Owe the Plaintiff A Duty Of Care For A Non-Visible Product Defect.

A Defendant is charged with constructive notice of a defect when said condition is **visible**, apparent and exists for a sufficient length of time prior to the happening of an accident to permit the Defendant to discover and remedy same. Gordon v. American Museum of Natural History, 67 N.Y. 2d 836 (1986)

V. THE CLAIM OF THE MINOR PLAINTIFF J.B.F AS TO NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IS BARRED AS A MATTER OF LAW

In New York, A person alleging negligent infliction of emotional distress based on the "zone of danger theory" must allege and prove contemporaneous awareness of the seriousness of the family member's injuries, as well as presence in the "zone of danger" at the time of the injuries. *Gonzalez v. New York City Housing Authority, 181 A.D.2d 440, 580 N.Y.S.2d 760* (1st Dep't 1992).

In New York, A person claiming the negligent infliction of emotional distress arising from special circumstances which serve as a guarantee that the claim is not spurious must allege and prove those particular circumstances. *Dangler v. Town of Whitestown, 241 A.D.2d 290, 672 N.Y.S.2d 188* (4th Dep't 1998).

The minor J.B.F. has testified he was not present at the site of the incident, and thus was not in the zone of danger. No Special circumstances have been alleged.

In Pennsylvania, a plaintiff may recover for negligent infliction of emotional distress where plaintiff: (1) was at or near the scene of an accident; (2) suffered an emotional shock as a result of his contemporaneous observation of the accident; and (3) was closely related to the victim of the accident. The cases in Pennsylvania make it clear that it is not sufficient merely to observe the effects of the injury on the person after the accident. It is clear that plaintiff's claim must result from his own "contemporaneous observance" of a traumatic event. Carpino v. United States, 2003 U.S. Dist. LEXIS 8036 (E.D.P.A. 2003). (See Sinn v. Burd, 486 Pa. 146, 404 A.2d 672, 685 (Pa. 1979).

It is not sufficient merely to see the effects of defendants conduct on the injured party after the fact; the plaintiff in an action for negligent infliction of emotional distress "must have observed the defendant traumatically inflicting the harm on the plaintiff's relative, with no buffer of time or space to soften the blow." Id.

Further, temporary or transitory distress is not compensable, as the harm must be long continuing for a plaintiff to recover. Ward v. Moses Taylor Hospital, 2009 CV 4842 (C.P. Lackawanna County, 2010).

I. Stipulations desired:

The agreed-to proposed facts.

J. Estimated number of trial days.

12 to 15 days.

K. Any other matter pertinent to the case to be tried.

None at this time.

L. Pursuant to local Rule 16.3 append to this Memorandum of pre-numbered scheduled exhibits with Brief identification of each on clerks exhibit form.

Defendant is preparing an Amended Exhibit List based on recent documents provided by Plaintiffs counsel.

M. Append any special questions which counsel desires to submit.

None at this time.

N. Defense counsel must file a statement that the person or committee with settlement authority has been notified of the requirements of and possible sanctions under local Rule 16.2.

See attached.

O. Certificate must be filed as required under Local Rule 30.10 that counsel has met and reviewed depositions and video tapes in an effort to eliminate irrelevancies, side comments, resolve objections and other matters not necessary for consideration by the trier of facts.

Counsel has met as required by Local Rule, but will meet again to discuss deposition admissions subsequent to the Daubert Hearing.

P. In all trials without a jury requests for findings of both fact and law shall be submitted with this memorandum as required under Local Rule 48.2.

Not applicable.

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

MARY ELIZABETH JORDAN FLICKINGER, O.D., and JAMES BRADLEY FLICKINGER, O.D., Individually and as Parents and Natural Guardians of D.J.F., a minor and J.B.F., a minor,	:	CIVIL ACTION – LAW
Plaintiffs	:	**JURY TRIAL DEMANDED**
vs.	:	
TOYS "R" US- DELAWARE, INC.,	:	JUDGE CAPUTO
Defendants	:	NO: 3:10-CV-00305

Statement Pursuant to Local Rule 16.2

I, Anthony P. Trozzolillo, Esquire, certify as follows:

1. I have advised the adjuster familiar of this matter of the requirements of Local Rule 16.2.

2. The aforementioned adjuster has the authority to make a decision on behalf of Defendants TOYS "R" US- DELAWARE, INC.

3. The aforementioned adjuster will be available via telephone at the time that the pre-trail conference will take place.

I certify that the foregoing statement is true and understand that I am subject to punishment for falsification of this information.

CIPRIANI & WERNER, P.C.

By: */s/ Anthony Trozzolillo*
Anthony P. Trozzolillo, Esquire