

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY

<u>Trial/IAS:</u>	<u>Part 42</u>
<u>Motion Date:</u>	<u>1/3/02</u>
<u>Index No.:</u>	<u>18787/2000</u>
<u>Mtn. Seq. No.:</u>	<u>003</u>

Present: Honorable Jerald S. Carter

-----x
**WILLIAM J. O'REILLY and
MAUREEN O'REILLY,**

Plaintiffs,

-against-

**JOHN F. KENNEDY and JOSEPHINE
C. KENNEDY,**

Defendants.

-----x
The following papers have been read in this matter:

Notice of Cross Motion and annexed Affirmation w/ exhibits 1

Defendant's application for an Order seeking attorney's fees and permission to use certain psychological records for purposes of cross examination of the Plaintiff is decided as follows:

Attorney Fees

Under the general rule, attorney's fees and disbursements are incidents of litigation and the prevailing party may not collect them unless the award is authorized by agreement between the parties, by statute or court rule. *City of Buffalo v. Cement Co.*, 284 NY2d 241. The rule is premised upon the high priority accorded free access to courts. *In the Matter of A.G. Ship Maintenance Corp. V. Lezak*, 69 NY2d 1 (1986).

Pursuant to NYCRR 130-1.1, the Court has the discretion in a civil action to sanction via the impose of costs and fees for frivolous litigation. The Court determines that the Plaintiff's withdrawal of their causes

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of action asserting intentional infliction of emotional distress does not warrant an award in favor of the Defendant for costs and attorney fees associated with costs of defending the action.

In order for this Court to award attorney fees, the Court has to determine the action was wholly without merit. The Court makes no such determination, especially in view of the fact that the Defendant pled guilty on April 23, 2002 before the Honorable Donald Belfi, Judge of the County Court, under indictment # 2620N/2000, to criminal mischief, third degree (Class E Felony) wherein he admitted to flooding the Plaintiff's kitchen with a garden hose.

THE COURT: I want you to tell me what happened on or about August 31, 2000, in connection with the home of William and Maureen O'Reilly.

DEFENDANT: I damaged the sprinkler system by stuffing a golf ball in the tube at the head, which I understand caused water and mud to go inside the home.

THE COURT: Of whom?

DEFENDANT: Of William and Maureen O'Reilly.

THE COURT: And was that at 176 Aikens Road in Munsey Park?

DEFENDANT: Yes, your Honor.
(Plea minutes, pg. 14, lines 8-21)

In view of the foregoing, the Defendant's request for costs and fees associated with withdrawal of the Plaintiff's cause of action for mental distress, is denied.

CSW Records

The Defendant's application for an Order permitting the records of Linda Mello to remain under seal until the Trial Justice determines whether the records can be used for impeachment on cross examination of the Plaintiff is denied.

The Plaintiff affirmatively withdrew her claims for emotional distress thereby removing her affirmative injection of her emotional and mental condition from the case. Accordingly, once withdrawn,

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the records are shielded by privilege. *Carboni v. New York Medical College*, 736 NYS2d 350 (2nd Dept., 2002); *Brown v. Telerep, Inc.*, 236 AD2d 378, 693 NYS2d 34 (2nd Dept., 1999).

Contrary to the Defendant's assertion, *Babrowsky v. Toyota Motor Sales U.S.A.*, 261 AD2d 349 (2nd Dept., 1999), the Court specifically stated "[P]laintiff's contention that her claim of psychiatric injury or damage was completely withdrawn is belied by the record." Thereby finding that the Plaintiff's causes of action for mental distress remained viable at the time she took the stand and therefore, the records could be used for impeachment. As such, the *Bobrowsky* case is distinguishable.

Accordingly, the respective applications are denied.

Dated: Mineola, NY
May 15, 2002

ENTER,



A.J.S.C.

ENTERED

MAY 22 2002

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**