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Appellate Division, Second Department Docket No. 2017-02080

Court of Appeals

STATE OF NEW YORK

STACY GREENE as the Administratrix of the Estate of GRETA DEVERE GREENE, Deceased, and on Behalf of her distributees, and SUSAN FRIERSON,

Plaintiffs-Appellants,

against

ESPLANADE VENTURE PARTNERSHIP, BLUE PRINTS ENGINEERING, P.C. and MASQSOOD FARUQI,

Defendants-Respondents,

and

D&N CONSTRUCTION AND CONSULTING, INC.,

Defendant.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a specialty bar association created to promote continuing legal education, diversity and justice for all in the civil justice system.

At issue on the appeal is the claim for damages for emotional distress sustained by plaintiff-appellant Susan Frierson based in part upon witnessing injuries inflicted in her grandchild under the "zone of danger" theory.

The issue raised in this appeal is a matter of great interest and concern to DANY, since it involves this the plaintiff's attempt to significantly expand this Court's well-settled jurisprudence on the "zone of danger issue." As more fully set forth below, there is no good reason for this Court to do so.

Accordingly, we submit that the decision and order of the Appellate Division should be affirmed.

POINT I

THE EXISTING "ZONE OF DANGER" RULE IS FAIR TO BOTH PLAINTIFFS AND DEFENDANTS

A. Introduction:

Whether a tortfeasor may be held liable to bystanders for emotional distress suffered as a result of injury to another remains a controversial issue in American law. New York courts have long recognized the potential unlimited liability inherent in permitting bystanders to recover for their emotional distress arising out of the injury or death of another. See, e.g., Bovsun v. Sanperi, 61 N.Y.2d 219, 227 (1984)("Traditionally, courts have been reluctant to recognize any liability for the mental distress which may result from the observation of a third person's peril or harm."); Tobin v. Grossman, 24 N.Y.2d 609, 616 (1969)("The problem of unlimited liability is suggested by the unforeseeable consequence of extending recovery for harm to others than those directly involved in the accident.")

Most states now recognize claims for negligent infliction of emotional distress and many states permit some bystanders to recover emotional distress damages resulting from negligent injury of a third party. See, Flora, C., "Special Relationship Bystander Test: A Rational Alternative to the Closely Related Requirement of Negligent Infliction of Emotional Distress for

Bystanders," 39 Rutgers L. Rev. 28, 29 (2012)(citing cases); cf., Dowty v. Riggs, 2010 Ark. 465, 466, 385 S.W.3d 117, 120 (2010)("Arkansas does not recognize the tort of negligent infliction of emotional distress"). Some states adopted a foreseeability theory of liability for bystander emotional distress, first described in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912 (1968). See, e.g., Clohessy v. Bachelor, 237 Conn. 31, 675 A.2d 852 (1996), modified by Squeo v. Norwalk Hosp. Ass'n, 316 Conn. 558, 113 A.3d 932 (2015); Portee v. Jaffee, 84 N.J. 88, 97, 417 A.2d 521, 526 (1980) (citing other states adopting the Dillon theory of liability); cf., Philibert v. Kluser, 360 Or. 698, 385 P.3d 1038 (2016)(adopting the variant Restatement rule). Others, like New York, rejected the foreseeability approach set forth in Dillon and adopted a zone of danger analysis to determine whether a bystander was owed a duty. See, Bovsun, 61 N.Y.2d at 230-231; see, also, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Engler v. Illinois Farmers Ins., 706 N.W.2d 764 (Minn. 2005).

This Court first permitted a bystander to recover emotional distress damages in Bovsun and outlined the policy bases justifying such damages in Trombetta v. Conklin, 82 N.Y.2d 549 (1993). In Trombetta, plaintiff was the adult niece of the decedent, standing within the zone of danger at the time of her

aunt's demise, and had a deep emotional relationship with her aunt. Id. at 550-551. Nevertheless, this Court affirmed the dismissal of plaintiff's complaint, ruling that New York law limited bystander claims for negligent infliction of emotional distress to immediate family members who were within the zone of danger. Id. at 554.

In the case at bar, plaintiff seeks to expand the scope of bystander negligent infliction of emotional distress claims beyond bystanders within the first degree of affinity or consanguinity, or to discard this Court's analysis of duty entirely by making the duty imposed turn on the foreseeability of plaintiff's emotional distress. DANY respectfully submits that plaintiff's "modest proposals" conflict with the established precedent of this Court and would vastly expand potential liability and undermine the policy bases for limiting liability to "immediate family."

DANY further submits that medical science has shown people can suffer extreme emotional distress from observing serious injury or death inflicted on strangers, and this showing has undermined the policy bases for the zone of danger and foreseeability theories of bystander liability. Therefore, this Court should affirm the order appealed or modify it to bar liability for bystander emotional distress.

B. Immediate Family Does Not Include Grandparents

Plaintiff contends that grandparents should be considered immediate family for three reasons: (i) because the danger of unlimited liability is primarily mitigated by the zone of danger requirement; (ii) because grandparents' unique status under New York law warrants their inclusion; and (iii) their inclusion within the meaning of immediate family would not significantly expand liability. As set forth below, each of these contentions lacks merit.

Contrary to plaintiff's contention that this Court's precedents primarily mitigate the possibility of unlimited recovery through the zone of danger requirement, the zone of danger requirement is merely the first hurdle that a plaintiff must overcome to recover. As this Court noted in Trombetta, while "it may seem that there should be a remedy for every wrong," the law requires courts to" 'limit the legal consequences of wrongs to a controllable degree.'" Id. at 554 (quoting Tobin v. Grossman, 24 N.Y.2d 609, 619 (1969)). In order to prevent "an unmanageable proliferation of such claims" and in recognition of "the complex responsibility that would be imposed on the courts in this area to assess an enormous range and array of emotional ties" if claims were not circumscribed, this Court reasoned it was necessary to limit recovery for

emotional distress to "a strictly and objectively defined class of bystanders …." Id. In other words, liability to bystanders within the zone of danger was limited to immediate family in order to avoid unlimited liability and to relieve courts from the difficult duty of delineating the emotional relationships between bystanders and injured victims.

Plaintiff's claim that grandparents have a special legal relationship with their grandchildren warranting inclusion within the definition of immediate family is also without merit. The plain meaning of "immediate family" is the nuclear family, consisting of parents and children. See, Merriam-Webster.com https://www.merriam-webster.com/dictionary/immediate%20family ("immediate family" as "a person's parents, brothers and sisters, husband or wife, and children.")(accessed August 31, 2020). While sometimes broadened to reflect the blended family so common today, the first degree of affinity or consanguinity remains the basis of the definition. See, e.g., Federal Family and Medical Leave Act. See, 29 C.F.R. § 780.308 ("Other than a parent, spouse or child, only the following persons will be considered to qualify as part of the employer's immediate family: Step-children, foster children, step-parents and foster parents. Other relatives, even when living permanently in the same household as the employer, will not be considered to be

part of the 'immediate family.'"); see, also, N.Y. Gen. Bus. Law § 898 (McKinney's 2019)("'immediate family' shall mean spouses, domestic partners, children and step-children."); New York Not-for-Profit Corp. Law § 1512(h)(2) (McKinney's 2019)("If the decedent is within the first degree of consanguinity to an individual already interred in the lot, plot or part thereof, or the spouse of the decedent is already interred in the lot, plot or part thereof, the cemetery may, at its discretion, proceed with the interment, provided some form of documentary evidence is provided to the cemetery as to the decedent's right of burial in the lot, plot or part thereof;").

While other statutory and regulatory definitions may include grandparents within the definition of family or immediate family, many of these provisions include other relatives as well. See, e.g., 14 NYCRR § 635-99(ax)(defining immediate family for the purpose of Mental Hygiene Law as "[b]rother, sister, grandparent, grandchild, first cousin, aunt, uncle, spouse, parent or child of an individual, whether such relationship arises by reason of birth, marriage or adoption."); New York Elec. Law App 6200.10(7)(McKinney's 2019) ("Immediate family means for the purposes of this section, the spouse, child, parent, grandparent, brother, half-brother, sister, half-sister of the candidate, and the spouses of such

persons"); New York Elec. Law § 14-107(f) (McKinney's 2020)(same); New York Envtl. Conserv. Law § 13-0328 (McKinney's 2020) ("6.d. For purposes of this section, "immediate family" shall include spouse, sibling, parent, child, grandparent, grandchild, and, in addition, all persons who are related by blood, marriage or adoption to the permit holder and domiciled in the house of the license or permit holder."); see, also, 29 C.F.R. § 1635.3(a)(2) (Definitions specific to GINA (Genetic Information and Non-Discrimination Act of 2008) "(i) First-degree relatives include an individual's parents, siblings, and children. (ii) Second-degree relatives include an individual's grandparents, grandchildren, uncles, aunts, nephews, nieces, and half-siblings.").

Moreover, any reliance on Domestic Relations Law § 72 to support the contention that grandparents should be entitled to recover is misguided. While that statute does afford grandparents rights to seek visitation and even custody of their grandchildren, it does so under essentially the same terms as are required to be met by third parties. See, Suarez v. Williams, 26 N.Y.3d 440, 447 (2015)("The legislative intent, as stated in the bill enacting this amendment, was 'to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren,'

but was 'in no way intended to limit the state of the law as it relates to the ability of any third party to obtain standing in custody proceedings' against a birth parent."); see, e.g., Bennett v. Jeffreys, 40 N.Y.2d 543, (1976)(extended voluntary separation of birth mother and child required hearing on best interests of the child in mother's challenge to custody by non-relative); Benitez v. Llano, 39 N.Y.2d 758 (1976)(custody with second cousin was continued where child would be an adult in a few months after Court of Appeals decision).

Third, if the immediate family requirement serves to limit what could easily become unlimited liability, that goal is frustrated by including grandparents in the definition of immediate family. Plaintiff contends that permitting grandparents to recover for negligent infliction of emotional distress would only expand potential liability by four people. This contention, however, ignores step-grandparents and more significantly, the reciprocal rights all grandchildren could sue for emotional distress caused by injuries to any of their four (or more) grandparents. See, e.g., Leong v. Takasaki, 55 Haw. 398, 413, 520 P.2d 758, 760 (1974)(sustaining infant plaintiff's claim of emotional distress upon witnessing his step-grandmother being struck and killed by an automobile as they crossed a highway).

Finally, what makes this plaintiff's emotional distress compelling is her close personal relationship with the decedent, not her status as a grandparent. Plaintiff's careful narrative of the details of her interaction with her granddaughter evoke well-deserved sympathy, but basing a bystander's claim for emotional distress on the reality of the emotional connection with the injured or deceased victim precludes any a priori basis for excluding a bystander other than a stranger. Requiring proof of an actual emotional connection between plaintiff and victim would also permit defendants to discover the intimate details of the relationship between plaintiff and victim. Doing so will also impose an obligation on the court (or the jury) to determine what level of "emotional connection" is sufficient – a parameter that does not lend itself easily to clear guidance from the court and may result in disparate results because of unclear or differing perceptions of what constitutes a "sufficient" emotional connection.

If, on the other hand, the bystander's relation to the accident victim functions as a filter, limiting liability to a reasonable degree, defining immediate family as those who are related within the first degree of consanguinity and those who are related because of a recognized legal relationship

(marriage, civil union, or domestic partnership) remains consistent with this Court's well-reasoned jurisprudence. Such plaintiffs may reasonably be presumed to sustain serious emotional distress as a result of witnessing their immediate family member's serious injury or death and that measure avoids the geometrically expanded potential liability increase of including relations within the second degree of consanguinity (and beyond), as well as the uncertainty of what constitutes a "sufficient" emotional connection. Therefore, DANY respectfully submits that the term immediate family should be given its ordinary meaning, encompassing only the nuclear family for the purposes of liability for bystander emotional distress claims.

C. A Foreseeability Standard Is Unworkable

Alternatively, plaintiff argues that this Court should adopt a foreseeability standard for permitting bystander emotional distress claims, even though this Court has explicitly rejected the Dillon court's foreseeability theory of liability as leading inevitably to unlimited liability. Tobin, 24 N.Y.2d at 615 ("But foreseeability, once recognized, is not so easily limited. Relatives, other than the mother, such as fathers or grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably

affected. Hence, foreseeability would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders."). DANY respectfully submits that plaintiff's argument ignores New York's established method of analyzing when the law imposes a duty as well as the tortured history the foreseeability standard has had in the courts that adopted this standard.

Recovery for emotional distress in New York has never been based on whether plaintiff suffered foreseeable emotional distress. See, e.g., Kennedy v. McKesson Co., 58 N.Y.2d 500 (1983)(dentist may not recover for emotional distress of patient's death resulting from mislabeled oxygen and nitrous oxide connections on anesthetic machine); Becker v. Schwartz, 46 N.Y.2d 401 (1978) (parents may not recover for emotional distress of caring for children born with birth defects caused by negligent genetic counseling). If it were, recovery would be permitted for the emotional distress caused by serious injury negligently inflicted on a beloved dog or cat, or on the damage or destruction of a treasured tea pot, painting, or home. Cf., Campbell v. State, 63 Haw. 557 (1981)(owners recover for foreseeable emotional distress resulting from death of dog); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37 (Fl. Ct. App. 3d Dist. 1978)(same); Rodrigues v. State, 52 Haw. 156, 472

P.2d 509 (1970)(permitting emotional distress damages as a result of negligent damage to home).

Dillon, of course, did not permit all foreseeable emotional distress claims. People who directly or indirectly observe the serious injury or death of another will almost certainly suffer at least some emotional distress. The three factors set forth in Dillon were meant to be limitations on the potentially endless chain of foreseeable "bystanders" who become emotionally distressed as a result of even the most minor accident. The Dillon Court directed that factors such as plaintiff's proximity to the accident, whether "the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident," and whether plaintiff and the victim were "closely related" were relevant in deciding the foreseeability of plaintiff's emotional distress. 68 Cal. 2d at 740-741, 441 P.2d at 920. Twenty years later, the same court discarded Dillon's open-ended approach and required a plaintiff to show she is "(1) closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness and which is not an

abnormal response to the circumstances." Thing v. LaChusa, 48 Cal. 3d 644,667-668, 771 P.2d 814, 829-830 (1989).

Significantly, limiting emotional distress damages to claims "beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances," is contrary to the normal tort rule that "a negligent person is responsible for the direct effects of his acts, even if more serious, in cases of the sick and infirm …." McCahill v. New York Transp. Co., 201 N.Y. 221, 223 (1911); see, also, Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 9 (2008)(permitting emotional distress damages for PTSD that persisted even after doctors determined plaintiff had not contracted HIV). In other words, making plaintiff's emotional distress claim dependent on whether most people would suffer the same kind of distress is contrary to the normal tort rule that plaintiff is entitled to recover for all her damages.

Moreover, neither the "close relationship" nor the "contemporary observance" limitation in the foreseeability test used by California and other states distinguishes meritorious medical claims from fraudulent ones. For instance, post-traumatic stress disorder (PTSD) is a psychiatric disorder that results in measurable changes in brain function. Shin, L., "Regional Cerebral Blood Flow in the Amygdala and Medial

Prefrontal Cortex During Traumatic Imagery in Male and Female Vietnam Veterans With PTSD," Arch. Gen. Psychiatry. 2004;61(2):168-176 (finding decreased regional cerebral blood flow to the medial frontal gyrus and increased regional cerebral blood flow to the amygdala during traumatic events in PTSD veterans when compared with non-PTSD veterans). PTSD can be caused by experiencing a traumatic event (e.g. soldiers engaged in a battle) as well as by observing a traumatic event or even learning of a traumatic event second hand. See, Tsavoussis, A., et al., "Child Witnessed Domestic Violence and its Adverse Effects on Brain Development: A Call for Societal Self Examination and Awareness," Front. of Public Health, 2014, 2:178 (citing DSM 5 diagnostic criteria and primary research articles). Thus, a plaintiff can suffer PTSD whether or not she learns of the accident and injury as it happens or second hand and regardless of whether the victim is a relative.

D. Medical Science Has Underscored The Need To Limit Bystander Emotional Distress Liability

At its core, the imposition of liability for bystander emotional distress is based on the notion that where a bystander and tort victim have a close emotional relationship, the bystander is very likely to suffer severe emotional distress. It is not surprising, however, that those who come to the aid

of accident victims can suffer severe emotional distress. See, Dillon, 68 Cal. 2d at 744, 441 P.2d at 923 (English courts "permitted recovery by a widow of a man who developed severe psychoneurotic symptoms as a result of harrowing experiences, not involving his personal safety, while serving as a rescuer at a gruesome train wreck . . ."). In fact, medical science confirms that severe emotional distress can result even when the victim and bystander have no pre-existing emotional relationship. About one in five police, firemen, and construction workers working to clean up the World Trade Center disaster site developed PTSD as a result that experience. See, e.g., Bromet, E.J., et al., "DSM-IV post-traumatic stress disorder among World Trade Center responders 11–13 years after the disaster of 11 September 2001 (9/11)," Psychological Medicine (2016), 46, 771–783. That is, these workers sustained severe emotional distress secondary to clearing the site of a disaster. Indeed, a nationwide survey conducted a few days after September 11, 2001 showed that a significant percentage of the population of the United States suffered from stress reactions, and "[e]xtensive television viewing was associated with a substantial stress reaction." Schuster, M. et al., "A National Survey of Stress Reactions after the September 11, 2001, Terrorist Attacks," N Engl J Med 2001; 345:1507-1512.

The medical evidence that bystanders can suffer severe emotional distress as a result of witnessing the serious injury or death of a stranger, further supports the narrowly limiting liability to an uninjured observer of a traumatic event to prevent the unrestrained expansion of such liability and its attendant adverse fiscal impacts. Adhering to the existing rule of limiting liability to first degree relatives who are within the zone of danger represents a clear delineation of the limitation. To do otherwise would be improvident.

CONCLUSION

Plaintiff's attempt to expand liability for negligent infliction of emotional distress should not be given credence, given both the well-settled law limiting such liability to those having a first degree familial relationship and the potential unlimited expansion of liability that would result from the rule espoused by plaintiff. Therefore, DANY respectfully requests an affirmance.

Dated: Jericho, New York
November 6, 2020.

Respectfully submitted,

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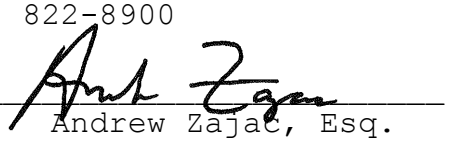
By: 
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CERTIFICATION PURSUANT TO §500.13(c)(1)

Court of Appeals

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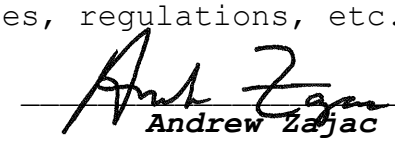

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