To Be Argued By:
Ben B. Rubinowitz
Time Requested: 15 Minutes

APL-2019-00209

Kings County Clerk's Index No. 510780/15
Appellate Division, Second Department Docket No. 2017-02080

Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Appellants,

against

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

Defendants-Respondents,

and

D&N CONSTRUCTION AND CONSULTING, INC.,

Defendant.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Despite recognizing the unspeakable tragedy that led to this case, namely, the negligent management of a commercial building which caused chunks of its facade to break off and fall eight stories, striking Susan Frierson and her granddaughter, Greta, causing the 2-year-old's death before her grandmother's eyes, Defendants-Respondents nonetheless offer a variety of reasons seeking to convince this Court that New York should remain the only state in the nation which recognizes a claim for bystander emotional distress, but would shut the courthouse doors to a grandparent who witnesses the injury or death of their grandchild. A simple analysis reveals their contentions to be wholly insufficient to deny Susan Frierson's claim.

I. DEFENDANTS' FLOODGATES ARGUMENTS DEFY REALITY AND SHOULD NOT BE THE BASIS OF DETERMINING THIS APPEAL

Simply put, Defendants-Respondents' cited concerns regarding a mythical floodgate of litigation or alleged uncertainty for litigants ring hollow. A finding for plaintiffs herein would simply result in this Court bringing New York into line with the current Restatement of Torts and all of the jurisdictions which have recognized the gross injustice of denying grandparents the right to bring such a claim. Their far-fetched doomsday scenarios cannot properly justify the perpetuation of a standard which would stand for the proposition that a grandparent witnessing the death of a grandchild from within the zone of danger

fails to present a case of "serious and verifiable" emotional distress.

Unable to mount any serious argument that compensation for Susan Frierson's torment is unjust, defendants instead project a world in which a decision by this Court to permit the claim will cause New York courts to suddenly be overwhelmed and inundated with additional zone of danger cases. In reality, their manufactured admonitions defy common experience and logic. Initially, while no data supports their alleged fears, we know from everyday experience that cases involving a family member, though not a parent or child, who witnesses the injury or death of another family member from within the zone of danger are simply not that common. With the number of courts and the volume of cases in New York, it is truly absurd to believe that allowing Ms. Frierson's claim for emotional distress to proceed will make any appreciable difference with respect to the administration of the court system at large.

Moreover, even if a reversal of the decision somehow led to a substantial number of new claims, it is crucial to note that each of those claims arises from a significant personal injury or wrongful death of another person, which will lead to a case being brought anyway. To be made clear, the injured person herself would have a claim for personal injuries that would be brought. Accordingly, the greatest impact such a decision could have would be to add an additional claim to actions already being filed, hardly an acceptable reason to embrace a rule which

leads to unjust results.

In any event, this Court has made clear that such considerations must always give way to ensuring the common law remain just and fulfill its intended purpose. Indeed, in altering the common law so as to permit a claim for negligently induced emotional distress, in the absence of a physical injury, this Court stated

> "[a]lthough fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. The argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one" *(Battalla v. State*, 10 N.Y.2d 237 [1961] [citations omitted]).

It is difficult, to say the very least, to reconcile a body of law which permits a claim for emotional distress by an individual for his fear in being improperly secured on a ski lift (from which no physical injury occurred), but would deny a claim for emotional distress to Susan Frierson resulting from the inconceivable horror she sustained of witnessing the fatal impact of terra cotta falling from the sky and crushing her only grandchild. Defendants' fantastical warnings of the dire consequences which would ensue from providing Susan Frierson with some small measure of justice should not distract this Court from the real issue before it, whether or not she has a right to maintain this claim for emotional distress.

II. NO STATE WHICH REQUIRES BYSTANDER EMOTIONAL DISTRESS HAS DENIED A CLAIM BY A GRANDPARENT

As set forth in detail in our initial brief to this Court, every single state which recognizes bystander emotional distress claims faced with the question at bar has permitted such a claim to be brought on behalf of a grandparent who witnesses the injury of death of a grandchild. Defendants deny this contention and yet, in support, they cite cases that do not, in fact, deal with the issue of grandparent recovery at all and in so doing, actually mistake the law of other states.

Specifically, *Wargelin v. Sisters of Mercy Health Corp.*, 149 Mich. App. 75 (Mich Ct App1986), cited in both of the Respondents' briefs, is a 34-year-old case in which the High Court of Michigan permitted a claim for emotional distress on behalf of parents who witnessed the stillbirth of their child (as this state did in *Broadnax v. Gonzalez* [2 NY3d 219] in 2014, some 28 years later). That case, which has nothing whatsoever to do with a claim by a grandparent, merely recites Michigan's rule at that time as permitting emotional distress damages caused by witnessing harm to another on behalf of "a member of the immediate family, or at least a parent, child, husband or wife." This case offers zero insight into how Michigan would apply that standard to a grandparent, or whether it would even perpetuate that test in 2020.

Worse yet, Defendant-Respondent, Esplanade Venture Partnership, finds value in calling the Court's attention to *Kaufman v. Langhofer*, 223 Ariz. 249 (AZ Ct App 2009), a veterinary malpractice case involving the death of a pet dog! Were the comparison not offensive enough, counsel also totally misstates the law of Arizona. A reading of that case reveals that the reference, in dicta, to recovery by a grandparent relates to loss of consortium and companionship damages, not zone of danger emotional distress claims.

In reality, Arizona law specifically provides for a flexible test with respect to eligibility to bring such claims. In *Keck v. Jackson*, 122 Ariz. 114 (AZ Ct App 1979), over 40 years ago, the Supreme Court of Arizona recognized a claim for emotional distress resulting from witnessing harm to another while in the zone of danger could be brought by a "person with whom the plaintiff has a close personal relationship, *either by consanguinity or otherwise*" (*Id.* at 116, emphasis added).

Thus, despite defendants' attempt to distract the Court by use of a few cherry-picked out-of-context words (and a veterinary case), the reality of the state of the law throughout the country remains that no reported cases exist in any jurisdiction, other than New York, which permits zone of danger emotional distress claims but would automatically deny a grandparent from recovery under this theory.

As set forth in our initial brief, New York has been a singular leader in recognizing the integral role of the relationship between grandparents and grandchildren, affording grandparents right to access to their grandchildren unknown in other states. It is simply incomprehensible that New York would conversely stand as a solitary voice against providing a grandparent a right to recovery when the unimaginable occurs, as it did to Susan Frierson.

Viewing the *Bovsun* Court's decision through the prism of time, it seems clear that, in establishing a right to such a claim, it relied upon the then-current Restatement of Torts (which set forth the "immediate family" requirement) in setting the boundary of "immediate family member." As *Bovsun* itself was a departure from previously decided cases, it stood as an effort to modernize New York law and harmonize it with the prevailing common law of the land as recognized by other states.

Today, so too would a decision in plaintiff's favor, granting Susan Frierson the right to bring her claim, and in so doing, clarifying New York law and bringing it in line with the vast majority of jurisdictions in the United States. Nothing in the text or the spirit of *Bovsun*, including the Court's purposeful restraint in declining to offer an exact definition of "immediate family," suggests that the Court, at that time, was of a mind to deny grandparents such a remedy.

Nor is there any reason to believe the decision was intended to be free from further reevaluation as the law evolves.

III. RESPONDENT'S SUGGESTION THAT THIS ISSUE SHOULD BE LEFT TO THE LEGISLATURE IS MISPLACED

Esplanade Ventures next contends that since the Legislature has never taken any action with respect to this area of law, that somehow, therefore the Court should affirm the Second Department's decision. Little analysis is needed to discern the frivolity of this contention.

Indeed, Esplanade Ventures' own brief includes a lengthy recitation of the history of emotional distress damages cases in New York, including the fact that at common law, no such law existed at all. All of the doctrines relating to emotional distress now viable in New York are the result of the Court's updating and altering the common law, which initially did not permit any such claims to be brought. To suggest that the Legislature's utter inaction with respect to this body of law, already squarely within the traditional domain of common law, sheds light on this Court's decision herein is ridiculous on its face.

CONCLUSION

"It is fundamental to our common-law system that one may seek redress for every substantial wrong" (*Battalia v State of New York*, supra). Seldom is this Court presented with a clearer opportunity to fulfill this central tenet of our system of justice.

There can be no denying that Susan Frierson's emotional distress resulting from witnessing the death of her grandchild is "serious and verifiable," the touchstone for such a claim as stated by the *Bovsun* Court. In reality, words fail to properly encapsulate the monumental nature of her pain. Indeed, for New York to recognize zone of danger emotional distress cases, yet somehow find that the facts which underlie Susan Frierson's emotional distress do not permit her to pursue such a claim is simply incongruous. In short, no fair formulation of the applicable rule could possibly derive such an unjust result.

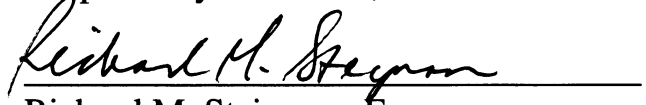
In recognition of this unshakable truism, Defendants-Respondents resort to dire forecasts of the crushing impact on the judicial system that allowing this claim to be adjudicated would create. These claims are both overwrought and irrelevant. The addition of an emotional distress claim to a personal injury or wrongful death claim already filed cannot, in any way, affect the working of our court system or place an undue burden on judges and their staff. Certainly, these

projections are no basis for this Court to deny Susan Frierson justice in this matter.

For all of the foregoing reasons, the decision of the Appellate Division, Second Department, should be reversed.

Dated: New York, New York
March 9, 2020

Respectfully submitted,



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Dated: New York, New York
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