To be Argued by:
CARYN L. LILLING
(Time Requested: 15 Minutes)

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Appellate Division, Second Department Case No. 2017-02080

Court of Appeals
of the
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 MAQSOOD FARUQI,

Defendants-Respondents,

– and –

D&N CONSTRUCTION AND CONSULTING, INC.,

Defendant.

BRIEF FOR DEFENDANTS-RESPONDENTS BLUE PRINTS ENGINEERING, P.C. and MAQSOOD FARUQI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), Defendant-Respondent, Blue Prints Engineering, P.C., states that it has no parents, subsidiaries or affiliates.

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QUESTION PRESENTED

Did the Appellate Division, Second Department properly adhere to precedent in precluding the plaintiff grandmother from asserting a "zone of danger" claim and should the precedent be upheld by this Court?

Defendants-Respondents, Blue Prints Engineering, P.C. and Maqsood A. Faruqi, P.E. s/h/a Maqsood Faruqi, contend that the Appellate Division's holding was proper and should be affirmed.

PRELIMINARY STATEMENT

The issue in this case has already been analyzed and decided by this Court: the class of bystanders who may recover for their emotional distress pursuant to a "zone of danger" claim is confined to "only the immediate family" (Trombetta v Conkling, 82 NY2d 549, 553 [1993], citing Bovsun v Sanperi, 61 NY2d 219 n 13 [1984]["plaintiffs in these cases were married or related in the first degree of consanguinity to the injured or deceased person"]).

The concerns that faced this Court when it decided Trombetta similarly exist today, such that no basis exists for this Court to stray from its precedent. Plaintiffs urge that the class of bystanders should be expanded to include grandparents, simply because it would increase the potential recovery in their particular case. While plaintiffs and the Appellate Division dissent assert that the current rule is arbitrary and has the potential for disparate results, expanding the "zone of danger" rule to include grandparents is no less arbitrary when one considers the role of other individuals, including aunts and uncles, who may have close emotional ties to the injured party.

In sum, the Appellate Division appropriately ruled that the plaintiff grandmother cannot maintain a "zone of danger" claim. Pursuant to Trombetta and the doctrine of stare decisis, its holding should be affirmed by this Court.

COUNTERSTATEMENT OF FACTS

Background Facts

On May 17, 2015, the plaintiff, Susan Frierson, and her then two-year-old granddaughter were walking on the Upper West Side of Manhattan; they took a break and sat on a bench outside a residential building located at 305 West End Avenue (the building is known as the "Esplanade"). At that moment, debris from the facade of the Esplanade fell, striking the infant in the head and the plaintiff on her left knee and right ankle. The plaintiff underwent treatment for her knee and ankle injuries, but the infant died the following day as a result of her injuries.

In September 2015, the plaintiff and the infant's mother, plaintiff Stacy Greene, commenced the instant action seeking to recover damages resulting from the incident. The named defendants included the building owner, Esplanade Venture Partnership ("Esplanade"), and companies that allegedly performed inspections and work on the building's facade, D & N Construction and Consulting, Inc. ("D & N") and Blue Prints Engineering, P.C., as well as its employee, Maqsood Faruqi (collectively "Blue Prints").

Plaintiffs' Motion to Amend their Complaint

In June 2016, the plaintiffs moved, pursuant to CPLR 3025(b), to amend their complaint (R. 12-41). Specifically, the plaintiff grandmother sought to add a "zone of danger" claim to recover for her emotional distress as a consequence of observing the serious injury of her granddaughter (R. 15). In support of their motion, plaintiffs relied on Bovsun v Sanperi (61 NY2d 219 [1984]), and asserted that the plaintiff grandmother was entitled to recover for her emotional distress because her infant granddaughter was a member of her "immediate family."

The defendants, Esplanade and Blue Prints, opposed plaintiffs' motion, arguing that the well-settled law precluded the plaintiff grandmother from asserting a "zone of danger" claim (R. 133-154). Not only did this Court previously hold that in order to recover under a "zone of danger" claim the plaintiff must be a member of the injured party's immediate family, but the controlling Appellate Division explicitly held under nearly identical circumstances that "the class of persons in a plaintiff's 'immediate family' does not include his or her grandchild" (Jun Chi Guan v Tuscan Dairy Farms, 24 AD3d 725, 727 [2d Dept 2005]).

The Trial Court's Order

Despite the controlling case law in direct contravention to plaintiffs' application, by decision and order of the Supreme Court, Kings County (Velasquez, J.), dated December 12, 2016, the plaintiffs' motion was granted (R. 8-11). The trial court ignored the controlling Second Department case, i.e., Jun Chi Guan v Tuscan Dairy Farms, and instead focused on multiple cases, including a federal district court opinion, which analyzed whether a particular party is within the "immediate family" of the plaintiff, ultimately concluding that "it is up to a trier of fact to determine whether the facts of this action can support a claim for negligent infliction of emotional distress" (R. 11).

The Appellate Division's Decision & Order

Blue Prints and Esplanade appealed, and by decision and order of the Appellate Division, Second Department, the order of the trial court was reversed and plaintiffs' motion to amend to add a "zone of danger" claim was denied (R. 174-189). Citing this Court's decision in Trombetta v Conkling (82 NY2d 549 [1993]) and its own decision in Jun Chi Guan v Tuscan Dairy Farms, the Appellate Division concluded that "plaintiffs' proposed cause of action sounding in negligent infliction of emotional distress was patently devoid of merit and, thus, the Supreme

Court should not have granted the plaintiffs leave to amend the amended complaint to assert it" (R. 176).

The dissent by Justice Miller, with Justice Hinds-Radix concurring, asserted that an expansion of the claim beyond the "immediate family" recognizes "the legitimacy of non-traditional family structures and evolving social practices" (R. 186). Overlooked by both the dissent and plaintiffs, however, is that this Court, in Trombetta, already recognized the existence of non-traditional family members, who could demonstrate "the equivalent of an intimate, immediate familial bond." Despite the existence of that class of individuals, however, this Court concluded that the claim should *not* be expanded beyond "a strictly and objectively defined class of bystanders" (82 NY2d at 553). Thus, the identical reasoning expressed by the Appellate Division dissent in this case has already been considered and rejected by this Court.

Plaintiffs subsequently moved for leave to appeal to this Court, which was granted by the Appellate Division (R. 192). As will be shown, the Appellate Division's decision and order was appropriate and should be affirmed by this Court.

ARGUMENT

THE APPELLATE DIVISION, SECOND DEPARTMENT'S DECISION AND ORDER SHOULD BE AFFIRMED BASED UPON THIS COURT'S PRECEDENT.

The issue raised on this appeal relates to the class of bystanders who may recover for their emotional distress in a "zone of danger" claim. This Court has already held, in Trombetta v Conkling (82 NY2d 549 [1993]), that the class of bystanders who my recover pursuant to a "zone of danger" claim is limited to those married or related in the first degree of consanguinity. No basis exists that would justify this Court straying from its precedent. Plaintiffs urge that the rule be expanded to include grandparents, *not* based upon any cogent analysis of the law, but simply to increase their personal financial recovery.

This Court Has Already Concluded That the Class Of Bystanders Who May Recover Under a "Zone Of Danger" Claim Is Limited to the Immediate Family, Which Does *Not* Include Grandparents

In the first instance, contrary to plaintiffs' contention, the plaintiff grandmother and her granddaughter are *not* "immediate family members" (Brief of Plaintiffs Appellants at p. 17), within the meaning of the "zone of danger" rule, according to this Court's own precedent.

Bovsun v Sanperi (61 NY2d 219 [1984]), was the case that first sanctioned a "zone-of-danger" claim. There, the plaintiffs were all immediate family members to the extent that they were married or related in the first degree of consanguinity. Therefore, this Court did not decide "where lie the outer limits of 'the immediate family'" for purposes of the "zone-of-danger" rule (id. n 13). Such a determination was not necessary since the plaintiffs were immediate family members, pursuant to the plain meaning of the term.

Plaintiffs assert that it was "evident" that the Bovsun Court did not view "the requirement that the plaintiff and the injured person be 'immediate family members,' as the primary mechanism for limiting the availability of recovery for emotional damages to a controllable degree" (Brief of Plaintiffs Appellants at p. 20). However, a fair reading of the decision does not support plaintiffs' presumption.

In Bovsun, this Court qualified and limited the "zone of danger" claim to the "immediate family member" repeatedly and consistently throughout the decision, *no less than twelve times*. Moreover, this Court expressed its comfort in broadening recovery for emotional damages to *only* immediate family members since "the circumstances in which a plaintiff who is within the zone of danger

suffers serious emotional distress from observing severe physical injury or death of *a member of the immediate family* may not be altogether common" (id. at 229 [emphasis added]). Clearly, this Court sanctioned the claim with full knowledge that the risk of the proliferation of claims was small given the limited pool of potential plaintiffs.

Indeed, the Bovsun Court "recognized…that arbitrary distinctions are an inevitable result of the drawing of lines which circumscribe legal duties" to the extent "that delineation of limits of liability in tort actions is usually determined on the basis of considerations of public policy" (id. at 228 [citations omitted]).

Almost ten years later, in Trombetta, this Court was again faced with the viability of a "zone of danger" claim, and specifically whether the plaintiff qualified as a bystander for purposes of asserting the claim. Unlike Bovsun, which involved parents and children, in Trombetta, the plaintiff sought to recover for the emotional distress stemming from observing her aunt being run over by a tractor-trailer. This Court noted that the plaintiff niece and deceased aunt shared "a long and strong emotional bond" since the niece's mother died when she was 11 years old and her aunt became her maternal figure; "[t]hey always lived close by and

enjoyed many activities together on a daily basis" (82 NY2d at 551). At the time of the accident, the plaintiff niece was 37 and the aunt was 59.

The trial court in Trombetta sustained the claim, noting that Bovsun explicitly left open the issue of "where lie the outer limits of 'the immediate family'" (154 Misc2d 844 [Sup Ct, Oneida County 1992]). The Appellate Division, Fourth Department *reversed* and dismissed the complaint, "confining the class of potential plaintiffs who may assert a claim of negligent infliction of emotional distress to the 'immediate family'" (187 AD2d 213 [4th Dept 1993]). The Appellate Division declined to impose liability on the defendants, notwithstanding a showing that a "strong bond" existed between plaintiff and the deceased, citing the "difficult proof problems and the danger of fictitious claims" (id.).

The Appellate Division in Trombetta granted the plaintiff leave to appeal, and this Court *affirmed* because it "share[d] the Appellate Division's concerns" and agreed that the broadening of the claim "beyond the footnote concerning the breadth of the rule is *not* warranted" (82 NY2d at 552-53 [emphasis added]), even in a case where the plaintiff's mother was no longer alive and the aunt was the maternal figure. This Court recognized the long-standing hesitation of creating a

right to recovery for bystanders based on the negligent infliction of emotional distress, and described the Bovsun decision as "a *narrow* avenue to bystander recovery" (id. at 552 [emphasis added]).

This Court went on to recognize the "important common-law tradition and responsibility to define the orbits of duty" and the "[s]ound policy and strong precedents [that] justify our confinement and circumscription of the zone of danger rule to only the immediate family as surveyed in Bovsun" (id. [citations omitted]). This Court reasoned that "[o]therwise, the narrow avenue will ironically become a broad concourse, impeding reasonable or practicable limitations" (id.).

Notably, this Court described recovery by the niece in Trombetta to be a "*significant* extension of defendants' obligation to be answerable in damages for her emotional trauma" and "on public policy grounds," concluded "that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (id. at 553 [emphasis added]).

This Court's further rationale is particularly relevant to the instant analysis:

> As a policy matter, we continue to balance the competing interests at stake by limiting the availability of recovery for the negligent infliction of emotional distress to a strictly and objectively defined class of bystanders. In addition to the prevention of an unmanageable proliferation of such claims--with their own proof problems and potentiality for inappropriate claims--the restriction of this cause of action to a discrete readily determinable class also takes cognizance of the complex responsibility that would be imposed on the courts in this area to assess an enormous range and array of emotional ties of, at times, an attenuated or easily embroidered nature. We have said before and it has special application here:
>
> > "Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the rippling of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree" (Tobin v Grossman, 24 NY2d 609, 619 [1969]).
>
> Thus, while plaintiff was, without doubt, within the zone of danger when defendants' truck killed her aunt, the claim for the negligent suffering of emotional distress was properly dismissed because plaintiff is not within the deceased's "immediate family" as defined and limited by Bovsun.
>
> Trombetta, 82 NY2d at 553-54.

In Trombetta, this Court ultimately concluded that the trial court's rationale -- that the Bovsun Court did not confine the "immediate family" definition and it was free to extend the "zone of danger" rule to "aunts, uncles and other persons sharing a strong emotional bond with the victim" -- exceeded the Bovsun Court's intentions and, as noted, was "not warranted" (id. at 552-553).

Likewise, the instant plaintiffs' argument -- that the Appellate Division should have extended the "zone of danger" rule to a grandmother -- exceeds the intentions of both the Bovsun and Trombetta Courts and is not warranted. In the first instance, there is no merit to plaintiffs' assertion that in Trombetta, this Court did not "expressly define 'immediate family' so as to exclude grandparents" (Brief of Plaintiffs Appellants at p. 22). Such assertion represents a basic misunderstanding of the holding in Trombetta. The Court's holding that "the zone of danger rule [be confined] to only the immediate family as surveyed in Bovsun" can only be interpreted to mean that the class of bystanders who can recover are "either married or related in the first degree of consanguinity to the injured or deceased person" as in Bovsun (Bovsun, 61 NY2d at 243 n 13). Thus, in rejecting the niece's claim in Trombetta, this Court expressly adopted the class "surveyed" in Bovsun as the identifiable class for bystander recovery, i.e., those married or related in the first degree of consanguinity. Given the foregoing, contrary to

plaintiffs' assertion, "the issue of grandparent bystander recovery" is not an "open issue at the Court of Appeals level" (Brief of Plaintiffs Appellants at p. 22).

Moreover, that this Court already defined the class of bystanders to exclude grandparents as outside of the injured party's "immediate family" was confirmed by the Appellate Division, Second Department in Jun Chi Guan v Tuscan Dairy Farms (24 AD3d 725 [2d Dept 2005]). The "zone of danger" claim was dismissed in Jun Chi Guan *not* because the aunt/niece relationship was analogous to a grandparent/grandchild relationship, but simply because, like the niece, the grandparent in Jun Chi Guan was *not* married or related in the first degree of consanguinity to the deceased person.

Plaintiffs argue that the dissenting opinion in Jun Chi Guan is more persuasive, in part, because it surveyed New York law and observed that there had been no New York case prohibiting bystander recovery based on a grandparent-grandchild relationship (Brief of Plaintiffs Appellants at p. 23). Omitted from plaintiffs' observation, however, was the dissent's simultaneous concession that "[n]or has any New York case permitted recovery of damages" based on a grandparent-grandchild relationship (Jun Chi Guan, 24 AD3d at 731).

Like they did in the trial court and Appellate Division, plaintiffs emphasize the dissent in Jun Chi Guan and its focus on New York legislation that recognizes the "special status of grandparents" (Brief of Plaintiffs Appellants at p. 24). The ability of a grandparent to seek visitation or petition for custody of a grandchild, however, is obviously in furtherance of this State's well-settled objective of fostering the best interests of children. Such legislation, however, is *not* germane to this State's desire to limit recovery by plaintiffs in personal injury cases to "a strictly and objectively defined class of bystanders" (Trombetta, 82 NY2d at 553).

Moreover, while the dissent in Jun Chi Guan recognized the "critical role that many grandparents play in the lives of their grandchildren" (Jun Chi Guan, 24 AD3d at 732), overlooked by plaintiffs and the dissent is that the specific emotional bond of a particular relationship is not the litmus test to determine the class of bystanders who can recover under a "zone of danger" claim. Indeed, in Trombetta, this Court recognized that the plaintiff niece suffered a "personal tragic loss," but could not justify the significant extension of a defendant's obligation to be answerable in damages for her emotional trauma on "firm public policy grounds" (Trombetta, 82 NY2d at 553). This Court was "persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be

able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (id.).

Thus, legislation concerning a grandparent's custody rights or family leave rights is of no consequence to the instant analysis. In other words, that New York has a strong interest in fostering the best interests of children and providing them with suitable caretakers, who may happen to be grandparents, is not linked in any manner to whether a party should be able to recover monetary damages in a "zone of danger" claim.

The Appellate Division dissent in the instant case focused on purported "arbitrary and disparate results" and "[t]he use of consanguinity as a crude proxy for emotional harm…" (R. 176, 187). Overlooked by the dissent, however, was the obligation of this Court to consider the policy concerns and practical realities if the class of plaintiffs is extended to include grandparents. As former Chief Judge Kaye eloquently stated:

> This sort of line-drawing -- a policy-laden determination reflecting a balance of competing concerns -- is invariably difficult not only because it looks in part to an unknowable future but also because it is in a sense arbitrary, hard to explain to the person just on the other side of the line, especially when grievous injury is alleged. Human compassion and rigorous logic resist the

> exercise. If this person can recover, why not the next? Yet line-drawing is necessary because, in determining responsibility for negligent acts, common-law courts also must look beyond the immediate facts and take into account the larger principles at stake.
>
> McNulty v City of New York, 100 NY2d 227, 234-235 (2003)(Kaye, Ch. J., concurring).

Extending the class of bystanders to recover will only result in additional litigation with parties seeking further "minor" extensions, which they will argue are appropriate given an extension of the rule to grandparents. It is for this reason that "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit" (De Angelis v Lutheran Med. Ctr., 58 NY2d 1053, 1055 [1983]; see also Albala v City of New York, 54 NY2d 269, 274 [1981]["[w]hile the temptation is always great to provide a form of relief to one who has suffered...the law cannot provide a remedy for every injury incurred"]).

Moreover, extending the "zone of danger" claim to include grandparents is arbitrary to the extent that other individuals and relatives, including aunts and uncles, can demonstrate similarly close relationships but would be precluded from asserting a claim even under plaintiffs' proposed extension. For example, an aunt who is a caregiver would be precluded from recovering, whereas an out-of-state

grandparent, who was uncharacteristically present at the time of an injury, would be permitted to recover. Indeed, plaintiffs seek to extend the "zone of danger" rule to grandparents *not* based upon any cogent analysis of the law, but simply because this group happens to apply to their case.

Plaintiffs' reliance on inapplicable statutes that define "immediate family" to include grandparents (Brief of Plaintiffs Appellants at p. 28-29), is immaterial to the extent that there are an equal, or even greater amount of statutes that define "immediate family" to *exclude* grandparents (see Financial Industry Regulatory Authority Rules; Penal Law § 120.40[4]; New York Public Health Law § 2805-e; New York Social Services Law § 461-e; General Business Law § 898[1]; New York Civil Court Act § 1601-a[2][a]; Local Emergency Housing Rent Control § 8605; McK. Unconsol. Laws § 6405[3][d][2][i]; Mental Hygiene Law §§ 13.16[b][3], 32.39[b][3]; Judiciary Law §390[1]).

Plaintiffs attempt to minimize their request by stating that grandparents are a "strictly and objectively defined class of bystanders" (Brief of Plaintiffs Appellants at p. 29). Contrary to plaintiffs' contention, however, grandparents are not necessarily a more strictly or objectively defined class of bystanders to the extent that "[a] person can, at most, have four biological grandparents" (Brief of Plaintiffs

Appellants at p. 38). Inevitably, a plaintiff will argue that a foster or step-grandparent should be deemed to be in the injured party's "immediate family" since they have a deeper and stronger emotional connection than any biological grandparent. Thus, the expansion of "immediate family" to include grandparents would impose on the courts the burden to "assess an enormous range and array of emotional ties of, at times, an attenuated or easily embroidered nature," which was the analysis the Trombetta Court explicitly sought to avoid (Trombetta, 82 NY2d at 554).

A Compelling Basis to Stray From Precedent
To Employ a More Flexible Approach Does Not Exist

It should not be overlooked that current New York law permits liability for emotional harm, albeit in a circumscribed class of cases. Because the limit of the scope of liability is neither random nor irrational, however, and given the practical realities of this jurisdiction, no basis exists for this Court to stray from the precedent set forth in Trombetta.

No Basis Exists to Justify Overturning Precedent

Plaintiffs adopt the dissent's contention that it is appropriate to eschew precedent when the existing rule "no longer serves the ends of justice or has proven unfair or indefensible" (Brief of Plaintiffs Appellants at p. 35). Contrary to

plaintiffs' contention, however, the existing rule, which limits the class of bystanders who may recover in a "zone of danger" claim to the immediate family, serves justice and is defensible based upon this State's history of limiting the scope of liability.

Plaintiffs rely on Broadnax v Gonzalez (2 NY3d 148 [2004]), in which this Court held that a mother may recover damages for emotional harm when medical malpractice causes a miscarriage or stillbirth. While the Broadnax Court strayed from precedent, there, unlike here, the precedent created a "logical gap," which this Court decided to fill (id. at 154). In Broadnax, this Court recognized that "line drawing is often an inevitable element of the common-law process," but strayed from precedent given that it was at odds with the "decisional law in this area" (id. at 155).

In contrast, here, the same considerations expressed in Trombetta exist today, such that, unlike Broadnax, the line drawn by the Trombetta Court is consistent with decisional law in the area and remains defensible. "On firm public policy grounds," this Court *unanimously* concluded that the class of bystanders permitted to recover in a "zone of danger" claim should *not* be expanded "to all bystanders who may be able to demonstrate a blood relationship coupled with

significant emotional attachment or the equivalent of an intimate, immediate familial bond" (Trombetta, 82 NY2d at 553). This Court explained that it has "been precise and prudent in resolving tort duties, because the significant expansion of a duty 'must be exercised with extreme care, for legal duty imposes legal liability'" (id. quoting Pulka v Edelman, 40 NY2d 781, 786 [1976]).

"The courts' definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if traditional tort principles had been applied" (Strauss v Belle Realty Co., 65 NY2d 399, 402-03 [1985]). Indeed, the Trombetta Court emphasized "this Court's important common-law tradition and responsibility to define the orbits of duty," in ultimately concluding that "[s]ound policy and strong precedents justify our confinement and circumscription of the zone of danger rule to *only* the immediate family as surveyed in Bovsun" (Trombetta, 82 NY2d at 553 [emphasis added]).

Plaintiffs assert that recent legislation granting grandparents additional custody rights somehow justifies the expansion of the "zone of danger" rule. Not only are the issues unrelated, but the role grandparents may play does not outweigh the "sound policy and strong precedents" identified by this Court in Trombetta.

While this Court is free "to overrule settled precedent…such a decision, made in derogation of the important policy of stare decisis, is not taken lightly, or unconsciously" (Policano v Herbert, 7 NY3d 588, 604 [2006]). Indeed, in 1991, two years *prior* to the Trombetta decision, this Court recognized the existence of the changing family structure "including…heterosexual stepparents, 'common law' and nonheterosexual partners…" and the fact that "more than 15.5 million children do not live with two biological parents…" (Alison D. v Virginia M., 77 NY2d 651, 657 [1991]), but still declined to extend the class of bystanders beyond the immediate family.

"It is well settled that '[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'" (People v Taylor, 9 NY3d 129, 148 [2007], quoting Payne v Tennessee, 501 US 808, 827 [1991]). The doctrine rests upon the principle that "a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes" (People v Bing, 76 NY2d 331, 338 [1990]). "At the root of [the application of stare decisis] must be a humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing

that of its predecessors. Without this assumption there is jurisprudential anarchy" (People v Hobson, 39 NY2d 479, 488 [1976]).

In People v Taylor, this Court recognized that "lessons of time may lead to a different result" and that "the strong presumption that the law is settled by a particular ruling may be rebutted, but only in exceptional cases" (9 NY3d at 149). It is submitted that plaintiffs have failed to demonstrate that this case represents an exceptional case that warrants the overturning of this Court's precedent as set forth in Trombetta.

Indeed, this Court recently recognized the high burden of establishing a "compelling reason to overrule our longstanding precedent" in Hinton v Vil. of Pulaski (33 NY3d 931, 933 [2019]). Hinton, like here, involved the application of settled precedent -- not statutory interpretation -- and this Court held "[w]e see no compelling reason to overrule our longstanding precedent" (id.).

Absent a compelling justification, no basis exists to overturn the precedent set forth in Trombetta. Defining the class of bystanders who may recover in a "zone of danger" claim to include only the immediate family is *not* "an unworkable rule" nor does it "create[] more questions than it resolves" (People v Mack, 27

NY3d 534, 546 [2016]). The preexisting rule is simple to apply; it is both defensible and serves the ends of justice in this State such that it should be maintained (see Policano v Herbert, 7 NY3d 588, 604 [2006]).

Although "the desire to provide an avenue to redress wrongs is...an important consideration underlying our tort jurisprudence, the recognition that there has been an interference with an interest worthy of protection has been the beginning, not the end, of our analysis" (Ortega v City of New York, 9 NY3d 69, 78 [2007]). This Court undoubtedly has the authority to expand the "zone of danger" cause of action, but it should "exercise that responsibility with care, mindful that" the expansion will have both "foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability" (Madden v Creative Servs., 84 NY2d 738, 746 [1995] [citations omitted]).

Plaintiffs rely heavily on the Third Restatement of Torts, which employs the term "close family member," as opposed to "immediate family member" as the class of individuals who should be permitted to recover in a "zone of danger" claim (Restatement [Third] of Torts: Phys. & Emot. Harm § 48 [2012]). Most significantly, however, the Restatement recognizes the "pragmatic recognition that

a line must be drawn" and that "[t]he case law in each jurisdiction will develop its own rules in this respect" (id.).

In addition, the Restatement anticipates a case-by-case determination as to whether a party qualifies as a "close family member," which may be feasible in other jurisdictions, but is simply too onerous for the New York court system. The Restatement also recognizes that the "requirements in this Section might be described or criticized as arbitrary…in the sense that they are both over-broad and under-broad (as is any rule) and that some other rules, modestly different, might equally well serve their function" (id.). As such, it also recognized that "[l]imits are required for emotional harm because of its ubiquity, and an alternative to workable and effective limits for such liability could be a rule of no liability" (id.).

Plaintiffs' reliance on Consolidated Rail Corp. v Gottshall (512 US 532 [1994]), is entirely misplaced as the case involved a negligent infliction of emotional distress claim under the Federal Employers' Liability Act ("FELA"), which allows for broader recovery than a general negligence claim in New York. In fact, FELA has historically been "liberally construed" and allows for a "broader scope to the statutory term 'injury'" in light of the statutes' remedial purpose (id. at 543, 550). Indeed, unlike a New York negligence claim, a relaxed standard of

causation applies under FELA, whereby the plaintiff may recover where the employer's negligence "played any part, *even the slightest*, in producing the injury or death…" (id. [emphasis added]). Moreover, a plaintiff can recover under FELA based upon a statutory violation under the doctrine of negligence per se even where the injuries sustained are *not* the type that the statute sought to prevent. Given the significant differences between a common law negligence action and a FELA claim, the holding in Consolidated Rail Corp. is not pertinent to the instant analysis.

Moreover, and contrary to plaintiffs' interpretation, the Court's holding in Consolidated Rail Corp., which did not apply the "close family member" restriction to an emotional distress claim, is inapposite since FELA claims stem from injuries that occur at *work*, such that "it would be a rare occurrence for a worker to witness during the course of his employment the injury or death of a close family member" (id. at 556).

Most significantly, while the Court in Consolidated Rail Corp. permitted recovery despite the absence of a close family relationship, the Court likewise noted that "[a] more significant problem is the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants" and

recognized the need for the common law to "place limits on this potential liability by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover" (id. at 552).

Expanding the Class Will Prove To Be Too Onerous

Adoption of plaintiffs' argument that the class of bystanders should be expanded to include grandparents will most certainly invite claims by individuals outside of the family, who have a grandparent-type relationship, resulting in additional litigation by those seeking to further expand the class. A deviation from the defined class of bystanders already sanctioned by this Court in Trombetta will saddle trial courts with the task of analyzing personal relationships to somehow determine, as a matter of law, whether a particular plaintiff can recover pursuant to a "zone of danger" claim."

Not only would the adoption of such a rule place an onerous burden on our courts, but it would most certainly result in inconsistent holdings by the numerous courts in the numerous counties, which will be required to assess the particular facts of the particular cases before them. Moreover, the notion that New York should follow other jurisdictions that have applied "a more pragmatic standard that inquires into the functional nature of the bystander's relationship with the injured

third party" (R. 187), is not realistic or practical given the sheer number of personal injury cases filed in New York courts as compared to other jurisdictions. According to the 2018 Unified Court System Annual Report, more than 1.3 million civil cases were commenced in New York in *each* of the last five years, and in 2018, 28% of those cases (364,000) were personal injury cases (https://www.nycourts.gov/legacypdfs/18_UCS-Annual_Report.pdf).

The dissent and plaintiffs referenced several states (Ohio, Oregon, Tennessee, New Hampshire, Washington and New Jersey), that have adopted a less formalistic approach to bystander recovery. Most significantly, however, every single state referenced by the dissent maintains a small fraction of New York's caseload. Specifically, according to the Ohio Judiciary Annual Report, 104,423 civil cases were commenced in 2017, and the biggest category of those cases was foreclosure (35,169), which would not involve the issue of bystander recovery.[1] Likewise, the Oregon Judicial Department reported 54,588 civil actions commenced in 2015, and the Tennessee Judiciary Annual Report cited 50,216 circuit court filings in 2018, which consisted of only 10,754 tort actions.[2] The New Hampshire Judiciary reported 4,818 and the Washington State Judiciary

[1] https://www.supremecourt.ohio.gov/Publications/annrep/17OCSR/2017OCSR.pdf

[2] https://www.courts.oregon.gov/about/Documents/2015_AnnualReport%20(6).pdf; https://www.tncourts.gov/sites/default/files/docs/annual_report_fy2018.pdf

reported 110,073 civil cases commenced in 2018.[3] Finally, the New Jersey Judiciary reported 492,110 civil cases commenced in 2017-2018, however, 376,874 of those cases involved either contract or tenancy, which would not implicate "zone of danger" litigation.[4]

Plaintiffs also point to Texas, New Mexico, Louisiana, Indiana, Iowa, Wyoming, Hawaii, Illinois, and Wisconsin, which likewise maintain a small fraction of the New York state caseload. Moreover, even California had significantly less case filings than New York; in 2017 through 2018, there were 221,090 civil cases filed in which the plaintiff sought more than $25,000.[5]

Most significantly, plaintiffs' assertion that New York "is the only state in the union which permits bystander recovery actions but would deny such a claim on behalf of a grandparent" (Brief of Plaintiffs Appellants at p. 36) is simply wrong. In fact, Michigan permits bystander recovery but precludes a grandparent from making such a claim. In Michigan, in order to recover for negligent infliction of emotional distress, "the plaintiff must be a member of the immediate family, or

[3] https://www.courts.state.nh.us/cio/2018-Circuit-Court-Filings-by-District-Division.pdf; https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=&fileID=filyr

[4] https://njcourts.gov/public/assets/annualreports/AnnualReportCY18_web.pdf?c=GOA

[5] https://www.courts.ca.gov/documents/2019-Court-Statistics-Report.pdf

at least a parent, child, husband or wife" (Wargelin v Sisters of Mercy Health Corp., 149 Mich App 75, 81 [Mich Ct App 1986]).

Moreover, there are several states that outright preclude *any* bystander recovery for negligent infliction of emotional distress: Alabama, Arkansas, Georgia, Idaho, Kentucky, Maryland, and Virginia.[6] As such, there are nine states, comprised of the seven foregoing states as well as New York and Michigan, that preclude a grandparent from recovering for negligent infliction of emotional distress under a "zone of danger" theory.

Finally, in considering the influence of neighboring states, this Court should remain mindful of this State's history of limiting the scope of liability such that negligence claims are not as broad as other states. For example, in New Jersey, in determining whether a party owes a duty of care, the Court considers fairness and public policy; foreseeability; the relationship between the parties; the nature of the conduct at issue; and the ability to alter behavior to avoid injury to another (G.A.-H. v K.G.G., 238 NJ 401, 414, 210 A3d 907, 915 [2019]). In New York, however,

[6] Gideon v Norfolk Southern Corp., 633 So2d 453 (Ala 1994); Dowty v Riggs, 2010 Ark 465, 385 SW3d 117 (2010); Lee v State Farm Mut. Auto. Ins. Co., 246 GaApp 720, 541 SE2d 700 (Ga Ct App 2000)(One narrow exception where pure bystander recovery possible – a parent can recover for witnessing death of child with no personal impact); Johnson v McPhee, 147 Idaho 455, 210 P3d 563 (Idaho Ct App 2009); Osborne v Keeney, 399 SW3d 1 (Ky 2012); Bagwell v Peninsula Regional Medical Center, 106 Md App 470, 665 A2d 297 (Md Court of Spec App 1995); Gray v INOVA Health Care Services, 257 Va 597, 514 SE2d 355 (1999).

"courts 'fix the duty point by balancing factors, including the reasonable expectations of [the] parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability'" (Pasternack v Laboratory Corp. of America Holdings, 27 NY3d 817, 825 [2016], quoting 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 288 [2001]). The incongruence of the factors considered by the two jurisdictions on the issue of duty confirms the propriety for declining to expand the "zone of danger" rule to beyond the immediate family, regardless of the holdings in other jurisdictions.

The Fact that the Plaintiff Grandmother Can Already Recover For Emotional Injuries Arising From Her Physical Injury Has No Bearing on the Class of Bystanders Permitted To Recover Under a "Zone Of Danger" Claim

The fact that the plaintiff grandmother can recover for any emotional injury she suffered in connection with the physical injuries she sustained as result of the incident is not relevant to the instant analysis. Certainly, any difficulty identified by the dissent in "parsing" the emotional trauma of a plaintiff is not a compelling reason for this Court to stray from its precedent (R. 186). To that end, any other bystander (other than an immediate family member) is required to distinguish between the emotional trauma associated with their own physical injury and the

trauma that arises as a result of observing another individual's injury, which is not compensable.

Contrary to the dissent's assertion, the "immediate family" requirement is simple to apply, even to the case at bar. Precluding the plaintiff grandmother's "zone of danger" claim will simply limit the evidence elicited at trial; plaintiffs will be precluded from questioning the plaintiff grandmother about any emotional injury stemming from witnessing her granddaughter's injury.

Plaintiffs rely on Shanahan v Orenstein (52 AD2d 164 [1st Dept 1976]), in which the Appellate Division, First Department permitted recovery seemingly in contradiction to New York law, since the decision was issued prior to Bovsun. It is unclear how Shanahan even supports plaintiffs' argument in the case at bar. Indeed, despite the lack of authority at the time, the case would be sustained under current law since the bystander was the mother of the injured party.

In sum, given the potential for a proliferation of claims, the considerable potential for fabricated claims and the heavy burden that would be faced by the court system, this Court has already decided that a "zone of danger" claim may be asserted by only an immediate family member, which is limited to those married or

related in the first degree of consanguinity. Neither plaintiffs nor the Appellate Division dissent has identified a compelling reason to stray from this Court's precedent. That other jurisdictions permit an expanded pool of plaintiffs to recover for their emotional distress does not alter the significant policy considerations this Court must balance. As such, it is respectfully submitted that the decision and order of the Appellate Division should be affirmed.

In the Event this Court Intends to Expand the Class of Bystanders, The Class Should be Limited to Individuals Who Stand In Loco Parentis

A person acting in loco parentis assumes the role of a parent to the extent that he or she undertakes the responsibility to support and care for a child on a permanent basis and acts as the functional equivalent of a parent (People v Barry, 27 NY3d 591 [2016]). In the event this Court is inclined to expand the class of bystanders who may recover under a "zone of danger" claim, it is submitted that the class should not be expanded further than including those standing in loco parentis and/or as defacto parents.

Indeed, by limiting the class of bystanders to immediate family and defacto parents, all of the purported flaws of the current framework identified by the dissent will be resolved. Although such an expansion would remain a bright-line test, it would also "recognize the legitimacy of non-traditional family structures

and evolving social practices," to the extent that the plaintiff who acts as a defacto parent in a "non-traditional family structure" will be permitted to recover (R. 186). In addition, such a ruling would eliminate consanguinity as the *sole* basis for recovery under a "zone of danger" claim, while at the same time preserving the reliability of such a claim to those in a role tantamount to an immediate family member.

Moreover, expanding the class of bystanders who may recover under a "zone of danger" claim to include defacto parents would likewise recognize a grandparent who undertakes the role of a parent while limiting the burden on the courts. To that end, the class would remain confined to a defined class of bystanders and would still preclude anyone "who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (Trombetta, 82 NY2d at 553).

CONCLUSION

Based upon all of the foregoing, the certified question should be answered in the affirmative and the decision and order of the Appellate Division, Second Department should be affirmed.

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Respectfully submitted,

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