STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0509

RUSSELL JOSEPH PERRONE

VERSUS

SHAWN W. ROGERS

c/w 2017 CA 0510

RUSSELL J. PERRONE, INDIVIDUALLY, AND AS PROVISIONAL ADMINISTRATOR OF THE SUCCESSION OF RANDALL WILLIAM PERRONE, RUSSELL J. PERRONE, JOHN J. PERRONE AND DEBORAH H. PERRONE

VERSUS

SHAWN W. ROGERS

c/w 2017 CA 0511

DEBORAH H. PERRONE AND JOHN J. PERRONE, JR.

VERSUS

SHAWN W. ROGERS

Judgment Rendered: DEC 1 8 2017

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On Appeal from the Twenty-Second Judicial District
In and for the Parish of St. Tammany
State of Louisiana
No. 2014-10588 c/w No. 2014-10589 c/w No. 2014-105900

Honorable Martin Coady, Judge Presiding

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Individually and as Provisional
Administrator of the Succession of
Randall William Perrone

Welch J. dissents with reasons.

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McCLENDON, J.

In this consolidated lawsuit asserting the tort of the intentional infliction of emotional distress, the plaintiff appeals a judgment of the trial court granting a motion for summary judgment in favor of the defendant and dismissing plaintiff's claim with prejudice. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The plaintiff, Russell Joseph Perrone, was the identical twin brother of Randall Perrone, who died in February 2013, following surgery for a brain tumor. At the time of his death, Randall was engaged to be married to Logan Shaw. Following his diagnosis, but prior to surgery, Randall asked his close friend and attorney, Shawn W. Rogers, the defendant herein, to draft a will for him. Although Rogers initially declined to draft the will, Randall sent him a document with his desired bequests that Rogers subsequently agreed to put in "a legal format" for Randall. On February 21, 2013, Randall executed his Last Will and Testament before another attorney. Randall died on February 27, 2013.

In the days following Randall's death, the will became a primary source of tension between the Perrone family and Rogers. Russell avers that after Randall's death, he retained an attorney who specialized in Louisiana succession law, who advised him of legal defects in the testament that Rogers prepared for Randall. According to Russell, when Rogers learned that Russell was going to be the executor of Randall's succession and had retained an estate attorney who was going to request the court to declare the will invalid, Rogers sent the following text message to Russell on April 3, 2013:

> Thanks for putting my law license in jeopardy! Real f-ckin friend. I think you are a piece of sh-t your every breath is an embarrassment to your brothers memory it should have been you and not him. Don't ever contact me again and when it is proven the Will is written correctly I will spend the rest of my life suing you for professional defamation until you don't have a pot to p-ss in, I am also going to let Logan know that per the will she is entitled to 50% of Randy's interest in the business. I hope you rot in h-ll while your brother you never cared about flourishes in heaven.

Thereafter, the Perrone family filed three separate lawsuits against Rogers.[1] The basis of the lawsuits, as alleged by the Perrone family, is as follows. The Perrones own a fourth-generation family business, Perrone and Sons, Inc. Russell and Randall had an interest in the business, along with their parents, Deborah H. Perrone and John J. Perrone, Jr., and brother, John J. Perrone, III. According to the allegations in the petitions, the testament that Rogers drafted was negligently drawn as it failed to provide that Randall's shares of and equity interest in the Perrone family business remain in the family. Particularly, the Perrone family averred that Rogers failed to mention the shares in the will in any manner, and therefore, the "Residuary Clause" of the will provided that the unmentioned assets of Randy were bequeathed in equal portions to Russell and to Logan. The family further asserted that this was entirely unintended by Randall.[2]

After the lawsuits were filed, Russell filed a Partial Motion for Summary Judgment in this suit for the intentional infliction of emotional distress, which was denied by the trial court. Thereafter, on February 29, 2016, Rogers filed the motion for summary judgment that is the subject of this appeal. Therein, Rogers averred that Russell could not establish the elements of the intentional infliction of emotional distress, particularly that the text message was extreme and outrageous.[3]

On November 3, 2016, the trial court held a hearing on Rogers' motion for summary judgment and took the matter under advisement. On November 22, 2016, the trial court issued lengthy Reasons for Judgment and, on December 13, 2016, signed

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[1] The suits were all filed on February 6, 2014. The first, Suit No. 2014-10588, involves Russell's claim in this matter for the intentional infliction of emotional distress. Suit No. 2014-10589 is a claim for legal malpractice against Rogers filed by Russell and his parents, Deborah and John. Suit No. 2014-10590, filed by Russell's parents, asserted a claim for defamation, public humiliation, and loss of consortium. The matters were consolidated in March 2014, and Suit No. 2014-10590 was voluntarily dismissed on November 7, 2016.

[2] However, in his affidavit in support of the motion for summary judgment, Rogers attested that he told Randall that the information he wanted in his will did not reference his ownership in the family business, that Randall responded that his family had the business ownership worked out, that Randall wanted any assets not mentioned in his will to be split between Russell and Logan and to please just put the information given to him into a legal format, and that he did as Randall requested.

[3] Rogers also asserted that Russell could not establish his claim for legal malpractice. In the December 13, 2016 judgment that granted the summary judgment and dismissed Russell's claim for the intentional infliction of emotional distress, the trial court also denied the motion for summary judgment as to the legal malpractice claim in Suit No. 2014-10589.

its judgment, granting the motion and dismissing the claim for intentional infliction of emotional distress in Suit No. 2014-10588.

Russell appealed and asserts that the trial court erred in granting the summary judgment.

DISCUSSION

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966A(3). The summary judgment procedure is favored and shall be construed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966A(2). The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue before the court on the motion for summary judgment, the mover's burden does not require that he negate all essential elements of the adverse party's claim, action, or defense, but rather to point to the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. LSA-C.C.P. art. 966D(1).

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Mabile's Trucking, Inc. v. Stallion Oilfield Services, Ltd.**, 15-0740 (La. App. 1 Cir. 1/8/16), 185 So.3d 98, 101, writ denied, 16-0251 (La. 4/4/16), 190 So.3d 1207. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. **Willis v. Medders**, 00-2507 (La. 12/8/00), 775 So.2d 1049, 1050 (per curiam). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be determined only in light of the substantive law applicable to the case. **Mabile's Trucking, Inc.**, 185 So.3d at 102.

The tort of the intentional infliction of emotional distress was adopted as a viable cause of action in the supreme court case of **White v. Monsanto Company**, 585 So.2d 1205 (La. 1991). One who by extreme and outrageous conduct intentionally 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. **White**, 585 So.2d at 1209. Louisiana courts, like courts in other states, have set a very high threshold on conduct sufficient to sustain an emotional distress claim, and the Louisiana Supreme Court has noted that courts require truly outrageous conduct before allowing a claim even to be presented to a jury. **Nicholas v. Allstate Ins. Co.**, 99-2522 (La. 8/31/00), 765 So.2d 1017, 1024-25; **Sullivan v. Malta Park**, 14-0478 (La.App. 4 Cir. 12/10/14), 156 So.3d 751, 757.[4] In order to recover for intentional infliction of emotional distress, a plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. **White**, 585 So.2d at 1209.

Outrageous conduct is a nebulous concept, as it does not refer to any specific type of conduct and it may even refer to a pattern of conduct. **Bustamento v. Tucker**, 607 So.2d 532, 538 n.6 (La. 1992). The supreme court in **White** pointed out that the conduct must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. **White**, 585 So.2d at 1209. See also **Nicholas**, 765 So.2d at 1022. Mere insults, indignities, threats, annoyances, petty oppressions, or

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[4] The **Sullivan** case is an example of one that stated a cause of action for the intentional infliction of emotional distress. Therein, the plaintiff, a 70-year-old terminally ill woman, living in an assisted living facility, who was legally blind and had been confined to a wheelchair for twelve years, was questioned in a deposition about her attorney husband's affair with his associate. The defendant's attorney knew his assertions, posed as affirmative statements, were false. The court found that based on the allegations, the plaintiff stated a cause of action for the intentional infliction of emotional distress. **Sullivan**, 156 So.3d at 752. In **Ratcliff v. Boydell**, 93-0362 (La.App. 4 Cir. 4/3/96), 674 So.2d 272, 280, the defendant represented the plaintiff and her minor child in a wrongful death action following the death of her husband. What began as a fee dispute between client and attorney degenerated into events that constituted, *inter alia*, intentional infliction of emotional distress. The behavior over six years included the filing of more than sixty exceptions and motions, six devolutive appeals, a baseless seven million dollar defamation suit, the use of a private process server to serve the plaintiff at home and at work, the filing of a defamation suit against the plaintiff's new attorney and that attorney's spouse, and the admission that the attorney intended his conduct to cause her distress because he was angry that she filed suit against him.

other trivialities are not enough to trigger liability; rather, persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. **White**, 585 So.2d at 1209. Not every verbal encounter may be converted into a tort; on the contrary, "some safety valve must be left through which irascible tempers may blow off relatively harmless steam." **White**, 585 So.2d at 1209.

The distress suffered must be such that no reasonable person could be expected to endure it. Liability arises only where the mental suffering or anguish is extreme. Further, the defendant's knowledge that plaintiff is particularly susceptible to emotional distress is a factor to be considered. But the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough. **White**, 585 So.2d at 1210. The actor's conduct must be intended or calculated to cause severe emotional distress and not just some lesser degree of fright, humiliation, embarrassment, worry or the like. **White**, 585 So.2d at 1210. Moreover, summary judgment is a proper procedural method to consider a plaintiff's allegation that a defendant is liable for the intentional infliction of emotional distress, especially in light of the additional burden that such a plaintiff has of showing that the conduct was extreme and outrageous. **Barrino v. East Baton Rouge Parish School Bd.**, 96-1824 (La.App. 1 Cir. 6/20/97), 697 So.2d 27, 32.

In his appeal, Russell contends that the April 3, 2013 text message was so extreme and outrageous that, immediately after receipt of the message, he suffered severe and debilitating depression and emotional trauma that required him to undergo counseling for eight months.[5] To the contrary, Rogers asserts that the text message was not extreme and outrageous and maintains that none of the evidence presented by

[5] However, we note that the counselor's treatment summary, dated March 25, 2014, submitted in support of Rogers' motion, showed office visits beginning on April 9, 2013, and ending on December 17, 2013, and makes no mention of the April 3, 2013 text message. The summary indicated that Russell sought counseling for grief issues surrounding the death of his identical twin brother. The summary also pointed out that a "significant portion of [Russell's] treatment was devoted to the topic of his brother's fiancé. Her relationship with [Russell] and his family precipitated an intensification of stressors throughout his treatment. She represents the triggering factor in the breakdown of [Russell's] social support system." Nor is the text message mentioned in any treatment notes. Nevertheless, in an October 17, 2016 affidavit, submitted by Russell in opposition, the counselor attested that the text message was the "principal cause of [Russell's] deep depression and severe emotional and mental symptoms and the reason he required psychological counseling."

Russell created an issue of material fact as to whether the text message was extreme and outrageous under the circumstances.

The evidence presented in support of and in opposition to the motion for summary judgment established that Rogers was a close and personal friend of both Russell and Randall. Rogers was close enough with Russell and Randall that he was at the hospital with the Perrone family when Randall passed away. They had been friends for more than ten years. Text messages between Russell and Rogers beginning on March 5, 2013, showed the close relationship, referring to each other as "brother" and expressing brotherly love to one another. However, on March 25, 2013, Rogers stated in a text message: "I was upset that there was an attorney already involved and you didn't even let me know that's all I was upset about! Maybe I'm just being hyper sensitive and for that I apologize I certainly don't want to make this harder for you." He then texted: "By giving you unnecessary grief." This was followed by the text message of April 3, 2013, that is at issue herein.

Several weeks later, on May 25, 2013, Rogers sent another text to Russell that stated: "FYI I never started this sh-t between us I just ended with a horrible message to you after I felt betrayed and lied to. I'm glad ya'll are working things out. Good luck and best wishes." Russell did not respond. On June 16, 2013, Rogers sent another text message telling Russell: "Happy Father's Day! I hope you have a great day with your family." Russell responded: "You too."

We find that there are no material facts in dispute with respect to the text message of which Russell complains. The only issue to be determined is whether this outburst under the attendant circumstances was truly extreme and outrageous conduct. Upon our careful *de novo* review, the text message, although crude and offensive, did not meet the high threshold for an intentional infliction of emotional distress claim as it was not of such an extreme and outrageous nature as is necessary to prove entitlement to damages. It was not 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.

The parties were all grieving as to the loss of Randall. Thus, while considering that Russell had just lost his identical twin brother, the one text message, sent by a good friend who obviously lost his temper, was not such that no reasonable person could endure it. The text messages before and after the one of April 3, 2013, show that Rogers was extremely upset at the time the text was sent, and Rogers apologized for the text message admitting it was "horrible." The text message, while clearly insulting and distasteful, is not sufficient to trigger liability.

As a matter of law, this single text message does not support Russell's conclusion that Rogers' conduct under the circumstances presented was extreme and outrageous as set forth in **White**. Thus, under the undisputed facts of this case, summary judgment was properly granted, dismissing Russell's claim for the intentional infliction of emotional distress.[6]

CONCLUSION

For the foregoing reasons, we affirm the December 13, 2016 summary judgment in favor of the defendant, Shawn W. Rogers. Additionally, all costs of this appeal are assessed against the plaintiff, Russell Joseph Perrone.

AFFIRMED.

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[6] As to Russell's argument regarding the exclusion of expert testimony, we are not bound by the conclusory opinions of experts on a legal question. See **Bowman v. City of Baton Rouge/Parish of East Baton Rouge**, 02-1376 (La.App. 1 Cir. 5/9/03), 849 So.2d 622, 629, writ denied, 03-1579 (La. 10/3/03), 855 So.2d 315. Because the question of whether the text message was extreme and outrageous is ultimately a legal question for the court, we find that the trial court did not err in finding that the experts' opinions were not necessary in the determination of this issue. Further, because we find that, upon our *de novo* review, Rogers' conduct under the circumstances was not extreme and outrageous as a matter of law, we need not specifically address Russell's other arguments.

RUSSELL J. PERRONE	**NO. 2017 CA 0509**
VERSUS	**COURT OF APPEAL**
	FIRST CIRCUIT
SHAWN W. ROGERS	**STATE OF LOUISIANA**

CONSOLIDATED WITH

RUSSELL J. PERRONE	**NO. 2017 CA 0510**
VESUS	**COURT OF APPEAL**
	FIRST CIRCUIT
SHAWN W. ROGERS	**STATE OF LOUISIANA**

CONSOLIDATED WITH

DEBORAH H. PERRONE	**NO. 2017 CA 0511**
VERSUS	**COURT OF APPEAL**
	FIRST CIRCUIT
SHAWN W. ROGERS	**STATE OF LOUISIANA**

WELCH, J., dissents.

JEW

I respectfully disagree with the majority opinion in this matter. The text message from Mr. Rogers, an attorney, that contained an overt threat of abuse of process, *i.e.*, "I will spend the rest of my life suing you for professional defamation until you don't have a pot to p-ss in," could be construed by a trier of fact as "extreme and outrageous." As such, this issue should be presented to a jury (or trier of fact) and is inappropriate for summary judgment, and I would reverse the judgment of the trial court.

Thus, I respectfully dissent.