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## Dickens v. Puryear and Progeny: An Overview of Recent North Carolina Case Law Concerning the Intentional Infliction of Emotional Distress

William B. L. Little

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# **DICKENS v. PURYEAR AND PROGENY: AN OVERVIEW OF RECENT NORTH CAROLINA CASE LAW CONCERNING THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

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Sticks and stones may break one's bones but outrageous words and other extreme and outrageous conduct, which is intended to cause and does cause severe emotional distress is a recoverable tort in North Carolina under the law of "intentional infliction of emotional distress."<sup>1</sup> While the development within North Carolina of this intentional tort traces back to 1936,<sup>2</sup> and arguably further back in time to 1906,<sup>3</sup> the formal supreme court recognition did not come about until 1979.<sup>4</sup> Even then, further clarification of the requisite evidentiary showing was required by the court in 1981. Therefore, this may be deemed the tenth anniversary year of the tort "intentional infliction of emotional distress" in North Carolina. In honor of this milestone, this Survey is an overview of relative North Carolina caselaw since 1981 concerning the intentional infliction of emotional distress. The Comment will focus on what pleadings are deemed sufficient to survive Rule 12b(6) defenses, as well as what material facts will deny both summary judgment motions and judgments notwithstanding the verdicts. Conversely, this Survey will show where the courts have found certain pleadings and evidentiary showings to be lacking, as a matter of law, as they

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1. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

2. *Id.* at 449, 276 S.E.2d at 333 (citing Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936)).

3. Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906), *overruled on other grounds*, Johnson v. Ruark Obstetrics and Gynecology Assoc., 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

4. Dickens, at 452, 276 S.E.2d at 335 (citing Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979)).

relate to the intentional infliction of emotional distress.

This Survey will first proceed with a developmental caselaw history of what eventually became recognized as the "intentional infliction of emotional distress." It will explore the analytical underpinnings of the modern tort and the two major elementary variances in relation to its caselaw ancestry; physical injury and foreseeability.

Next, North Carolina caselaw regarding the intentional infliction of emotional distress since 1981, from both the North Carolina Court of Appeals and Supreme Court, will be examined. Salient trial level procedural history relating to Rule 12b(6) defenses, summary judgment, directed verdict and j.n.o.v. motions will be discussed, and how the trial and appellate level applied caselaw to the facts in order to decide whether the plaintiff's tort action for intentional infliction of emotional distress would pass its respective procedural barrier.

Finally, this Survey will attempt to discern if a factual judicial mindset exists, static or otherwise, as to when a defendant's "'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'"<sup>5</sup> In essence, what pleading or evidentiary showing will cause the judiciary in North Carolina to find "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another."<sup>6</sup>

## I. THE DEVELOPMENT OF THE INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS TORT

In the 1906 case of *Kimberly v. Howland*,<sup>7</sup> the Supreme Court

5. *Id.* at 447, 276 S.E.2d at 331 (quoting *Stanback* 297 N.C. at 196, 254 S.E.2d at 622).

6. *Id.* at 452, 276 S.E.2d at 335.

7. 143 N.C. 398, 55 S.E. 778 (1906). Plaintiff showed that defendant blasted rock, using dynamite, on the outskirts of the city of Asheville and within approximately 175 yards from plaintiff's residence. *Id.* at 401, 55 S.E. at 779. Justice Mitchell in *Ruark*, a case dealing with the negligent infliction of emotional distress, stated that "[t]he *Kimberly* opinion was the first opinion of this Court to characterize, unfortunately, emotional injury as a type of physical injury—albeit injury for which plaintiffs could recover in emotional distress." *Ruark* 327 N.C. at 294, 395 S.E.2d at 91. Justice Mitchell further stated that:

[c]laims for negligent infliction of emotional distress have been recognized by this Court for at least one hundred years . . . [t]he history of the tort of negligent infliction of emotional distress in North Carolina begins for all practical purposes with *Young v. Telegraph Co.*, 107 N.C. 370, 11

of North Carolina decided a case involving the plaintiff's wife being frightened into a near miscarriage, while wrecking her nervous system, all by a rock which had been negligently thrown through her house by the defendant's blasting operation.<sup>8</sup> The defendant contended that "(1) That the evidence discloses no negligent act. (2) That the defendant's agents could not have reasonably foreseen the consequences of their acts. (3) That the injury complained of by the wife was the result of fright only, for which no recovery can be had."<sup>9</sup>

The court found the "evidence of negligence amply sufficient to have been submitted to the jury,"<sup>10</sup> and that "a man of ordinary prudence should have foreseen the probable consequences of blasting with dynamite in such a neighborhood without properly smothering the blast."<sup>11</sup> Regarding the defendant's third contention, that the wife could not recover for her alleged injury, the court noted that "most respectable authority" supported the defendant's assertion that wife's injuries resulting from fright could not be recovered for if they were without contemporaneous physical injury.<sup>12</sup> However, the court noted that "where the fright occasions physical injury, not contemporaneous with it, but directly traceable to it, the courts are hopelessly divided."<sup>13</sup> The court also noted that the rock "greatly shocked her nervous system and nearly caused a miscarriage. . . ."<sup>14</sup>

The court held that "the injury to the wife was a physical in-

S.E. 1044 (1890) . . ."

*Ruark*, 327 N.C. at 291, 395 S.E.2d at 89. See also *Hancock v. Telegraph Co.*, 137 N.C. 497, 49 S.E. 952 (1905) (for the proposition that physical injury is not necessitated for the recovery of the negligent infliction of emotional distress); *Bowers v. Telegraph Co.*, 135 N.C. 504, 47 S.E. 597 (1904).

8. *Kimberly v. Howland*, 143 N.C. 398, 401, 55 S.E. 778, 779 (1906).

9. *Id.*

10. *Id.* (citing *Blackwell v. Railroad*, 111 N.C. 151, 16 S.E. 12 (1891)). The Court stated that "[i]t was in evidence that the blasts were fired off without being properly 'smothered', and that 'smothering' is a safe method usually employed in such operations, and that, had it been properly done on this occasion, the injury to plaintiffs' residence could not well have resulted." *Id.*

11. *Id.* The court further stated that "[p]ersons using such an inflammable and powerful instrumentality as dynamite are charged with knowledge of its probable consequences which they could by reasonable diligence have acquired. *Id.* at 401, 55 S.E. at 779-80.

12. *Id.* at 403, 55 S.E. at 780.

13. *Id.*

14. *Id.*

jury resulting from shock and fright.”<sup>15</sup> Most importantly, the court stated that the physical injury was “nervous physical pain”<sup>16</sup> in that:

[t]he nerves are as much a part of the physical system as the limbs, and in some person are very delicately adjusted, and, when ‘out of tune,’ cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs.<sup>17</sup>

Finally, the court approvingly quoted the trial judge as clearly stating the law, as follows:

While fright and nervousness alone do not constitute an injury within the meaning of this issue, if this fright and nervousness is the natural and direct result of the negligent act of the defendant, and if this fright and nervousness naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an injury within the meaning of this Issue.<sup>18</sup>

In *Kirby v. Jules Chain Stores Corporation*,<sup>19</sup> a 1936 supreme court case, Chief Justice Stacy decided the issue of whether the plaintiff’s complaint stated sufficient facts to constitute a cause of action. The plaintiff alleged that the defendant corporation, through its collecting agent, called plaintiff a deadbeat and threatened to have her arrested for failing to pay a debt owed to the defendant, and that these actions resulted in the premature birth of her dead child.<sup>20</sup> While there was evidence refuting the premature status of the child,<sup>21</sup> the jury found the defendant liable and awarded \$1,000 in damages.<sup>22</sup>

The court held that defendant’s demurrer must be overruled and that the “gravamen,” or injury specially complained of, lay in trespass to the person, and that this may be either willfully or negligently inflicted.<sup>23</sup> The court stated that “[i]t is no doubt correct

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15. *Id.*

16. *Id.*

17. *Id.* at 403-04, 55 S.E. at 780.

18. *Id.* at 404, 55 S.E. at 780-81.

19. 210 N.C. 808, 810, 188 S.E. 625, 626 (1936).

20. *Id.* at 809, 188 S.E. at 625.

21. *Id.*

22. *Id.* at 809, 188 S.E. at 625-26.

23. *Id.* at 810, 188 S.E. at 626. See generally BLACK’S LAW DICTIONARY 631

to say that fright alone is not actionable<sup>24</sup> . . . but it is faulty pathology to assume that nervous disorders of serious proportions may not flow from fear or fright."<sup>25</sup>

Perhaps with greatest insight, Chief Justice Stacy quoted with approval *Candler v. Smith*, a 1935 Georgia appellate case, wherein Justice Sutton stated:

As a general rule, damages for mere fright are not recoverable; but they may be recovered where there is some physical injury attending the cause of the fright, or, in the absence of physical injury, where the fright is of such character as to produce some physical or mental impairment directly and naturally resulting from the wrongful act.<sup>26</sup>

In *Sparks v. Tennessee Mineral Products Corp.*,<sup>27</sup> a 1937 case, the supreme court once again decided the issue of whether fright and nervousness alone, unaccompanied or followed by physical injury, should constitute an element of damages. Plaintiff alleged defendant was negligent in carrying out blasting operations near plaintiff's house, and that his negligence resulted in a rock being hurled through plaintiff's house causing her terrible shock and injury to her nerves, resulting in loss of weight, nervousness, periodical confinement in bed and other ailments.<sup>28</sup> Citing with approval *Kimberly and Kirby*, Justice Barnhill held that:

[w]hile fright and nervousness alone, unaccompanied or followed by physical injury, do not constitute an element of damages, if this fright and nervousness is a natural and direct result of the negligent act of the defendant, and naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an element of injury to be considered by the jury.<sup>29</sup>

In *Martin v. Spencer*,<sup>30</sup> a 1942 case, Chief Justice Stacy upheld the verdict and judgment, on the authority of his earlier opin-

(5th ed. 1979).

24. *Id.* at 812, 188 S.E. at 627 (citing *Arthur v. Henry*, 157 N.C. 438, 73 S.E. 211 (1911)).

25. *Id.* at 812, 188 S.E. at 627 (citing *Hickey v. Welch*, 91 Mo. Ct. App. 4 (1901)).

26. *Id.* at 812-13, 188 S.E. at 627 (quoting *Candler v. Smith*, 50 Ga. App. 667, 179 S.E. 395, 399 (1935)).

27. 212 N.C. 211, 213-14, 193 S.E. 31, 33 (1937).

28. *Id.* at 212, 193 S.E. at 32.

29. *Id.* at 213-14, 193 S.E. at 33.

30. 221 N.C. 28, 30, 18 S.E.2d 703, 703-04 (1942).

ion in *Kirby*. The plaintiff alleged that while she and her 16-year old brother were replacing stakes which they thought had been moved from their father's property line adjacent to that of the defendant's property, the defendant called to her and her brother in a loud and angry voice regarding his flowers. That defendant and other members of his family approached the plaintiff and her brother. The defendant threatened to kill the plaintiff's brother and that the defendant looked like a maniac with his face red and his forehead beading perspiration, that his voice was loud, vicious, and angry. The defendant approached the plaintiff and her brother, striking the brother. The defendant's behavior and appearance caused the plaintiff to faint. Plaintiff's husband picked her up in a crying and jerky condition, and that as a result of defendant's actions, within in a month, plaintiff suffered a miscarriage in her fourth month of pregnancy.<sup>31</sup> Testimony by physicians asserted that the fright caused by the defendant could have produced the miscarriage of plaintiff's child.<sup>32</sup> Stating that there was evidence of "trespass to the person" of the defendant, Chief Justice Stacy affirmed the judgment, overruling a demurrer to the complaint, and quoted COOLEY ON TORTS 3d with approval:

But if there may be a recovery for physical injuries resulting from fright wrongfully caused by the defendant, it would seem that an assault committed in the view of a woman whose presence is known, especially upon a member of her family, was an act of negligence towards the woman, a failure to exercise the due care towards her which the occasion and circumstances required, and was therefore a legal wrong against her which will support an action if damage follows.<sup>33</sup>

In 1960, the supreme court decided, in *Williamson v. Bennett*,<sup>34</sup> whether the trial judge committed reversible error in overruling defendant's motion for nonsuit of plaintiff's personal injury action. Justice Moore found that the plaintiff suffered no immediate physical injury from the collision with the defendant's motor vehicle, that plaintiff did not see what had struck her motor vehi-

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31. *Id.* at 29-30, 18 S.E.2d at 703.

32. *Id.* at 30, 18 S.E.2d at 703.

33. *Id.* at 30, 18 S.E.2d at 703-04 (quoting 1 COOLEY ON TORTS 98 (3rd ed. 1930)).

34. 251 N.C. 498, 502, 112 S.E.2d 48, 51 (1960), *disapproved by*, *Johnson v. Ruark Obstetrics and Gynecology Assoc.*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

cle until she drove one half block and then parked her vehicle beyond the point of collision, that she only heard "a grinding noise" on her vehicle's left side, and perhaps most importantly, she was more than ordinarily predisposed to neurosis.<sup>35</sup>

Plaintiff gave evidence that the collision occurred near a school building, in which children were in attendance at the time of the collision, that her brother-in-law had killed a child one month earlier in a collision and that the "grinding noise," in the opinion of her psychiatrists, "triggered" a neurosis resulting in a conversion reaction or pseudo-paralysis.<sup>36</sup> Justice Moore stated that *Kimberly* was nearest in approach for precedential value and quoted the trial court's charge to the jury "[t]his injury [fright and nervousness] must be the natural and direct result of the negligent act of the defendant and one which should have been foreseen by the defendant by the exercise of ordinary care."<sup>37</sup>

Justice Moore denied recovery, agreeing with the defendant that there was no causal connection between defendant's negligence and the fright, neurosis and conversion reaction experienced by plaintiff, stating: "We agree that defendant's negligence was not that cause which 'in natural and continuous sequence, unbroken by any new and independent cause,' produced the personal injury plaintiff complains of."<sup>38</sup> Justice Moore's analysis in denying recovery for personal injury, being predicated on the lack of causal connection between a breach of duty and the injury, was based on the assertion that it was not the collision which caused plaintiff's neurosis, but a collision with a non-existent child.<sup>39</sup> Justice Moore found support regarding this conclusion by these salient facts: 1) a lack of testimony or contention that plaintiff was frightened by the collision between her motor vehicle and defendant's; 2) a lack of assertion that plaintiff's anxiety was occasioned by the "grinding sound;" 3) plaintiff's only thoughts were that she had killed a child on a bicycle; 4) plaintiff's more than ordinary predisposition to neurosis; and 5) her brother-in-law's collision with a child had deeply affected her and increased her proneness to emotional disturbance.<sup>40</sup> In conclusion, Justice Story quoted with approval from the RESTATEMENT OF THE LAW on torts, "The actor's conduct is not

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35. *Id.*

36. *Id.* at 502-03, 112 S.E.2d at 51.

37. *Id.* at 506, 112 S.E.2d at 54.

38. *Id.* at 507, 112 S.E.2d at 54.

39. *Id.* at 507, 112 S.E.2d at 55.

40. *Id.* at 507, 112 S.E.2d at 54-55.



a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."<sup>41</sup>

*Langford v. Shu*,<sup>42</sup> a 1962 supreme court case, found Justice Sharp ruling on an issue of nonsuit regarding a practical joke gone awry. Plaintiff showed that defendant, who was a neighbor, after having been warned of plaintiff's fear of snakes, approved and participated in a practical joke involving a box plaintiff believed to contain a snake eating mongoose.<sup>43</sup> In all actuality, the box only contained a spring loaded furry object, which defendant's child released and subsequently caused plaintiff injury (a torn cartilage in plaintiff's left knee) and fright.<sup>44</sup> Citing *Kirby*, Justice Sharp stated that defendant owed the plaintiff, "the duty not to subject her to a fright which, in the exercise of due care or reasonable foresight, she should have known was likely to result in some injury to her."<sup>45</sup> Justice Sharp reversed the superior court's decision of nonsuit.<sup>46</sup>

A practical joke proved actionable in yet another supreme court case in 1965. In *Slaughter v. Slaughter*, the plaintiff, a 67-year old mother, showed evidence that she suffered injuries (fracture of the left hip and fracture of the proximal end of the left fibula requiring surgery) while in flight engendered by the defendant, her son, exploding firecrackers at night outside the window of a room in which plaintiff occupied.<sup>47</sup> The plaintiff showed evidence that upon hearing several reports, the plaintiff thought that she and her grandchildren were fired upon, possibly by a shotgun. The plaintiff further showed that both grandchildren were screaming, "[s]omebody is shooting at us; [s]omebody is shooting at us," that plaintiff left her seat in a crouched position to escape the "firing,"

41. *Id.* at 508, 112 S.E.2d at 55 (quoting RESTATEMENT OF THE LAW, TORTS § 435(2) (Supp. 1948)).

42. 258 N.C. 135, 128 S.E.2d 210 (1962).

43. *Id.* at 136-37, 128 S.E.2d at 211.

44. *Id.* at 137, 128 S.E.2d at 211.

45. *Id.* at 139, 128 S.E.2d at 212.

46. *Id.* at 141, 128 S.E.2d at 213.

47. 264 N.C. 732, 142 S.E.2d 683 (1965). Perhaps most egregious of all, plaintiff had been a guest at the defendant's home for two weeks and at the time of the commission of the tort was babysitting the defendant's children, the plaintiff's grandchildren. *Id.* at 733, 142 S.E.2d at 685.

and that she subsequently fell and suffered injuries.<sup>48</sup> The single contested issue of *Slaughter* was that of foreseeability.<sup>49</sup> Defendant contended, relying on general principles of foreseeability, that the plaintiff's fall and resulting injuries, were not, as a matter of law, reasonably foreseeable.<sup>50</sup> Justice Moore disagreed, and declared that the trial judge committed no error in charging the jury with respect to foreseeability in and its application, as an integral part, in finding proximate cause.<sup>51</sup>

In *Crews v. Provident Finance Co.*,<sup>52</sup> a 1967 supreme court case, a debt collector's abusive behavior towards a plaintiff in arrears once again created a jury question concerning whether recoverable damages were suffered and whether such damages were reasonably foreseeable, such that an award of nonsuit should be held in error. The plaintiff offered evidence that she was an uneducated elderly woman, that she borrowed \$70.00 from the defendant, that she gave the defendant a chattel mortgage on her furniture for \$244.90 and that she had paid up the arrearage to the defendant. Subsequent to payment, a bill collector, acting as defendant's agent, came to her home demanding still further payment in addition to threatening her in vulgar language with imprisonment. His threats and demeanor caused her to get hot and have sharp pains in her chest, she began to feel funny and nervous, and her heart was about to burn up with sharp pains. She offered evidence that she was "going around" and did not know anything until the next morning and that the agent knew plaintiff had suffered previous heart trouble. Upon visiting a physician the next morning, it was discovered that "she was nervous and suffering with acute angina, nervous, trembling in speech and emotionally disturbed." Her blood pressure had gone from 170/180 to 220 and stayed at 220 for two weeks. In answering a hypothetical question, the plaintiff's physician testified that it was his opinion that the agent's visit and threat could have caused the condition and that the condition will cause the plaintiff irreparable damage.<sup>53</sup>

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48. *Id.* at 734, 142 S.E.2d at 685.

49. *Id.* at 735, 142 S.E.2d at 686. Justice Moore, in dicta, cited the general rule that, although damages for mere fright are not recoverable, should there be in addition to the fright contemporaneous physical injury resulting from defendant's conduct, there may be recovery. *Id.*

50. *Id.*

51. *Id.* at 736-37, 142 S.E.2d at 686-87.

52. 271 N.C. 684, 157 S.E.2d 381 (1967).

53. *Id.* at 685-87, 157 S.E.2d at 384-85. Justice Pless at one point acerbically

Justice Pless cited to *Slaughter*, stating that damages for mere fright are generally not recoverable, but they may be if there is contemporaneous physical injury.<sup>54</sup> In addition to this physical injury prong of fright, Justice Pless stated that the defendant might have foreseen that some injury would result from his conduct or that "consequences of a generally injurious nature might have been expected."<sup>55</sup> He then cited to *Kirby*, as the leading case regarding this fact scenario. Justice Pless dismissed defendant's claims that *Kirby* was not applicable because it specifically dealt with fright while the plaintiff's case at bar showed no evidence of fright, by stating that plaintiff testified as being mad and that *Kirby* was not limited to cases of fright.<sup>56</sup> Justice Pless further stated:

Under Sec. 436 of the American Law Institutes Restatement of the Law of Torts, under the heading, 'Physical harm resulting from emotional disturbance,' it is stated: '(1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright OR OTHER EMOTIONAL DISTURBANCE does not protect the actor from liability. (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, OR OTHER SIMILAR AND IMMEDIATE EMOTIONAL DISTURBANCE, the fact that such harm results solely from the internal operation of fright OR OTHER EMOTIONAL DISTURBANCE does not protect the actor from liability.' (Emphasis supplied).<sup>57</sup>

Justice Pless goes on to state that madness or anger, to the extent of causing acute angina and high blood pressure, must certainly qualify as an "emotional disturbance," and that "Webster defines MAD as 'aroused or controlled by intense emotion' and 'furious because of abnormal excitation.'"<sup>58</sup>

In reversing the trial court, Justice Pless held that in finding emotional disturbance from physical harm, the "physical injury"

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commented that "[t]he defendant is not charged with usury, but the record is remindful of the saying 'if you got it, you don't need it — if you need it, you don't got it!'" *Id.* at 688, 157 S.E.2d at 385.

54. *Id.* at 689, 157 S.E.2d at 385.

55. *Id.*

56. *Id.* at 689, 157 S.E.2d at 386.

57. *Id.* at 689-90, 157 S.E.2d at 386.

58. *Id.* at 690, 157 S.E.2d at 386.

requirement need not be visible, such as "a cut or a broken arm."<sup>59</sup> He found that it was beyond question that nervousness necessitating bedrest caused by an attack of acute angina and high blood pressure gave rise to requisite "physical injury."<sup>60</sup>

Therefore, from caselaw extending from *Kimberly to Crews*, mental distress seemed to be an actionable tort, so long as the injury complained of was "foreseeable" and "physical" in nature. Additionally, although caselaw had long termed the distress with the moniker "fright," the actionable spectrum had been expanded to "other emotional disturbance" which is foreseeable to cause "bodily harm."<sup>61</sup>

## II. THE MODERN DEVELOPMENT

By 1979, the major trend in the United States was to recognize the intentional infliction of emotional distress as a separate intentional tort independent of physical injury or any requisite that the alleged conduct constitute another recognizable tort.<sup>62</sup> In 1979, the

59. *Id.*

60. *Id.*

61. See generally *Crews v. Provident Finance Co.*, 271 N.C. 684, 157 S.E.2d 381.

62. See *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *State Rubbish Collectors Assoc. v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970); *Hiers v. Cohen*, 31 Conn. Supp. 305, 329 A.2d 609 (1973); *Strickland v. Hodges*, 134 Ga. App. 909, 216 S.E.2d 706 (1975); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); *Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972); *Dawson v. Associates Fin. Serv. Co.*, 215 Kan. 814, 529 P.2d 104 (1974); *Vicnir v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979); *Harris v. Jones*, 281 Md. 560, 380 A.2d 611, 86 A.L.R.3d 441 (1977); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976); *Frishett v. State Farm Mut. Auto. Ins. Co.*, 3 Mich. App. 688, 143 N.W.2d 612 (1966); *Daniels v. Adkins Protective Services, Inc.*, 247 So. 2d 710 (Miss. 1971), *overruled on other grounds*, *First Nat. Bank v. Langley*, 314 So.2d 324 (1975); *Warrem v. Parrish*, 436 S.W.2d 670 (Mo. 1969); *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975), *later appeal* 199 Neb. 683, 260 N.W.2d 612 (1977), *later proceeding* 217 Neb. 761, 351 N.W.2d 74 (1984); *Fischer v. Maloney*, 43 N.Y.2d 553, 402 N.Y.S.2d 991, 373 N.E.2d 1215 (1978); *Hanke v. Global Van Lines*, 533 F.2d 396 (8th Cir. 1976); *Breeden v. League Servs. Corp.*, 575 P.2d 1374 (Okla. 1978); *Pakos v. Clark*, 253 Or. 113, 453 P.2d 682 (1969); *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147 (1963); *Rhodes v. Security Fin. Corp.*, 268 S.C. 300, 233 S.E.2d 105 (1977); *Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 398 S.W.2d 270 (1966); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961), *overruled on other grounds*, *Johnson v. Rogers*, 763 P.2d 771 (1988); *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974); *Grimsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975); *Alsteen v. Gehl*, 21 Wis.

North Carolina Supreme Court decided *Stanback v. Stanback*,<sup>63</sup> a case involving an alleged breach of a separation agreement and dealing with the issue, among others, of whether the trial judge properly dismissed plaintiff-wife's claim for punitive damages from defendant-husband for breach of said contract. Plaintiff's complaint alleged that defendant agreed that if plaintiff was unable to deduct from her 1968 state and federal tax returns, the cost of her attorney's fees, then defendant would pay plaintiff the resulting increased state and federal tax burden. Both the I.R.S. and the North Carolina Department of Revenue audited her 1968 tax return and disallowed \$28,500.00 of a \$31,000.00 deduction claimed for attorney's fees. The defendant, upon demand, refused to pay this tax deficiency, thus breaching said contract by not paying the aforementioned increase in plaintiff's tax burden. In consequence of not being solvent to pay this disallowance and subsequent to the United States placing a lien on plaintiff's property, the plaintiff, in 1974, borrowed \$18,099.51 by securing a deed of trust on her home in order to pay off the deficiency owed to the I.R.S. As a result of plaintiff being unable to pay off the loan, the lender was currently in the process of foreclosing on plaintiff's home. The State of North Carolina garnished plaintiff's funds owed to plaintiff by defendant for support and maintenance under the deed of separation in the order of \$2,989.00. Under an amended complaint, the plaintiff alleged that consequential mental anguish damages were contemplated by the parties when they entered into agreement.<sup>64</sup> Plaintiff requested, among other relief, \$100,000.00 in punitive damages for the defendant's alleged breach of contract.<sup>65</sup> The defendant moved under Rule 12(b)(6) to dismiss plaintiff's complaint for failure to state a claim. The trial court granted the motion, regarding all of plaintiff's claims and requests for relief, except plaintiff's claim and request for general damages for breach of the agreement.<sup>66</sup>

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2d 349, 124 N.W.2d 312 (1963).

63. 297 N.C. 181, 254 S.E.2d 611 (1979).

64. *Id.* at 183-84, 254 S.E.2d at 614-15.

65. *Id.* at 184, 254 S.E.2d at 615.

66. *Id.* In addition to requesting punitive damages and general damages for breach of contract; plaintiff also requested \$250,000.00 in consequential damages as compensation for mental anguish and loss of reputation in the community. Plaintiff also alleged and requested relief from defendant's "abuse of process" caused by a separate suit initiated by the defendant; the trial court again granted a 12(b)(6) motion to dismiss regarding this allegation. *Id.* The court of appeals

Justice Brock, writing for the supreme court, affirmed the court of appeals decision which had affirmed the trial court's dismissals under Rule 12(b)(6), except for the issue of punitive damages for the alleged breach of contract.<sup>67</sup> Writing that, although it is generally ruled that there may be no recovery in punitive damages for breach of contract, with the exception of breach of contract to marry, when the breach of contract is accompanied by or constitutes an identifiable tort, such tort may enable recovery for punitive damages.<sup>68</sup> Justice Brock then established for the first time in North Carolina caselaw which is now known as the intentional infliction of emotional distress when he next wrote:

Because we think the allegations in plaintiff's complaint with respect to punitive damages are sufficient at least to state a claim for damages for an identifiable tort accompanying a breach of contract, the trial court's dismissal of that claim must be reversed. Plaintiff's allegations are sufficient to state a claim for what has become essentially THE TORT OF INTENTIONAL INFLICTION OF SERIOUS EMOTIONAL DISTRESS. Plaintiff has alleged that defendant intentionally inflicted mental distress. This tort has been recognized in many states. William Prosser states that liability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a serious kind.'<sup>69</sup>

Justice Brock, after recognizing this tort, found support for it in *Kirby*, specifically relating that plaintiff's physical suffering and subsequent loss of a child born prematurely in *Kirby* was determinative in Chief Justice Stacy's ruling. Justice Brock stated that "damages for fright are recoverable when some physical injury contemporaneously, naturally, and proximately results from the fright caused by a defendant's negligent and wilful misconduct."<sup>70</sup>

Justice Brock cited to other cases that applied *Kirby*, including *Sparks*, *Martin*, *Langford*, *Slaughter*, and *Crews*, noting that

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affirmed the dismissals of the trial court, *Id.* and the supreme court affirmed the court of appeals save the issue of punitive damages for defendant's alleged breach of contract.

67. *Id.* at 199, 254 S.E.2d at 623.

68. *Id.* at 196, 254 S.E.2d at 621 (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)).

69. *Id.* at 196, 254 S.E.2d at 621-22 (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* § 12, p.56 (4th ed. 1971)).

70. *Id.* at 197, 254 S.E.2d at 622 (citing *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936)).

these cases allowed recovery in similar situations.<sup>71</sup> He cites *Kirby* for the proposition that recovery is not limited to physical harm resulting from fright only and that recovery may be based on fright or other emotional disturbance resulting from the defendant's conduct.<sup>72</sup>

Finally, Justice Brock held that plaintiff in *Stanback* sufficiently stated a claim by alleging that she suffered "great mental anguish and anxiety as a result of defendant's allegedly wilful, malicious, and calculated conduct."<sup>73</sup> Furthermore, Justice Brock stated that although a physical injury resulting from the emotional disturbance caused by the conduct of defendant is clearly required, given broad caselaw regarding what actually constitutes physical injury, e.g. *Kimberly*, he found her allegation, that she suffered great mental anguish and anxiety, sufficient to proceed to trial on the issue of whether "great mental anguish and anxiety has caused physical injury."<sup>74</sup>

Therefore, the court in *Stanback* formally recognized the tort of intentional infliction of emotional distress, seemingly aligning itself with not only the national trend but also the majority of jurisdictions.<sup>75</sup> However, in recognizing this tort, the court still retained the element of a contemporaneous or resultant physical injury, therefore denying this tort the independent status which other jurisdictions bestowed upon it.<sup>76</sup>

In the 1981 case *Dickens v. Puryear*,<sup>77</sup> the supreme court gave a definitive reading on the "tort alluded to" in *Stanback*, the intentional infliction of emotional distress. In writing the decision, Justice Exum decided whether physical injury and foreseeability were necessary elements of the intentional infliction of emotional distress.<sup>78</sup> Plaintiff had specifically claimed intentional infliction of emotional distress by the defendants.<sup>79</sup> Plaintiff had showed evidence that defendants lured plaintiff into the countryside, that one defendant had pointed a pistol between plaintiff's eyes, that one defendant directed four other men to leave their hiding spaces and

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71. *Id.* at 197, 254 S.E.2d at 622.

72. *Id.* at 198, 254 S.E.2d at 622.

73. *Id.* at 198, 254 S.E.2d at 623.

74. *Id.* at 198-99, 254 S.E.2d at 623.

75. *Id.* at 198, 254 S.E.2d at 623.

76. *See supra* note 62 and accompanying text.

77. 302 N.C. 437, 276 S.E.2d 325 (1981).

78. *Id.* at 452, 276 S.E.2d at 335.

79. *Id.* at 438, 276 S.E.2d at 327.

that they beat the plaintiff into semi-conscious. They handcuffed the plaintiff and beat him further. One defendant threatened plaintiff with castration while flashing a knife and cutting plaintiff's hair, and that one defendant and the others openly discussed, in front of the plaintiff, whether to kill or castrate him. After two hours, one defendant told the plaintiff "to go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina, otherwise he would be killed."<sup>80</sup> The trial court entered judgment for the defendants and the court of appeals affirmed, on the basis that the one year statute of limitations concerning assault and battery governed plaintiff's cause and that this statute had been violated.<sup>81</sup> Justice Exum held that the defendant's actions up to, but not including, telling the defendant to go home and in essence "get out of town," constituted assault and battery and therefore were governed by the one year statute of limitations.<sup>82</sup> However, with regards to defendant's threats of future action, they did not threaten action in the imminent future, and therefore did not constitute an "assault" as recognized by North Carolina common law.<sup>83</sup> Justice Exum stated in a footnote that the doctrine of "expressio unius est exclusio alterius, meaning the expression of one thing is the exclusion of another" would deny the one-year statute of limitation found in G.S. 1-54(3), concerning "libel, slander, assault, battery, or false imprisonment," from applying to the intentional infliction of emotional distress.<sup>84</sup> He then declared that this tort must therefore be governed by the general three year statute of limitation found in G.S. 1-52(5), which applies to "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated."<sup>85</sup>

Having found that the defendant's threat for the future was not statutorily barred, Justice Exum then definitively stated the

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80. *Id.* at 439. Evidently, the defendant's motive for such treatment of plaintiff concerned the 31 year old plaintiff sharing "sex, alcohol and marijuana" with defendant's 17 year old daughter who had not yet graduated high school at the time of the incident. *Id.*

81. *Id.*

82. *Id.* at 444-45, 276 S.E.2d at 330-31. Thus, Justice Exum therefore affirmed that on the herein described actions for assault and battery, the trial court was correct in applying a one year statute of limitations.

83. *Id.* at 444, 276 S.E.2d at 330 (citing *Hayes v. Lancaster*, 200 N.C. 293, 156 S.E. 530 (1931)).

84. *Id.* at 446, S.E.2d at 330.

85. *Id.*



North Carolina rule for the intentional infliction of emotional distress, and provided analysis of relevant caselaw history.<sup>86</sup> Recognizing that the intentional infliction of emotional distress was “alluded to” in *Stanback*, Justice Exum quoted the RESTATEMENT (SECOND) OF TORTS, as stating that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”<sup>87</sup> The court then stated:

[The] holding in *Stanback* was in accord with the Restatement definition . . . We now reaffirm the holding . . . [t]here is, however, troublesome DICTUM in *Stanback* that plaintiff, to recover for this tort, ‘must show some physical injury resulting from the emotional disturbance caused by defendant’s alleged conduct’ and that the harm she suffered was a ‘foreseeable result.’<sup>88</sup>

Justice Exum stated that not only was the dictum not necessary to the holding but actually conflicted with the holding in certain respects, and that *Stanback* was now disapproved.<sup>89</sup> One conflict in *Stanback*, which Justice Exum asserted in *Dickens*, is that if physical pain is an element within the tort of intentional infliction of emotional distress, why did the court hold that the plaintiff stated a claim for intentional infliction of emotional distress when, as noted, the plaintiff never alleged that she had suffered any physical injury.<sup>90</sup> In regard to *Stanback*, requiring that the harm suffered from the defendant’s actions be foreseeable, Justice Exum, in *Dickens*, stated that the question of foreseeability should not arise in that the actor acts intending to cause emotional distress, or is recklessly indifferent to the likelihood that it may result.<sup>91</sup> In an attempted reconciliation with *Stanback*, Justice Exum wrote in *Dickens*, “[w]e are now satisfied that the DICTUM in *Stanback* arose from our effort to conform the opinion to LANGUAGE in some of our earlier cases the HOLDINGS of which led ultimately to our recognition in *Stanback* of the tort intentional infliction of mental

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86. *Id.* at 446-53, 276 S.E.2d at 332-35.

87. *Id.* at 447, 276 S.E.2d at 332.

88. *Id.* (quoting *Stanback v. Stanback*, 297 N.C. 181, 198, 254 S.E.2d 611, 623 (1979)).

89. *Id.* at 448, 276 S.E.2d at 332.

90. *Id.*

91. *Id.* at 449, 276 S.E.2d at 333.

distress."<sup>92</sup>

The court then goes on to analyze *Stanback's* utilization of caselaw found in *Kirby*, noting that *Kirby* "rightly or wrongly, has been read to require some physical injury in addition to emotional distress."<sup>93</sup> In addition, Justice Exum wrote of the other cases which had relied on *Kirby - Crews, Slaughter, Langford, Martin, and Sparks*, and that while these cases did permit recovery under facts similar to those found in the modern tort of intentional infliction of emotional distress, these cases were still broader in their concept of liability.<sup>94</sup> Standing in contrast to the modern tort, these cases were concerned with permitting recovery for both mental and physical injuries, whether they be intentionally or negligently committed.<sup>95</sup>

Finally, Justice Exum writes:

*Stanback* . . . should not be read as grafting "physical injury" and "foreseeability" on the tort . . . Neither should it be read as grafting . . . this tort on other theories of recovery for mental and emotional distress dealt with in our earlier cases . . . This tort . . . consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other harm which proximately results from the distress itself.<sup>96</sup>

One of the first cases for appellate review concerning the rule of law regarding the intentional infliction of emotional distress reported after *Dickens*, is the 1982 North Carolina Court of Appeals decision in *Morrow v. Kings Dept. Stores, Inc.*<sup>97</sup> In *Morrow*, the plaintiff alleged that after he entered the defendant's store, he purchased several items, including two shirts. After purchasing these items, she attempted to leave said store, but upon approaching the exit, defendant's agent, a security guard, stopped the plaintiff. The agent removed one purchased shirt from a bag in plain-

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92. *Id.*

93. *Id.* at 450, 276 S.E.2d at 334 (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 12, p.59 n.19 (4th ed. 1971)).

94. *Id.* at 450-51, 276 S.E.2d at 334.

95. *Id.*

96. *Id.* at 452-53, 276 S.E.2d at 335.

97. 57 N.C. App. 13, 290 S.E.2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E.2d 210 (1982).

tiff's possession containing the other purchased items, and, that as a result of these acts, the plaintiff suffered severe emotional distress and great embarrassment from the fact that defendant's actions occurred before numerous onlookers, including a friend of the plaintiff's.<sup>98</sup> In response to the defendant's motion for dismissal of plaintiff's cause of action for failure to state a claim upon which relief can be granted, the trial court ruled that while the plaintiff's complaint stated a complaint "for conversion of one shirt," the complaint failed to state a claim "for severe emotional distress and great embarrassment" or for punitive damages.<sup>99</sup> As a result of this finding, the trial court dismissed all requests for relief, except the conversion claim.<sup>100</sup>

Judge Wichard, in affirming the trial court, decided whether plaintiff could recover for emotional distress in an action for conversion.<sup>101</sup> He wrote that while:

[c]ases involving recovery for mental anguish in connection with an action for conversion of personal property are collectible<sup>102</sup> . . . [and that] several jurisdictions allow such recovery, especially when the conversion involves malice or insult<sup>103</sup> . . . [i]t appears that absent malice, wantonness, or other aggravating circumstances, this jurisdiction does not allow recovery for mental anguish in such actions.<sup>104</sup>

Justice Wichard then stated that since the complaint did not assert explicitly nor implicitly allegations of malice, wantonness, or other aggravating circumstance, it fails to state the substantive elements to recover for the intentional infliction of emotional distress.<sup>105</sup> Next, Justice Wichard responded to plaintiff's assertion that his complaint is sufficient to allow recovery for emotional distress under the theory of the intentional infliction of emotional distress.<sup>106</sup> Responding to this contention, the court cited to *Stanback*. Justice Wichard stated that while this jurisdiction recognized

98. *Id.* at 14-16, 290 S.E.2d at 733-34.

99. *Id.* at 15, 290 S.E.2d at 734.

100. *Id.* at 16.

101. *Id.* at 17-18, 290 S.E.2d at 735.

102. *Id.* (citing 28 A.L.R.2d 1070, § 7 (1953)).

103. *Id.* at 18, 290 S.E.2d at 735.

104. *Id.* (citing *Chappell v. Ellis*, 123 N.C. 259, 31 S.E. 709 (1898)).

105. *Id.* at 19, 290 S.E.2d at 736.

106. *Id.* Justice Wichard additionally refuted plaintiff's contention that the complaint was sufficient to recover emotional distress under the legal theories of assault, battery, slander and invasion of privacy. *Id.*

the tort of intentional infliction of emotional distress in *Stanback*, *Stanback's* plaintiff alleged that the

defendant's conduct . . . was wilful, malicious, calculated, deliberate, and purposeful; that defendant acted recklessly and irresponsibly with full knowledge of the consequences which would result; and that plaintiff suffered great mental anguish and anxiety as a result<sup>107</sup> . . . Here, by contrast, no such allegations appear. Plaintiff alleged only that she suffered severe emotional distress and great embarrassment. She alleged nothing regarding the intent of defendant's agent or his knowledge of consequences resultant upon his conduct.<sup>108</sup>

Justice Wichard then stated that the plaintiff failed to allege a claim for damages for intentional infliction of emotional distress. The complaint failed to satisfy the elementary requirements of the tort and left to "conjecture that which must be stated."<sup>109</sup>

In *Woodruff v. Miller*,<sup>110</sup> a 1983 decision, Judge Phillips of the court of appeals cited to *Dickens* to decided the issue of whether defendant's conduct in evidence established all the evidence of intentional infliction of emotional distress. The plaintiff showed evidence that the defendant obtained 30 year old court documents relating to a college prank which plaintiff participated in and was indicted in Orange County, for aiding and abetting a service station break in. These documents constituted copies of the warrant, bond, preliminary hearing order, indictment and prayer for judgment continued, requiring plaintiff to pay the costs and periodically report his good behavior. Other allegations were that the defendant held ill feelings towards the plaintiff derived from two bitterly contested lawsuits between them. The defendant posted a copy of these documents on the post office bulletin board normally reserved for unapprehended criminals, and alongside such "Wanted Posters." The defendant indicated to the postmaster that

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107. *Id.* at 21-22, 290 S.E.2d at 737 (quoting *Stanback v. Stanback*, 297 N.C. 181, 198, 254 S.E.2d 611, 622-23 (1979)).

108. *Id.* at 22, 290 S.E.2d at 737.

109. *Id.* (quoting *United Leasing Corp. v. Miller*, 45 N.C.App. 400, 405-06, 263 S.E.2d 313, 317, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980)). "A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim." *Id.* at 17, 290 S.E.2d at 735 (quoting *Leasing Corp.*, 45 N.C. App. at 405, 263 S.E.2d at 317).

110. 64 N.C.App. 364, 307 S.E.2d 176 (1983).

the defendant had a right to post such documentation since "the rogue is stealing and I intend to put a stop to it." When the Postmaster disputed defendant's right to post such, the defendant replied that since posters were put up for the federal government regarding persons stealing, then a "Wanted" poster should be put up for the defendant. The plaintiff alleged that the defendant showed the documents to one of the county's leading citizens, and the defendant posted the documents in and around plaintiff's place of employment, Alleghany High School, the plaintiff, upon learning of these occurrences, was anxious, humiliated, embarrassed, and could not sleep. He had pancreatic bleeding from a long standing pancreatic condition which is caused by stress. The defendant, upon learning of plaintiff's debilitating condition, indicated a justification for the defendant's actions.<sup>111</sup>

In reversing the trial court's j.n.o.v. for the defendant, Judge Phillips found for the plaintiff regarding the issue of whether plaintiff had established all of the elements of intentional infliction of emotional distress.<sup>112</sup> Judge Phillips stated that j.n.o.v. should only be entered for the defendant as against the plaintiff when the essential elements of the alleged claim are not established by the evidence when viewed in its most favorable light to such plaintiff.<sup>113</sup> He then gave the *Dickens* rule regarding the requisite evidentiary showing of the intentional infliction of emotional distress: (1) extreme and outrageous conduct, (2) which is intended to cause severe emotional distress, and (3) does cause severe emotional distress.<sup>114</sup> He goes on to state the following regarding the defendant's intentions and conduct:

[t]hat defendant's conduct . . . was intended to cause plaintiff severe mental distress and in fact did so is so obviously inferable, it need not be discussed; and that defendant's conduct was extreme and outrageous is equally plain . . . [f]ortunate it is for our people and society that such maliciously destructive and disruptive conduct is regarded as extreme and outrageous . . . and that our law provides an orderly way for the community to disapprove of it

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111. *Id.* at 364-65, 307 S.E.2d at 177. Plaintiff for the previous seventeen years was the superintendent of the Alleghany County School system and for many years before that a teacher and high school principal. *Id.*

112. *Id.* at 366, 307 S.E.2d at 178.

113. *Id.* (citing *Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981)).

114. *Id.* at 366, 307 S.E.2d at 178 (citing *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)).

and compensate those victimized by it.<sup>115</sup>

In *Briggs v. Rosenthal*,<sup>116</sup> a 1985 North Carolina Court of Appeals case, Judge Parker decided the issue of whether the trial court committed reversible error in dismissing the plaintiff's complaint following defendant's 12(b)(6) motion. The plaintiff's complaint alleged that the defendant Rosenthal wrote an article regarding the plaintiff's son, Warren Briggs, Jr., who had died recently in an automobile accident, and that the defendant Sun Publishing Co. had published the article, entitled "Saying Goodbye to Warren" in a magazine periodical. The article described Warren in an unpleasant and insulting manner calculated to cause outrage. The plaintiff alleged that the article was published in an irresponsible and reckless manner, and the defendants, knew or should have known the article would cause plaintiff's great pain and suffering. The plaintiffs suffered and continue to suffer severe anguish and emotional distress after reading said article. The article read in part:

[s]trangers usually dislike him [Warren] when he was drinking, which was alot of the time . . . He didn't do very well with responsibility . . . Warren was a pain in the ass but he was evidence that we exist . . . But when you figured that out, what did you do with Warren? Dismiss him? Feel sorry for him? Call him a drunk and avoid him? . . . He was confused but so are we . . . the things he kept were wonderful- his spirit, his insistence that boredom was the enemy, his refusal to be false, or dishonest. He was a fool indeed but he was God's fool . . .<sup>117</sup>

In affirming the trial judge, Judge Parker stated that even though *Dickens* recognizes intentional infliction of emotional distress, this case is one of first impression regarding the publication of an article.<sup>118</sup> Judge Parker held that it is a question for the court as a matter of law regarding whether intentional infliction of emotional distress arising out of publication may be "reasonably so regarded as extreme and outrageous," and if so, it then is a decision for the jury regarding whether the defendant's conduct was extreme and outrageous.<sup>119</sup> Regarding the sufficiency of outrageous-

115. *Id.* at 366-67, 307 S.E.2d at 178.

116. 73 N.C. App. 672, 675, 327 S.E.2d 308, 310, *disc. rev. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985).

117. *Id.* at 672-74, 327 S.E.2d at 309-10.

118. *Id.* at 676, 327 S.E.2d at 311.

119. *Id.*

ness, he quotes the RESTATEMENT (SECOND) OF TORTS, as follows:

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities . . . plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion . . .<sup>120</sup>

In finding that the defendant's conduct did not reach the necessary level of extreme and outrageous conduct sufficient to preclude a 12(b)(6) motion, Judge Parker stated that the publication of the article was not directed towards the defendants, that the magazine was intended for the public, that the plaintiff's son was the subject of the article, not the plaintiff, and that there was no physical act committed against the plaintiff's son.<sup>121</sup> Citing to Prosser and Keeton for support, Judge Parker stated, "recovery to third parties 'is clearly limited to the most extreme cases of violent attack, where there is some especial likelihood of fright or shock.'"<sup>122</sup>

In the 1985 case of *Beasley v. National Savings Life Insurance Company*,<sup>123</sup> the court of appeals once again decided whether the trial court properly granted defendant's motion under Rule 12(b)(6). The plaintiff alleged in his complaint for intentional infliction of emotional distress that the defendant issued a hospital insurance contract covering plaintiff for medical and hospital expenses. The plaintiff paid premiums owed under the contract and the plaintiff subsequently suffered a heart attack. The plaintiff was hospitalized and incurred medical expenses in excess of \$10,000. The plaintiff made a claim for benefits under the contract. The defendant denied plaintiff benefits under the contract. The plaintiff alleged that the defendant contractually owed to the plaintiff the duty to act in good faith and to deal fairly and that defendant violated its covenant of good faith and fair dealing to the plaintiff when defendant failed to pay. The plaintiff alleged that, in withholding payment, the defendant acted unreasonably and in bad faith, and that the defendant committed fraud as against the

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120. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

121. *Id.* at 677-78, 327 S.E.2d at 312.

122. *Id.*

123. 75 N.C. App. 104, 330 S.E.2d 207 (1985).

plaintiff.<sup>124</sup> Judge Parker cited to the *Dickens* rule to hold that plaintiff's attempt to plead the intentional infliction of emotional distress was fatally defective, in that defendant's actions as alleged clearly are insufficient to establish the requisite intent.<sup>125</sup>

The year 1986 found the court of appeals deciding two other cases regarding the intentional infliction of emotional distress. In *Trought v. Richardson*,<sup>126</sup> Judge Webb decided the issue of whether the trial court properly granted defendant's motion under Rule 12(b)(6) regarding the intentional infliction of emotional distress. The plaintiff alleged that the defendant-employer, upon notifying plaintiff of plaintiff's discharge from employment at Pitt County Memorial Hospital, met with several employee groups of the hospital and told them that the defendant had been discharged for "lack of credibility." The plaintiff claimed that the defendant knew that plaintiff's standing in the nursing profession and her job were the most important aspects of plaintiff's life, and that the wrongful discharge, in addition to the slanderous communication, displayed "reckless disregard to the likelihood that it would cause severe emotional distress to the plaintiff."<sup>127</sup>

Judge Webb held that the trial court committed no error regarding the dismissal of the intentional infliction of emotional distress claim.<sup>128</sup> Citing the *Dickens* rule, in addition to *Stanback*, he stated that the defendant's conduct did not reach to the level of "extreme and outrageous conduct" or conduct which "exceeds all bounds usually tolerated by decent society."<sup>129</sup>

In *Hogan v. Forsyth Country Club Company*,<sup>130</sup> the court of appeals decided the first intentional infliction of emotional distress claim arising from an alleged employer's sexual harassment. The plaintiffs' complaint alleged that plaintiff Cornatzer, while em-

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124. *Id.*

125. *Id.* at 109, 330 S.E.2d at 210 (quoting *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)). Judge Parker distinguished *Stanback*, the one case on record recognizing intentional infliction of emotional distress in conjunction with breach of contract, on the personal nature of *Stanback's* contract, a marital separation agreement, as opposed to the instant case's insurance contract.

126. 78 N.C. App. 578, 338 S.E.2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1985).

127. *Trought*, 78 N.C. App. at 760, 338 S.E.2d at 618, *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1985).

128. *Id.* at 763, 338 S.E.2d at 620.

129. *Id.*

130. 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).



ployed by defendant, was shouted at by the defendant's agent (the club's chef). The verbal abuse was profane, and he interfered with her duties. The defendant's agent threatened her, made sexually derogative comments about her and caused her to fear bodily harm.<sup>131</sup> Furthermore, plaintiff Cornatzer alleged that she complained to defendant's principle agent (the club's manager), that the club manager made no attempt to prevent plaintiff's harassment, that the club manager retained the chef and she was wrongfully discharged as a result of her complaints against the chef.<sup>132</sup>

Plaintiff Hogan alleged that while employed as the manager of the defendant's dining room, the chef harassed her by shouting profanities at her, that he interfered with employees under her supervision, that he threatened her and threw objects at her.<sup>133</sup> Furthermore, plaintiff Hogan alleged that, like plaintiff Cornatzer, she complained to the defendant's management, but once again, no action was taken by the defendant and that she was terminated for the same reasons as plaintiff Cornatzer, wrongfully and in retaliation for complaints against the chef.<sup>134</sup>

Plaintiff Mitchell contended a similar factual allegation in comparison to plaintiffs Cornatzer and Hogan. She alleged that, while employed by the defendant, she became pregnant, and that she requested and was denied a leave of absence. The club manager harassed her by requiring her to perform tasks which she was physically unable to accomplish, and that when she experienced labor pains, she requested to leave work, was subsequently denied permission, but departed anyway and as a result was terminated.<sup>135</sup> All three plaintiffs requested relief for the intentional infliction of emotional distress.<sup>136</sup>

Judge Martin first decided the issue of whether the exclusive remedies provision of the Workers' Compensation Act, G.S. 97-10.1 acted to bar the plaintiff's claims.<sup>137</sup> Acknowledging that this issue was one of first impression, Judge Martin stated that the Act "does not bar a common law action by an employee against his employer for the intentional conduct of the employer."<sup>138</sup> Judge Martin dis-

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131. *Id.* at 485-86, 340 S.E.2d at 118.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 488, 340 S.E.2d at 120.

138. *Id.*

tinguished case law in *Andrews v. Peters*<sup>139</sup> and *Daniels v. Swofford*,<sup>140</sup> case law which if found dispositive could be argued to preclude the plaintiffs' claim via the exclusive remedies provision. Judge Martin stated that:

[t]he intentional conduct involved in *Andrews* and *Daniels* was assaultive conduct for which damages were sought for physical injuries. In the present case, plaintiffs allege severe emotional distress; they do not allege any physical or mental illness nor do they allege employment disability or loss of earning capacity resulting from their emotional distress.<sup>141</sup>

Judge Martin then states that since the purpose of the Act is to furnish compensation for loss of wage earning capacity, and no loss of earnings capacity is alleged here, then plaintiff's claims are not compensable under the Act but are still recoverable in a civil action.<sup>142</sup> Quoting with approval from Larson in *THE LAW OF WORKMEN'S COMPENSATION*, Judge Martin then discusses non-physical injury torts as follows:

[w]hen no compensation is available, these tort actions fall squarely within the broad class of cases . . . which do not come within the fundamental coverage pattern of the Act<sup>143</sup> . . . If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort . . . the suit should not be barred.<sup>144</sup>

Holding that the intentional infliction of emotional distress as alleged by the plaintiffs was not barred by the Act's exclusivity provision, Judge Martin stated in support of that decision that "[t]he essence of the tort of intentional infliction of emotional distress is

139. 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982). Judge Martin cited to *Andrews*, stating that "an employee is not barred by the Act from bringing a common law action against a co-employee for intentional conduct even though the reverse is true for negligent conduct on the part of the co-employee." *Hogan*, 79 N.C. App. at 488, 340 S.E.2d at 120.

140. 55 N.C.App. 555, 286 S.E.2d 582 (1982). Judge Martin cited to both *Andrews* and *Daniels* for the proposition that "the Act bars any common law action by an employee against his employer for the intentional conduct of a co-employee, unless the co-employee was acting as an alter ego of the employer." *Hogan*, 79 N.C. App. at 488, 340 S.E.2d at 120.

141. *Hogan*, 79 N.C. App. at 488-89, 340 S.E.2d at 120.

142. *Id.*

143. *Id.* (quoting 2A LARSON, *THE LAW OF WORKMAN'S COMPENSATION* § 68.30 (1983)).

144. *Id.* at 489, 340 S.E.2d at 120 (quoting LARSON at § 68).

non-physical; the injuries alleged by plaintiff's do not involve physical injuries resulting in disability."<sup>145</sup>

Regarding plaintiff Cornatzer's allegations of blatant sexual harassment by the defendant's agent,<sup>146</sup> Judge Martin stated that plaintiff Cornatzer's forecast of evidence showed an "irrefutable" level of outrageous conduct sufficient as a matter of law for the jury to hear the allegation of intentional infliction of emotional distress as against the chef.<sup>147</sup> Defendant, in an attempt to counter any liability for the chef's actions, stated that the actions were not committed for any work related purpose.<sup>148</sup> Although agreeing with the defendant that the chef's actions were not within the scope of his employment or in the furtherance of any purpose of the defendant and that it appeared that the actions were simply the chef's own corrupt or lascivious pursuit, Judge Martin stated that the doctrine of respondeat superior could still hold the defendant liable for the chef's actions if it is found that his actions were ratified by the defendant.<sup>149</sup> Recounting that plaintiff Cornatzer alleged that she notified the manager of the defendant's club of the chef's actions and that the manager did nothing to prohibit any further outrageous conduct, it could be imputed that the defendant ratified the chef's conduct, thus raising a jury question as to whether the defendant should be held liable.<sup>150</sup> Thus, Judge Martin held that the trial court was in error regarding the dismissal of

145. *Id.* at 490, 340 S.E.2d at 121.

146. *Id.* Judge Martin recounted the plaintiff's statements recorded in both her pretrial affidavits and depositions, showing that the chef:

made sexually suggestive remarks to her while she was working, coaxing her to have sex with him and telling her that he wanted to 'take' her. He would brush up against her, rub his penis against her buttocks, and touch her buttocks with his hands. When she refused his advances, he screamed profane names at her, threatened her with bodily injury, and on one occasion, advanced toward her with a knife and slammed it down on a table in front of her.

*Id.*

147. *Id.* at 491, 340 S.E.2d at 121.

148. *Id.*

149. *Id.* (citing *Snow v. DeButts*, 212 N.C. 120, 193 S.E. 224 (1937), for the general rule that the principal may be liable for the torts of his agent in three situations:

- 1) the principal expressly authorizes the agent's actions;
- 2) the agent's actions are committed within the scope of his employment and in furtherance of his employment; or
- 3) the principal ratifies the agent's actions).

150. *Id.* at 492-93, 340 S.E.2d at 122.

plaintiff Cornatzer's complaint pursuant to Rule 12(b)(6).<sup>151</sup>

Regarding plaintiffs Hogan's and Mitchell's claims of intentional infliction of emotional, Judge Martin affirmed their dismissals by stating:

[w]hile we do not condone Pfeiffer's [the chef's] intemperate conduct [towards Hogan, which consisted of screaming and shouting at her, calling her names, throwing menus at her, and interfering with her supervision of waitresses under her charge], neither do we believe that his alleged acts 'exceed all bounds usually tolerated by a decent society' so as to satisfy the first element of the tort, requiring a showing of 'extreme and outrageous conduct.'

Mitchell's evidence, if accepted as true by the jury, would show that Brennan [a club manager] refused to grant her a pregnancy leave of absence, directed her to carry objects such as trash bags, vacuum cleaners, and bundles of linen weighing more than 10 pounds. He cursed at her on one occasion. When she requested . . . to leave work to go to the hospital, Brennan refused . . . When she left without his permission, he terminated her from employment . . . Brennan's alleged conduct, though unjustified under the circumstances apparent from Mitchell's testimony, was not so 'extreme and outrageous' as to give rise to a claim for intentional infliction of mental or emotional distress.<sup>152</sup>

In 1987, the court of appeals decided the issue of whether an attorney who sends a letter of demand, in anticipation of litigation, along with a proposed complaint detailing the basis of the claim, to an adverse party may be deemed sufficiently extreme and outrageous so as to support a claim of intentional infliction of emotional distress, in *Harris v. NCNB National Bank of North Carolina*,<sup>153</sup> Judge Martin held that:

[w]hether or not the conduct complained of may reasonably be regarded as 'extreme and outrageous' is initially a question of law for the court . . . [therefore] [w]e conclude that the acts of a defendant in sending a letter of demand to an adverse party in anticipation of litigation together with a proposed complaint setting for the basis of its claim may not be reasonably regarded as extreme and outrageous conduct sufficient to support a claim for

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151. *Id.*

152. *Id.* at 493-94, 340 S.E.2d at 122-23 (citations omitted).

153. 85 N.C. App. 669, 676, 355 S.E.2d 838, 844 (1987) (citing *Briggs v. Rosenthal*, 73 N.C. App. 627, 327 S.E.2d 308, *disc. rev. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985)).

intentional infliction of mental distress.<sup>154</sup>

In *Burton v. NNCB National Bank of North Carolina*,<sup>155</sup> the court of appeals decided whether a statement made by a bank's attorney that the bank was considering the pursuit of a criminal prosecution against an alleged guarantor for filing an inaccurate financial statement was sufficiently extreme and outrageous to support a claim of intentional infliction of emotional distress. At the time of the alleged tortious statement the plaintiff and the bank-defendant were parties in an action brought by the bank-defendant to recover a debt guaranteed by the plaintiff.<sup>156</sup> Judge Greene wrote:

[I]f the court determines that the statement may be reasonably regarded as extreme and outrageous, then it is for the jury to determine whether, under the facts of a particular case, the defendant's conduct in making the statement was in fact extreme and outrageous . . . [w]e find as a matter of law that the statement was not extreme and outrageous conduct.<sup>157</sup>

In the 1987, court of appeal's case *McKnight v. Simpson's Beauty Supply, Inc.*,<sup>158</sup> Judge Phillips decided whether a cause of action exists in intentional infliction of emotional distress when an employer discharges an employee abruptly, without cause or explanation. Judge Phillips held that the allegation did not sufficiently support the first element of the tort, as contemplated by *Dickens* and that the dismissal was not sufficiently outrageous, although it was enough for a breach of contract claim.<sup>159</sup>

In *Stack v. Mecklenburg County*,<sup>160</sup> another 1987 court of appeals Case, Judge Eagles decided whether a plaintiff employee, who was raped by a resident of one of the defendant employer's group homes, could recover under intentional infliction of emotional distress and not be precluded by the Workers' Compensa-

154. *Id.* at 676, 355 S.E.2d at 844. Judge Martin cited, in support of his decision, the *Dickens* rule, in addition to *Stanback's* characterization of "extreme and outrageous conduct" as being conduct which "exceeds all bounds usually tolerated by decent society." *Id.*

155. 85 N.C. App. 702, 355 S.E.2d 800 (1987).

156. *Id.* at 706, 355 S.E.2d at 803.

157. *Id.*

158. 86 N.C. App. 451, 454, 358 S.E.2d 107, 109 (1987).

159. *Id.* at 454, 358 S.E.2d at 109-10.

160. 86 N.C. App. 550, 359 S.E.2d 16, *disc. rev. denied*, 321 N.C. 121, 361 S.E.2d 597 (1987).

tion Act's exclusivity provision. Judge Eagles stated that, while the court of appeals in *Hogan* recognized that a claim of intentional infliction of emotional distress is not barred by the Workers' Compensation Act's exclusivity provision, the plaintiff failed to allege the requisite defendant's intent to inflict emotional distress upon the plaintiff as required by *Dickens*.<sup>160</sup> Hence, Judge Eagles affirmed the trial court's dismissal of the plaintiff's claim for failure to state a claim.<sup>161</sup>

The supreme court revisited the issue of tortious intentional infliction of emotional distress in the 1988 case *West v. King's Department Store, Inc.*<sup>162</sup> The supreme court held that the trial court committed error in directing a verdict for the defendant regarding the issue of whether the defendant intentionally inflicted emotional distress upon the plaintiff.<sup>163</sup> Justice Frye stated that the plaintiffs' evidence tended to show that the plaintiffs (husband and wife) along with their three children and plaintiff-husband's mother were shopping at defendant's store, that plaintiff-husband decided to purchase a pair of dolly hand trucks, that they purchased the hand trucks and a cashier gave plaintiff-wife a receipt and that plaintiff-wife and her mother-in-law took the hand truck's to the parking lot and locked them in their car, a Ford Bronco. They soon realized that the store was paging them as owners of a Ford Bronco, upon responding to the page, the plaintiff-husband was accused by the store manager of stealing merchandise. The evidence showed that the manager threatened the plaintiff-husband with arrest if he did not return the goods. The plaintiff-husband denied stealing anything and showed the manager his receipt for the hand trucks. The manager disregarded the receipts, saying that the hand trucks had not been for sale. The plaintiff-husband pleaded with the manager not to arrest him, but the manager continued to accuse the plaintiff-husband of stealing, while a small number of customers surrounded the accused and the accuser. The manager spotted the plaintiff-wife and accused her of stealing, despite her protests to the contrary. The cashier was offered as verification regarding the purchase, but the manager refused to listen. The plaintiffs finally left the store, after some seventy five minutes of this confrontation had taken place. The

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160. *Id.* at 555, 359 S.E.2d at 19.

161. *Id.*

162. 321 N.C. 698, 365 S.E.2d at 621 (1988).

163. *Id.* at 706, 365 S.E.2d at 626.

plaintiffs' last memory of this confrontation was the manager's reminder that they could be arrested for larceny anytime within the next year.<sup>164</sup> Justice Frye cited to *Stanback* and *Dickens* for support, when he stated that the "extreme and outrageous conduct of the store manager" was "manifest."<sup>165</sup> The court continued to explain that the store manager's "unrelenting attack, in the face of explanation, was both extreme and reckless under the circumstances. Since the intentional element of this tort may be accomplished through reckless behavior, we find this evidence sufficient to sustain a *prima facie* case of intentional infliction of emotional distress."<sup>166</sup>

Spoken words were the crux of the decision in *Troxler v. Charter Mandala Center, Inc.*<sup>167</sup> regarding the issue of whether defendant's conduct as alleged by the plaintiff could, as a matter of law, be reasonably regarded as extreme and outrageous in order for the plaintiff's claim of intentional infliction of emotional distress to be able to survive defendant's motion for summary judgement. The plaintiff alleged in this 1988 court of appeals case, that the statements made by defendants' employees that plaintiff, while employed as a mental health worker, had sexual relations with a minor female patient at defendant's hospital and the alleged manner in which they were communicated caused an intentional infliction of emotional distress.<sup>168</sup>

Stating that the record was entirely devoid as to any evidence of outrageous conduct on the part of the defendants' employees, Judge Smith held that the defendant's administrator, upon receiving information regarding a minor-patient's sexual abuse, acted properly in investigating these statements and reporting them to protective services, and that all of the people with whom he spoke were part of that proper investigative process. Therefore, trial court acted property in granting defendant's motion for summary judgment.<sup>169</sup>

*Matthews v. Johnson Publishing Co., Inc.*,<sup>170</sup> again found the

164. *Id.* at 699-01, 365 S.E.2d at 622-23.

165. *Id.* at 704-05, 365 S.E.2d at 625.

166. *Id.* at 706, 365 S.E.2d at 626.

167. 89 N.C. App. 268, 365 S.E.2d 665, *disc. rev. denied*, 322 N.C. 838, 371 S.E.2d 284 (1988).

168. *Id.* at 274, 365 S.E.2d at 669.

169. *Id.*

170. 89 N.C. App. 522, 366 S.E.2d 525, *disc. rev. denied*, 322 N.C. 836, 371 S.E.2d 284 (1988).

court of appeals deciding whether an intentional infliction of emotional distress claim was dismissed in error. However, this suit complained of an omission, unlike *Brigg's* allegedly tortious commission.<sup>171</sup> The plaintiff alleged that the defendant intentionally and negligently failed to include the plaintiff's contributions to the sit-in movement of the 1960's in its publication, *Ebony* magazine. The plaintiff alleged that the defendant conspired with the National Association of Colored People (NAACP) and certain mayors and Board of Alderman of Winston-Salem, North Carolina, to suppress and prevent any recognition due the plaintiff from said sit-ins and that the defendant's negligent and conspiratorial conduct resulted in plaintiff's severe emotional distress.<sup>172</sup>

Judge Smith stated that the majority of plaintiff's claims, which accrued between the years 1960 up to, but not including, 1985, were barred by the statute of limitations.<sup>173</sup> However, he did find that defendant's claims which arose from being omitted from the defendant's 1985 publication of *Ebony* magazine's fortieth anniversary issue were not statutorily barred.<sup>174</sup> However, Judge Smith stated there was no act alleged by the plaintiff that was sufficient to satisfy the *Dickens* rule. Therefore, defendant's 12(b)(6) motion to dismiss for plaintiff's failure to state a cause of action was properly granted.<sup>175</sup>

In *Hagel v. Blue Cross & Blue Shield of North Carolina*,<sup>176</sup> the court faced the issue of whether the plaintiff alleged sufficient facts to defeat a Rule 12(b)(6) motion by defendant against the plaintiff's claim of wilful and intentional infliction of emotional distress. Plaintiff asserted that defendant refused to pay under an insurance policy for the cost of private nursing rendered to plaintiff's now-deceased spouse, and that the defendant knew of plaintiff's vulnerable physical and mental condition when it refused to pay.<sup>177</sup> Citing to *Beasley* in support, Judge Smith held that plaintiff's complaint failed, in that it did not allege that defendant demonstrated "calculated intentional conduct causing emotional distress directed toward [plaintiff.]"<sup>178</sup>

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171. *Id.*

172. *Id.* at 523, 366 S.E.2d at 525.

173. *Id.* at 524, 366 S.E.2d at 526.

174. *Id.*

175. *Id.*

176. 91 N.C. App. 58, 370 S.E.2d 695 (1988).

177. *Id.*

178. *Id.* at 63, 370 S.E.2d at 700 (quoting *Beasley v. National Sav. Life Ins.*



*Hill v. City of Kinston*,<sup>179</sup> found the North Carolina Court of Appeals deciding whether the defendant's conduct, as alleged, was sufficiently extreme and outrageous so as to withstand a motion for summary judgment as against the complaint of intentional infliction of emotional distress. The plaintiff, a lieutenant with the Kinston Police Department, had been terminated from that position following a Board of Inquiry's investigation concerning the officer's indictment for possessing and receiving stolen goods.<sup>180</sup> The plaintiff claimed that the Police Chief prepared the disposition of plaintiff's appeal of the Board's decision before a personnel board actually upheld the Board of Inquiry's decision.<sup>181</sup> The plaintiff's complaint alleged both wrongful dismissal and the intentional infliction of emotional distress. The trial court granted the defendant's motion for summary judgment.<sup>182</sup>

Judge Wells, stating that "[a] defendant is entitled to summary judgment if he shows that the plaintiff cannot prove one or more essential elements of his claim."<sup>183</sup> He also cited to the decision in *Hogan*, in which the treatment afforded two out of the three plaintiff's, while pugnacious in content, did not "exceed all bounds usually tolerated by a decent society," which caused these plaintiffs' claims of emotional distress to be defeated by summary judgment.<sup>184</sup> Judge Wells affirmed the trial court's entry of summary judgment in this case, holding that "the process of plaintiff's dismissal was carried out in a responsible manner"<sup>185</sup> . . . the fore-

Co., 75 N.C. App 104, 110, 330 S.E.2d 207, 210 (1985)).

179. 92 N.C. App. 375, 374 S.E.2d 425 (1988).

180. *Id.* The record showed that the officer had learned of a robbery on November 19, 1988, in which several kerosene heaters were stolen; that on the following day, the officer visited a police informant who offered to sell the officer the above-referenced items; and that the officer purchased the goods, only asking the informant whether the heaters were his, but not where he obtained them. *Id.* Plaintiff's indictment for receiving stolen goods were later dismissed; although the Board of Inquiry still recommended termination. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 376-77, 374 S.E.2d at 426 (citing *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)).

184. *Id.* at 377, 374 S.E.2d at 426.

185. *Id.* Judge Wells wrote regarding the forecast of evidence that:

[f]ollowing his suspension plaintiff's actions and conduct were investigated and heard by a duly constituted Board of Inquiry, which recommended his dismissal. Acting upon the recommendation, defendant Haigler [the police chief] then notified plaintiff of his dismissal. Plaintiff then appealed to the city manager, who upheld Haigler's decision. Plain-

cast of evidence shows no extreme or outrageous conduct on the part of defendants, an essential element of the tort of intentional infliction of emotional distress."<sup>186</sup>

In *Edwards v. Advo Systems, Inc.*,<sup>187</sup> the court of appeals decided whether defendant's filing of counterclaims against a plaintiff in a prior action can reasonably be regarded as extreme and outrageous conduct sufficient to withstand defendant's motion for summary judgment. The plaintiff's complaint alleged that defendant's counterclaims in the prior action lacked any foundation in the law or fact and were brought simply for the purpose of intimidating the plaintiff.<sup>188</sup>

Judge Eagles cited to the *Dickens* rule regarding the three elements of intentional infliction of emotional distress, and, quoting *Dickens*, included the "reckless" prong when he wrote that the "[t]he tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress."<sup>189</sup> However, whether one looked at the claimed tortious action from either a purely intentional view, or one of recklessness, Judge Eagles still found that the plaintiff's claim could not survive a motion for summary judgment.<sup>190</sup> He stated that the "defendants' act of filing counterclaims against plaintiff may not be reasonably regarded as extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress."<sup>191</sup>

Judge Eagles revisited the issue of intentional infliction of emotional distress in 1989, when he authored the decision of *Leake v. Sunbelt Ltd. of Raleigh*.<sup>192</sup> The complaint in that case alleged

tiff then appealed to the Personnel Board of the City Council, which upheld his dismissal.

*Id.*

186. *Id.*

187. 93 N.C. App. 154, 376 S.E.2d 765 (1989), *overruled on other grounds*, *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

188. *Id.* at 155, 376 S.E.2d at 766. The prior action concerned the plaintiff suing the defendant for lost sales commission. *Id.* The defendant's counterclaim, at issue here, was that the plaintiff's negligence in handling certain sales accounts caused the defendant damages. *Id.*

189. *Id.* at 157, 376 S.E.2d at 767.

190. *Id.*

191. *Id.*

192. 93 N.C. App. 199, 377 S.E.2d 285, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989).

fraud, unfair and deceptive trade practices, and intentional infliction of emotional distress regarding the sale of townhouses to plaintiffs by the agents of the corporate defendant.<sup>193</sup> The alleged facts were that the agents of the defendant induced the plaintiffs to buy townhouses in a "planned solar townhome community." The plaintiffs each bought a townhouse and a large stand of trees was located within 50 feet. The trees were a major reason for the purchasing decision for the privacy that they afforded. A defendant-officer of the defendant corporation told one of his agent-sales representatives that the trees would make it easier to market these particular townhouses. Soon after the plaintiffs bought their townhouses, they learned that a highway was being built within 50 feet of their lots resulting in the trees being bulldozed.<sup>194</sup>

Judge Eagles noted that in *Dickens*, the supreme court stated that through a motion for summary judgment the plaintiff could be forced to produce a forecast of evidence that would show that plaintiff could make a *prima facie* case at trial.<sup>195</sup> This being the case, Judge Eagles held that nothing in the record would support the requisite evidentiary showing, as required by *Dickens*, that the defendants intended to cause emotional distress, thus affirming the trial court's order of the summary judgment in the defendant's favor with regard to the issue of intentional infliction of emotional distress.<sup>196</sup> The court did not, however, expressly analyze the record with reference to the "reckless" prong as it did in *Edwards*.<sup>197</sup>

In *Mullis v. The Pantry, Inc.*,<sup>198</sup> a 1989 court of appeals decision, under review once more was a complaint which alleged a combination of wrongful discharge and the intentional infliction of emotional distress. The plaintiff's own deposition showed that at no time was she discharged from her job as a manager of one of defendant's convenience stores. Her district manager only told her that she would no longer be manager at that store, that she would be put on a vacation for one week and then transferred to another store. Other conversations were had by plaintiff with other corporate agents of the defendant disclosing that she would be transferred to another store in another district. She was contacted by

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193. *Id.*

194. *Id.* at 200, 377 S.E.2d at 286.

195. *Id.* at 205-06, 377 S.E.2d at 289.

196. *Id.* at 205, 377 S.E.2d at 289.

197. *Id.*; See *supra* text accompanying note 187.

198. 93 N.C. App. 591, 378 S.E.2d 578, *disc. rev. denied*, 325 N.C. 272, 384 S.E.2d 517 (1989).

her zone manager and asked if she would transfer to another store within the same town as her original store. Each time plaintiff answered defendant's queries with a reply that she would only return to her original store. Soon after these and some further negotiations, it came apparent that plaintiff would only return to her original store.<sup>199</sup>

After affirming the trial court's grant of summary judgment for the defendant on the claim of wrongful discharge as a matter of law, Chief Judge Hedrick held that:

We have carefully examined plaintiff's allegations regarding her claim for intentional infliction of emotional distress. We hold that no construction of the forecast of evidence gives rise to an issue as to whether defendant's conduct was intended to inflict emotional distress or was done with reckless indifference to the likelihood that emotional distress may result. Summary judgment for defendant on this claim, like the other, is affirmed.<sup>200</sup>

In support of this decision, Chief Judge Hedrick cited to *Stanback* wherein the supreme court stated that liability arises under this tort when a defendant's "conduct exceeds all bounds usually tolerated by decent society," and, the conduct "causes mental distress of a very serious kind."<sup>201</sup> The court also cited as support the now perfunctory *Dickens* rule.<sup>202</sup>

In *Murray v. A.A. Justice*,<sup>203</sup> a 1989 court of appeals decision, the plaintiffs were in the retail and wholesale automobile sales business. The plaintiffs brought suit against an inspector employed by the North Carolina Division of Motor Vehicles to investigate alleged violations of licensing laws by motor vehicle dealers, manufacturers and salesmen, and motor vehicle odometer alterations and other violations of Chapter 20 of the General Statutes.<sup>204</sup> The complaint alleged that the defendant maliciously intended to harass the plaintiffs by initiating a hearing regarding the business conduct of the plaintiff, that the defendant intended to harass and intimidate the plaintiff when it investigated allegations of illegal

199. *Id.* at 592-93, 378 S.E.2d at 579.

200. *Id.* at 593-94, 378 S.E.2d at 580.

201. *Id.* (citing *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* § 12, p.56 (4th ed. 1971)).

202. *Id.* at 593, 378 S.E.2d at 580.

203. 96 N.C. App. 169, 385 S.E.2d 195 (1989), *disc. rev. denied*, 326 N.C. 265, 389 S.E.2d 115 (1990).

204. *Id.* at 171, 385 S.E.2d at 197.

odometer alterations, and that this resulted in plaintiff being subjected to severe emotional distress and mental anxiety.<sup>205</sup> The defendant, by affidavit, answered that he only knew the plaintiff in a professional capacity and that he had acted reasonably, and within the customs of his position and within the scope and course of his employment, and that he bore the plaintiff no ill will or malice.<sup>206</sup>

Judge Eagles cited to the familiar litany of the *Dickens* rule regarding the essential elements of a claim for the tortious intentional infliction of emotional distress: "(1) extreme and outrageous conduct; (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress,"<sup>207</sup> Judge Eagles also cited to *Stanback's* definition for that level of 'extreme and outrageous conduct' required for recovery; conduct which 'exceeds all bounds usually tolerated by decent society,'<sup>208</sup> and the *Brigg's* ruling "[t]he determination of what is extreme and outrageous conduct is a question of law for the court."<sup>209</sup>

Judge Eagles concluded:

[T]he defendant's conduct was within the scope of his employment and was under the directions of his superior. In our judgment, it could not reasonably be regarded as extreme and outrageous conduct sufficient to satisfy a claim for intentional infliction of emotional distress. Summary judgment for the defendant was . . . proper.<sup>210</sup>

*Medlin v. Bass*<sup>211</sup> was the last case the court of appeals handed down in 1989 concerning whether defendant's motion for summary judgment was properly granted against the plaintiff's allegation of tortious intentional infliction of emotional distress. The plaintiff, a nine-year old fourth grade student at the time of the incident, alleged that she was twice assaulted by her principal and that this resulted in the intentional infliction of emotional distress. She alleged that the superintendent and the assistant superinten-

205. *Id.* at 172, 385 S.E.2d at 198.

206. *Id.*

207. *Id.* at 175, 385 S.E.2d at 200.

208. *Id.*

209. *Id.*

210. *Id.*

211. 96 N.C. App. 410, 386 S.E.2d 80 (1989), *aff'd on other grounds*, 327 N.C. 587, 398 S.E.2d 460 (1990).

dent of the local Board of Education were liable for the negligent investigation, hiring and supervision of the principal. She claimed that a school truancy officer was liable for the intentional infliction of emotional distress and failure to properly investigate the plaintiff's school attendance problems, and that all actions by the principal, the superintendent, the assistant superintendent, and the school truancy officer should be attributed to the Board of Education and asserted each claim for relief previously described against the Board.<sup>212</sup> The trial court granted defendants' motion for summary judgment in favor of the superintendent, the assistant superintendent, the truancy officer and the Board of Education.<sup>213</sup> The plaintiff appealed, stating that there were genuine issues of material fact which should have defeated the defendants' motion for summary judgment.<sup>214</sup>

The claim of intentional infliction of emotional distress, as against the assistant superintendent, was predicated on his filing of a juvenile petition against the plaintiff concerning her truancy problems.<sup>215</sup> Judge Lewis stated that there was no evidence that the assistant superintendent knew of the principal's alleged assault, and that what the evidence did show was that he adhered to his job expectations and requirements.<sup>216</sup> Citing to the *Dickens* rule, Judge Lewis wrote that there was no evidence presented as to any element of the tortious intentional infliction of emotional distress as against the assistant superintendent.<sup>217</sup> Hence, the Board of Education would not be liable for any imputed intentional infliction of emotional distress as derived from the assistant superintendent's actions.<sup>218</sup>

As for the Board of Education's imputed liability for the principal's alleged intentional infliction of emotional distress, Judge Lewis cited to *Hogan*, stating that:

An employer can be held vicariously liable for the torts of its employees in three situations: (1) when the employer expressly authorizes the employee's act; (2) when the employee's act is committed in the scope of his employment and in furtherance of the

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212. *Id.* at 412, 386 S.E.2d at 80-81.

213. *Id.* at 413, 386 S.E.2d at 81. The claim as against the principal remained. *Id.*

214. *Id.*

215. *Id.* at 415, 386 S.E.2d at 82.

216. *Id.* at 415, 386 S.E.2d at 83.

217. *Id.*

218. *Id.* at 416, 386 S.E.2d at 83.

employer's business; or (3) when the employer ratifies the employee's act.<sup>219</sup>

Judge Lewis held that in the case at bar there was no claim of express authorization for the principal's actions, that there were no issues of material fact as to whether the principal was acting within the scope or furtherance of his employment in that he was not performing the business that he was employed to do when he allegedly assaulted the plaintiff, and that there was no ratification by the Board of Education of the principal's alleged actions in that the Board had no prior notice of his conduct and immediately sought the principal's resignation upon learning of the alleged assaults.<sup>220</sup> Therefore, Judge Lewis affirmed the granting of summary judgment on the claims against the Board of Education.<sup>221</sup>

In *White v. Hugh Chatham Memorial Hospital*,<sup>222</sup> a 1990 decision, the court of appeals reviewed the granting of a motion for summary judgment on plaintiff's claims for intentional infliction of emotional distress and breach of contract against the defendant, her former employer. Affidavits and other materials before the court indicated that the defendant had employed the plaintiff as a full time nurses' assistant for over 34 years until plaintiff was discharged due to a disabling illness. Plaintiff's employment had never been under a written contractual agreement, but the plaintiff was covered for several years before the aforementioned discharge by the defendant's low cost group medical insurance plan. This insurance plan was limited to one million dollars. Upon being disabled, the plaintiff was unable to maintain such insurance due to the defendant's group carrier not permitting disabled former employees to continue under it, notwithstanding defendant's PERSON-

219. *Id.*

220. *Id.*

221. *Id.* In a dissent, Judge Phillips differed with the majority's decision regarding whether the principal acted within the scope of his authority. *Id.* Judge Phillips wrote that the issue is a question of fact, unlike the majority's "at law" analysis. In support of his position, Judge Phillips states that:

[s]ince the board endowed Bass [the principal] with authority and control over the school and Bass exercised that authority to abuse plaintiff, it can be reasonably inferred, it seems to me, that the board's work of operating the school and controlling the children was very definitely involved in plaintiff's abuse.

*Id.* at 417, 386 S.E.2d at 83

222. 97 N.C.App. 130, 387 S.E.2d 80, *disc. rev. denied*, 326 N.C. 601, 393 S.E.2d 890 (1990).

NEL POLICIES HANDBOOK stating that "A full time employee who become disabled during his employment will be able to maintain his group insurance." As a result of plaintiff's inability to maintain said insurance, plaintiff was forced to obtain an individual policy which cost more than the group policy and was limited to only one hundred thousand dollars.<sup>223</sup> Judge Phillips summarily affirmed the judgment of the trial court on the tortious intentional infliction of emotional distress claim stating that:

Obviously, the foregoing forecast of proof raises no genuine issue of material fact in the claim for intentionally inflicting emotional distress, and that claim was properly dismissed. Since plaintiff did not argue otherwise in the brief she abandoned the claim in any event.<sup>224</sup>

*McKinney v. Avery Journal, Inc.*,<sup>225</sup> a 1990 court of appeals case, brought another publisher back into the judicial arena to defend itself against a plaintiff's claim of libel and intentional infliction of emotional distress. The plaintiff's complaint was prompted by the defendant's publication of two articles which concerned a dispute between the plaintiff and her neighbor regarding the neighbor's barking dogs. The dogs barked to such a degree that the plaintiff and the neighbor swore out warrants against each other.<sup>226</sup> Within these two articles were three statements which constitute the gravamen of the case:

Ms. McKinney made international headlines several years ago for allegedly kidnapping and raping a Mormon missionary in London, England. Ms. McKinney fled Europe before the trial was over and is still listed in Interpol although authorities in England have made no attempt to extradite her.

Ms. McKinney could not be reached for comment. . . . Avery County Sheriff's Department has been unable to locate Ms. McKinney.

Joy McKinney never came in to have the warrant served and make bond and apparently left the county in an attempt to avoid arrest.<sup>227</sup>

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223. *Id.* at 130-31, 387 S.E.2d at 80-81.

224. *Id.* at 131, 387 S.E.2d at 81 (citations omitted).

225. 99 N.C. App. 529, 393 S.E.2d 295, *cert. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990).

226. *Id.* at 530, 393 S.E.2d at 296.

227. *Id.* at 530-31, 393 S.E.2d at 296.



Judge Johnson wrote that the record revealed that the defendant only published a "fairly innocuous condensation of numerous articles which had been published previously by reputable newspapers." [*The Charlotte Observer, The Winston-Salem Journal, The Asheville Citizen, The Greensboro Daily News, and The News and Observer*]<sup>228</sup> Additionally, the record showed that the defendant also relied on information received from the local Sheriff concerning the plaintiff allegedly being listed on Interpol and to the status of the warrant sworn out against the plaintiff.<sup>229</sup> Citing to *Dickens* for support, Judge Johnson quoted *Briggs*, as follows in affirming the trial court's granting of summary judgment for the defendant: "This conduct simply does not rise to the level of behavior '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 community.'" <sup>230</sup>

In *Waddle v. Sparks*,<sup>231</sup> a 1990 the court of appeals decided a case in which summary judgment had been granted against the plaintiffs and was factually similar to that of *Hogan*. In this case, there were two female plaintiffs, and they both brought actions against their shift-supervisor for the tortious intentional infliction of emotional distress, and against their former employer for negligent hiring and retention of said supervisor.<sup>232</sup>

Plaintiff Waddle alleged that the defendant-supervisor made several "vulgar and filthy" comments regarding her worrying about a coworker's genitals, that upon plaintiff's finger becoming infected with pus, she had a "p— finger," that the defendant constantly used sexual innuendoes and interjected sexual comments into ordinary statements. She alleged that on two occasions the defendant tried to brush up against the plaintiff's breasts, and thereafter, the plaintiff continually watched out for these physical attempts in order to avoid them. The defendant ventured that plaintiff knew how to use certain parts of her anatomy. The plaintiff complained about the defendant to the assistant plant manager about the "vulgar and filthy" conduct, resulting in a verbal reprimand being

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228. *Id.* at 532-34, 393 S.E.2d at 297-98.

229. *Id.* at 532, 393 S.E.2d at 297.

230. *Id.* at 534, 393 S.E.2d at 298 (quoting *Briggs v. Rosenthal*, 73 N.C. App. 627, 677, 327 S.E.2d 308, 311, *disc. rev. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985) and citing RESTATEMENT (SECOND) OF TORTS § 46, Cmt. d)).

231. 100 N.C. App. 129, 394 S.E.2d 683 (1990), *rev'd on other grounds*, No. 476A90, slip op. (N.C. Mar. 5, 1990).

232. *Id.*

given to the defendant. Later, the plaintiff again complained about defendant's behavior, this time to the personnel director.<sup>233</sup>

Judge Orr stated that there were sufficient facts to question: whether the defendant's actions were extreme and outrageous, whether the defendant did not intend to cause severe emotional distress, whether the plaintiff suffered emotional distress, whether the defendant was acting in the course and scope of his employment and whether his conduct was ratified implicitly by the corporate defendant.<sup>234</sup> Therefore Judge Orr held that the trial court erred in granting summary judgment against the plaintiff Waddle.<sup>235</sup>

Concerning the plaintiff Simpson, Judge Orr held that summary judgment was appropriate for the defendant on the allegations of intentional infliction of emotional distress against the individual defendant.<sup>236</sup> While the defendant Simpson alleged similar foul language, sexual innuendoes, and obscene gestures suffered at the hands of the defendant supervisor, Judge Orr noted that the plaintiff Simpson could not place any time reference in which the defendant allegedly intentionally inflicted emotional distress.<sup>237</sup> Therefore, in light of the statutory three year period of limitations being raised as a defense by the defendant, Judge Orr affirmed the granting of summary judgment for the defendant against the plaintiff Simpson.<sup>238</sup>

On January 10, 1991, the supreme court allowed discretionary review of *Waddle v. Sparks*.<sup>239</sup> The court held that the court of appeals should have affirmed summary judgments entered for defendants against both Waddle and Simpson.<sup>240</sup>

Chief Justice Exum stated that the plaintiff Waddle failed to forecast sufficient evidence of severe emotional distress, therefore not overcoming the defendants' summary judgment motion.<sup>241</sup> While citing to *Dickens* for the essential elements, Chief Justice Exum pointed to the fact that *Dickens* "failed to address in any

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233. *Id.* at 132, 394 S.E.2d at 686.

234. *Id.* at 133, 394 S.E.2d at 686.

235. *Id.*

236. *Id.* at 134, 394 S.E.2d at 687.

237. *Id.*

238. *Id.*

239. *Waddle*, No. 476A90, slip op. at 1-2.

240. *Id.* at 3.

241. *Id.* at 11.

detail the severe emotional distress element . . . .”<sup>242</sup> However, referencing *Ruark*, C.J. Exum wrote:

This is not the first time we have broached a definition of the element of severe emotional distress. In the context of a claim for *negligent* infliction of mental distress, we stated “the term ‘severe emotional distress’ means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so”<sup>243</sup> . . . We see no reason not to adopt the same standard for a claim for intentional infliction of emotional distress. At a minimum, applying the same standard to both torts promotes a symmetry desirable in this area of the law.<sup>244</sup>

For further support, Justice Exum quoted the RESTATEMENT (SECOND) OF TORTS, stating, in part, that: “[i]t is only where it is extreme that the liability arises . . . [t]he law intervenes only where the distress inflicted is so severe that no reasonable man could expect to endure it.”<sup>245</sup>

Stating that there was no “forecast of any medical documentation of plaintiff’s alleged ‘severe emotional distress’ nor any other forecast of evidence of ‘severe and disabling’ psychological problems within the meaning of the test laid down in” *Ruark*, the court affirmed the trial court’s granting of summary judgment and reversed the court of appeals’ decision to the contrary.<sup>246</sup>

*Rogers v. T.J.X. Companies, Inc.*<sup>247</sup> found the court of appeals deciding the issue of whether summary judgment was properly entered for the defendants when the plaintiff complained that the corporate defendant and individual defendant falsely imprisoned and intentionally inflicted emotional distress upon her when she

242. *Id.* at 11-12.

243. *Id.* at 12 (quoting *Johnson v. Ruark Obstetrics and Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh’g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)).

244. *Waddle*, No. 476A90, slip op. at 12.

245. *Id.* at 13 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (emphasis supplied by the Court)).

246. *Id.* at 14-15. The Court affirmed the Court of Appeals’ unanimous decision granting summary judgment as against the plaintiff Simpson on the issue of the statute of limitation barring said plaintiff’s action as against the defendant Sparks. *Id.* at 15.

247. 101 N.C. App. 99, 398 S.E.2d 610 (1990), *rev’d on other grounds*, 329 N.C. 266, 404 S.E.2d 664 (1991).

was acting as their store patron.

The evidence tended to show that the plaintiff went to the defendant's store to shop for kitchen linens and tablecloths. Plaintiff was wearing bermuda shorts, a white T-shirt and sandals and carried a pocketbook which contained cosmetics, her wallet, her glasses case, a packet of material samples in a clear ziploc bag, and a couple of pens. Upon entering the store, the plaintiff went to the cosmetics counter, before proceeding to the linen department, and then looked at some dishes and cut glass before exiting the store. The plaintiff's stay in the store was approximately twenty to twenty-five minutes. The plaintiff at no time entered the lingerie department or examine any lingerie. Upon exiting the store, the plaintiff was approached by the defendant-security guard who showed the plaintiff his badge and identified himself as store security. The security guard asked the plaintiff to return to the store to speak to her about some merchandise. The plaintiff told the defendant that he was making a mistake, but agreed to return with him anyway. The plaintiff accompanied the defendant to his office, the defendant following the plaintiff closely in full view of other store patrons. The defendant told her that "Good customers will steal." The plaintiff dumped the contents of her pocketbook onto the defendant's desk. The defendant left the plaintiff in his office for fifteen minutes, and the plaintiff did not leave because she felt that she was free to leave. Upon the defendant's return, the plaintiff stated that she did not do anything wrong and wished to leave. The defendant replied that "all we want is our merchandise. What did you do with it? You were in our lingerie department." The plaintiff explained that she was not in the lingerie department, but the defendant continued to request the return of the stolen items and refused tell the plaintiff what particular item that he wanted. The defendant told the plaintiff not to touch her belongings which she had removed from her pocketbook. The defendant instructed the plaintiff to read from a clipboard containing the message that the store had the right to detain and question anyone that it had reason to believe had been shoplifting. After reading the clipboard, the plaintiff told the defendant that she had not been shoplifting and that he was wrong. The defendant responded: "Ma'am, I was only five feet from you the whole time you were in the store." The plaintiff responded that "If you were only five feet from me, you know I was not in the lingerie department. You know I didn't steal anything." The defendant had the plaintiff read a card which contained the *Miranda* warnings. The defendant, in response to the

plaintiff requesting him to be quiet so she could read the card, stated: "Usually the dog that barks the loudest is guilty." Finally, after thirty minutes, the plaintiff was told by the defendant that she was free to go, after having been told that she had to sign the *Miranda* card and one which released the store from liability. She complied with both requests, and that as a result of this incident, the plaintiff then experienced mental and physical infirmities.<sup>248</sup>

Chief Judge Hedrick held that the facts as alleged were sufficient to assert the tortious infliction of emotional distress.<sup>249</sup> He stated that:

We find the facts of the case *sub judice* sufficient to raise genuine issues of material fact as to whether 'defendant's actions indicate a reckless indifference to the likelihood that they will cause emotional distress' and hold the trial court erred in entering summary judgment against plaintiff with respect to her claim for intentional infliction of emotional distress.<sup>250</sup>

Finally, in *Shillington v. K-Mart*,<sup>251</sup> a 1991 court of appeals decision, the court decided whether a plaintiff who had previously been arrested and tried for trespassing on the defendant's store property and for looting merchandise following a devastating tornado, had made a sufficient showing of evidence to defeat the defendant's motion for a directed verdict. The plaintiff's evidence tended to show that during the early morning hours of November 28, 1988, a tornado struck and completely destroyed a K-Mart in Raleigh, North Carolina, and the winds scattered the defendant's property over a wide area including the ravine behind the store. On that morning the plaintiff, an employee at the ATEC building, a structure several hundred feet to the northwest of the K-Mart, decided to survey the damage along with a co-worker. The two encountered a police officer and the three amicably talked for 15-20 minutes. The officer told them not to go into an area near the K-Mart. Upon returning to the ATEC building, which had also been damaged from the tornado, the plaintiff and the co-worker discovered that some documents and equipment were missing, and as a result, the two began to search for the missing documents and equipment. In the course of said search, the plaintiff and the co-

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248. *Id.* at 101-03, 398 S.E.2d at 611-12.

249. *Id.* at 106, 398 S.E.2d at 614.

250. *Id.* at 106-07, 398 S.E.2d at 614 (quoting *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)).

251. 102 N.C. App. 187, 402 S.E.2d 155 (1991).

worker walked along the ridge behind the K-Mart. While moving in this area, the plaintiff picked up some K-Mart merchandise, a coat, and placed it on a tree in the open. Some time later, a K-Mart security guard saw the plaintiff and requested that the plaintiff come to him, the plaintiff complied with this request. The security guard took the plaintiff by the arm and searched the plaintiff. The plaintiff attempted to explain his presence but the guard refused to listen. As a result of statements given by that guard to the police that the plaintiff had come on K-Mart's property and was picking up the defendant's merchandise and had thrown an item down when challenged, the plaintiff was arrested.<sup>252</sup>

Judge Johnson held that the trial judge did not commit error when he granted the defendant's motion for directed verdict on plaintiff's claim for tortious intentional infliction of emotional distress because the defendant's conduct could not reasonably be regarded as extreme and outrageous.<sup>253</sup> Noting that the "events in question occurred during a state of emergency following a devastating tornado" and that "[p]laintiff was walking in an area close proximity to the defendant's property and in an area where defendant's merchandise had been scattered by the winds,"<sup>254</sup> Judge Johnson held that given what the guard saw (implicitly including the defendant's agents perceiving the plaintiff picking up an item of K-Mart property and putting it down) the guard's simple refusal to listen to plaintiff's explanation, "while rude and officious, does not reach the level of being extreme and outrageous."<sup>255</sup>

### III. CONCLUSION

The supreme court in *Dickens* decided the requisite evidentiary showing to recover for the tortious intentional infliction of emotional distress. Upon doing so, the court disapproved of its earlier decision in *Stanback*. No longer is there a required showing of a contemporaneous physical injury, nor an injury directly resulting from the defendant's egregious behavior. Moreover, the supreme court refuted any necessary showing that it was foreseeable that the defendant's actions would result in the plaintiff's severe emotional distress. Rather, the plaintiff must prove only that the defendant either intended such result or was reckless in his action,

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252. *Id.* at 191-92, 402 S.E.2d at 157-58.

253. *Id.* at 198, 402 S.E.2d at 161.

254. *Id.*

255. *Id.*

and that severe emotional distress was an actual result.

Without the additional evidentiary "baggage" of foreseeability and physical injury to prove, one may have presupposed that a litigious "floodgate" alleging the tortious intentional infliction of emotional distress would soon have ensued. However, for the past ten years, the appellate courts have affirmed several procedural rulings which have stated that the plaintiff either failed to state a claim pursuant to Rule 12(b)(6), did not provide the proper evidentiary forecast in order to defeat the defendant's motion for summary judgment, or did not produce sufficient evidence to survive a motion for directed verdict.

The supreme court, in following what was then national trend, in not requiring physical injury or foreseeability, is now encased within the vast majority of jurisdictions regarding the requisite evidentiary showing. In doing so, the supreme court allowed a common law tort recovery for non-physical sexual harassment, for extreme debt collection practices, against overzealous department store employees whose egos are skewered by an overwrought sense of self importance, and against vengeful parties who would maliciously destroy and disrupt other people's lives with conduct so extreme that one would exclaim "Outrage!"

Conversely, the North Carolina courts, in their caselaw, have narrowly defined what factually constitutes extreme and outrageous conduct. When the facts dictate a commercial setting, the alleged "intent" is more likely to be dispositive in the action. Thus, when dealing with insurance contracts, legal actions between parties, real estate transactions, or at-will employment terminations, the court is likely to find an evidentiary failure in the plaintiff's case regarding "intent" to the extent that "recklessness" is given shortshrift.

Perhaps, in attempting to discern any non-changing particular judicial mindset as to what constitutes extreme and outrageous behavior, one should look to the court's consistent and logical application of the *Dickens*' rule, holding that there may be recovery under the tortious intentional infliction of emotional distress as defined by the RESTATEMENT (SECOND) OF TORTS. In doing so, one would then further look to the other heavily cited secondary source, William Prosser, and his often quoted passage that liability arises under this tort when a defendant's "conduct exceeds all bounds usually tolerated by decent society." In reading the appellate decisions using Prosser's comment as a yardstick, one finds that the North Carolina courts have been consistent and fair,

**weighing both the plaintiff's need for proper redress, in addition to the public's need for a society in which the slightest offense or even rude and officious behavior can and should be tolerated in order to promote the free discourse of ideas and relationships.**

*William B. L. Little*