To be Argued by:
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(Time Requested: 30 Minutes)

APL-2019-00209
Kings County Clerk's Index No. 510780/15
Appellate Division–Second Department Docket 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 MASQSOOD FARUQI,

Defendants-Respondents,

– and –

D&N CONSTRUCTION AND CONSULTING, INC.,

Defendant.

BRIEF FOR DEFENDANT-RESPONDENT ESPLANADE VENTURE PARTNERSHIP

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Date Completed: February 21, 2020

Estate of Greta Greene, et al. v. Esplanade Venture Partnership, et al.

APL-2019-00209

RULE 500.1(F) DISCLOSURE STATEMENT

Defendant-Respondent Esplanade Venture Partnership ("EVP") is wholly owned by Scharad Associates, L.P. and ZBD Associates, LLC. EVP does not have any subsidiaries or affiliates.

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BRIEF FOR DEFENDANT-RESPONDENT ESPLANADE VENTURE PARTNERSHIP

PRELIMINARY STATEMENT

Defendant-Respondent Esplanade Venture Partnership ("EVP") submits this brief in response to plaintiff Susan Frierson's appeal from an order of the Appellate Division, Second Department, entered May 15, 2019, that reversed an order of the Supreme Court, Kings County (Velasquez, J.), entered January 4, 2017, that granted plaintiff's motion pursuant to CPLR 3025(b) to amend her complaint to assert a cause of action for negligent infliction of emotional distress ("NIED"). The Appellate Division granted plaintiff leave to appeal to this Court by order entered October 9, 2019.

In this appeal, plaintiff asks the Court to disregard fifty years of settled precedent and expand tort recovery to allow a grandmother to recover for the emotional damages she suffered from witnessing the injuries that tragically led to the death of her granddaughter Greta Devere Greene ("Greene"). While the facts of this case are heartbreaking, expanding the right of recovery in this case will have profound, lasting, and acute consequences for the public and court system. The Court should not simply abandon its carefully crafted jurisprudence or disregard the lessons gleaned from around the country in search of a rule that permits recovery in this case at the expense of the other important considerations at issue in this sensitive, sympathetic, and challenging area of the law.

After substantial resistance, the Court first recognized a narrow right of recovery for bystander NIED in Bovsun v Sanperi, where a plaintiff in the zone of danger witnessed the injury or death of an "immediate family" member (61 NY2d 219 [1984]). At the heart of plaintiff's appeal is her contention that grandparents and grandchildren are members of the immediate family. While grandparents are important family members, plaintiff's argument suffers from at least three flaws. First, when the Court initially recognized a claim for bystander NIED, it could have selected from a number of more expansive formulations, but adopted the narrower "immediate family" requirement. Second, the immediate family, as defined by popular dictionaries both today and at the time Bovsun was decided, does not include grandparents and grandchildren. Third, this Court subsequently held that immediate family was limited to the relationships surveyed in Bovsun (i.e. spouse, parent, child) (Trombetta v Conkling, (82 NY2d 549, 553 [1993]). Fourth, extending the right to recovery in this case is sharply at odds with Trombetta, where the Court held that a plaintiff who witnessed the death of her aunt could not recover for NIED. The plaintiff in Trombetta shared a particularly close relationship with her aunt, who served as the mother figure in her life after the plaintiff's own mother died when she was just eleven years old.

Plaintiff has not offered a persuasive justification for departing from this well-settled law. Although she cites to various statutes in support of her claim that

grandparents are immediate family, these laws are concerned with the procedural mechanism for obtaining custody of a child or paid family leave, and not tort recovery. Nor does the fact that certain statutes define grandparents as immediate family support expanding the right of recovery for bystander NIED. A survey of New York's law reveals that the Legislature has assigned various definitions to "immediate family", including grandparents within the scope of the phrase in certain circumstances, excluding grandparents in other instances, and sweeping aunts and uncles into the fold in other situations. The disparate treatment simply reflects that immediate family carries varying meanings depending on the context and that the Legislature is perfectly capable of defining the phrase.

Expanding bystander NIED to include grandparents and grandchildren is also bad public policy. A key consideration driving this Court's NIED jurisprudence was the recognition that this species of recovery, left unchecked, threatens to impose sweeping liability, whose ultimate cost is shouldered by the public. Consequently, the Court limited bystander NIED to spouses, parents, and children, relationships that are without question unequaled in law or society. As the Court proceeds beyond these relationships, it is difficult to divine a limiting principle that will not eventually spiral into a crushing and unwieldy right of recovery.

Plaintiff's argument that her close relationship with Greene transforms her into an immediate family member who is entitled to recover for bystander NIED is

also unpersuasive. First, focusing on the relationship between the parties enmeshes the Court in precisely the type of analysis of emotional ties it has long sought to avoid. Second, plaintiff presumes that her relationship with Greene is typical of the relationship that *every* grandparent shares with *every* grandchild. Accepting plaintiff's argument will transform that assumption into a reality as the Court will now categorically permit grandparents to recover for bystander NIED, irrespective of *their* relationship with *their* grandchild. Finally, plaintiff's reasoning is easily applied across a wide spectrum of relationships that extend well beyond the familial context.

Allowing plaintiff to recover in this case also implicates this Court's aversion to creating a right of recovery that is unduly arbitrary. As noted above, the relationships where the Court permits recovery for NIED – spouses, parents, and children – are unrivaled. While any rule limiting recovery is necessarily arbitrary, this Court drew the line at a rational point limiting liability to an extremely narrow set of relationships that enjoy a unique and special status in the law. Broadening beyond these core relationships will necessarily produce the arbitrary outcomes the Court carefully sought to avoid.

Ultimately, to the extent that the definition of immediate family member should be expanded to include grandparents and grandchildren, this is a task best left to the Legislature. Along these lines, the Legislature has repeatedly rejected

proposed bills defining grandparents as immediate family for purposes of an NIED claim. The Legislature's repeated refusal to pass these laws not only establishes that this is an issue best left to elected officials, but that on sound public policy grounds the Legislature has elected not to expand NIED claims to include a whole new class of plaintiffs.

Perhaps recognizing that the immediate family test does not and should not permit grandparents to recover for NIED, plaintiff advocates for a wholesale abandonment of this rule in favor of a more flexible test. Plaintiff's argument is flatly foreclosed by the doctrine of *stare decisis* as this Court has repeatedly refused to employ a functional test that analyzes the nature of the relationship between the plaintiff and injured third party. Plaintiff has not offered a compelling justification for departing from these prior decisions.

Nevertheless, plaintiff claims that New York's immediate family test, as compared to the rest of the country, is an outlier. The truth is far more complicated. There are a number of states that have not recognized bystander NIED claims, not addressed whether grandparents can recover for this claim, or flatly precluded grandparents from recovering. Other jurisdictions employ additional limitations, like a physical impact or physical manifestation requirement, that are absent from New York's rule. Still other jurisdictions impose higher burdens on any plaintiff attempting to prove an NIED claim. All of this is to say, New York is not an outsider

that imposes an abnormally strict limitation on the rights of plaintiffs to recover for bystander NIED.

Sound public policy also weighs decisively against the flexible test sought by plaintiff. Dispensing with the objective immediate family test will flood already overburdened courts with claims from bystanders who witness an injury to or the death of a third party. The courts will then have to engage in the complex task of assessing whether a relationship is sufficiently close to permit a plaintiff to recover for NIED– a fact intensive analysis that will not lend itself to summary judgment. Simply stated, abandoning the immediate family rule will inundate courts with new claims that are not easily dispensed with, thereby adding to the congestion and backlog that already plagues New York's court system.

Similarly, discarding the objective immediate family test will lead to crushing liability. The Court need look no further than those jurisdictions that have experimented with flexible tests. For example, there are jurisdictions that now allow recovery for witnessing an injury to complete stranger or even a pet. These types of tests would impose staggering liability in a state as populated and litigious as New York.

Finally, plaintiff claims that because it is too difficult to parse out her damages she should recover *all* of her claimed emotional damages, including those occasioned by witnessing the events that led to the death of Greene. This argument

is unpreserved, ignores the Court's bystander NIED jurisprudence, and disregards the evidence that the jury would receive at trial.

COUNTER-STATEMENT OF FACTS

A. Background

The facts of this appeal, as drawn from plaintiff's motion to amend her complaint, are tragic. Plaintiff, Greene's maternal grandmother, was babysitting her granddaughter when the two left her apartment on Manhattan's Upper Westside to stroll around the neighborhood (R. 15, 17, 45).[1] The pair eventually stopped in-front of EVP's building where plaintiff sat down on a park bench while Greene stood next to her (R. 17, 45). Although the exact sequence of events is somewhat unclear, at some point, debris from the façade of EVP's building fell, striking plaintiff and Greene (id.). Despite the best efforts of plaintiff and first responders, Greene, at the age of two, succumbed to her injuries in the hospital (R. 18, 45-46).

Plaintiff claims that she and Greene enjoyed a personal relationship that was formed early in Greene's life (R. 16-17, 43-45). While plaintiff's motion to amend delves into the nature, depth, and contours of her relationship with Greene, defendants refrain from recounting these details as they are simply irrelevant to the issue on this appeal. The sole dispositive fact concerning their relationship is that

[1] The Record on Appeal is cited herein as "R.__".

Greene was plaintiff's granddaughter – a relationship that is insufficient to trigger liability for purposes of a bystander NIED claim (R. 42).

B. Procedural History

1. The Initial Complaints

As relevant to this appeal, plaintiff, along with Greene's estate, commenced a negligence action in the Supreme Court, Kings County seeking to recover damages for the conscious pain and suffering she incurred as a result of the accident (R. 51-52). The complaint named EVP, Esplanade 94 LLC, Esplanade Ventures, LLC, Esplanade Associates Five, LLC, Esplanade Associates One, LLC, and Blue Prints Engineering, P.C., as defendants (R. 48). EVP joined issued by service of a Verified Answer (R. 55-63).

Plaintiff subsequently served an amended complaint that removed all of the originally named defendants, except for EVP and Blue Prints Engineering, P.C., and added D & N Construction and Consulting, Inc. and Maqsood Faruqi as additional defendants (R. 64-71). EVP served an answer several months later (R. 78-92).

2. Plaintiff's Motion To Amend Her Complaint

Shortly after EVP served its answer to the amended complaint, plaintiff filed a consent to change attorneys (R. 93-95). Approximately six-months later, plaintiff's new attorney filed a motion pursuant to CPLR 3025(b) seeking leave to amend the complaint to assert a new claim for negligent infliction of emotional

distress (R. 12-13, 15). Plaintiff maintained that the allegations in her proposed complaint satisfied all of the elements required to state a claim for NIED, including that she was in the zone of danger when she witnessed the death of an immediate family member (R. 26). Despite this assertion, plaintiff, constrained as she was by controlling precedent, conceded that the Second Department had previously held that a grandchild did not constitute "immediate family" for purposes of an NIED claim (R. 27-28, citing Jun Chi Guan v Tuscan Dairy Farms (Guan), 24 AD3d 725 [2d Dept. 2005]).

Plaintiff then spent the bulk of her motion advancing arguments as to why, notwithstanding the controlling authority, her complaint was not patently devoid of merit (R. 27-28). First, plaintiff argued that in Bovsun the Court left open the question of whether a grandparent-grandchild relationship satisfied the immediate family member element of a claim for bystander NIED (R. 30). Second, plaintiff asserted that the aunt-niece relationship that the Court rejected as a basis for a bystander NIED claim in Trombetta was appreciably distinguishable from the grandparent-grandchild relationship at issue in this case (R. 32-33). Third, plaintiff maintained that permitting grandparents to recover would not contravene this Court's efforts to narrowly circumscribe NIED to avoid an unsustainable proliferation of claims (R. 34-36). Finally, plaintiff contended that because other

jurisdictions permit grandparents to recover for NIED, New York should follow suit (R. 36-39).

EVP's opposition first argued that plaintiff's motion to amend should be denied based on the fact that her proposed complaint did not clearly delineate the changes or additions from the prior complaint as required by CPLR 3025(b) (R. 139-41). Setting aside this defect, EVP reasoned that plaintiff's motion should be denied because the proposed complaint was palpably insufficient and patently devoid of merit (R. 141-43). Along these lines, plaintiff's arguments essentially disregarded the fact that the Court's decision in Bovsun only opened a "narrow avenue" of recovery for bystander NIED claims (R. 146-47). And while Bovsun may have left open the question as to the outer boundaries of "immediate family", Trombetta closed the door (R. 147). As the Court explained in Trombetta, the right to recover for bystander NIED was limited to the "immediate family as surveyed in *Bovsun*", i.e., spouses, parents, and children (R. 147, 150). Applying this instruction, the Second Department in Guan determined that grandparents and grandchildren were not immediate family, and as a consequence, plaintiff's amendment was flawed (R. 148).

As to plaintiff's arguments, EVP demonstrated that permitting grandparents to recover for bystander NIED was a slippery slope culminating in an expansive right of recovery for every conceivable family member – whether related through

blood or marriage - in direct contravention of the Court's efforts to narrowly tailor liability in this area (R. 153). Nor did the out-of-state cases support plaintiff's efforts to expand bystander NIED to include the grandparent-grandchild relationship as these jurisdictions did not employ the immediate family test adopted by the Court in Bovsun (R. 152). Finally, while plaintiff cited to statutes in support of her argument, a number of other laws actually excluded grandparents from the definition of immediate family (R. 149-50).

In reply, plaintiff persisted in her assertion that the boundaries of immediate family remained unsettled despite the Court's instruction in Trombetta that the right to recover for bystander NIED was limited to the immediate family surveyed in Bovsun (R. 163-64). Next, she argued that EVP erred in relying on the statutory definition of immediate family to define that phrase in the context of a common-law claim (R. 167-68). Plaintiff then asserted that EVP's efforts to distinguish cases from around the country were unpersuasive as a number of these decisions had purportedly permitted grandparents to recover on similar facts (R. 168-69). Finally plaintiff contended that because "grandparents are a discrete" class of individuals, allowing them to recover for bystander NIED did not threaten to unleash a torrent of litigation (R. 169-70).

3. Decision On Plaintiff's Motion To Amend

The motion court granted plaintiff's motion to amend her complaint to assert a claim for NIED, finding that she had substantially complied with CPLR 3205(b)'s requirements (R. 9-10). Next, the motion court determined that plaintiff had sufficiently alleged a claim for bystander NIED because she was in the zone of danger at the time she witnessed the injuries that led to Greene's death (R. 10). As to the immediate family requirement, the motion court held that plaintiff had furnished sufficient evidence to allow a jury to determine that she was an immediate family member for purposes of stating a NIED claim (R. 10).

4. EVP's Appeal

As relevant to the instant appeal, EVP appealed from the motion court's decision, identifying three principal errors. First, plaintiff's amended complaint failed to comply with CPLR 3025(b) because it did not clearly identify the proposed changes to the pleading (App. Br. 12-14).[2] Second, the Second Department's determination in Guan that grandparents and grandchildren were not immediate family members established that plaintiff's proposed complaint was patently devoid of merit (App. Br. 21-24). Third, the motion court erred in finding that the issue of

[2] EVP's brief in the Second Department is cited herein as "App. Br." Plaintiff's brief in the Second Department is cited herein as "Resp. Br." EVP's reply brief in the Second Department is cited herein as "Re. Br." Plaintiff's brief in this Court is cited herein as "Br."

whether plaintiff and Greene were immediate family members presented a question of fact for a jury (App. Br. 27-28).

In opposition, plaintiff maintained that she complied with CPLR 3025(b) because the proposed changes to her complaint were readily apparent (Resp. Br. 15-17). Although she acknowledged Guan, plaintiff claimed that the issue of grandparent bystander recovery was still an open question in New York. At a high level, plaintiff asserted that this Court had never resolved the issue, the Second Department's attempts to analogize the aunt-niece relationship and grandparent-grandchild relationship were unpersuasive, grandparents enjoyed an elevated status in New York, and there was little danger of an unmanageable proliferation of claims (Resp. Br. 23-26, 28-30). Additionally, plaintiff claimed that decisions from around the country further supported expanding bystander NIED claims to include the grandparent-grandchild relationship (Resp. Br. 31-35). Finally, plaintiff posited that the motion court's order should be affirmed because excluding the grandparent-grandchild relationship from the definition of immediate family was unfair (Resp. Br. 36-38).

In reply, EVP demonstrated that Guan was not an outlier, but rather a natural extension of Bovsun and Trombetta (Re. Br. 9-10). Similarly, plaintiff's efforts to graft the statutory definition of immediate family into the NIED context were unpersuasive as a number of laws also excluded grandparents from this phrase (Re.

Br. 13). Nor were plaintiff's efforts to distinguish her relationship with Greene from the relationship at issue in Guan particularly effective (Re. Br. 14). Finally, while plaintiff cited to a number of jurisdictions purportedly permitting grandparents to recover for bystander NIED, other states do not allow this claim at all, bar grandparents from recovering, or impose even stricter requirements than New York (Re. Br. 14-20).

5. The Second Department's Decision

The Second Department reversed the motion court's decision, holding that plaintiff's "proposed amendment was patently devoid of merit" (R. 175). The majority specifically reasoned that this Court's decisions in Bovsun and Trombetta coupled with its own decision in Guan established that a grandparent and grandchild were not immediate family members for purposes of bystander NIED (R. 175-76).

The Second Department subsequently granted plaintiff's motion for leave to appeal to this Court (R. 192).

Additional facts are incorporated into the Argument section below.

ARGUMENT

POINT I

THE "IMMEDIATE FAMILY" FOR PURPOSES OF NEW YORK'S BYSTANDER NIED CLAIM DOES NOT INCLUDE GRANDPARENTS AND GRANDCHILDREN

A. Historically, The Court Struggled To Define The Contours Of Bystander NIED Claims, Before Establishing A Narrow Right Of Recovery

For nearly twenty years, this Court struggled to define the boundaries of NIED claims before creating an extremely narrow right for bystanders to recover the emotional harm from witnessing the injury or death of a third party. The Court first addressed the question of bystander NIED in Tobin v Grossman, where a mother sought to recover for the mental injuries she suffered after hearing the defendant's vehicle strike her two year old son and then viewing his body sprawled across the ground (24 NY2d 609, 611 [1969]). After weighing various policy considerations, the Court concluded that it was impossible to develop a rational limiting principle that would not inevitably spiral into unlimited liability (id. at 618-19). As the Court explained, "the logical difficulty of excluding the grandparent, the relatives, or others *in loco parentis*, and even the conscientious and sensitive caretaker, from a right to recover, if in fact the accident had the grave consequences claimed, raises subtle and elusive hazards in devising a sound rule in this field" (id. at 617). Ultimately, the majority held that because there was "no rational way to limit the scope of liability" through a "reasonably objective" test that "hold[s] strict rein on

liability" (id. at 618), the mother could not recover for her psychological injuries (id. at 619).

The Court next addressed the issue of bystander NIED in Howard v Lecher, where the plaintiff parents commenced an action against their doctor for the mental distress and emotional disturbance they suffered from witnessing their daughter succumb to Tay-Sachs disease (42 NY2d 109, 110 [1977]). The majority's decision, like the majority in Tobin, wrestled with the difficulty of crafting a principled rule that avoided "artificial and arbitrary boundaries" and simultaneously limited the "legal consequences of wrongs to a controllable degree" (id. at 113). Although recognizing that the parents indisputably suffered, the majority, citing to Tobin, concluded that the fairest approach to balancing these competing considerations was to deny recovery (id.).

When the Court was presented with a similar question in Becker v Schwartz, the majority once again held that the plaintiff parents were not entitled to recover damages for the emotional injuries they suffered from witnessing the deformities and gradual death of their children as the result of the defendants' alleged medical malpractice (46 NY2d 401, 413 [1978]). The Court's reasoning was essentially twofold: first, "the recovery of damages for such injuries must of necessity be circumscribed" (id. at 413); and second, to allow these claims to proceed would "inevitably [lead] to the drawing of artificial and arbitrary boundaries" (id. at 413-

14). The Court subsequently relied upon this decision and Howard, to preclude the plaintiff mother in Vaccaro v Squibb Corp., from recovering emotional damages when her child was born without limbs (52 NY2d 809 [1980]).

Next, in Lafferty v Manhasset Med. Ctr. Hosp., the plaintiff filed an action for emotional distress damages based on witnessing the defendant hospital negligently transfuse blood into her mother-in-law and her subsequent, but failed efforts to render rescue assistance (54 NY2d 277, 279 [1981]). As the Court recognized, the plaintiff's claim merely "represent[ed] another effort to extend existing principles of law so as to expand the liability of the negligent actor to include third parties who suffer shock as a result of direct injury to others" (id.). The Court, however, remained resolute, holding that "there appears to be no rational way to limit the scope of liability" for these types of claims (id., quoting Tobin, 24 NY2d at 618). Indeed, the Court was particularly troubled by the near impossibility of developing a rule that rationally and practically limited liability to third parties for unintended fault (see id. at 281).

The Court, unsurprisingly, adhered to these prior decisions in Kennedy v McKesson Co., where the plaintiff, a dentist, commenced an action for emotional damages against the defendants, who negligently repaired an anesthetic device, causing him to administer a lethal dose of nitrous oxide to his patient (58 NY2d 500, 502-03 [1983]). Summarizing the state of the law, the majority explained there "is

no duty to protect from emotional injury a bystander to whom there is otherwise owed no duty, and, even as to a participant to whom a duty is owed, such injury is compensable only when a direct, rather than a consequential, result of the breach" (id. at 506). Applying this rule, the Court held that the plaintiff could not recover for the emotional damages he sustained as a result of his patient's death (id.). As is readily apparent from the face of its decision, the Court once again struggled "in the search for a 'rational practical boundary for liability'" (id. at 507, quoting Tobin, 24 NY2d at 618).

Against this backdrop, when the Court decided Bovsun it had, to date, uniformly rejected recovery for emotional damages stemming from witnessing the injury or death of a third party (61 NY2d at 227-28). In Bovsun, the Court deviated from this long-standing rule and opened an extremely narrow avenue for recovery (see Trombetta, 82 NY2d at 552, citing Bovsun, 61 NY2d at 229-33). Bovsun was, in actuality, two separate appeals that presented identical questions concerning the reach of bystander NIED (61 NY2d at 224). The first appeal, Bovsun v Sanperi, arose from a car accident where the defendant's car struck Jack Bovsun while he was standing near the rear of his family's station wagon, pinning him against the vehicle (id.). Bovsun's wife and daughter, who were passengers in the station wagon at the time of the accident, commenced an action seeking, in part, to recover damages for emotional distress based on observing the injuries to their husband and father

immediately after the impact (id. at 224-25). The second appeal, Kugel v Westchester Industrial Park, Inc., also arose from a car accident where a mother and father sought, in part, emotional damages based on witnessing the death of their daughter, a passenger in the car with them (id. at 225-26).

The Court's analysis began by acknowledging the traditional reluctance "to recognize any liability for the mental distress which may result from the observation of a third person's peril or harm" (id. at 227). Nevertheless, the Court determined that the facts of Bovsun and Kugel were distinguishable from those of Tobin and its progeny in that the plaintiffs were within the zone of danger of bodily harm (id. at 228). Accordingly, the Court held, "where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her *immediate family*" (id. at 230-31 [emphasis added]). The Court explained its new rule (i) comports with traditional negligence principles, (ii) provides a reasonably objective standard that will still hold a strict rein on liability, and (iii) mitigates the inherent risk of sweeping liability (see id. at 229-30).

Applying the new "zone of danger" test to the facts presented on the two appeals, the Court found that in Bovsun and Kugel the "seriously injured or deceased person was a member of the immediate family of plaintiffs, each of whom alleges

serious emotional trauma as a result of observing the injury or death" (id. at 233). Critically, the Court noted that "[i]nasmuch as all plaintiffs in these cases were married or related in the first degree of consanguinity to the injured or deceased person, we need not now decide where lie the outer limits of 'the immediate family'" (id. n 13).

Nine years after Bovsun, the Court in Trombetta clarified that its holding in Bovsun represented a "very circumscribed right of recovery for bystanders based on the negligent infliction of emotional distress" (82 NY2d at 552). The plaintiff in Trombetta commenced an action for emotional damages after she watched the defendants' truck strike and kill her aunt, who had acted as a maternal figure to the plaintiff after her mother died when she was eleven years old (id. at 551). Although the plaintiff was in the zone of danger, the Court dismissed her bystander NIED claim, holding that aunts and nieces are not "'immediate family' as defined and limited by *Bovsun*" (id. at 554). The Court explained, "[s]ound policy and strong precedents justify our confinement and circumscription of the zone of danger rule only to the immediate family as surveyed in *Bovsun*. Otherwise, the narrow avenue will ironically become a broad concourse, impeding reasonable or practicable limitations" (id. at 553).

B. Extending Bystander NIED Claims To Grandparents And Grandchildren Upsets The Careful Compromises This Court Struck In Allowing Bystander Recovery

The picture that emerges from the foregoing decisions is a prolonged, considered, and careful effort by this Court to balance three interlocking and competing policy goals. First, the desire to provide a remedy for those placed in the position of witnessing the serious injury or death of a child, parent, or spouse (see Bovsun, 61 NY2d at 231-32). Second, the need to fix liability at a point that avoids the societal harms flowing from nearly unbounded liability (see Tobin, 24 NY2d at 618; Howard, 42 NY2d at 113; Becker, 46 NY2d at 413; Bovsun, 61 NY2d at 230; Trombetta, 82 NY2d at 553-54). Third, the necessity of developing a rule of law that reasonably limits liability without drawing indefensibly arbitrary boundaries (see Tobin, 24 NY2d at 619; Howard, 24 NY2d at 113; Becker, 46 NY2d at 414; Lafferty, 54 NY2d at 279).

The Court ultimately balanced these considerations by developing an extremely narrow cause of action for bystander NIED that allows a plaintiff in the "zone of danger" to recover emotional damages for contemporaneous observation of injuries to an "immediate family" member (see Trombetta, 82 NY2d at 552; Bovsun, 61 NY2d at 233). Plaintiff's appeal threatens to upend the carefully calibrated compromises this Court reached in permitting a cause of action for emotional damages based on witnessing the injury or death of a third party. As

discussed more fully below, the Court should reject plaintiff's attempts to expand these claims to grandparents and grandchildren because these efforts are: (i) inconsistent with the Court's prior decisions; (ii) unwarranted; (iii) open the doors to a proliferation of claims; (iv) infuse a level of arbitrariness into bystander NIED claims that the Court has long sought to avoid; and (v) best left to the Legislature.

1. Extending Bystander NIED To Grandparents And Grandchildren Is Inconsistent With The Court's Prior Decisions

a. *The "Immediate Family" Was Carefully Selected And Does Not Include Grandparents And Grandchildren*

The Court's prior decisions considering bystander NIED indicate that "immediate family" was a carefully selected term that does not encompass grandparents and grandchildren. At the time the Court created a claim for bystander NIED in Bovsun, a number of jurisdictions around the country permitted plaintiffs to recover emotional damages for witnessing injuries to third parties. Critically, each jurisdiction embraced one of the following terms to define the necessary relationship between the direct victim and the bystander-plaintiff: (i) "close personal relationship" (see Keck v Jackson, 122 Ariz 114, 116, 593 P2d 668, 670 [1979]); (ii) "close relative" (see Shelton v Russell Pipe & Foundry Co., 570 SW2d 861, 866 [Tenn 1978]; Rickey v Chicago Trans. Auth., 98 Ill 2d 546, 554, 457 NE2d 1, 4 [1983]); or (iii) "closely related" (see Dillon v Legg, 68 Cal 2d 728, 741, 441 P2d 912, 920 [1968]; Leong v Takasaki, 55 Haw 398, 409, 520 P2d 758, 765 [1974];

Barnhill v Davis, 300 NW2d 104, 107 [Iowa 1981]; Culbert v Sampson's Supermarkets, Inc., 444 A2d 433, 438 [Me 1982]; Entex, Inc. v McGuire, 414 So2d 437, 444 [Miss 1982]; Corso v Merrill, 119 NH 647, 654, 406 A2d 300, 304 [1979]; Portee v Jaffee, 84 NJ 88, 98, 417 A2d 521, 526 [1980]; Paugh v Hanks, 6 Ohio St 3d 72, 79, 451 NE2d 759, 766 [1983]; Sinn v Burd, 486 Pa 146, 171, 404 A2d 672, 685 [1979]; D'Ambra v United States, 114 RI 643, 662-63, 338 A2d 524, 534 [1975]; Bedgood v Madalin, 589 SW2d 797, 802 [Tex App 1979]).

The Court in Bovsun could have very easily adopted one of these other more expansive formulations for bystander recovery, but instead selected the phrase "immediate family."[3] Not surprisingly, at the time Bovsun was decided, Black's Law dictionary defined immediate family, as it does today, as "a person's parents, spouse, children, and siblings" (Black's Law Dictionary [11th ed 2019]; Black's Law Dictionary [5th ed 1983]).[4] The Court's decision to employ a phrase that, by definition, is limited to parents, spouses, children, and siblings, especially where

[3] Indeed, Bovsun actually cited every one of the foregoing decisions in its analysis.

[4] The Court frequently uses Black's Law Dictionary and Merriam-Webster's Collegiate Dictionary as its reference for defining terms (see e.g. Yaniveth R. v LTD Realty Co., 27 NY3d 186, 192 [2016]; De La Cruz v Caddell Dry Dock & Repair Co., Inc., 21 NY3d 530, 537 [2013]; Orens v Novello, 99 NY2d 180, 185-86 [2002] ["In cases where the term at issue does not have a controlling statutory definition, courts should construe the term using its usual and commonly understood meaning," as set forth in popular dictionaries]). Immediate family is also defined by Merriam-Webster's Collegiate Dictionary as "a person's parents, brothers and sisters, husband or wife, and children" (Merriam-Webster Online Dictionary, immediate family [https://www.merriam-webster.com/dictionary/immediate%20family]).

broader alternatives were available, demonstrates that grandparents are not "immediate family" for purposes of the bystander NIED claim.

Nevertheless, plaintiff maintains that Bovsun "left open the possibility that the relationship between a grandchild and grandparent could support a zone-of-danger bystander" claim because it "specifically declined to decide the scope of [the] term immediate family" (Br. 20). While Bovsun did not "decide where lie the outer limits of the 'immediate family'" (61 NY2d at 233 n 13), the Court subsequently set the perimeter in Trombetta when it held that "sound policy and strong precedents justify the zone of danger rule to only immediate family *as surveyed in Bovsun*" (82 NY2d at 553) (emphasis added). As the plaintiffs in Bovsun were a spouse, a parent, and a child, it is clear that the Court has limited NIED to the extremely narrow and discrete set of relationships at issue on that appeal.

b. *Trombetta Requires Dismissal Of Plaintiff's Claim*

Plaintiff's bystander NIED claim is also foreclosed by this Court's decision in Trombetta. As noted above, the plaintiff in Trombetta was walking across the street with her aunt when she noticed the defendants' truck rapidly approaching (id. at 551). When plaintiff realized the truck was not going to stop, she tried to pull her aunt out of its path (id.). Sadly, plaintiff failed and she watched as the wheels of the truck crushed her aunt (id.). The plaintiff then commenced an action against the

defendants for NIED, which the Appellate Division ultimately dismissed on the grounds that she and her aunt were not "immediate family members" (id.).

The plaintiff appealed to this Court arguing that her aunt was an immediate family member because their relationship was more akin to a mother/child relationship than an aunt/niece relationship (id.). The plaintiff's mother died when she was eleven years old and the aunt was "like a mother to her" and "was the closest person in her life" (see Trombetta v Conkling, 154 Misc 2d 844, 845 [Sup Ct, Oneida County 1992]). At the time of the accident, the plaintiff and aunt lived next door, shopped, ate breakfast, spoke multiple times a day, and enjoyed activities together every evening (see id.; Trombetta, 82 NY2d at 551). Prior to the accident, plaintiff always lived near her aunt, even residing in the same residence for a period of time (Brief for Plaintiff-Appellant in Trombetta at 4).

Despite the close nature of their relationship, the Court refused to allow the plaintiff to recover for NIED, out of fear that the narrow avenue for bystander recovery would expand into a "broad concourse" (Trombetta, 82 NY2d at 553). As the Court explained "although plaintiff suffered a personal tragic loss… [o]n firm public policy grounds, we are 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. at 553). Ultimately, the Court

recognized the importance of limiting NIED to "a strictly and objectively defined class of bystanders" in order to prevent an "unmanageable proliferation of such claims" and avoid saddling courts with "the complex responsibility" of "assess[ing] an enormous range and array of emotional ties" (id. at 553-54).

Plaintiff's claim in this case closely parallels the claim the Court rejected in Trombetta. Plaintiff essentially argues that she is an immediate family member because she developed a close personal relationship with Greene through her constant presence in Greene's life. Along these lines, plaintiff alleges that she was present for Greene's birth, babysat for Greene, fed her, bathed her, changed her, and put her to sleep (R. 43-45). These interactions are not appreciably distinguishable from those in Trombetta where the plaintiff testified that her aunt had essentially acted as her mother for twenty-six years, especially given the fact that Greene's mother was still alive (see Guan, 24 AD3d at 727). Accordingly, the Court, as it did in Trombetta, should reject plaintiff's efforts to expand NIED to include recovery for a bystander who "may be able to demonstrate a blood relationship coupled with significant emotional attachment" (82 NY2d at 553).

2. Plaintiff Fails To Proffer A Sufficient Basis For Expanding The "Immediate Family" To Include Grandparents And Grandchildren

The law limiting immediate family to spouses, parents, and children has remained unchanged since the Court's decision *Trombetta*. Plaintiff fails to proffer an adequate basis for disrupting this well-settled settled rule. First, plaintiff claims

that Domestic Relations Law § 72 elevated grandparents to the status of immediate family for purposes of a claim for bystander NIED (Br. 24, 27). The statute, however, was designed to create a procedural mechanism for grandparents to obtain custody of a grandchild. The law was unconcerned with tort recovery, but instead focused on shielding children and the State from the emotional and financial costs attendant to the foster care system.

Second, plaintiff points to New York's Paid Family Leave Law as evidence that grandparents are immediate family (Br. 28). Again, this statute is wholly unrelated to the issue of tort-recovery, and cannot furnish a basis for re-writing New York law on bystander claims for NIED.

Third, plaintiff cites to a host of statutes that include grandparents in the definition of immediate family. As with the Domestic Relations Law and Paid Family Medical Leave Law, these statutes do not address the issue of tort recovery. In any event, there are also a host of statutes that do not define grandparents as immediate family members (see Men Hyg Law § 32.39(b)(3); Soc Serv § 461-e(4)(a)(x)(3); Pub Health Law § 2805-e(2)(c); Civil Ct Act § 1601-a(2)(a); Jud Law § 390(1); Penal Law § 120.40(4)). Additionally, the Legislature has enacted a number of laws that include aunts and uncles in the statutory definition of immediate family (see Pub Health Law § 2805-e(2)(c); Soc Serv § 461-e(4)(a)(x)(3); Men Hyg Law § 13.16(b)(3); Correc Law § 851(2-a)).

The Legislature's disparate definitions of immediate family wholly undercut plaintiff's attempts to graft the statutory definition of immediate family into the NIED context. The fact that aunts and uncles are defined as immediate family when this Court has specifically held otherwise for purposes of NIED undermines plaintiff's statutory argument (see Trombetta, 82 NY2d at 554). The Legislature's decision to include grandparents as immediate family members in certain situations, but not in others, weighs decisively against relying on the statutory definition of immediate family to expand NIED claims to include grandparents, as the meaning of this phrase plainly varies with the circumstances. Ultimately, the shifting statutory definitions demonstrate that the Legislature is perfectly capable of defining immediate family and will freely do so when it deems it necessary. Indeed, plaintiff's entire argument falls by the wayside given the fact that, as discussed below, the Legislature has repeatedly rejected amendments to the CPLR and General Obligations Law that include grandparents within the definition of immediate family for purposes bystander NIED.

3. Expanding Bystander NIED To Grandparents And Grandchildren Runs Afoul Of The Court's Efforts To Narrowly Tailor This Right Of Recovery To Avoid The Proliferation Of Claims

A key consideration driving this Court's NIED jurisprudence is the need to hold strict rein on claims for bystander liability (see Bovsun, 61 NY2d at 230). Plaintiff's appeal threatens to unleash the torrent of litigation this Court has

painstakingly sought to avoid through decades of NIED decisions. Initially, this Court has only recognized the right for bystanders to recover for emotional damages in cases involving injuries to spouses, parents, and children (see id. at 233). Consequently, permitting recovery in this case necessarily represents an expansion of NIED to a new class of plaintiffs– grandparents and grandchildren.

Plaintiff, in seeking to expand the orbit of a tort duty, faces an exacting burden. While "[i]t is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, regardless of the economic and social burden… the fixing of the 'orbit' of duty, as here, in the end is the responsibility of the courts" (De Angelis v Lutheran Medical Ctr., 58 NY2d 1053, 1055 [1983]). When discharging its responsibilities to fix the orbit of a duty, the Court 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'" (Trombetta, 82 NY2d at 553, quoting Pulka v Edelman, 40 NY2d 781, 786 [1976]). Ultimately, "this Court has been especially reluctant to broaden the concept of duty where, as here, the injury alleged is negligently inflicted emotional injury" (Lauer v City of N.Y., 95 NY2d 95, 103 n 1 [2000]).

The Court should exercise restraint and reject plaintiff's expansionist efforts. The relationships in Bovsun, the only case where the Court has permitted a claim for

NIED to proceed, indisputably enjoy a unique, elevated, and unrivaled position in law and society. First, as to spouses, the Supreme Court recognizes that "[m]arriage is fundamental under the Constitution" (Obergefell v Hodges, 135 S Ct 2584, 2599 [2015]). Indeed, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" (Loving v Virginia, 388 US 1, 12 [1967]). Consequently, "choices about marriage … are among associational rights [the Supreme Court] has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment" (M.L.B. v S.L.J., 519 US 102, 116 [1996]).

The special status between spouses is accorded such weight that communications between partners are, as a statutory right, privileged and shielded from disclosure (see CPLR 4502(b); People v Mills, 1 NY3d 269, 276 [2003] [recognizing that martial privilege "[d]esigned to protect and strengthen the marital bond"]). That is to say, the sanctity of the relationship between spouses is of such paramount importance that this State imposes an obstacle to the truth-finding process to preserve the bonds of marriage (see Ambac Assurance Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 624 [2016] [recognizing that "privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process"]).

Second, it is beyond cavil that the parent-child relationship is "one of society's most sacrosanct relationships" (In re Sayeh R., 91 NY2d 306, 334 [1997, Bellacosa, J., dissenting]; see also Jennifer Ayres Hand, Note, Preventing Undue Terminations: A Critical Evaluation of the Length-Of-Time-Out-Of-Custody Ground For Termination of Parental Rights, 71 NYU L Rev 1251 [1996] ["The American legal system views the relationship between parent and child as sacrosanct"]). As recognized by the Supreme Court, "the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition" (Wisconsin v Yoder, 406 US 205, 232 [1972]). Unsurprisingly, this Court recognizes that a parent and child enjoy a "special relationship" (Parker v Stage, 43 NY2d 128, 132 [1977]). Indeed, "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests" (Matter of Brooke S.B. v Elizabeth A.C.C., 28 NY3d 1, 26 [2016]).

Allowing recovery to proceed beyond the unequaled relationships of spouse, parent, and child will invariably transform the "narrow avenue" for bystander recovery into a "broad concourse" (Trombetta, 82 NY2d at 553). Distilled to its essence, plaintiff argues that because she shared a close relationship with Greene that developed through frequent contacts, where she fed, bathed, dressed, and

otherwise nurtured, she was an immediate family member. Plaintiff's argument perfectly illustrates the slippery slope created by extending liability in this case.

First, the logic of plaintiff's argument is far too malleable to provide any reasonable limitation on liability as the bonds that are forged through proximity, routine, and the tender care for a child, can develop in a host of relationships. An aunt who serves as a mother figure for the plaintiff for over twenty years surely developed a relationship that is equal in significance to the relationship between plaintiff and Greene (see Trombetta, 82 NY2d at 554; see also Guan, 24 AD3d at 727). The step-parent who never legally adopts a child, but is a constant presence, is equally likely to form a strong bond with that child (see Thompson v Dhaiti, 103 AD3d 711, 712 [2d Dept 2013]). Slightly further afield, a care giver who watches a child eight-hours a day, certainly develops an intimate relationship with the child (see Tobin, 24 NY2d at 617). Accordingly, if plaintiff can proceed with her claim in this case, it is virtually impossible to identify a principled limiting rule that will foreclose liability in any case where a child was injured in the presence of a caregiver or vice versa. From there, liability will naturally expand to foster parents, coaches, clergy, and teachers. Unsurprisingly, the Court has repeatedly recognized this concern in limiting the right of recovery for bystander NIED (Trombetta, 82 NY2d at 553; Tobin, 24 NY2d at 615).

Second, the closeness of the relationships between plaintiff and Greene is simply irrelevant to the issue on appeal.[5] The Court should not cast aside its efforts to narrowly circumscribe liability in this area using the particular relationship between plaintiff and Greene as a proxy for the relationship between *every* grandparent and grandchild. While plaintiff and Greene may have shared a close relationship, she has not demonstrated any basis for concluding that *all* grandparents and grandchildren enjoy this type of bond. Simply stated, adopting plaintiff's rule would permit recovery by every grandparent regardless of their relationship with their grandchild.

Nor is it enough to argue, as plaintiff has, that extending NIED claims to include grandparents will not lead to a proliferation of litigation because they enjoy an "elevated" or "special" status above other relatives (Br. 26-27). Whatever their status in New York, plaintiff cannot seriously argue that the relationship between grandparent and grandchild is universally akin to the relationships between spouses, parents, and children. Indeed, the statute plaintiff relies on effectively recognizes the primacy of the parent-child relationship (see Matter of Suarez v Williams, 26 NY3d 440, 448 [2015] [noting that under Domestic Relations Law § 72, grandparents must "prove the existence of *extraordinary circumstances* in order to

[5] Plaintiff's focus on her relationship with her granddaughter also asks the Court to engage in an analysis of emotional ties, an exercise it has steadfastly refused (Trombetta, 82 NY2d at 554).

demonstrate standing when seeking custody against a child's parent"] [emphasis added]). At base, once the Court strays from these core relationships, it is only a matter of time before another class of plaintiffs identifies statutory language or decisional law that they perceive as creating a special status entitling them to recover for NIED. The class of plaintiffs who claim they are entitled to recovery for bystander NIED will then naturally proceed beyond these constraints to an ever widening array of relationships.

Plaintiff's argument that grandparents are a discrete readily determinable class because a person only has four biological grandparents is equally unpersuasive (Br. 29). First, a person only has *one* spouse and *two* biological parents. Viewed through this prism, plaintiff, in noting that a person has *four* biological grandparents, has essentially conceded that she is advocating for a substantial expansion of the class of bystanders who may recover for NIED. Second, plaintiff's assertion ignores the other half of the equation. A person can only have four biological grandparents, but a grandparent can have substantially more biological grandchildren. Consequently, plaintiff, contrary to her assertion, is advocating for a sweeping enlargement of NIED claims.

Finally, plaintiff likely fails to appreciate the ramifications of her appeal because she misapprehends the importance of the immediate family member element in guarding against the unmanageable expansion of liability in the context of a

bystander NIED claim. According to plaintiff, "the zone of danger rule, and not the requirement that the plaintiff and the injured person be 'immediate family members'" acts "as the primary mechanism for limiting the availability of recovery for emotional damages to a controllable degree" (Br. 20). Contrary to plaintiff's contention, this Court recognized that a "strict and objectively defined class of bystanders", i.e. immediate family members, is instrumental to preventing "an unmanageable proliferation of claims" (Trombetta, 82 NY2d at 553-54).

Plaintiff compounds this mistake by asserting that the immediate family member requirement merely serves as a proxy for determining whether an emotional injury was serious and verifiable (Br. 20). As the Court explained in Bovsun, however, a serious and verifiable emotional injury is a separate element of the bystander NIED claim (61 NY2d at 231). The immediate family member requirement, on the other hand, is the essential factor for limiting liability as it determines in the first instance whether a plaintiff may assert a bystander NIED claim (see e.g. Trombetta, 82 NY2d at 553-54; Matter of Kmiotek v Sachem Cent. Sch. Dist., 176 AD3d 1063, 1065 [2d Dept 2019] [friends]; Santana v Salmeron, 79 AD3d 1122, 1123 [2d Dept 2010] [girlfriend]).

4. Allowing Grandparents To Recover Would Infuse A Level Of Arbitrariness Into NIED Claims That The Court Has Long Sought To Avoid

The Court was long concerned with developing a rule for bystander recovery that was not unduly arbitrary (see Tobin, 24 NY2d at 616, 618; Trombetta, 82 NY2d at 552; Kennedy, 58 NY2d at 506). Ultimately, the Court resolved this concern through a test that limited the right of recovery to immediate family members, including spouses, parents, and children (Bovsun, 61 NY2d at 224-34; Trombetta, 82 NY2d at 553-54). Allowing grandparents to recover for NIED upsets the delicate balance that the Court struck between the need to create a rule that protects against crippling liability and avoid a limit that is unduly arbitrary.

The relationships between spouses, parents, and children are qualitatively different from every other relationship in society. As noted above, consistent with their unique and important roles, these relationships are afforded Constitutional protections and, in the case of spouses, safeguarded through evidentiary privileges. Accordingly, there is an eminently rational, logical, and defensible basis for extending bystander NIED recovery to spouses, parents, and children, while excluding more distant relatives.

Permitting recovery beyond this point, necessarily injects the very arbitrariness that the Court sought to avoid into claims for NIED. For example, given the close relationship between the plaintiff and her aunt in Trombetta, allowing

plaintiff to recover in this case would certainly be unduly arbitrary (see Guan, 24 AD3d at 727). Similarly, it is arbitrary to preclude a plaintiff from recovering for the death of her step-father when she lived with the decedent since she was four years old, relied on him financially, and was the only father figure she ever knew, but allow recovery in this case (see Thompson, 103 AD3d at 711). Barring a fiancé from recovery while permitting plaintiff to proceed in this case, raises the same arbitrariness concerns (see Capolupo v Trustees of Columbia Univ. in City of New York, 193 AD2d 466 [1st Dept 1993]).

While any rule is necessarily arbitrary, this Court drew the line at a rational point by limiting liability to an extremely narrow set of relationships that are unique in the law and society. Expanding beyond this point serves to inject an intolerable level of arbitrariness into NIED claims that cannot and should not be remedied by simply expanding the class of plaintiffs who can recover. As any expansion of NIED threatens to inflict societal harms through far reaching liability, the surest path to avoiding unnecessary arbitrariness in this area of the law is to enforce the compromise the Court reached in Bovsun and limit recovery to spouses, parents, and children.

5. Any Expansion Of The Definition Of Immediate Family Should Be Left To the Legislature

Finally, any expansion of the definition of the phrase immediate family should be left to the Legislature. Although bystander NIED is a common-law cause of action, the Legislature has not hesitated to enact laws that modify these types of claims (see e.g. Mullen v Zoebe, 86 NY2d 135, 140 [1995] [recognizing General Municipal Law § 205-a was enacted to "ameliorate the harsh effects of the firefighter rule's bar to recovery in common-law negligence"]). Indeed, the Legislature has repeatedly proposed statutory amendments to the New York General Obligations Law and CPLR specifically expanding the definition of immediate family to include grandparents for purposes of bystander NIED claims. Most recently, Assembly Bill A4451, introduced in the 2017-2018 Legislative Session sought to amend the General Obligations Law to include a new section, §11-108, captioned "Recovery by certain persons for intentional or negligent infliction of emotional distress," which would have provided:

> In addition to any other right of recovery otherwise available under law, an immediate family member within the zone of danger may recover damages for intentional or negligent infliction of emotional distress. For the purposes of this section, "immediate family member" shall mean, spouse, parent, child, sibling or grandparent.

This same bill was introduced during the 2015-2016 Legislative Session, under bill number A1313, but similarly failed to pass.

In the 2013-2014 Legislative Session, the Assembly introduced Bill A8314, which sought to amend Section 215 of the CPLR by adding a new subdivision providing: "An action by an immediate family member within the zone of danger for intentional or negligent infliction of emotional distress. For the purpose of this section, 'immediate family member' shall mean a spouse, parent, child, sibling or grandparent." This Bill also failed to pass into law.[6]

The fact that the Legislature repeatedly considered, but ultimately elected not to expand the definition of immediate family for purposes of bystander NIED to include grandparents demonstrates that this is an issue best resolved by elected officials. While the Court has "often been reluctant to ascribe persuasive significance to legislative inaction", this concern yields where the "legislative inactivity has continued in the face of a prevailing statutory construction" (Desrosiers v Perry Ellis Menswear, LLC, 30 NY3d 488, 497 [2017]). Although this case does not present an issue of statutory construction, assigning weight to the Legislature's rejection of proposals to amend the CPLR or General Obligations Law to include grandparents is particularly appropriate. In Guan, the Second Department

[6] The existence of these proposals only serves to further undercut plaintiff's argument. The Legislature's decision to propose amendments to the General Obligations Law and CPLR establishes that, as the law stands today, grandparents are not immediate family members for purposes of an NIED claim, otherwise these changes would prove redundant and unnecessary (cf. Commonwealth of the N. Mar. I. v Canadian Imperial Bank of Commerce, 21 NY3d 55, 61 [2013] ("[t]he Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law"]).

held that grandparents are not immediate family members for purposes of a bystander NIED claim (24 AD3d at 727). Thereafter, the Legislature, on three separate occasions, rejected efforts to amend the definition of immediate family to include grandparents. These "repeated unsuccessful legislative efforts" are ultimately "indicative of the type of broad public policy issue reserved exclusively to the legislature" (Matter of LeadingAge N.Y., Inc. v Shah, 32 NY3d 249, 266 [2018]).

Allowing the Legislature to set the bounds of immediate family is particularly appropriate given this Court's prior decisions narrowly interpreting the phrase and recognizing that bystander NIED claims threaten to impose nearly limitless liability (see Semenetz v Sherling & Walden, Inc., 7 NY3d 194, 201 [2006] [recognizing that decisions that "would mark a radical change from existing law implicating complex economic considerations [are] better left to be addressed by the Legislature"] [internal quotation marks omitted]; Murphy v Am. Home Prods. Corp., 58 NY2d 293, 301 [1983] [holding "that such a significant change in our law is best left to the Legislature"]).

POINT II

THE COURT SHOULD REJECT PLAINTIFF'S INVITATION TO ADOPT A MORE FLEXIBLE TEST FOR BYSTANDER RECOVERY

A. *Stare Decisis* Counsels Against The Adoption Of A Flexible Test

S*tare decisis* impels this Court to reject plaintiff's invitation to adopt a more flexible analysis of the relationships that are sufficient to trigger liability for NIED. The *stare decisis* doctrine provides "that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (People v Peque, 22 NY3d 168, 194 [2013]). The rule "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" (Matter of State of N.Y. v Donald DD., 24 NY3d 174, 187 [2014]).

As discussed above, this Court carefully developed an extremely narrow avenue for NIED recovery where a person in the zone of danger witnesses an injury to or the death of an immediate family member (Bovsun, 61 NY2d at 224; Trombetta, 82 NY2d at 552). While developing this rule, the Court repeatedly refused to adopt the "functional" tests from other jurisdictions that plaintiff advocates for in this case. The Court in Tobin first declined to follow the California Supreme Court's decision in Dillon, which established a bystander's right to recover

emotional harm where the plaintiff and injured party were "closely related" (Tobin, 24 NY2d at 618, citing Dillon, 68 Cal 2d at 741, 441 P2d at 920). As the majority wisely predicted, California's rule was not at all effective at limiting liability to a controllable degree (see Tobin, 24 NY2d at 615; see also Thing v La Chusa, 48 Cal 3d 644, 655, 771 P2d 814, 821 [1989] ["the only thing that was foreseeable from the *Dillon* decision was the uncertainty that continues to this time as to the parameters of the third party NIED action."]).

When the Court in Bovsun carved out an extremely narrow right of bystander recovery, it adhered to its rationale in Tobin, explaining that New York's zone of danger rule is designed to set forth a "'reasonably objective' standard which will 'serve the purpose of holding a strict rein on liability'" (Bovsun, 61 NY2d at 230, quoting Tobin, 24 NY2d at 609, 618). Nine years later, the Court in Trombetta once again refused to adopt a more flexible test for defining the immediate family, explaining that this requirement serves to limit the right of recovery to a controllable degree and avoids enmeshing courts in the complex process of assessing a wide array of emotional ties (82 NY2d at 554). Accordingly, under the principles of *stare decisis* the Court should reject plaintiff's embrace of a flexible test that analyzes the nature of the relationships between the plaintiff and injured third person.

Nor has plaintiff identified any basis for departing from this Court's sound decisions in Tobin, Bovsun, and Trombetta. While the rule of *stare decisis* is not

"inexorable" (K2 Inv. Grp., LLC v Am. Guar. & Liab. Ins. Co., 22 NY3d 578, 587 [2014]), it will only yield where there is a "compelling justification" (Peque, 22 NY3d at 194). A compelling justification arises in three circumstances: (i) "when the Court's prior holding leads to an unworkable rule, or creates more questions than it resolves"; (ii) where "adherence to a recent precedent involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience"; or (iii) when "a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience" (id. [internal quotation marks and citations omitted]).

As to the first exception, there is no evidence that the immediate family rule has proven unworkable or raises more questions than it resolves. The lower courts have easily and consistently applied this rule to bar claims brought by those outside the immediate family (see e.g. Guan, 24 AD3d at 727 [grandmother]; Thompson, 103 AD3d at 73 [stepdaughter]; Capolupo, 193 AD2d at 467 [fiancé]; Santana, 79 AD3d at 1123 [girlfriend]; Matter of Kmiotek, 176 AD3d at 1065 [friends]). Similarly, the courts have effortlessly applied the rule to permit claims for those who readily fit the definition of immediate family (see e.g. Hass v Manhattan & Bronx Surface Transit Operating Auth., 204 AD2d 208, 208 [1st Dept 1994] [mother]; Zae v Kolb, 204 AD2d 1019, 1019 [4th Dept 1994] [mother]; Wallace v Parks Corp.,

212 AD2d 132, 142 [4th Dept 1995] [husband and sons]; Fonzi v Beishline, 270 AD2d 912, 913 [4th Dept 2000] [husband]).

Indeed, not only is there no evidence that the rule is unworkable, but just the opposite is true: experience demonstrates that the flexible standard plaintiff promotes is actually unworkable. As a prime example, California, the pioneer in establishing bystander NIED, narrowed its own rule twenty years after its adoption in Dillon. In Dillon, the California Supreme Court set forth a "closely related" standard for the requisite relationship between the bystander-plaintiff and direct victim (68 Cal 2d at 741, 441 P2d at 920). After permitting its courts to "approach [liability] on a 'case-to-case' basis [for] some 20 years after *Dillon*" the court characterized its rule as "an amorphous nether realm" which "produced inconsistent rulings" and exposed the "essential" need for bright-line rules in this area of law (Thing, 48 Cal 3d at 659, 664, 771 P2d at 823, 827). Critically, in Thing the court abandoned its "*ad hoc*" approach to its rule's "closely related" prong, and explicitly defined the term (id. at 667-68 n 10, 771 P2d at 829 n 10). The court explained, "[n]o policy supports extension of the right to recover for NIED to a larger class of plaintiffs… [e]ven if it is 'foreseeable' that persons other than closely related percipient witnesses may suffer emotional distress, this fact does not justify the imposition of what threatens to become unlimited liability" (id. at 667, 771 P2d at 828-29).

Next, the application of Tobin, Bovsun, and Trombetta does not involve a collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. First, these cases are not recent as Tobin was decided in 1969 while Trombetta is over twenty-five years old. Second, Bovsun and Trombetta actually stand in derogation of the Court's long-standing reluctance to permit emotional damages claims in general, and bystander claims in particular (see Howard, 42 NY2d at 112; Becker, 46 NY2d at 414; Kennedy, 58 NY2d at 506).

Finally, to the extent plaintiff even attempts to identify a grounds for deviating from the rule of *stare decisis*, she appears to invoke the exception that a preexisting rule, once thought defensible, should be abandoned where it no longer serves the ends of justice or withstands the cold light of logic and experience (Br. 31). Chief among her complaints is that the immediate family test is arbitrary, but "characterizing a rule limiting liability as 'unprincipled' or 'arbitrary' is often the result of overemphasizing the policy considerations favoring imposition of liability, while at the same time failing to acknowledge any countervailing policies and the necessary compromise between competing and inconsistent policies informing the rule" (Conrail v Gottshall, 512 US 532, 557 [1994]).

Plaintiff's arbitrariness argument falls directly into this trap: the rule limiting bystander recovery to claims involving the injury or death of immediate family, rather than a more nebulous group of victims, fulfills a critical function. As the

Court has repeatedly recognized, the immediate family rule prevents "an unmanageable proliferation of such claims" (Trombetta, 82 NY2d at 554). Plaintiff may assign little weight to this function, but this Court routinely recognizes both the need and importance of developing rules that prevent the imposition of staggering liability (see Doerr v Goldsmith, 25 NY3d 1114, 1137 [2015, Abdus-Salaam, J., concurring] [recognizing benefit of bright-line rule that helps "keep liability within manageable limits"]; Holdampf v A.C. & S., Inc. (In re N.Y.C. Asbestos Litig.), 5 NY3d 486, 493 [2005] [recognizing importance of avoiding creation of duties that impose "limitless liability"]; Excess Ins. Co. v Factory Mut. Ins. Co., 3 NY3d 577, 583 [2003] [rejecting interpretation of contract that would impose "limitless liability"]).

Additionally, this Court has repeatedly recognized that "arbitrary distinctions are an inevitable result of the drawing of lines which circumscribe legal duties" (Broadnax v Gonzalez, 2 NY3d 148, 157 [2004], quoting Bovsun, 61 NY2d at 228). Along these lines, bright-line rules are not, as plaintiff suggests, pernicious or disfavored (see Matter of Larchmont Pancake House v Bd. of Assessors, 33 NY3d 228, 240 [2019] [extolling virtues of bright-line rule]; Matter of Murphy v N.Y. State Div. of Hous. & Cmty. Renewal, 21 NY3d 649, 659 [2013] [recognizing utility of bright-line rule]). Indeed, as stated by this Court on numerous occasions, "[e]very injury has ramifying consequences, like the ripplings of the waters, without end. The

problem for the law is to limit the legal consequences of wrongs to a controllable degree" (Tobin, 24 NY2d at 619; Bovsun, 61 NY2d at 235-36; Trombetta, 82 NY2d at 554; McNulty v City of New York, 100 NY2d 227, 235 [2003]). As such, perceived arbitrariness is not a sufficient basis for ignoring *stare decisis*, overturning fifty years of sound precedent, and adopting a test that threatens to impose sweeping liability.

B. Plaintiff's Argument For A "Flexible Test" Rests On A False Premise

A central pillar of plaintiff's argument in support of adopting a more "flexible test" is her assertion that New York is an "outsider" in terms of its NIED jurisprudence (Br. 31). A careful review of the authority, including the decisions plaintiff cites and those she omits, reveals that her assertion is, at best, a gross over simplification. Initially, plaintiff claims that the United States Supreme Court "flatly rejected imposing any limitations on the availability of bystander recovery based on familial relationship" (Br. 32). The Supreme Court, in Gottshall, established a cause of action for bystander NIED under the Federal Employers Liability Act ("FELA"), a federal law enacted to compensate *railroad workers* for injuries sustained *in the course of their employment* (512 US at 537). FELA was intended to "shift[] part of the human overhead of doing business from employees to their employers" (id. at 542). Critically, in recognition of the statute's "humanitarian purposes", the

Supreme Court has "liberally construed FELA to further Congress' remedial goal" (id. at 542-43).

When defining the right to recover for emotional damages under FELA, the nation's highest court cited to this Court's decision in Tobin, explaining, "recognition of a cause of action for [NIED] holds out the very real possibility of nearly infinite and unpredictable liability for defendants. Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable" (id. at 546). After analyzing several limiting tests, the Supreme Court ultimately sided with New York in adopting a zone of danger test for considering bystander NIED claims under FELA (id. at 555). The Court settled on this rule after rejecting the "foreseeability" test on the grounds that "if one takes a broad enough view, all consequences of a negligent act, no matter how far removed in time or space, may be foreseen. Conditioning liability on foreseeability, therefore, is hardly a condition at all" (id. at 553).

As to its decision to eschew a "close family member test", the Court explained "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). Accordingly, an immediate familial relationship requirement was wholly impractical because it would essentially read a claim for bystander NIED out of the statute in contravention of FELA's broad "remedial purposes" (id. at 550). Ultimately, given the unique

statutory overlay, Gottshall's unwillingness to include any familial limitation is as unsurprising as it is irrelevant to this case. What is relevant to this case, is the Supreme Court's recognition of the need to strictly circumscribe bystander NIED to guard against "the specter of unlimited and unpredictable liability" (id. at 557).

Next, in describing New York as an outlier, plaintiff cites to eleven jurisdictions that expressly include grandparents in the class of plaintiffs entitled to assert bystander NIED claims (Br. 32-33). These decisions paint an incomplete picture. A number of other jurisdictions either do not yet recognize a claim for bystander NIED, have not directly ruled on the issue of grandparents, or expressly exclude grandparents from the limited class of persons permitted to pursue such recovery (see e.g. Dowty v Riggs, 385 SW3d 117, 120-21 [Ark 2010] [refusing to recognize a claim for bystander NIED]; Wargelin v Sisters of Mercy Health Corp., 149 Mich App 75, 81, 385 NW2d 732, 735 [1986] [immediate family defined as parent, child, husband or wife]; Gideon v Norfolk S. Corp., 633 So 2d 453 [Ala 1994] [refusing to extend NIED claims to bystanders]; Kaufman v Langhofer, 223 Ariz 249, 256, 222 P3d 272, 279 [2009] ["nonnuclear family members such as grandparents, grandchildren, nieces, nephews, aunts, and uncles" cannot recover for bystander NIED]; Gray v Inova Health Care Servs., 257 Va 597, 599, 514 SE2d 355, 356 [1999] [barring mother from recovering claim for NIED from witnessing injury to child]; Williams v Baker, 572 A2d 1062, 1069 n 16 [DC 1990] [adopting "zone

of danger" and "immediate family" requirements but leaving it to future cases "to determine the meaning of the term 'immediate family'"]).

Still other jurisdictions impose more stringent requirements than New York for bystander claims, mandating that the plaintiff suffer an injury in the accident (i.e. a physical impact) and/or explicitly requiring that their emotional distress is accompanied by physical manifestations (see Willis v Gami Golden Glades, LLC, 967 So 2d 846, 850 [Fla 2007] [explaining that Florida requires physical impact; "[i]f, however, the plaintiff has not suffered an impact, the complained-of mental distress must be manifested by physical injury"]; Majors v Hillebrand, 51 Kan App 2d 625, 628, 349 P3d 1283, 1285 [2015] ["Kansas has consistently held that generalized physical symptoms of emotional distress, such as those associated with PTSD… are insufficient to state a cause of action for [NIED]."]; Dobbins v Washington Suburban Sanitary Comm'n, 338 Md 341, 347, 658 A2d 675, 678 [1995] [requiring "physical injury"]; Nielson v AT & T Corp., 1999 SD 99, P21, 597 NW2d 434, 440 [1999] [requiring "manifestation of physical symptoms"]; Keck, 122 Ariz at 115, 593 P2d at 669 [emotional injury "must be manifested as a physical injury"]; Engler v Farmers Ins. Co., 706 NW2d 764, 770 [Minn 2005] [adopting physical manifestation requirement]; Coon v Med. Ctr., Inc., 300 Ga 722, 734-53, 797 SE2d 828, 837 [2017] [declining to create an exception to Georgia's physical impact rule]).

Additionally, while New York's rule simply requires "serious and verifiable" emotional distress (Bovsun, 61 NY2d at 231), other jurisdictions require a much higher threshold before permitting a claim for bystander NIED (see Johnson v Scott, 137 NC App 534, 539, 528 SE2d 402, 405 [2000] [plaintiffs failed to meet requisite level of "severe and disabling" emotional distress as a consequence of defendant's conduct in fatally shooting plaintiffs' father]; Estate of Hendrickson v Genesis Health Venture, Inc., 151 NC App 139, 154-56, 565 SE2d 254, 264-65 [2002] [claims of ongoing therapy, depression requiring medication, hospitalization due to emotional stress, trouble eating and sleeping were insufficient as a matter of law to meet threshold for "severe emotional distress" required to state claim for NIED]; Squeo v Norwalk Hosp. Ass'n, 316 Conn 558, 561, 584-86, 113 A3d 932, 935, 937, 947-49 [2015] [dismissing parents' bystander NIED claims, holding "a bystander's emotional distress must be both severe and debilitating" and declining to adopt a more lenient standard]; Abouzaid v Mansard Gardens Associates, LLC, 207 NJ 67, 87, 23 A3d 338, 351 [2011] ["we presume that the extraordinary level of emotional distress required to support a [bystander NIED] claim—'severe emotional distress'—will, in most cases, bear with it a physical component"]; Delk v Columbia/HCA Healthcare Corp., 259 Va 125, 137, 523 SE2d 826, 834 [2000] [employing a "clear and convincing" evidence standard for NIED claims]).

New York's bystander NIED jurisprudence is thus hardly an aberration given the jurisdictions that bar these claims, have not opined on the issue of grandparent recovery, or flatly foreclosed grandparent claims. While other jurisdictions may employ a more lenient standard for the relationship between the bystander and direct victim, they impose their own rigorous elements for NIED claims that are absent in New York. Ultimately, the immediate family member requirement is not abnormally restrictive, but rather the limiting principle this Court selected for holding strict rein on liability while avoiding unduly arbitrary results.[7]

C. A "Flexible Test" Will Flood The Court System

As the law currently stands, the immediate family requirement of Bovsun is a legal determination, while the zone of danger element presents a factual issue (see e.g. Coleson v City of New York, 24 N.Y.3d 476, 483-84 [2014]). Departing from this framework and adopting a "flexible test" for analyzing relationships runs contrary to public policy as it will invariably add to court congestion.

Dispensing with the objective immediate family test will inevitably lead to a groundswell of claims as bystanders who witness the injury or death of a third party

[7] Assuming, *arguendo*, that New York was an outlier, and it is not, this would not serve as a basis for abandoning the immediate family test. There are plenty of other areas in the law where New York's law stands as an outsider. For example, no other state maintains legislation similar to New York's infamous Labor Law § 240(1), but plaintiffs do not denounce this law on the grounds that it is an aberration. New York has settled on a test, which accords with the State's unique size, litigiousness, and public policy concerns, and should not abandon this rule solely for the sake of conforming with other jurisdictions.

that they share a relationship with will now have the right to assert claims for NIED. As a corollary, what was once a steady drip of NIED claims will transform into a wave that crashes into an already overburdened court system (see People v Davis, 13 NY3d 17, 29 [2009] [recognizing the "detrimental effects that congestion and backlog in our State's courts can have upon the administration of justice"]; Am. Ins. Co. v Messinger, 43 NY2d 184, 189 [1977] [citing with approval procedures that have "the salutary effect of alleviating court congestion in New York State"]).

Nor are these simple claims as they call on courts to engage in the Sisyphean task of "assess[ing] an enormous range and array of emotional ties of, at times, an attenuated or easily embroidered nature" (Trombetta, 82 NY2d at 554). Additionally, because these determinations are necessarily fact driven, bystander NIED claims will not readily lend themselves to summary judgment, further clogging the state's already backlogged trial docket (see Brill v City of N.Y., 2 NY3d 648, 651 [2004] ["summary judgment is a great benefit both to the parties and to the overburdened New York State trial courts"]).

D. A "Flexible Test" Will Lead To Staggering Liability

Plaintiff's proposed flexible test that analyzes the "nature and integrity of the relationship" should also be rejected because experience reveals that this framework inevitably leads down the path of limitless liability (Br. 34-35). Indeed, two decades worth of litigation led the California Supreme Court to the realization that "bright

line[s] in this area of the law [are] essential" (Thing, 48 Cal 3d at 664, 771 P2d at 827). In 1968, the court saw "no reason for substituting for the case-by-case resolution" of cases for "artificial and indefensible barrier[s]" (Dillon, 68 Cal 2d at 737, 441 P2d at 918). However, it did set forth "guidelines for the determination of future cases" (id. at 743, 441 P2d at 922), including that the plaintiff and third-party victim were "closely related" (id. at 741, 441 P2d at 920). Ultimately, this approach, which the plaintiff would have this Court adopt today, was rejected by the California Supreme Court because it created a body of case law marked by troubling uncertainty, inconsistency, and expansive progression to near limitless liability (see Thing, 48 Cal 3d at 655, 656, 663-64, 670, 771 P2d at 815, 821, 825, 826-27).

Nevertheless, plaintiff cites to six jurisdictions—New Hampshire, Tennessee, Montana, Ohio, Washington, and New Jersey—in support of her argument that the Court should discard its own jurisprudence, ignore the lessons gleaned from around the country, and adopt a flexible test (Br. 34). The case law in these jurisdictions draws into sharp relief the danger of sweeping liability that naturally flows from the absence of an objectively defined class of plaintiffs. As an example of the perils of adopting a flexible test, New Jersey first set forth its limiting rule as "a marital or intimate, familial relationship" (Portee, 84 NJ 88 at 101, 417 A2d at 528). Not surprisingly, however, the New Jersey Supreme Court was forced to revisit its imprecise rule when there was substantial litigation over whether a plaintiff could

bring a bystander NIED claim based on witnessing the death of her dog (see McDougall v Lamm, 211 NJ 203, 206, 48 A3d 312, 314 [2012]). Although the New Jersey Supreme Court ultimately denied recovery, three of the jurisdictions plaintiff cited in her brief actually allow recovery based on the death of a pet (see Knowles Animal Hosp. v Wills, 360 So 2d 37, 38 [Fla App 1978]; Campbell v Animal Quarantine Station, 63 Haw 557, 558, 632 P2d 1066, 1067 [1981]; Peloquin v Calcasieu Parish Police Jury, 367 So 2d 1246, 1251 [La App 1979]). Ultimately, if pet owners are permitted to recover, it is virtually impossible to argue that even the most tangential of relationships is insufficient to support a claim for NIED, opening up the right of recovery well beyond a manageable class of persons.

Finally, Tennessee, which employs a foreseeability test, now permits bystander NIED claims brought by completely unrelated strangers who witness an accident (see Lourcey v Estate of Scarlett, 146 SW3d 48, 50 [Tenn 2004]). Applying this rule in New York would have catastrophic consequences; every accident in Manhattan where a pedestrian was struck on a crowded street would spawn a multitude of claims that, in turn, impose the type of crushing liability this Court has so carefully sought to avoid.

POINT III

PLAINTIFF IS NOT ENTITLED TO BYSTANDER EMOTIONAL DAMAGES SIMPLY BECAUSE SHE WAS STRUCK BY DEBRIS

Plaintiff argues that because she suffered physical trauma in this accident all of her emotional distress damages, including those from witnessing the debris strike Greene, are recoverable (Br. 37-38). Initially, it is well settled that the Court's jurisdiction is confined to reviewing issues of law (see Hunt v Bankers & Shippers Ins. Co., 50 NY2d 938, 940 [1980]), and that "unpreserved issues are not issues of law" (Khan v N.Y. State Dep't of Health, 96 NY2d 879, 880 [2001]). Although "[t]he Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, the Court of Appeals may not address such issues in the absence of objection in the trial court" (Merrill v Albany Med. Ctr. Hosp., 71 NY2d 990, 991 [1988]). As plaintiff failed to advance this argument below, she is barred from raising it for the first time before this Court.

Plaintiff's argument fares little better on the merits. Simply stated, plaintiff's contention that all of her emotional damages are recoverable because she suffered a physical trauma implicitly reads the immediate family member requirement out of this Court's bystander NIED jurisprudence. Plaintiff has not offered any real justification or cited any authority for dispensing with a key element of bystander NIED claims, especially where that element prevents the proliferation of claims and provides an easily workable rule that avoids court congestion. At most, she cites to

a First Department decision pre-dating Bovsun, and with virtually no analysis argues that this opinion should control (Br. 38). This is far too slender of a reed to drastically rewrite New York's bystander NIED law.

Finally, plaintiff's argument that parsing her psychological injuries requires courts to engage in "metaphysical gymnastics" is a straw man (Br. 38). As plaintiff is not entitled to recover her emotional damages for witnessing the death of Greene, she will not be permitted to introduce evidence on this issue at trial. Consequently, a jury would not have to disentangle the value of her emotional claims because they would never receive evidence relating to the emotional damages plaintiff suffered from witnessing the death of Greene in the first instance.

POINT IV

THE MOTION TO AMEND SHOULD HAVE BEEN DENIED BASED ON PLAINTIFF'S FAILURE TO COMPLY WITH CPLR 3025(B)

As a final matter, the lower courts erred in granting plaintiff's motion to amend on the separate basis that her counsel failed to comply with the procedural elements of CPLR Rule 3025(b). A movant seeking leave to amend a pleading is required to annex to their motion papers "the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." (CPLR 3025[b].).

Here, not only did plaintiff's counsel entirely rewrite the pleading, they misrepresented in their motion to be adding just one cause of action (R. 15), when

in reality, the proposed complaint interposed two new causes of action (see R. 50-53, 65-70, 129-30). In effect, plaintiff completely altered her representation of the facts and overall theory of recovery approximately a year after the filing of their original complaint simply because they retained new counsel. This is a gross departure from the legislative intent behind CPLR Rule 3025(b), which is to "permit the plaintiff to amend his theory of recovery to comply with the facts as they unfold, not to permit the plaintiff to alter his representation of material facts to best suit his theory of recovery and thereby overcome defenses raised in opposition" (Bogoni v Friedlander, 197 AD2d 281, 292 [1st Dept 1994]). As such, plaintiff's failure to comply with the procedural elements of CPLR Rule 3025(b) serve as a separate basis for overruling the trial court's decision in this case.

CONCLUSION

For the foregoing reasons, the Appellate Division order insofar as appealed from should be affirmed.

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NEW YORK STATE COURT OF APPEALS
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Dated: New York, New York
February 21, 2020

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