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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 FOR PLAINTIFFS-APPELLANTS

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QUESTION PRESENTED

Where defendants negligently caused plaintiff, Susan Frierson, to be injured and in addition, suffer severe emotional distress caused by observation, from within the zone of danger, of the fatal injury of her two-year-old granddaughter, the decedent Greta Devere Greene, did the Motion Court appropriately exercise its discretion in granting plaintiffs-appellants leave to serve and file their Proposed Second Amended Verified Complaint, which, in relevant part, added a claim for her resultant emotional distress?

Plaintiffs answer this question in the affirmative.

PRELIMINARY STATEMENT

In this appeal, this Court is asked to decide, for the first time, whether a grandparent who as a result of a defendant's negligence, was caused to observe, while within the zone of danger, the serious injury or death of her grandchild, may recover for her resulting emotional injuries.

On May 17, 2015, plaintiff Susan Frierson was strolling around her Upper West Side neighborhood with her two-year-old granddaughter when the pair decided to take a rest on a bench outside of a building known as the Esplanade owned by the defendants-respondents, Esplanade Venture Partnership. Without warning, terracotta debris suddenly fell eight stories from the façade of the Esplanade, striking young Greta in the head and Susan on her left knee and right ankle. To this day, Susan has horrific, vibrant memories of seeing Greta on the ground in the fetal position, pale, motionless and bleeding. Susan tried to call 911 but her hands were trembling so violently that she could not operate her cell phone. Susan attempted to perform CPR on Greta, but her grandchild's mouth was clenched too tightly shut. She eventually succeeded in getting air through Greta's nose and she started to breathe again. The two were both rushed to the hospital in separate ambulances. Susan was in serious, but stable condition. Greta survived through the night but passed away the next morning.

Needless to say, the horrific events of May 17, 2015, forever changed Susan Frierson. The crippling, emotional injuries that she suffered as the result of

witnessing what no grandparent should ever have to see are undeniable. Susan has been diagnosed with post-traumatic stress disorder and severe depression. She has persistent flashbacks and intrusive thoughts in which she sees and relives Greta lying on the ground, trying to pry her mouth open for CPR and hearing her daughter Stacy's scream over the phone when Susan called her from the scene of the accident. The sadness and tearfulness creeps into all aspects of her life: she is rarely able to leave her apartment, and when she does, she experiences recurring panic attacks and intense anxiety. For a substantial period of time, Susan has been unable to sleep, focus or work, and has become socially withdrawn. In other words, Susan's life has been completely and irreparably disrupted.

The Motion Court below correctly recognized that Susan Frierson should be allowed to assert a claim of negligent infliction of emotional distress under the *Bovson* standard for bystander recovery adopted by this Court. In *Bovson v. Sanperi*, 61 N.Y.2d 219 (1984), the Court held that when a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as an element of his or her damages, damages for injuries suffered as consequence of observing the serious physical injury or death of a member of his or her immediate family. In reaching this holding, the Court expressly declined to define the outer limits of "the immediate family." Although the Court has subsequently held that an aunt is not a member of one's "immediate family," it has never been called upon to

decide the specific question at issue here: whether the relationship between a grandparent and grandchild is sufficient to support a claim for bystander recovery.

On appeal to the Appellate Division, Second Department, by a 3-2 decision, the appellate court reversed the motion court's decision and denied plaintiff's motion for leave to amend the complaint. The majority concluded that "on constraint of" *Jun Chi Guan v Tuscan Dairy Farms* (24 AD3d 725 [2d Dept 2005] [holding, over a dissent, that the grandparent/grandchild relationship cannot constitute immediate family absent further direction from the Court of Appeals or legislature]), the only prior appellate case to have addressed bystander recover on behalf of a grandparent, it was compelled to conclude that the proposed cause of action for Susan Frierson's emotional distress was patently devoid of merit.

The two dissenting justices penned a thorough opinion, noting that the line of cases supporting this precedent had been so thoroughly rejected that it was "long ago considered the 'threshing [of] old straw' to dismantle them." They further observed that Susan Frierson was actually injured in the accident herself, and indisputably had a right to recover for her emotional distress resulting from those injuries. Thus, the majority's holding, dismissing the claim for her emotional distress as a result of witnessing her granddaughter's death from within the zone of danger would require the parsing of her emotional trauma into discrete portions that correspond to concurrent causes, requiring "tortuous" "metaphysical gymnastics" that "have no basis in reality."

The dissent further argued that, to the extent the zone-of-danger test is still viable where plaintiff alleges concurrent physical injury, the "immediate family" requirement no longer comports with modern tort law throughout the country as evidenced by the Third Restatement of Torts adopting a standard of "close family member" as opposed to the former "immediate family" standard. The dissent recognized that the immediate family requirement leads to arbitrary results in utilizing "consanguinity as a crude proxy for emotional harm." According, the justices urged that this rigid barrier be replaced by a more functional approach that focuses on the nature of the relationship between the bystander and the injured third party, a standard which would recognize the legitimacy of non-traditional family structures and evolving social practices.

In short, whether or not this Court changes the standard for recovery for zone-of-danger emotional distress damages, it is clear that Susan Frierson should be entitled to recover as a result of this accident. New York case and statutory law has long recognized the unique and special relationship that exists between a grandparent and a grandchild, formally elevating it high above any other familial bond other than the relationship between a parent and child. At the very least, allowing grandparents like Susan Frierson to recover for the emotional injuries they suffer as a consequence of seeing the serious injury or death of their grandchild while within the zone of danger is consistent with New York's recognition of the special status of

grandparents, and would begin to bring New York in line with the clear majority rule across the country.

Moreover, inasmuch as grandparents are a discreet, identifiable group, allowing them to recover under a bystander recovery claim does not pose a threat of limitless liability and will not result in an unmanageable proliferation of claims. In fact, in light of the extreme rarity of the occurrence of incidents in which grandparents observe the death or serious injury of a grandchild while within the zone of danger – as evidenced by the fact that the issue has arisen in one prior case since *Bovsun* was decided - the recognition of four discrete people in the class of the individuals that are considered to be members of one's "immediate family" will have no significant impact on defendants or the court system in general, while it will have a substantial positive impact on the few grandparents that are faced with such a horrific situation who would otherwise be denied the ability to recover damages for the emotional injuries negligently inflicted upon them.

Finally, Esplanade Venture Partnership's contention argued below that the motion for leave to amend should have been denied because plaintiffs purportedly failed to comply with the procedural requirements of CPLR 3025 (b) in making their motion has no merit. Plaintiffs satisfied the requirements of CPLR 3025 (b) by submitting a copy of the proposed amended complaint, and the changes and additions found therein were readily apparent. In any event, to the extent plaintiffs' motion was somehow procedurally deficient, the motion court properly exercised its

discretion to look past any such deficiencies in light of defendant's failure to demonstrate that they caused any prejudice.

Accordingly, the motion court properly exercised its discretion in granting plaintiffs' motion for leave to amend the complaint to assert a bystander recovery claim for emotional damages suffered by Susan Frierson as a result of witnessing her granddaughter sustain fatal injuries while she was within the zone of danger. Thus, the decision of the Appellate Division should be reversed, and the motion court's decision reinstated.

STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain this appeal and to review the questions raised herein by virtue of the Decision and Order of the Appellate Division, Second Department dated October 9, 2019, in which that Court granted plaintiffs-appellants' motion for leave to appeal to this Court, finding that questions of law had arisen which, in its opinion, ought to be reviewed by this Court. Accordingly, the Appellate Division certified the following question to this Court: "Was the decision and order of this Court dated May 15, 2019, properly made?" (R192).

STATEMENT OF FACTS

A. Factual Background

To understand why New York's courts and Legislature recognize the special, elevated status of grandparents, one need look no further than the bond shared by plaintiff Susan Frierson and her two-year-old granddaughter, Greta Greene. As set forth in her affidavit submitted on the underlying motion to amend, Susan had an exceptionally close relationship with Greta, her first grandchild, that extended back before Greta was even born (R 43). When Greta's mother and Susan's daughter, plaintiff Stacy Greene, felt the first signs that she was going into labor, she and her husband, Jayson Greene, stayed at Susan's apartment in the Upper West Side of Manhattan as they waited for labor to progress. As the contractions became more condensed, Susan went with them to the birthing center at Roosevelt Hospital and stayed throughout the entire birthing process, even functioning as the official birth photographer (R 43). When Greta was born, Susan had never felt such an immediate and intense love, with the exception of what she experienced when her own children were born (*id.*).

Susan played an active role in Greta's care during the first few weeks of her life, travelling to the Greene's apartment in Brooklyn to help change diapers, take Greta for walks and put her to sleep (R 43). After a few months, when Greta was old enough to be out and about, she alternated visits at Susan's apartment in the Upper West Side and the Greene's apartment in Brooklyn, and Susan would babysit Greta

on a regular basis (*id.*). By six months, Susan babysat Greta for longer periods of time as Stacy and Jayson had to work more (R 44). Susan took Greta on walks, read to her, bathed her, fed her, dressed her, held and comforted her when she cried and rocked her to sleep (*id.*). In addition to her regular babysitting duties, Susan and the Greene family vacationed together (*id.*). On the few days when Susan was not caring for Greta in person, Stacy made sure that they still were able to have FaceTime (video phone calls) before Greta went to bed (*id.*). By the time Greta was one year old, she was regularly spending the night at Susan's apartment. The significant amount of time that Greta spent with Susan was evidenced by the crib, high chair, clothes, diapers, toys and books that she kept in her Upper West Side apartment (*id.*). The two had special routines in the apartment like making macaroni and cheese and baking cookies, and were fixtures in the neighborhood with their frequent walks around Central Park and Riverside Park and visits to the Children's Museum and the theater (R 44-45). They met friends for lunch, went shopping and Greta loved to play with the doorman of Susan's building (R 45). The emotional bond that was so powerful from the beginning only grew stronger each day.

On Sunday, May 17, 2015, Greta and Susan were in the middle of one of their special weekends in the Upper West Side (R 45). Greta had spent the night at Susan's apartment and when they awoke on Sunday, Susan gave Greta a bath (*id.*). It was a nice day and at Greta's request, the two ventured out on foot without a stroller for a walk around the neighborhood (*id.*). They eventually took a break and Susan sat

on a bench outside of the residential building located at 305 West End Avenue known as the "Esplanade," while Greta stood beside her (*id.*).

Then, the unimaginable happened. Without warning, heavy pieces of terracotta fell eight stories from the façade of the Esplanade, striking Greta in the head and Susan on her left knee and right ankle (R 45). The impact knocked Greta to the ground and Susan still vividly remembers seeing her there in the fetal position on her right side (*id.*). Susan lifted her on to the bench (*id.*). She was pale, motionless and bleeding (*id.*). Susan attempted to call 911 but her hands were shaking so much that she could not operate her cell phone (*id.*). She tried to perform CPR, but Greta's mouth was clenched shut (*id.*). She eventually managed to get air through Greta's nose and Greta started to breathe again (*id.*). Emergency responders arrived minutes later and Susan and Greta were both rushed to New York-Presbyterian Hospital in separate ambulances (*id.*). Susan was in serious but stable condition. Greta survived through the night but passed away the next morning (R 45-46).

Following the terrible events of May 17, 2015, in addition to the extensive treatment and physical therapy she has undergone for her knee and ankle injuries, Susan has required medical care and treatment from, among others, a psychiatrist and a therapist, in order to help her deal with the extreme emotional trauma of having witnessed the horrific death of her granddaughter, Greta (R 46). Susan has been diagnosed with post-traumatic stress disorder and depression, and prescribed

Propanolol and Diazepam for anxiety and Wellbutrin for depression (*id.*). She has severe depression and persistent flashbacks and intrusive thoughts where she not only sees but relives the traumatic experience: Greta lying on the ground; trying to pry her mouth open for CPR; and the sound of her daughter Stacy's scream when Susan called her from the scene of the accident (*id.*). The sadness and tearfulness are so overwhelming that Susan is rarely able to leave her apartment, and she experiences recurring panic attacks and intense anxiety (*id.*). For substantial periods of time, Susan has been unable to sleep or work (*id.*). She has lost weight, been unable to focus and become socially withdrawn (*id.*). In short, losing a member of her immediate family has turned Susan's life completely upside down, and she continues to suffer the consequences of what she witnessed on that terrible day (*id.*).

In the months following this tragedy, an investigation by the City of New York's Department of Investigation (the DOI) revealed that the owners of the Esplanade had an extensive history of receiving violations from the Department of Buildings (the DOB) for their failure to comply with their obligations under Local Law 11 to ensure that the building's exterior walls and appurtenances were maintained in a safe condition (R 19). Inspection reports filed with the DOB were falsified and the dangerous conditions of the façade were so apparent that an engineer inspecting a nearby building noticed them and was concerned enough to report them to the DOB. Most egregiously, over a year before the incident that killed Greta, in March of 2014, a

piece of the façade fell onto the sidewalk in front of the Esplanade building but the owners still did nothing to remedy the dangerous conditions (R 19).

B. Procedural Background

Plaintiffs were initially represented in this action by Rappaport, Glass, Levine & Zullo, LLP (herein referred to as "Rappaport"). On or about September 2, 2015, Rappaport commenced the instant action by filing the summons and complaint, naming Esplanade Venture Partnership, Esplanade 94 LLC, Esplanade Ventures, LLC, Esplanade Associates Five, LLC, Esplanade Associates One, LLC and Blue Prints Engineering, P.C. as defendants (R 47-54). On October 23, 2015, defendant Esplanade Venture Partnership ("EVP") filed an answer (R 55-63).

Not long thereafter, on November 17, 2015, the City of New York's Department of Investigation (the "DOI") released a report of its investigation into the circumstances that led to the tragic incident in which Greta Greene was killed and her grandmother Susan Frierson was seriously injured (R 20). At the same time, the DOI and the Manhattan District Attorney jointly announced the arrest of a professional engineer, Maqsood Faruqi, on a charge that he falsely filed an inspection report for the façade of the Esplanade certifying that it was safe and complied with the laws and rules regarding façade inspections (*id.*).

Therefore, on December 2, 2015, Rappaport filed on plaintiffs' behalf an "Amended Summons" and an "Amended Verified Complaint" (R 64-71). In the Amended Summons, all of the original defendants except for Esplanade Venture

Partnership and Blue Print Engineering, P.C. were removed from the caption, and two new defendants, Maqsood Faruqi, and D & N Construction and Consulting, Inc., were added (R 64).

The Amended Verified Complaint includes two causes of action, each of which are asserted against all four of the defendants (R 65-71). The first cause of action alleges, among other things, that defendants negligently permitted the façade of the Esplanade building to exist in an unsafe condition; failed to make complete and proper inspections of the façade; negligently hired façade inspectors; repeatedly failed to make timely façade inspections and file mandated inspection reports despite receiving NYC Building Department violations for the same; falsified the façade inspection reports that were filed with the Buildings Department; violated Local Law 11 of the City of New York; and failed to make timely repairs to the façade (R 67-68). It further alleges that defendants had either actual or constructive knowledge of the dangerous conditions created for plaintiff, plaintiff's decedent and the public at large by the building's façade, specifically pointing out that an entry in the Esplanade's front desk diary on March 22, 2014 – 14 months before the subject accident – indicated that a piece of the façade had fallen to the sidewalk in front of the building, and in October of 2014, cracks were visible in the façade, photographed and identified during an inspection of an adjacent building (R 68-69). The first cause of action further alleges that as a result of the abovementioned conduct, plaintiff Susan Frierson was caused to sustain "severe and permanent personal injuries, has and will

require medical care and treatment, and has and will suffer great general and special damages" and the decedent Greta Devere Greene was caused to sustain "severe and permanent personal injuries, required emergent medical care and treatment, and was caused to die as a consequence of those injuries" (R 68-69). It further seeks punitive damages in the amount of $3 million based on defendants willful and grossly negligent acts (R 69). The second cause of action in the Amended Verified Complaint asserts a wrongful death claim on behalf of Greta Greene's distributees and reiterates plaintiffs' demand for punitive damages (R 69-70).

On December 11, 2015, Rappaport filed a Request for Judicial Intervention (RJI) and a Request for a Preliminary Conference (R 72-77). Defendant EVP filed an Answer to the Amended Verified Complaint on December 23, 2015 (R 78-92). This Answer asserted five affirmative defenses, including ones alleging that any damages sustained by plaintiff Susan Frierson were caused by her own culpable conduct and she voluntarily assumed the risks associated with the open, obvious and apparent conditions alleged in the Amended Verified Complaint (R 78-92).

On January 12, 2016, plaintiffs filed a fully-executed consent to change attorney form substituting, Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, for Rappaport as counsel for plaintiffs (R 93-95).

Thereafter, defendant D & N Construction and Consulting, Inc. filed a handwritten Answer on January 29, 2016 (R 96-98). Because it was not clear if D & N's Answer was intended to respond to the original or the Amended Verified

Complaint, on February 19, 2016, my office served D & N with the Amended Verified Complaint pursuant to Business Corporation Law § 306 (R 99-100).

Defendants Blue Prints Engineering, P.C. and Maqsood Faruqi filed a Verified Answer to the Amended Verified Complaint on March 1, 2016 (R 101-113), and defendant D&N served a Verified Answer to the Amended Verified Complaint on or about April 12, 2016 (R 114-123).

On June 3, 2016, plaintiffs filed the underlying motion seeking leave to again amend the complaint (R 12-13). The Proposed Second Amended Verified Complaint includes an additional cause of action on behalf of plaintiff Susan Frierson seeking to recover for the emotional trauma that was negligently inflicted upon her by defendants as a result of having observed, while in the zone of danger, the fatal injuries sustained by her granddaughter Greta (R 124-132). In support of this motion, plaintiffs argued, in short, that leave to amend should be granted because as a matter of law, plaintiff Susan Frierson, as a grandparent, comes within the meaning of "immediate family" and thus is entitled to recover for the emotional injuries she sustained as a result of observing the serious, fatal injury of her granddaughter (R 14-41).

Defendants Blue Prints Engineering, P.C. and Maqsood Faruqi filed their opposition to the motion on August 10, 2016 (R 133-136). On the same day, opposition was also filed by defendant EVP (R 137-154). On August 15, 2016, plaintiffs filed a reply affirmation in further support of the motion (R 155-171).

In an Order dated December 12, 2016, and entered on January 4, 2017, the Supreme Court (Richard Velasquez, J.) granted plaintiffs' motion for leave to amend and allowed plaintiffs to file and serve the Second Amended Complaint (R 8-11). In doing so, the court took the position that the question of whether Susan Frierson was a member of Greta's immediate family for purposes of bystander recovery was a factual issue to be determined by the trier of fact (R 11).

On appeal to the Appellate Division, Second Department, in a 3-2 decision, the majority reversed the motion court and denied the motion for leave to amend the complaint. The two-justice dissent contended that Susan Frierson's physical injuries permitted her to recover all emotional damages caused by this accident, and even if that were not the case, that she should be permitted to recover for her emotional damages as a result of witnessing her granddaughter's fatal injuries from within the zone of danger (R 174-189).

ARGUMENT

The motion court properly exercised its discretion in granting leave to plaintiffs to amend the complaint to add a potentially meritorious claim on behalf of Susan Frierson under the bystander theory of recovery

Pursuant to CPLR 3025 (b) a party may amend or supplement his or her pleading "at any time by leave of court or by stipulation of all parties," and "[l]eave shall be freely given upon such terms as may be just …." "The determination to permit or deny amendment is committed to the sound discretion of the trial court" (*Marcum, LLP v Silva*, 117 AD3d 917, 917 [2d Dept 2014]). In exercising this

discretion, "[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*id.*).

Under the liberal standard set forth in CPLR 3025 (b), "a party seeking leave to amend need not make an evidentiary showing of merit" (*Stein v Doukas*, 128 AD3d 803, 804 [2d Dept 2015], citing *Katz v Castlepoint Ins. Co.*, 121 AD3d 948, 950 [2014]; *Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836, 836 [2014]). Moreover, the "court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt" (*Favia*, 119 AD3d at 836, quoting *United Fairness, Inc. v Town of Woodbury*, 113 AD3d 754, 755 [2d Dept 2014]).

A. Susan Frierson and her granddaughter, Greta, are immediate family members

While the motion court correctly granted the motion and permitted amendment, it held that the issue of whether Susan Frierson could recover under a bystander theory of recovery was a question of fact. We urge this Court to reverse the Appellate Division's decision and reinstate the Motion Court's underlying Order and find as a matter of law that Susan Frierson is entitled to recover damages for the emotional injuries she sustained as a result of having observed, while within the zone of danger, the fatal injury of her granddaughter. Such conclusion finds overwhelming support from the public policy that shaped the development of the law of bystander recovery in New York, the special status bestowed by statutory and

common law upon grandparents in New York and a review of the relevant law in other jurisdictions.

The zone-of-danger theory of bystander recovery at issue here is part of a larger development in the common law, both in New York and nationally, towards allowing recovery for emotional harm and psychological injuries. Unlike in many states where the development was driven in significant part by statutes, in New York, it was completely a creature of common law. In abandoning the antiquated doctrines prohibiting recovery for emotional harm and psychological injuries, the Court of Appeals has generally sought to strike a balance between two basic public policies: (1) the idea that it "is fundamental to our common-law system that one may seek redress for every substantial wrong" (*Battalia v State of New York*, 10 NY2d 237, 240 [1961]); and (2) "the prevention of an unmanageable proliferation of ... claims" and the need "to limit the legal consequences of wrongs to a controllable degree" (*Trombetta v Conkling*, 82 NY2d 549, 554 [1993]).

Prior to 1984, the common law of New York prohibited any recovery for emotional harm suffered by a plaintiff who witnessed the death or injury of another (*see Tobin v Grossman*, 24 NY2d 609 [1969]). The rationale for this rule was based in now long disfavored public policy primarily concerned with the potential for imposing unlimited liability upon defendants for negligent conduct (*see Bovsun*, 61 NY2d at 227, citing *Tobin*, 24 NY2d 609).

In *Bovsun*, the Court of Appeals held where a plaintiff that has been exposed to an unreasonable risk of bodily injury or death, he or she may recover, as an element of his or her damages, damages for injuries suffered as a consequence of having observed the serious injury or death of a member of his or her immediate family (61 NY2d at 230-231).

In reaching this holding, the Court declined to follow the foreseeability approach adopted by the California Supreme Court in *Dillon v Legg* (68 Cal.2d 728 [1968]) and fourteen other States as of 1984, which provided that damages could be recovered for the emotional trauma caused when a plaintiff witnesses the injury or death of a "close relative" even though the plaintiff himself was not within the zone of danger of physical injury, so long as the injury was reasonably foreseeable (*see Bovson*, 61 NY2d at 227). Concerned with what it perceived as the "apparently sweeping liability" of the *Dillon* approach, the Court instead adopted the "zone-of-danger" rule to limit the availability of the newly recognized cause of action. Under the "zone-of-danger" rule, which was then the majority rule in the country, only plaintiffs who were themselves threatened with bodily harm as a consequence of the defendant's negligence are entitled to recover damages (*id.* at 228-229).

The Court emphasized that the "[r]ecognition of this right to recover for emotional distress attributable to observation of injuries suffered by a member of the immediate family involves a broadening of the duty concept but – unlike the *Dillon* approach – not the creation of a duty to a plaintiff to whom the defendant is not

already recognized as owing a duty to avoid bodily harm" (*id.* at 229). Instead, it permitted the "plaintiff recovery for an element of damages not heretofore allowed," while "mitigat[ing] the possibility of unlimited recovery" (*id.*). It is thus evident that the Court viewed the zone-of-danger rule, and not 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. Further support for this conclusion comes from the fact that the *Bovsun* Court specifically declined to decide the scope of term "immediate family," and its discussion of the term was limited to a single footnote (61 NY2d at 234, n 13). Significantly, *Bovsun* left open the possibility that the relationship between a grandchild and grandparent could support a zone-of-danger bystander liability claim. Indeed, in citing the then up-to-date 2nd Restatement of Torts, the Court's touchstone for setting forth the zone-of-danger immediate family requirement was that the emotional distress must be "serious and verifiable" (*Id.* at 231),

In the thirty-five years since *Bovsun*, the Court of Appeals has only once been called upon to determine whether a particular familial relationship qualified as "immediate family." Some twenty-six years ago, in *Trombetta v Conkling* (82 NY2d 549 [1993]), the 37-year-old plaintiff, while within the zone of danger, observed her 59-year-old aunt as she was run over by a truck, killing her instantly (*id.* at 551). The Court rejected the plaintiff's claims for emotional damages under a zone-of-danger bystander theory of recovery. In doing so, the Court emphasized its continued

rejection of the approach formerly adopted by the California Supreme Court in *Dillon v Legg* (68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912). In *Dillon*, the Court suggested guidelines for determining the degree to which a defendant owes a duty to a plaintiff bystander, which required the reviewing court to determine on a case-by-case basis, after balancing certain factors, whether a particular plaintiff bystander's emotional injury was foreseeable (*Trombetta*, 82 NY2d at 553). The *Trombetta* Court was "troubled by the potential sweeping liability and the unwarranted complication imposed on the judicial role, which the adoption of indefinite and open-ended analysis would entail" (*id.*).

The Court, at that time, believed that extending bystander recovery to the aunt-niece relationship would require adopting a standard similar to the *Dillon* approach and open the door to a wide range of plaintiffs that shared only a "blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (*id.* at 553), which would similarly result in an "unmanageable proliferation of such claims – with their own proof problems and potentiality for inappropriate claims" (*id.* at 553). It sought to avoid such issues "by limiting the availability of recovery for the negligent infliction of emotional distress to a strictly and objectively defined class of bystanders" (*id.*).

Although the *Trombetta* Court expressly recognized that the *Bovsun* Court "saw no necessity to define the boundaries of 'the immediate family,' expressing its forbearance in a footnote" (*id.* at 552), it declared later in the opinion 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*" (*id.* at 553 [*internal citations omitted*]). In order words, the *Trombetta* Court suggested it was restrained by definition of "immediate family" from *Bovson*, but the *Bovson* Court expressly declined to define the limits of the term "immediate family member." In any event, in no way did *Trombetta* expressly define "immediate family" so as to exclude grandparents. Rather, all that can be deduced from the *Trombetta* decision is that, a generation ago, the Court's hesitance to adopt the more flexible *Dillon* case-by-case foreseeability approach, and its unwillingness to interpret the term "immediate family member" to encompass the relationship between an adult niece and adult aunt. It did not specifically delineate the scope of the term "immediate family member" and included no discussion of the grandparent-grandchild relationship. Accordingly, the issue of grandparent bystander recovery remains an open issue at the Court of Appeals level.

Since *Bovsun*, prior to this case, only one reported decision from a New York Court dealt with the question of whether the grandparent-grandchild relationship could support a zone-of-danger claim, *Jun Chi Guan v Tuscan Dairy Farms* (24 AD3d 725 [2d Dept 2005], *appeal dismissed* 7 NY3d 784 [2006]). There, the majority of the Second Department held the class of persons identified as "immediate family" in *Bovsun* did not specifically include a plaintiff's grandson, and concluded that it was "not appropriate for this Court to expand the class absent further direction from the Court of Appeals or the New York State Legislature" (*id.* at 726).

A fundamental flaw in the majority's decision was its unexplained determination that the grandparent-grandchild relationship was "analogous" to the aunt-niece relationship at issue in *Trombetta* (82 NY2d at 549, 552), a feat that it could only accomplish by reducing both of these entirely distinct types of relationships to nothing more than a "blood relationship, coupled with a significant emotional attachment and intimate, immediate familial bond" (*Jun Chi Guan*, 24 AD3d at 727). By defining the class of bystanders so expansively, the majority believed that it could simply import wholesale the rationale applied in *Trombetta* to an entirely distinct category of potential bystanders, stating, "[t]his argument was rejected in *Trombetta* and must be rejected here" (*id.* at 727).

The dissenting opinion by Justice Sondra Miller first surveyed New York law and correctly noted that at that time there had been no New York case prohibiting bystander recovery based on a grandparent-grandchild relationship (*id.* at 730-731). Next, the dissent pointed to several examples nationally where states allowed, by either case law or statute, such recovery to be obtained by a grandparent, and emphasized that "no authorities have been found nationally prohibiting recovery by a grandparent or a grandchild" (*id.* at 731).

The dissent forcefully discredited the majority's fundamental assumption that the relationship between a grandmother and her two-year-old grandchild was equivalent to the adult aunt-niece relationship at issue in *Trombetta*. The dissent identified specific statutory and case law from New York that demonstrated the

"special status of grandparents" had "long been recognized in New York statute and case law," and indeed, "[n]o other relationship is afforded such standing or consideration" (24 AD3d at 731, citing *e.g.* Domestic Relations Law § 72; *Matter of Emanuel S. v Joseph E.*, 78 NY2d 178 [1991][providing special standing for grandparents to seek visitation rights with their grandchildren]). While the majority claimed it needed further guidance from the Legislature or Court of Appeals before it could interpret "immediate family" to include a grandparent (*see Jun Chi Guan*, 24 AD3d at 726), the dissent correctly pointed out that such guidance was found in the legislative materials related to the 2003 enactment of the "Grandparent Caregivers' Rights Act" (L 2003, ch 657), which provided, among other things, a specific procedure for grandparents to petition for custody of grandchildren. She explained that in enacting this statute, the Legislature recognized that "with 413,000 children living in grandparent headed household[s] in New York, grandparents play a special role in the lives of their grandchildren and are increasingly functioning as care givers in their grandchildren['s] lives" (24 AD3d at 732, quoting L 2003, ch 657, § 1). She added that elsewhere the Legislature had referred to the "critical role that many grandparents play in the lives of their grandchildren," which made it necessary for the original Domestic Relations Law § 72 to be amended to "provide guidance regarding the ability of grandparents to obtain standing in custody proceedings" (*id.*). The dissent emphasized that "this law is the most expansive statutory grant of rights to

grandparents caregivers in any state" (*id.* at 732 [*emphasis added*], citing *Matter of Tolbert v Scott*, 15 AD3d 493 [2005]).

Justice Miller's dissent next discredited the majority's unsupported claim that public policy required exclusion of grandparents to prevent an "unmanageable proliferation" of claims or impose limitless liability upon defendants (*id.* at 727, quoting *Trombetta*, 82 NY2d at 554-555). She pointed out that grandparents are a "discreet, identifiable and their inclusion does not infer or require that other relatives closely-bonded emotionally and practically to family members must be included as well" (*id.* at 732).

Against this backdrop, the Appellate Division, Second Department rendered its decision in this case. With respect to the substantive question of whether Susan Frierson should be permitted to recover for her emotional damages, the majority offered no analysis other than single paragraph recitations of *Bovsun, Trombetta* and *Jun Chi Guan,* leading the majority to conclude that it was constrained by the Second Department precedent of *Jun Chi Guan* to reverse the motion court's decision and deny the motion to amend.

The dissent, in contrast, offered a detailed analysis of both New York precedents and those from other states and sources and applied it to the facts before the Court. In so doing, the dissent issued a sharp rebuke to the fundamentally unfair result which the majority's decision would cause:

> "[W]here, as here, a court is asked to mechanically apply a court-made rule that lacks justification in theory, and which, in practice, produces arbitrary and disparate results, it is the duty of the court to inquire into its continued viability and, if appropriate, reformulate the rule or abolish it completely. As the Court of Appeals has recognized, '[w]e act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice'" (R176).

When one considers that *Bovsun* adopted the "immediate family" test in order to ensure that claims for emotional injury were "real and verifiable," it becomes crystal clear that emotional injuries likely to be caused by a grandparent witnessing horrors such as Susan Frierson did meet such a standard. No one could seriously claim to be surprised that the unspeakable trauma of watching a grandchild endure fatal injuries while sitting next to her would cause permanent and significant emotional damages.

Indeed, New York has been out front on recognizing the special relationship between grandparents and their grandchildren.

As discussed in Justice Miller's dissent in *Jun Chi Guan*, New York law and public policy bestows grandparents with a special status elevated above any other type of relationship except for the parent-child relationship. Set forth below is merely a small sample legislative and other official actions reflecting this policy, but it nevertheless provides ample evidence against legally equating the relationship between a grandparent and grandchild with that between an adult aunt and niece, and support

for allowing grandparents to recover for negligently inflicted emotional injuries under a theory of bystander recovery.

For instance, powerful evidence of the elevated status of grandparents can be found in the Domestic Relations Law, which gives certain rights to grandparents, but not to aunts and uncles, to petition for visitation or custody of a grandchild. The legislative findings behind the 2003 revision to Domestic Relations Law § 72 concerning the number of children living in grandparent-headed homes in New York are just as pertinent today, as is the Legislature's recognition that "grandparents play a special role in the lives of their grandchildren and are increasingly functioning as care givers in their grandchildren['s] lives" (24 AD3d at 732, quoting L 2003, ch 657, § 1). Another example of the Legislature expressly elevating the status of the grandparent-grandchild relationship above the aunt-niece relationship can be seen in the laws governing the distribution of an intestate estate (*see* EPTL § 4-1.1).

Additional developments after *Jun Chi Guan* was decided show New York public policy continues to recognize the special nature of the relationship between grandparents and grandchildren. Since 2006, New York State's Office of Children and Families Services has funded a statewide information, referral and advocacy program called "Kinship Navigator" to help individuals that are caring for a child that is biologically not their own, with a specific emphasis on grandparents who make up a substantial majority of such caregivers (www.nysnavigator.org).

Recent legislation demonstrates that the Legislature and the Governor and New York public policy in general not only recognize the important role that a grandparent may play in the life of a grandchild, but the increasingly important roles that grandchildren are playing in the lives of grandparents. In 2016, Governor Andrew Cuomo signed into law the "Paid Family Leave Law," which makes virtually all full-time and part-time private employees in New York State eligible for employee-funded Paid Family Leave in certain circumstances, including when such leave is needed to participate in the physical or psychological care of a grandparent or grandchild with a serious health condition (*see* Workers Compensation Law § 201 [15]; [20]; [21]; [23]).

Although unlike some states, bystander recovery in New York is purely a development of the common law, and the Legislature has never acted to either expand or constrain such claims. Significantly, however, numerous New York statutes exist dealing with a wide range of subject matter where the Legislature has expressly defined "immediate family member" or "immediate family" to include grandparents and grandchildren. Among other examples, Public Health Law § 238 (8), defines "immediate family member" to include "spouse and adoptive parents, children and siblings … and grandparents and grandchildren." Similarly, Election Law § 14-107 (1)(f) defines the term "immediate family" to mean "spouse, child, parent, grandparent, brother, half-brother, sister or half-sister …, and the spouses of such persons" (*see also* Election Law § 6200.10 [b][7]). Penal Law § 125.27 (1)(a)(v), which

sets forth the elements of murder in the first degree, defines "immediate family member" to include "husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild or grandchild." Environmental Conservation Law § 13-0328 (6)(d), which governs commercial fishing licenses, defines "immediate family" to include "spouse, sibling, parent, child, grandparent [and], grandchild …." Rent Stabilization Code § 2520.6 (n) defines "immediate family" to include, in relevant part, "grandfather, grandmother, grandson [and] granddaughter…." Notably, none of these statutes include aunts and uncles or nieces and nephews in their definitions of "immediate family."

Furthermore, allowing grandparents to pursue bystander recovery claims is fully consistent with the *Trombetta* Court's emphasis on restricting the cause of action to a "discrete readily determinable class" (82 NY2d at 554). Grandparents, more than aunts and uncles, are a "strictly and objectively defined class of bystanders" (*id.* at 553). A person can, at most, have four biological grandparents, and that number will only diminish with the passage of time. In contrast, a person may have numerous aunts and uncles, and the number that can expand, if, for example, those aunts and uncles marry, creating new aunts and uncles, or contract, through divorce or death. Thus, there is a far greater chance that with aunts and uncles, a "complex responsibility 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" (*Trombetta*, 82 NY2d at 554). Such concerns simply do not arise from interpreting "immediate family" to include grandparents.

Accordingly, the majority opinion in *Jun Chi Guan* (to which the majority of the Appellate Division herein deferred) was wrong to equate the grandparent-grandchild relationship to the aunt-niece relationship at issue in *Trombetta*, and it was wrong when it held that New York public policy required exclusion of grandparents from the class of individuals who could bring a claim under a bystander theory of recovery. Subsequent developments since 2005 have only made this more apparent.

To the extent this Court determines that the zone-of-danger immediate family test remains viable, to hold the grandparent-grandchild relationship insufficient to warrant permitting a claim for emotional distress would be to ignore the reality of the role of grandparents today and well-established New York statutory and case law all evincing a strong policy of bestowing special status upon grandparents. Conversely, a determination that a grandparent is an immediate family member would not open the floodgates to numerous claims, but rather would only permit grandparents who suffer the tragic results of witnessing an injured or killed grandchild from close range to seek compensation from the responsible party.

B. This Court should adopt a more flexible test for bystander recovery that focuses on the relationship between the bystander and injured person

The dissent herein forcefully argues for the abandonment of the immediate family requirement in favor of a more flexible test that comports with modern notions of justice and the decisions of courts in other states. Moreover, it contends that the bright-line test presently in place does create an arbitrary standard and does not, in reality, supply a requirement which is easy to apply. Simply put, the dissent is correct.

Initially, at the time New York first adopted the immediate family rule, the *Bovsun* Court relied heavily on the American Law Institute (ALI)'s Second Restatement of Torts (61 NY2d at 229-230). Since *Bovsun* was decided, the ALI has adopted the Third Restatement of Torts, which includes a new Section 48, "Negligent Infliction of Emotional Harm Resulting from Bodily Harm to a Third Person."

Whereas the old Restatement rule employed the phrase "immediate family member," the new Restatement uses the phrase "close family member." Comment *f* to Section 48 specifically indicates that a grandparent may qualify as a "close family member." It is notable that the only two cases referred to in Comment *f* of the Reporters' Notes for Section 48 as examples of courts deciding that a family member was insufficiently close to permit recovery under the Section are *Trombetta* and *Jun Chi Guan*, clearly suggesting their outsider status.

The United States Supreme Court, in the context of an action commenced under the Federal Employers' Liability Act, has held that a plaintiff may recover for

emotional distress under a bystander theory of recovery (*see Consolidated Rail Corp. v Gottshall*, 512 US 532, 556-557 [1994]). In doing so, the Court, after conducting an extensive national survey of the common law and recognizing the oft-cited concerns of limitless liability and proliferation of claims, flatly rejected imposing any limitations on the availability of bystander recovery based on familial relationships, and instead found that such concerns were adequately addressed by limiting the class of available plaintiffs to those who were within the zone of danger when they observed the serious injury or death of another person (*id.*).

In the dissenting opinion in *Jun Chi Guan*, Justice Miller identified several cases and statutes from around the country that would allow bystander recovery by a grandparent in circumstances like those presented in this case (*see Jun Chi Guan*, 24 AD3d at 731, citing *Fernandez v Walgreen Hastings Co.*, 126 NM 263, 968 P2d 774 [1998]; *Genzer v City of Mission*, 666 SW2d 116 [Tex App 1983]; *Dickerson v Lafferty*, 750 So 2d 432 [La Ct App 2000]; *Thomas v Schwegmann Giant Supermarket, Inc.*, 561 So 2d 992 [La Ct App 1990]). However, an updated list of jurisdictions that would allow Ms. Frierson to recover in this case is actually far more expansive that what is hinted in that dissent.

Turning to the law in other states, in addition to the three states identified by the dissent in *Jun Chi Guan* (24 AD3d at 731)(Texas, New Mexico, Louisiana), there are numerous states that limit bystander recovery to a certain class of plaintiffs based on a familial relationship like *Bovsun*, where it has expressly been held that the

grandparent-grandchild relationship is sufficient. For example, the rule in California is "recovery should be limited to relatives residing in the same household, *or* parents, siblings, children, and *grandparents* of the victim" (*Thing v La Chusa*, 48 Cal.3d 644, 647 [1989][*emphasis added*]). The Supreme Court of Oregon recently adopted the test set forth in Restatement (Third) of Torts § 48, which as mentioned above, does not preclude recovery for grandparents (*Philibert v Kluser*, 360 Or. 698, 716 [2016]). Indiana allows recovery in instances where the person the plaintiff witnessed was a "loved one with a relationship to the plaintiff analogous to a spouse, parent, child, *grandparent*, *grandchild*, or sibling" (*Smith v Toney*, 862 NE2d 656, 659 [2007][*emphasis added*]). Iowa recognizes emotional injury claims when "the bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity," a definition that encompasses grandparents and grandchildren (*Barnhill v. Davis*, 300 NW2d 104 [Iowa 1981]). Wyoming's statutory bystander recovery rule allows claims to be asserted by husbands, wives, children, parents, siblings, *grandparents*, aunts, uncles and cousins (*see* Wyo. Stat. Ann. §§ 1-38-102; 2-4-101). In Hawaii, the grandparent-grandchild relationship has been found sufficiently close to sustain a bystander recovery claim, even when the person who the plaintiff witnessed injured was his step-grandmother, and thus, had no blood relationship (*see Leong v Takasaki*, 520 P.2d 758 [Haw. 1974]). This list is not exhaustive and represents only a sample of the states that have expressly allowed recovery to be predicated on a

grandparent-grandchild relationship (*see also Hayes v Illinois Power Co.*, 587 N.E.2d 559 [Ill. App. 1992]; *Bowen v Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432 [Wis. 1994]).

Many other states have gone even further and expressly eschewed the adoption of bright-line rules that would arbitrarily restrict who can obtain bystander recovery for negligently inflicted emotional damages based solely upon the fact that the particular plaintiff's relationship with the injured person "does not carry a particular label," and they instead look at the relationship of the plaintiff and the injured person as just one factor bearing on foreseeability (*see Graves v Easterbrook*, 149 NH 202, 818 A2d 1255, 1261-1262 [NH 2003][considers whether the plaintiff and the injured person had a "close relationship, *i.e.*, relationship that is stable, enduring, substantial, and mutually supportive … cemented by strong emotional bonds and provid[ing] a deep and pervasive emotional security"]; *Ramsey v Beavers*, 931 SW2d 527, 531-532 [Tenn. Sup Ct 1996][nature of relationship between the plaintiff and victim was one factor to consider when determining if emotional injury was foreseeable]; *Asaro v Cardinal Glennon Mem'l Hosp.*, 799 SW2d 595, 599–600 [Mo. 1990]; *Paugh v Hanks*, 451 NE2d 759, 766 [Ohio 1983][considers as one factor, but not a requirement, "whether the plaintiff and victim (if any) were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship]; *Hunsley v Giard*, 553 P2d 1096 [Wash. 1976][declined to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress]).

Our neighboring state, New Jersey, has refused even to require a "strict blood relationship" and instead "focus[es] on the nature and integrity of the relationship" (*Dunphy v Gregor*, 136 NJ 99, 114-115 [1994]; *see also Moreland v. Parks*, 456 NJ Super 71, 191 A.3d 729 [App. Div. 2018] [plaintiff who witnessed her same-sex wife's child die in a motor vehicle accident could maintain an action for emotional distress].

Thus, an updated national survey of the law reveals no other jurisdiction where grandparents have been excluded from pursuing a claim under a bystander theory of recovery.

As mentioned above, it "is fundamental to our common-law system that one may seek redress for every substantial wrong," and the "wrong-doer is responsible for the natural and proximate consequences of his [or her] misconduct; and what are such consequences must generally be left for the determination of the jury" (*Battalla*, 10 NY2d at 240, quoting *Ehrgott v Mayor of City of N.Y.*, 96 NY 264, 281 [1884]).

In furtherance of these fundamental principles, the Court of Appeals has repeatedly emphasized the courts must not hesitate to overrule even settled precedent if the preexisting rule no longer serves the ends of justice or has proven unfair or indefensible (*see e.g. Policano v Herbert*, 7 NY3d 588 [2006]). A recent example of this can be found in *Broadnax v Gonzalez* (2 NY3d 148, 155 [2004]), where the Court overruled past precedent, and held that an expectant mother is entitled to damages for emotional distress caused by medical malpractice resulting in miscarriage or stillbirth, even in the absence of an independent injury on the part of the mother. In doing so,

the Court noted the unfair and arbitrary nature of the preexisting rule requiring evidence of independent injury, and said it could no longer defend that rule's "logic or reasoning." While the Court acknowledged the importance of precedent, the more significant consideration was that the preexisting rule failed to "withstand the cold light of logic and experience." It further stated, in a passage relevant to the issue here, "[t]o be sure, line drawing is often an inevitable element of the common-law process, but the imperative to define the scope of a duty – the need to draw difficult distinctions – does not justify our clinging to a line that has proved indefensible" (*id.* at 156). The Court was also cognizant of the fact, as it should be here, that the new rule it was adopting was consistent with the approach taken by a majority of jurisdictions in country (ain *id.* at 155, n4).

It is simply incongruent for this State to be at the forefront of recognizing the unique devotion that the grandparent-grandchild relationship entails while remaining the only state in the union which permits bystander recovery actions but would deny such a claim on behalf of a grandparent. Moreover, as the dissent herein so eloquently sets forth, the blind use of family status as a benchmark for emotional distress, while purposely ignoring the actual nature of the relationship between the injured party and bystander is fundamentally unfair and leads to unjust results, including the deprivation of rights to those with non-traditional family structures. To wit, no just law could deny recovery to a person who witnesses the death of his/her fiancee on the way to their wedding, but permit a claim on behalf of a person who

witnesses injury to an estranged sibling who happens to be attending the same family function. Yet, that is havoc wreaked by affirmance of the majority's decision.

Modern understanding regarding the devastating effects of traumatic emotional distress has led multiple courts to discard strict requirements in favor of realistic guideposts for permitting bystander emotional distress cases to brought. Of course, it must be remembered that merely permitting such a claim to be filed does not guarantee recovery; the finder of fact must still determine, based upon the witness testimony and expert proof, whether any plaintiff has truly sustained emotional suffering as a result of witnessing the occurrence. But a rule which would disallow a claim in circumstances such as the one at bar, where any reasonable person would immediately recognize the "serious and verifiable" nature of Susan Frierson's immense emotional suffering simply is not worthy of preservation.

C. Because Susan Frierson suffered physical trauma in this accident, all of her emotional distress resulting from this occurrence is compensable

The dissent herein suggests an alternative basis for affirmance of the motion court's decision to permit amendment of the complaint. It points out that because she suffered a physical trauma inasmuch as she also was struck by falling pieces of the building's facade, she undeniably can maintain a claim for her physical and emotional suffering as a result of those injuries. With respect to her emotional damages, the majority would limit recovery to that portion of her psychic trauma relating to her

own injuries sustained in this occurrence, but prohibit a claim for the emotional damages caused by witnessing her granddaughter's injuries and death.

The dissent properly called out the absurdity of that distinction:

> "The parsing of Frierson's emotional trauma into discrete portions that correspond to concurrent causes has no basis in reality, and should be not be compelled by the courts... As this case illustrates, the metaphysical gymnastics involved in such an enterprise are tortuous... Under the circumstances of this case, Frierson should be entitled to recover damages for all of the emotional injuries she sustained as a result of this incident' (R186).

In fact, in a case decided prior to *Bovsun* on similar facts, the First Department permitted recovery of emotional distress on behalf of a woman who witnessed injuries that ultimately caused the death of her mother and son as a result of a collapse of a brick wall (*Shanahan v. Orenstein*, 52 A.D.2d 164 [1st Dept. 1976]). The fact that the bricks had come into contact with the plaintiff was determinative in the decision to allow plaintiff's emotional distress claim.

Thus, Susan Frierson had a valid claim for all of the emotional distress she suffered as a result of this accident under New York law even before *Bovsun*. That expansion of bystander rights recognized by this Court in *Bovsun* should not be used to now restrict her ability to recover in this case.

D. The purported procedural deficiencies in the motion alleged by defendants, even if they existed, did not require denial of plaintiffs' motion

Finally, EVP argued below that plaintiffs' underlying motion should have been denied because plaintiffs purportedly failed to comply with CPLR 3025 (b)'s procedural requirements. Specifically, CPLR 3025 (b) provides, "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Contrary to EVP's contention, plaintiffs' underlying motion complied with these requirements. There is no dispute that plaintiffs actually submitted a copy of the Proposed Second Amended Verified Complaint with the underlying motion for leave to amend, as required by CPLR 3025 (b) (R 124-132). The changes made in the proposed amendment were readily apparent, a fact that EVP does not actually contest. The proposed amendment adds two additional causes of action on behalf of plaintiff Susan Frierson: (1) a negligence claim – which had previously been incorporated into the first cause of action in the original and first amended complaints – based on the physical injuries and related emotional injuries sustained by Susan Frierson as a result of being struck by the crumbling façade of the Esplanade building; and (2) a new claim for negligent infliction of emotional distress under the bystander recovery theory based on the injuries that Susan Frierson sustained as a result of

having observed the fatal injury of her granddaughter while within the zone of danger (R 124-132).

There can be no legitimate contention that plaintiffs' moving papers and proposed amendment did not make it clear that the only substantive change in the proposed Second Amended Verified Complaint was the inclusion of the new claim under the bystander theory of recovery. This point was emphasized by plaintiffs' motion papers (R 24; 25; 40), and again in their reply papers (R 157-158). This was clear to EVP, as reflected in the arguments raised in its opposition to the motion below.

To the extent plaintiffs' motion papers can somehow be found to be procedurally deficient, the motion court properly exercised its discretion in disregarding any such alleged deficiencies and instead deciding the motion on its merits, because EVP has not shown, nor could they, that they were prejudiced by any purported irregularities in the motion papers (*see* CPLR 2001). Plaintiffs' motion for leave to amend was made early in the litigation, before there had been any substantial discovery and before any depositions had been conducted. Therefore, there can be no reasonable claim that defendants' ability to defend against the bystander recovery claim has in some way been diminished. Significantly, in opposing the motion below, neither defendant argued that they would suffer any prejudice by amendment.

Moreover, it is well established that the possibility that the newly-added claim for emotional injuries under a bystander theory of recovery could cause defendants to

incur additional damages does not constitute prejudice in this context (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014], quoting *Loomis v Civetta Corinno Constr. Corp.,* 54 NY2d 18, 23 [1981]["(p)rejudice is more than 'the mere exposure of the (party) to greater liability'"]).

In addition, while EVP seems to fault plaintiffs for rewriting the original complaint after obtaining new counsel, such claim is unavailing as there is no restriction on the degree or extent of changes that may incorporated in an amended pleading in CPLR 3025 (b). Instead, the provision mandates that leave to amend be "freely given," and this "favorable treatment applies "even if the amendment substantially alters the theory of recovery" (*Kimso Apts., LLC*, 24 NY3d at 411). The proposed amendment does not, and EVP does not contend otherwise, significantly alter plaintiffs' representation of the material facts (*cf. Bogoni v Friedlander*, 197 AD2d 281 [1st Dept 1994]). Rather, the proposed Second Verified Amended Complaint contains all of the same basic factual allegations concerning the parties, their relationships and the substantive facts of the events giving rise to this case, albeit some of these have been slightly reordered or reworded (*see Kimso Apts., LLC*, 24 NY3d at 411).

Accordingly, the motion court properly decided the merits of plaintiffs' motion for leave to amend on its merits.

CONCLUSION

The common law which limited recovery for emotional damages derives from a scepticism in bygone days regarding the legitimacy of claims for purely emotional suffering. There can be no dispute that we now have a greater understanding regarding the serious, life-altering effects that emotional trauma can cause.

In this case, there can be no legitimate dispute that plaintiff Susan Frierson sustained serious emotional and psychological injuries as a result of observing, while within the zone of danger, her two-year-old granddaughter sustain fatal injuries. There also can be no dispute that if the allegations in the pleadings are assumed to be true, as they must be in this procedural context, Ms. Frierson's emotional and psychological injuries were proximately caused by defendants' negligence.

There is no sound basis in logic or public policy to deny Ms. Frierson the right to obtain damages to compensate her for her very real, crippling emotional injuries. The same public policies that drove the Court of Appeals to reject decades of precedent by creating a cause of action for bystander liability, namely, that it is fundamental to our common-law tort system that one may seek redress for every substantial wrong, and a wrong-doer must be held responsible for the natural and proximate consequences of his or her misconduct, are advanced by imposing bystander recovery liability against the defendants here. Moreover, the public policy considerations that compelled the Court of Appeals to limit the bystander recovery cause of action only to those individuals who were within the zone of danger when

they observed a member of their immediate family suffer a serious injury or death, namely, the prevention of an unmanageable proliferation of claims and limitless liability, will not be compromised because grandparents are a discrete readily determinable class of individuals.

This Court is not bound by any precedent to exclude grandparents from bystander recovery. The issue of grandparent bystander recovery has never been decided by the Court of Appeals, and beyond disqualifying aunts, has never specifically delineated the limits of the term "immediate family member."

Moreover, in numerous statutes and regulations covering a wide spectrum of subject matters, the Legislature has expressly defined the term "immediate family" to encompass grandparents while excluding aunts and uncles. The Legislature has granted rights to grandparents with respect to child visitation and custody that have not been granted to other blood relatives like aunts and uncles, and in doing so, it expressly recognized "the critical role that many grandparents play in the lives of their grandchildren" (*Jun Chi Guan*, 24 AD3d at 725, quoting L 2003, ch 657, § 1).

That New York has enacted the most expansive grant of rights to grandparents of any state, cannot be reconciled with the fact that if this decision is affirmed, it will be the only jurisdiction in the United States which recognizes such claims that has denied grandparents the right to recover for emotional injuries sustained as a result of having observed, while within the zone of danger, the serious injury or death of a grandchild. To do so would defy both law and logic.

Further, this case presents the opportunity for this Court to bring New York law in line with other states which have recognized that looking to the actual relationship between the bystander and injured person, as opposed to applying rigid requirements based solely on familial status. Such a result would undoubtedly harmonize New York law with well-settled principles of justice, create fairer results and prevent the slamming the courthouse door in the face of victims of real, verifiable emotional suffering.

Accordingly, for all of the foregoing reasons, it is respectfully submitted that justice requires this Court reverse the Order on appeal, and grant plaintiffs leave to file and serve their Second Amended Verified Complaint.

Dated: New York, New York
December 6, 2019

Respectfully submitted,

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Dated: New York, New York
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