STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-166

Marc Chartier, Individually, and as Administrator of the Estate of Lisa Chartier

v.

Apple Therapy of Londonderry, LLC; Heather C. Killie, M.D.; and Four Seasons Orthopaedic Center, PLLC, d/b/a New Hampshire Orthopaedic Center

Appeal from Partial Summary Judgment and Denial of Motion for Reconsideration, Hillsborough County Superior Court Southern District

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BRIEF FOR THE DEFENDANTS

Todd Hathaway, NHBA No. 12102
Gretchen W. Wade, NHBA No. 273726
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4041
thathaway@wadleighlaw.com
gwade@wadleighlaw.com

Tory Weigand, Pro Hac Vice
Justin R. Veiga, NHBA No. 267600
Morrison Mahoney, LLP
250 Summer Street
Boston, MA 02210-1181
(617) 439-7500
tweigand@morrisonmahoney.com
jveiga@morrisonmahoney.com

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STATEMENT OF ISSUES PRESENTED

1. Whether the Trial Court properly granted summary judgment on Plaintiff's bystander negligent infliction of emotional distress ("NIED") claim where there was no close connection between the alleged negligence and Decedent's death, and where Plaintiff was not aware of any injury producing conduct of the Defendants and observed only the resulting injuries well after the alleged negligence.

2. Whether New Hampshire should abandon the carefully-considered limitations on bystander NIED claims.

3. Whether New Hampshire should join the numerous other jurisdictions which have recognized the important policy considerations favoring strict limitations on bystander NIED claims standard in medical malpractice failure to diagnose cases.

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STATEMENT OF FACTS[1]

In January 2018, Ms. Chartier underwent a left scope with medial meniscal repair surgery with Defendant Dr. Killie for a left knee injury. After the surgery, Dr. Killie spoke to Plaintiff in the waiting room and indicated that the surgery "went well." Ms. Chartier was released the same day. App. at 230 ¶2.

On January 12, 2018, Plaintiff drove Ms. Chartier to her first physical therapy visit at Defendant Apple Therapy. Plaintiff did not accompany Ms. Chartier to the physical therapy room; he remained in the lobby. App. at 231 ¶3. Plaintiff alleges that Ms. Chartier reported a sign or symptom of a potential DVT at this visit. App. at 231 ¶4. Defendant maintains that Ms. Chartier reported calf tightness typical for a post-operative knee patient, there was no signs or symptoms of DVT upon evaluation, and Ms. Chartier completed therapy without any problems.

On January 15, 2018, Plaintiff accompanied Ms. Chartier to her first postoperative visit with Dr. Killie. Plaintiff was present in the treatment room when Dr. Killie examined Ms. Chartier's left leg. App. at 231 ¶5. It is disputed whether Ms. Chartier reported that she was experiencing left calf symptoms during this visit on January 15, 2018. App. at 231 ¶6.

On January 17, 2018, Ms. Chartier attended her second Apple physical therapy appointment. Plaintiff was not present during the physical

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[1]Many of the facts set forth in the pleadings below were undisputed solely for the purposes of summary judgment. Defendants will dispute many of the facts alleged by Plaintiff, and characterizations of those facts, at trial.

therapy; he remained working on his computer in the lobby. App. at 231 ¶7. The Apple therapist for this visit has indicated that there was no report of calf symptoms and no complaints or issues completing the therapy. After the January 17th physical therapy visit, Ms. Chartier told Plaintiff she "was excited because [the physical therapist] put her on the exercise bike" and "gave her crutch lessons." Plaintiff dropped off Ms. Chartier at home after her appointment and returned to work. App. at 232 ¶8.

Later that day, at around 7:00 p.m., Ms. Chartier and Plaintiff left home to go watch a movie. While leaving their house, Ms. Chartier reported for the first time that she was "a little bit out of breath." However, Ms. Chartier "seem[ed] to get her breath back" as they drove to the brewery. App. at 232 ¶9. At around 9:30 p.m., Plaintiff and Ms. Chartier left the brewery and Ms. Chartier felt "fantastic." While on the way home, however, Ms. Chartier complained of being hot and started making a "terrible noise" before passing out in the passenger seat. App. at 232 ¶10.

Plaintiff drove to the closest urgent care, but it was closed. While in the parking lot, Plaintiff called 911. Ms. Chartier vomited while Plaintiff was on the phone with the 911 operator. When responders arrived, they took Ms. Chartier to the hospital. Plaintiff was not allowed to go in the ambulance, so followed in his car. App. at 232 ¶11. At the hospital, care providers performed chest compressions without success. Ms. Chartier passed away at 11:15 p.m. Plaintiff was present in the cardiac room throughout these events. App. at 233 ¶12.

After Ms. Chartier passed away, Plaintiff remained in the room for some time. He does not recall any conversations with the medical providers about Ms. Chartier's cause of death. App. at 233 ¶13.

Days after the death, Plaintiff informed Dr. Killie about what had happened. He told her that he was not sure what caused the death. App. at 233 ¶14. Plaintiff subsequently received a call from the New Hampshire Medical Examiner's Office. He was told that the "autopsy reports describe the cause of death as 'cardiovascular collapse due to pulmonary thromboembolism due to deep vein thrombosis due to immobilization following recent surgical repair of torn meniscus.'" App. at 233 ¶15.

Plaintiff initiated suit in March 2019. After initial discovery, Defendants moved for partial summary judgment as to his bystander NIED claim. App. at 14-141. The basis for Defendants' Motion was, among other things, that there was "no immediate connection between the alleged negligence and Decedent's arrest and death," id. at 15 ¶3, and Plaintiff did not "immediately perceive any connection between the wrongdoing and his wife's subsequent arrest and death." Id. at 18 ¶16. Defendants argued that a claim, like this one, based solely on experiencing the result of alleged negligence several days or hours later was not sufficient to support a claim pursuant to Corso's strict requirements. Id. at 26 ¶35. See also id. ¶36.

After oral arguments, the court granted Defendants' Motion. App. to Pl.'s Br. at 43-47. Plaintiff moved for reconsideration, App. 271-81, and that Motion was denied. Id. at 48. Plaintiff then sought leave for interlocutory appeal, id. at 287-95, and the trial court requested briefing on whether an appeal pursuant to Rule 46(c) was appropriate. Id. at 303. After briefing and oral argument on this issue, the court permitted Plaintiff to appeal pursuant to Rule 46(c) and Supreme Court Rule 77.

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SUMMARY OF ARGUMENT

The Trial Court properly granted partial summary judgment. The circumstances in which one can bring a bystander NIED claim are limited, and do not include cases where a spouse perceives the resulting injury alone, and/or was not present for or have contemporaneous awareness of defendant's alleged injury producing conduct. The Trial Court properly observed that there must be "a close connection in time between the negligent act and the resulting injury" with the requirements of Corso likewise including the need to show the bystander's perception or awareness of defendant's injury producing conduct Here, neither Decedent nor Plaintiff were aware of any alleged negligent or injury producing conduct at the time the conduct occurred, and Plaintiff is not claiming trauma due to witnessing the actual care provided.

Both the "close connection" and contemporaneous awareness or causal nexus requirements, originally set forth in Corso v. Merrill, 119 N.H. 647 (1979) and reiterated in subsequent decisions, are a necessary part of the Court's ruling in Corso, which carefully balanced the competing interests. They were not dicta.

Regardless, the close connection and contemporaneous awareness prerequisites are appropriate and vital elements, particularly in the context of medical malpractice cases, including here where a failure to diagnose is alleged, given the paramount need to demarcate between distress resulting from medical results or outcomes and distress resulting from contemporaneous awareness of injury producing conduct. It has been applied by several New Hampshire trial courts and courts in numerous

jurisdictions around the country. Continuing to apply Corso and the close connection and causal nexus prerequisites in failure to diagnose cases is consistent with important public policy goals and considerations including that any such drastic expansion of medical care provider liability is for the legislature not the courts.

ARGUMENT: THE TRIAL COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S NIED BYSTANDER CLAIM [2]

A. NEW HAMPSHIRE LAW ON BYSTANDER NIED CLAIMS INCLUDES THE "CLOSE CONNECTION" AND CONTEMPORANEOUS AWARENESS OF INJURY PRODUCING CONDUCT REQUIREMENT.

Plaintiff's Brief addresses the history of bystander NIED claims in New Hampshire, but ignores the critical context - - that the recognition of bystander NIED claims in Corso was pursuant to a careful balancing of competing interests and subject to critical limitations.

Corso was a break from existing law on this issue, and the Court's decision makes clear that it was attempting to balance protection of one's interest in freedom from mental distress against fear of potentially unlimited liability. See id. at 652-53. In allowing a claim for bystander NIED, the Court specifically indicated that this balance "can be maintained by carefully defining the foreseeability factors that are to be applied." See id. at 653.

The Court went on to describe the limitations applied by other courts around the country. Id. In order to balance the need to avoid infinite liability and uncertainty in the law. The Court identified three particular considerations: "[w]hether plaintiff was located near the scene of the accident as contrasted with one who was a distance from it. Whether the

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[2]A trial court's grant of summary judgment is reviewed *de novo*. See Ladue v. Pla-Fit Health, LLC, 173 N.H. 630, 633 (2020).

shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. Whether the plaintiff and victim were closely related, as contrasted with an absence from relationship or the presence of only a distant relationship." Id. at 653-54 (quotations and citations omitted).

After turning its attention to the facts at issue in Corso, the Court then wrote that the "test of foreseeability requires a relatively close connection in both time and geography between the negligent act and the resulting injury." Id. at 657. (emphasis added). The Court was not merely making a passing observation or providing superfluous context; it was describing a part of the "test of foreseeability" that is "require[d]."

Indeed, the Court also concluded as follows:

> In summary, we hold that a mother and father who witness or contemporaneously sensorily perceive a serious injury to their child may recover if they suffer serious mental and emotional harm that is accompanied by objective physical symptoms. Any action for negligent infliction of emotional distress must be based on the criteria of foreseeability outlined in this opinion….

Id. at 659 (emphasis added).

In context, then, the "close connection" as well as the need of causal distress from contemporaneous observance of the accident or defendant's

injury producing conduct requirement was not dicta; it was a necessary part of the "test of foreseeability" in a bystander NIED case that "must" exist in "[a]ny action for negligent infliction of emotional distress." See, e.g., Ridlon v. N.H. Bureau of Securities Regulation, 172 N.H. 417, 436 (2019)(Hantz Marconi, J. dissenting)(defining dicta as superfluous context).

This conclusion is reinforced by the Court's decision in Nutter v. Frisbie Memorial Hospital, 124 N.H. 791 (1984). That medical negligence case involved alleged failure to properly treat plaintiffs' three-month-old daughter for pneumonia. Several days later, the child developed complications, was brought immediately to the hospital, but died shortly after arrival. Id. at 793. Plaintiffs alleged that the death was caused by defendants' failure to properly treat the pneumonia days earlier, and that their distress in observing the baby in the emergency room immediately after her death was grounds for a bystander NIED claim. Id. The Court disagreed, concluding that Corso "clearly limit[ed] bystander recovery to those plaintiffs whose injuries were most directly and foreseeably caused by the defendant's negligence." Id. at 795. "This means that the parent had to be close enough to experience the accident [i.e., injury producing event] at first hand, and that recovery will be denied if the plaintiff either sees the accident victim at a later time, or if the plaintiff is later told of the seriousness of the accident." Id. at 795-96 (quotations and citations omitted).

The Nutter Court went on to review the policy considerations underlying Corso, which "recognized the need for a clearly defined boundary to liability…, where both foreseeability and causation become attenuated very gradually as the plaintiff becomes further and further

removed from the defendant's negligent act." Id. at 795 (emphasis added). The Court indicated the policy consideration of "the need to avoid both infinite liability and an uncertainty in the law, must weigh against the need to compensate those plaintiffs whose injuries derive, however remotely, from the defendants' negligence." Id.

As Nutter illustrates, the Corso factors were designed to distinguish between cases where an injury is observed after the fact, and cases where the plaintiff not only perceives the injury, but also immediately associates it with the defendant's allegedly negligent conduct. If all that were required was the perception of a "distinct event" well after a failure to diagnose (as Plaintiff claims), the decision in Nutter would have been different. See id.

Notably, the term "accident" as used in Corso is synonymous with awareness of the defendant's injury causing conduct or "injury producing event." Indeed, in Corso the accident and negligent act were one and the same with the Court otherwise making clear that the emotional distress be "directly attributable" to the claimant contemporaneously seeing or perceiving the accident or injury producing event. As such, the "causal negligence" identified by Corso subsumes the need for awareness of defendant's conduct being the injury producing event and is an absolute prerequisite to any liability as it draws the necessary line between distress caused by the ultimate outcome (injury or death) and that caused by the defendant's conduct. Such a demarcation is particularly paramount in the medical care context given that illness, medical treatment and outcomes as to medical care and treatment are by their very nature distress causing to family members. See Nelson v. Flanagan, 677 A.2d 545, 548-49 (Me. 1996)(applying same Corso criteria and denying NEID in medical

malpractice action as distress was not result of immediate awareness or perception of defendant's alleged misdiagnosis). As the Court in Nutter emphasized, "pain as to the death, illness or injury of a loved one is an emotional cost borne by everyone living in society".

Nutter also illustrates that the Corso causal awareness and "close connection" requirements demarcating between distress caused by a defendant and that by the outcome require distinguishing between cases where an injury is observed after the fact, and cases where the plaintiff not only perceives the injury, but also immediately associates it with the defendant's allegedly negligent conduct. If all that were required was the perception of a "distinct event" well after a failure to diagnose (as Plaintiff claims), the decision in Nutter would have been different. See id. There is otherwise a manifest difference, particularly in actions premised on medical misdiagnosis, between observing or perceiving conduct alleged to have caused harm and the later or subsequent harm alleged to have resulted from that conduct. Awareness and distress stemming from the injury resulting from malpractice remains insufficient and a far cry from contemporaneous awareness of medical negligence or putative conduct that later led to injury. Moreover, this Court has been vigilant in maintaining the requirement that a claimant for bystander emotional distress present expert support for the distress which includes that it be "unusual and aggravated" with physical symptomology as well as causal to **the defendant's conduct**. See O'Donnell v. HCA Health Services of N.H., Inc., 152 N.H. 608, 611, 883

A. 2d 29 (2005)(mandating expert testimony for bystander emotional distress).[3]

As the Trial Court properly observed, the "close connection" and causal nexus prerequisite was also reiterated again in Wilder v. City of Keene, 131 N.H. 599, 602 (1989). There, the Court denied a NEID claim by parents as to the claimed distress they suffered as a result of their young son being involved in a fatal accident. Despite the fact that the parents, upon learning of the accident, immediately went to the hospital and while their son was still alive witnessed him "in extremis" including "multiple bruises and abrasions, glazed eyes and blood flowing from his ears," the Court found no actionable claim. Id. It did so making clear that the distress was not shown to be the contemporaneous result and awareness of the defendant's conduct as opposed to the injury itself. Id. at 306-07. (Corso's "time limitation requires a direct emotional impact upon the plaintiffs through their sensory perception of the accident, which must be contemporaneous with the accident, and immediate viewing of the accident victim" as well as physical consequences").

In short, the "close connection" and awareness of defendant's injury producing conduct prerequisites are fundamental requirements of the "test of foreseeability" set forth in Corso. They were not dicta. Even if dicta, however, this would not change the result. "Although not binding, dicta can be helpful and instructive." See In re: O'Malley, 601 B.R. 629, 646

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[3]Notably, plaintiff had not presented any expert evidence including physical symptomatology of emotional distress from the alleged misdiagnosis as opposed to the death.

(Bankr. N.D. Ill. 2019)(citations omitted). As explained more fully below in Section C(3), the "close connection" and contemporaneous awareness of the defendant's injury producing conduct aspects of the "test of foreseeability" balances the competing interests at stake and supports sound public policy regarding the liability of health care providers.

B. NEW HAMPSHIRE TRIAL COURTS HAVE PROPERLY FOLLOWED CORSO'S DIRECT CAUSAL PREREQUISITE IN FAILURE TO DIAGNOSE CASES.

Plaintiff has cited a number of New Hampshire trial court decisions on this issue, but a few are noteworthy. In Brauel v. White, Straff. Cty. S.C., No. 96-C-0238, Order on Defs.' Mot. to Dismiss 5/27/97 (Nadeau, J.), plaintiff alleged emotional distress from perceiving the results of a failure to diagnose cancer, and the court rejected the claim because the distress was related solely to plaintiff's observation of her husband's subsequent deterioration. App. at 85. According to the court, bystander NIED recovery "does not depend on the extent, nature, or type of negligence, but rather on the drastic effects of observing the immediate consequences of a defendant's negligent act or negligent failure to act." Id. at 84. (emphasis added). "[T]hough Nutter does not appear to require observation of the negligent act to support a claim for negligent infliction of emotional distress, it does suggest that in medical malpractice cases observation of the resulting injury alone is insufficient." While plaintiffs who perceive the results of alleged malpractice clearly suffer serious distress, Corso does not allow recovery for emotional distress "in every medical malpractice case in which a plaintiff is closely related to the injured party." See id. Indeed,

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"[p]ain at the death, illness or injury of a loved one is an emotional cost borne by everyone in society." Nutter, 124 N.H. at 796 (citations omitted).

Street v. Rhodes, Rock. Cty. S.C. No. 218-2015- CV-00835, Order on Def.'s Partial Mot. for Summ. Judg. 3/27/17 (Delker, J.) involved alleged failure to diagnose breast cancer. The court in that case noted that, "[a]s in Nutter, here the plaintiffs were unaware of malpractice at the time it occurred. In both cases, the plaintiffs learned about the consequences of the negligence only when the malpractice manifested itself." App. at 90.

In Kidder v. Newell, D.N.H. No. 96-254-M, Report and Recommendation 11/10/97 (Muirhead, Mag. J.), the court flatly rejected Plaintiff's argument here that the term "accident" as used in Corso is synonymous with "injury." In that case, parents of a stillborn baby brought a NIED claim against their obstetrician. It was alleged that a blood test taken during the plaintiff mother's pregnancy showed the presence of antibodies which required in vitro treatment in order to preserve the life of the unborn baby. App. at 127-29. The obstetrician had not obtained the results of the blood test, and the infant was allegedly stillborn as a result. Id. Applying the Corso requirements, the court reasoned that the alleged negligence of the defendants was the failure to interrupt the naturally occurring process of the mother's antibodies acting upon the unborn child's red blood cells, and because plaintiffs did not observe the alleged negligence, or any connection between the negligence or injury producing events and the injury, they could not satisfy the Corso requirements. Id. at 140-41. In response to the argument that the perception of the stillbirth itself was sufficient, the court reasoned:

> The requirement that there be an 'accident' which causes an 'injury' both of which must be observed or perceived, cannot be met by defining 'accident' as synonymous with 'injury'. Otherwise, the Corso requirements become not only arbitrary but meaningless as well. 'Accident,' as used in Corso, must mean the event or events which produce the injury.

Id. at 138-39 (emphasis added).

Other New Hampshire trial courts have reached similar conclusions in medical malpractice cases. See Leach v. Ray, Straff. Cty. S.C. No. 219-2011-CV-00038, Order 11/28/11 (Wageling, J.) (rejecting bystander NIED claim where plaintiff failed to observe intubation accident and saw victim's death hours later)(App. At 92-98); Farrington v. Cendron, Graf. Cty. S.C. No. 01- C-0122, Order 10/7/05 (Vaughan, J.) (granting summary judgment where a mother did not contemporaneously perceive medical error during her child's surgery when it occurred, but was informed of it an hour later)(App. at 100-05); Bronson v. Hitchcock Clinic, Inc., Coos Cty. S.C., No. 89-C-95, Order 6/9/92 (Perkins, J.) (granting summary judgment where husband did not have contemporaneous perception of the alleged negligent misdiagnosis at time it occurred)(App. at 107-13).

C. THE TRIAL COURT'S RULING IS CONSISTENT WITH PRECEDENT OF OTHER JURISDICTIONS AND THE NEED FOR CLEAR LIABILITY LIMITS.

1. Dillon, Bird, and Misdiagnosis Cases

Plaintiff's argument essentially seeks to have this Court follow a pure, unrestricted "foreseeability" rule pursuant to the approach first

articulated in Dillon v. Legg, 441 P.2d 912, 919 (Cal. 1968) and otherwise leave the matter to the finder of fact in virtually any case. Such an approach would result in unwarranted and expansive medical provider liability to non-patients.

While the Dillon factorial approach is the most expansive of the various approaches to bystander emotional distress, the court sought "to limit the otherwise potentially infinite liability which would follow every negligent act" through adoption of its factorial approach with California subsequently adopting even stricter limitations. Dillon v. Legg, 441 P.2d 912, 919 (Cal. 1968). California, in fact, found it necessary to strictly construe the Dillon requirements and step back from the broad rule initially set out. Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) (relating difficulties encountered after Dillon; establishing strict requirements of physical presence, contemporaneous awareness that the event is causing injury, and close consanguine or marital relationship to the primary victim).[4] Indeed,

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[4]According to the Supreme Court of California in Thing:

> The expectation of the Dillon majority that the parameters of the tort would be further defined in future cases has not been fulfilled. Instead, subsequent decisions of the Courts of Appeal and this court, have created more uncertainty. And, just as the "zone of danger" limitation was abandoned in Dillon as an arbitrary restriction on recovery, the Dillon guidelines have been relaxed on grounds that they, too, created arbitrary limitations on recovery. Little consideration has been given in post-Dillon decisions to the importance of avoiding the limitless exposure to liability that the

the California Supreme Court has since emphasized the importance of limiting bystander emotional distress claims to those circumstances of personal, contemporaneous observation or appreciation of the injury producing event including the awareness the event is causing injury in order to distinguish such causal distress from the distress and emotion experienced as a result of the injury or death. Id.

As the Thing court explained:

> Emotional distress is an intangible condition experienced by most persons, even absent negligence, at some time during their lives. Close relatives suffer serious, even debilitating, emotional reactions to the injury, death, serious illness, and evident suffering of loved ones. These reactions occur regardless of the cause of the loved one's illness, injury, or death. That relatives will have severe emotional distress is an unavoidable aspect of the "human condition." The emotional distress for which monetary damages may be recovered, however, ought not to be that form of acute emotional distress or the transient emotional reaction to the occasional gruesome or horrible incident to which every person may potentially be exposed in an industrial and sometimes violent society.

> pure foreseeability test of "duty" would create and towards which these decisions have moved.

Thing, 771 P.2d at 821.

> Regardless of the depth of feeling or the resultant physical or mental illness that results from witnessing violent events, persons unrelated to those injured or killed may not now recover for such emotional upheaval even if negligently caused. Close relatives who witness the accidental injury or death of a loved one and suffer emotional trauma may not recover when the loved one's conduct was the cause of that emotional trauma. The overwhelming majority of "emotional distress" which we endure, therefore, is not compensable.

Thing, 771 P.2d at 829. The Court proceeded to set out the mandatory criteria as being that the claimant: "(1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." Id. at 829-30.

Subsequent California cases addressing bystander NIED claims in the medical care context have made clear that, absent specific awareness that the alleged conduct of the defendant caused the injury or harm, there is no viable emotional distress claim. Mota v. Tri-City Healthcare District, 2021 WL 4935525, *3-4 (S.D. Cal. 2021) (no viable claim of emotional distress premised on sister undergoing c-section without anesthesia as claimant could not be aware that any form of anesthesia, or at the very least a substitute, was not provided without being physically present in the

operating room even if she heard siter’s pleas for help); Bird v. Saenz, 51 P.3d 324, 328-29 (Cal. 2002) (no viable claim as lay person would have no awareness of harm related to failure to treat and diagnose artery); Goldstein v. Sup. Ct., 223 Cal.App. 3d 1415, 1427 (1990) (plaintiffs did not have a “contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury” when they saw the child's injuries after overdose of radiation); Jansen v. Children’s Hosp. Medical Center of East Bay, 31 Cal.App.3d 22, 24 (1973) (no recovery as to mother who took her five-year-old daughter to defendant hospital where the mother observed her daughter's progressive decline and death because of the hospital’s alleged failure to diagnose a massive gastrointestinal hemorrhage due to a penetrating duodenal ulcer, noting that the precipitating event was neither sudden nor “one which can be the subject of sensory perception,” and rejecting “visibility of the result, as distinguished from that of the tortious act itself, [as] the essential element.”); Morton v. Thousand Oaks Surgical Hosp., 187 Cal. App. 4th 926 (2010) (patient’s children could not maintain claim for negligent infliction of emotional distress against medical defendants arising out of defendants’ post-operative failure to respond to their mother’s steadily worsening condition, as an objective person could not be aware of the cause of patient’s injuries); Cf. Keys v. Alta Bates Summit Medical Center, 235 Cal. App. 4th 484, 485 (2015) (actionable claim as claimants witnessed the injury-producing event themselves—i.e. the “defendant's lack of acuity and response to [decedent's] inability to breathe, a condition plaintiffs observed and were aware was causing her injury”).

The Bird decision is particularly notable. There, the California Supreme Court explicitly discussed the extent of a layperson's ability to recover for NIED in medical malpractice suits:

> Except in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders ... In other NIED cases decided after Thing, and based on alleged medical negligence, courts have not found a layperson's observation of medical procedures to satisfy the requirement of contemporary awareness of the injury-producing event. This is not to say that a layperson can never perceive medical negligence, or that one who does not perceive it cannot assert a valid claim for NIED. To suggest an extreme example, a layperson who watched as a relative's sound limb was amputated by mistake might well have a valid claim for NIED against the surgeon. Such an accident, and its injury-causing effect, would not lie beyond the plaintiff's understanding awareness. But the same cannot be assumed of medical malpractice generally.

Bird v. Saenz, 51 P.3d 324, 329 (Cal. 2002) (emphasis added); see also Trahan v. McManus, 728 So.2d 1273, 1280 (La. 1999) (alleged malpractice was failure to read the correct chart and provide treatment to the patient based on the data on the chart; "this negligence of omission … was not an injury-causing event in which the claimant was contemporaneously aware that the event had caused harm to the direct victim; even if the injury-causing event was the doctor's negligent discharge of the patient, that event

was not a traumatic event likely to cause severe contemporaneous mental anguish to an observer, even though the ultimate consequences were tragic indeed").

In Bird, the plaintiff, the daughter of the patient, took her mother to the hospital for a surgical procedure. Bird, 51 P.3d at 325. After about an hour for a procedure expected to take twenty minutes, plaintiff saw and heard a call for a thoracic surgeon, a report of her mother suffering a possible stroke, the mother's distress, the mother being rushed by numerous medical personnel to another room for surgery, a report of a possible nicked artery or vein, and a physician carrying units of blood. Id. at 329. The court held that plaintiff could not recover for NIED because she was neither present at the scene of the injury-producing event (i.e. transection of the artery) nor was she aware that the transection caused injury to her mother because she could not have meaningfully perceived any such failure. Id. at 331-32. The court reasoned that the defendant's failure to diagnose and treat a damaged artery in a meaningful way was beyond the awareness of a lay bystander. Id. at 328-29.[5] Directly applicable here is the Court's observation:

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[5]As the Court explained:

> The problem with defining the injury-producing event as defendants' failure to diagnose and treat the damaged artery is that plaintiffs could not meaningfully have perceived any such failure. Except in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders. Here, what plaintiffs actually saw and heard was a call for a thoracic

> [A] rule permitting bystanders to sue for NIED on account of unperceived medical errors hidden in a course of treatment cannot be reconciled with Thing's requirement that the plaintiff be aware of the connection between the injury-producing event and the injury." To do so would "impose nearly strict liability on health care providers for NIED to bystanders who observe emotionally stressful procedures that turn out in retrospect to have involved negligence.

Id. at 331.

> surgeon, a report of [the mother] suffering a possible stroke[the mother] in distress being rushed by numerous medical personnel to another room, a report of [the mother] possibly having suffered a nicked artery or vein, a physician carrying units of blood and, finally, [the mother] still in distress being rushed to surgery. Even if plaintiffs believed, as they stated in their declarations, that their mother was bleeding to death, they had no reason to know that the care she was receiving to diagnose and correct the cause of the problem was inadequate. While they eventually became aware that one injury-producing event—the transected artery—had occurred, they had no basis for believing that another, subtler event was occurring in its wake.

Id. at 328–29.

2. Other Cases and the Prerequisite of Awareness of the Injury Producing Conduct

Courts in other states addressing bystander NIED claims in the medical care context have applied similar reasoning providing further support to the trial court's ruling.

As noted above, California—the very birthplace of the pure foreseeability rule sought to be implemented by plaintiff—now recognizes such an action only where the claimed medical care injury producing event was obvious (severance of a limb or symptoms obviously requiring attention) as such medical conduct and errors do not lie beyond the "understanding or awareness of a layperson." Bird, 51 P.3d 324, 329-30 (Cal. 2002).

The New Jersey Supreme Court, in turn, while noting that "[i]n an appropriate case, if a family member witnesses the physician's malpractice, observes the effect of the malpractice on the patient, and immediately connects the malpractice with the injury, may be sufficient to allow recovery for the family member's emotional distress," rejected such a claim by parents involving the misdiagnosis of their son. Frame v. Kothari, 560 A.2d 675, 681 (N.J. 1989). In so holding, the Court appropriately recognized in failure to diagnose cases that such claims are usually not cognizable.

> Our focus here is on the right of one family member to recover for the emotional distress caused by the medical misdiagnosis of another member of the family. A misdiagnosis may lead to tragic consequences that expose the negligent physician to

> claims for personal injuries or the wrongful death of the victim. By its nature, diagnosis is an intellectual undertaking, requiring the physician to analyze symptoms and reach a conclusion. The nature of a misdiagnosis is such that its results may neither manifest themselves immediately nor be shocking. Hours, days, or months may separate a misdiagnosis, the manifestation of the injury to the patient, and the family member's observation of the injury. Thus, the event may not cause the simultaneous concurrence or rapid sequence of events associated with a shocking event. The observing family member will not be exposed to the harm of seeing a healthy victim one moment and a severely injured one the next.

Frame v. Kothari, 560 A.2d 675, 678-79 (N.J. 1989); see also Gendek v. Poblete, 654 A.2d 970 (N.J. 1995) (rejecting ED claim where alleged there was inadequate medical care as to the infant who developed respiratory problems and stopped breathing the day after his birth limiting recover in in medical malpractice cases where the family member witnesses the alleged malpractice, observes the effect, and immediately connects the malpractice with the injury).[6] As here, there was no such contemporaneous awareness.

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[6]According to the Court in Gendek:

> As Justice Pollock observed in Frame, "Everyone is subject to injury, disease and death. Common

Similarly, members of the Supreme Court of Wisconsin observed that there could be no viable bystander emotional distress claim where the allegation is premised on lack of a proper diagnosis as "the failure to make the proper medical diagnosis is not an event that itself is perceived by a

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> experience teaches that the injury or death of one member of a family often produces severe emotional distress in another family member." Although the law recognizes that at times the severe emotional trauma accompanying the tortious death or injury of a family member may be compensable, such a claim is narrowly circumscribed in the context of a medical misdiagnosis or failure to act. In the context of health care, life and physical wellbeing are often at stake and frequently at risk, and injury and death are not unforeseeable. In considering the standards that govern an appropriate duty of care and limitations of liability in that setting, we must be especially mindful of the principles of sound public policy that are informed by perceptions of fairness and balance. We therefore insist that an immediate, close and clear involvement or connection be present between a person suffering emotional distress and the conduct of the professional healthcare providers whose fault has contributed to the grave or fatal injuries of a related loved one.

Id. at 975-76.

family member." Finnegan ex rel. Skoglind v. Wisconsin Patients Compensation Fund, 666 N.W.2d 797, 803 (Wis. 2003) (emphasis added); see also Trahan, 728 So.2d 1273, 1280 (La. 1999) (alleged malpractice was failure to read the correct chart and provide treatment to the patient based on the data on the chart; "this negligence of omission was not an injury-causing event in which the claimant was contemporaneously aware that the event had caused harm to the direct victim; even if the injury-causing event was the doctor's negligent discharge of the patient, that event was not a traumatic event likely to cause severe contemporaneous mental anguish to an observer, even though the ultimate consequences were tragic indeed"). The Supreme Court of New Mexico, in turn, has made clear that any viable emotional distress bystander claim requires that the claimant-bystander not jury contemporaneously perceive both a sudden injury-producing event and the injury but understand the causal relation between the former and the latter noting that "[a]lthough undoubtedly horrific and tragic, witnessing a victim's suffering and death is not compensable." Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 779 (N.M. 1998). The Court, in a further effort to reign in potential liability, requires the injury producing event to be "sudden and traumatic." Id. at 780; Bloom v. Dubois Regional Medical Center, 597 A.2d 671 (Pa. 1991) (denied recovery to a husband who found his wife hanging by her neck in a hospital room, allegedly due to the failure of the hospital and her doctor to treat her suicidal tendencies as husband had not witnessed the tortious conduct, only its aftermath); Vargas v. Penn State Hershey Milton Medical Center, 2018 WL 2287670, at * 23 (M.D. Penn. 2018) (insufficient evidence that claimant contemporaneously

observed the infliction of harm on her husband, through a negligent act or omission on the part of the Medical Center).

Similarly, in Pate v. Children's Hosp. of Michigan, 404 N.W.2d 632 (1986), a Michigan Appeals Court rejected a bystander claim premised on alleged negligent omissions at the hospital ER two days before the death of claimant's sister who died in the claimant's arms. It found that the allegations were insufficient to establish "the contemporaneous infliction of a tortious injury that could be described as an inherently shocking event. All that the plaintiff has alleged are negligent omissions in the form of non-observable events that occurred two days prior to the decedent's death." Id. at 633. See also Wright v. City of Los Angeles, 219 Cal. App. 3d 318 (Cal. Ct. App. 1990) (holding that the relative did not witness and comprehend an injury-producing event when he watched a paramedic examine the patient, but the paramedic failed to detect signs of sickle cell shock); Goldstein , 223 Cal. App. 3d at 1415 (holding that parents could not make out an NIED claim where they watched their child undergo radiation therapy but only learned later than he had been lethally overexposed); Nelson v. Flanagan, 677 A.2d 545, 548-49 (Me. 1996) (court dismissed plaintiffs' claims for negligent infliction of emotional distress in medical malpractice case; court found after-the-fact emotional distress was not result of immediate perception of defendant's misdiagnosis and found lack of contemporaneous awareness that defendant's conduct causing harm).

To the extent certain courts have recognized bystander NIED claims in the medical care context, they have done so on facts far different from those here, and do not involve claims of misdiagnosis. They involve circumstances where there is blatant improper treatment of an urgent or

obviously dire situation despite pleas and requests for assistance. They involve facts establishing the appreciation, awareness or understanding of the causal connection between the defendant's conduct and injury. Ochoa v. Superior Court, 703 P.2d 1, 7–8 (Cal. 1985) (parents allowed to recover for the mental distress they experienced as a result of watching their convulsive, hallucinating child receive fatally negligent medical treatment while confined in a juvenile detention facility, where they perceived that the child was being harmed and their entreaties for permission to have the child treated by their private physician were rejected);[7] Henderson v. Vanderbilt University, 534 S.W.3d 426 (Tenn. App. 2017) (alleging hospital failed to provide care to daughter, despite repeated assurances from hospital and after she was admitted to pediatric intensive care unit (PICU) for septic shock related to the flu; parents informed that a cardiology consultation had been ordered and watched helplessly as the hours passed without this promised intervention, all the while as their daughter complained of shortness of breath and pain in her chest); Keys v. Alta Bates Summit Medical Center, 235 Cal. App. 4th 484, 489-90, 185 Cal.Rptr.3d at 318 (plaintiff daughters were contemporaneously aware of their mother's difficulty breathing, as well as the defendant medical provider's failure to take action to treat her emergent condition); LeJeune v. Rayne Branch Hospital, 556 So.2d 559 (La. 1990) (action for wife's mental anguish upon discovering her hospitalized comatose husband incurred rat bites); Love v. Cramer, 606 A.2d 1175 (Pa. Super. Ct. 1992) (allowing recovery by

[7] Ochoa was decided before the decision in Thing limited the Dillon formulation.

daughter of patient who died in her arms after a doctor failed to diagnose or treat a serious heart ailment and after daughter pleaded for treatment and physician dismissive of symptoms).

Here, the trial court's ruling is entirely consistent with the case law outside of New Hampshire addressing emotional distress claims in the medical care context including the need to limit such claims to extraordinary circumstances. The claimed injury producing event is the failure to diagnose a purported clot and/or failure to order further work-up. Plaintiff was not aware of any negligence as it was allegedly happening, and there was and is nothing remotely sudden or traumatic about these encounters or the care provided with the resulting injury occurring days or hours later. There is no basis for any finding that Plaintiff could have meaningfully perceived this alleged misdiagnosis and failure with there no basis that the conduct or omissions at the office visits caused distress as opposed to the resulting arrest and death. See e.g., Miles v. Tabor, 443 N.E.2d 1302 (Mass. 1982) (no evidence of emotional distress experienced by parent at time of physician's negligence in delivery room and no evidence of any distress until after child died); Amodio v. Cunningham, 438 A.2d 6, 12 (Conn. 1980) (one day following doctor's misdiagnosis, daughter of claimant began gasping, and mother administered mouth-to-mouth resuscitation; two days later, following the discontinuance of extraordinary life-support methods, daughter died; held: "[t]he allegations of the complaint indicate that the injuries suffered by the plaintiff's child became manifest a considerable period of time after the alleged negligence of the defendants occurred."); Wilson v. Galt, 668 P.2d 1104 (N.M. Ct. App. 1983) (no NIED claim by parents in failure to diagnose

encephalopathy of new born son over eight days resulting in brain damage; parent's aware of deterioration but not cause). Robinson v. Chiarello, 806 S.W.2d 304 (Tex. App. 1991) (ruling that family member who witnessed the victim's decline and eventual death failed to state a bystander NIED claim because a failure to diagnose properly is not an event that can be perceived by a layperson).

3. Policy Considerations And The Need To Demarcate Between Conduct and Outcome Caused Stress in Medical Care Setting

To be sure, state courts are not uniform in their approach to bystander NIED claims, including in the medical care context. Approximately 21 states do not recognize bystander emotional distress in the medical care context either because they follow the zone of danger

rule;[8] the impact rule;[9] otherwise do not recognize an emotional distress bystander cause of action generally;[10] or do not recognize such a claim in the medical malpractice context specifically.[11] As to bystander emotional

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[8]Handley v. U.S., 2021 WL 2073057 (N. Ala. 2021) *citing* Daniels v. E. Alabama Paving Inc., 740 So. 2d 1033, 1049 (Ala. 1999); Villareal v. Ariz. Dep't of Transp., 774 P.2d 213, 220 (Ariz. 1989); Colwell v. Mentzer Investments, Inc., 973 P.2d 631, 638 (Colo. App. 1998); Williams v. Baker, 572 A.2d 1062, 1067 (D.C. 1990); Rickey v. Chicago Transit Authority, 457 N.E.2d 1 (Ill. 1983); Engler v. Illinois Farmers Ins. Co., 706 N.W.2d 764, 767 (Minn. 2005); Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595, 597 (Mo. 1990); Hamilton v. Nestor, 659 N.W.2d 321 (Neb. 2003); Coleson v. City of New York, 24 N.Y.3d 476, 483-484 (2014); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972); Straub v. Fisher Paykel Healthcare, 990 P.2d 384 (Utah 1999);Vaillancourt v. Medical Ctr. Hosp. of Vt., 425 A.2d 92 (Vt. 1980).

[9]Lee v. State Farm, Ins. Co., 533 S.E.2d 82 (Ga. 2000); Bruscato v. O'Brien, 705 S.E.2d 275 (Ga. Ct. App. 2010) (noting given need for impact no bystander emotional distress in medical negligence cases); Posey v. Medical Center West, 361 S.E.2d 505 (Ga. Ct. App. 1987).

[10]Dalrymple v. Fields, 633 S.W.2d 362 (Ark. 1982); Abrams v. City of Rockville, 596 A.2d 116 (Md. 1991); Kraszewski v. Baptist Med. Ctr., 916 P.2d 241, 243 (Okla. 1996); Gray v. INOVA Health Care Services, 514 S.E.2d 355 (Va. 1999).

[11]Branom v. State, 974 P.2d 335 (negligent infliction of emotional distress claims arising out of medical malpractice are barred by Washington

distress claims generally, approximately 27 states follow Dillon, a form of Dillon and/or otherwise require presence and close relationship with most requiring injury producing conduct of the defendant that was contemporaneously perceived or experienced.[12]

Certain states have held that a bystander NIED claim in the medical care context is against public policy and/or outside the scope of the applicable medical malpractice statute. Edinburg Hospital Authority v. Treviño, 941 S.W.2d 76 (Tex. 1997);[13] Maloney v. Conroy, 545 A.2d 1059,

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statute), review denied, 989 P.2d 1136 (Wash. 1999); Finnegan ex rel. Skoglind v. Wisconsin Patients Compensation Fund, 666 N.W.2d 797, 806 (Wis. 2003) ("negligent infliction of emotional distress claims arising out of medical malpractice are not actionable under Wisconsin law"); Phelps v. Physician Ins. Co. Wisconsin Inc., 768 N.W.2d 615 (Wis. 2009) (holding same); Edinburg Hospital Authority v. Treviño, 941 S.W.2d 76, 81 (Tex. 1997) ("Texas … precludes bystander recovery in medical malpractice cases").

[12]The states following such an approach include: Alaska; California; Hawaii; Florida; Indiana; Iowa; Louisiana; Maine; Massachusetts; Michigan; Mississippi; Montana; Nebraska; Nevada; New Hampshire; New Mexico; North Carolina; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Texas; Washington; Wisconsin; West Virginia; and Wyoming. See compilation in addendum.

[13]According to the Court in Edinburgh, "[a] bystander may not be able to distinguish between medical treatment that helps the patient and conduct that is harmful."). 941 S.W.2d at 81; Robinson v. Chiarello, 806 S.W.2d

1064 (Conn. 1988) (refused to recognize a bystander cause of action in medical malpractice as the likelihood of hospitals' substantially curtailing patient visitation to prevent bystander suits); Finnegan ex rel. Skoglind v. Wisconsin Patients Compensation Fund, 666 N.W.2d 797, 803 (Wis. 2003) (the Wisconsin Supreme Court ruled that NIED claims "premised on medical malpractice" were not recognized by the state's medical malpractice statute). As to policy, exposing medical health care providers to bystander emotional distress claims requires significant pause given it represents an expansion of liability against the historical backdrop of the legislature's tort reform and the expressed important policy goal of limiting the potential liability of health care providers. See Lord v. Lovett, 146 N.H. 232, 240-41 (2001) (Broderick, J. concurring); Francoeur v. Piper, 146 N.H. 525, 528 (2001); RSA § 507-E:2(III) (abrogating recovery for loss of chance). This policy is also reflected in the general reluctance to enlarge the common law to extend the duty of healthcare providers to non-patients as well as the recognition that medical care, treatment, and procedures can be inherently traumatic and distress causing to close family members with or with any negligence. Medical care and treatment and outcomes of such

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304, 310 (Tex. App. 1991) ("to extend the rule of Dillon to the entire area of bystander injury to a parent, in situations involving improper diagnosis of a child's ailment, is an extreme broadening of the rule which the California Supreme Court apparently sought to limit, and the extension of this cause of action to the whole field of medical malpractice in diagnosis appears to us an unwarranted and impractical expansion").

treatment are, by definition and nature, distress provoking. Moreover, the focus of the concern of medical care practitioners should be upon the patient and any diversion of attention or resources to accommodate the sensitivities of others is bound to detract from that devoted to patients. Indeed, bystander emotional distress liability exposure would serve to encourage healthcare providers to preclude family members from attending medical appointments or hospitalizations as mere presence exposes the provider to additional potential liability beyond that to the patient. See Maloney, *supra* ("Medical judgments as to the appropriate treatment of a patient ought not to be influenced by the concern that a visitor may become upset from observing such treatment or from the failure to follow some notion of the visitor as to care of the patient"). Further, if such liability can be imposed without contemporaneous awareness and simply because a close family member is at the beside or present over the course of treatment and ultimate outcome there is no meaningful distinction between distress as to outcome or due to the asserted negligence marking unwarranted liability.

Due to the policy concerns and nature of medical care, the rule in Connecticut is that there can be no viable bystander NIED claim in the medical care setting unless there is gross negligence. Squeo v. Norwalk Hospital Ass'n, 113 A.3d 932, 946 (2015) (cause of action requires that "the severe emotional distress that he or she suffers as a direct result of contemporaneously observing gross professional negligence such that the bystander is aware, at the time, not only that the defendant's conduct is improper but also that it will likely result in the death of or serious injury to the primary victim"). By requiring contemporaneous observance and awareness of grossly negligent conduct, the Court provided a definitive,

bright line policy-based limitation subsuming the recognition that a layperson would not appreciate medical care was causal unless gross conduct. Id. at 559 ("[t]his additional element reflects our determination that bystander claims should be available in the medical malpractice context only under extremely limited circumstances").[14] This "troublesome nature of causation" in the medical care context was noted by the Court:

> In fact, bystander claims arising from alleged medical malpractice raise two distinct but related problems with regard to causation. The first problem is that laypeople are, for the most part, unqualified to identify medical malpractice or determine whether a particular medical procedure, decision or diagnosis complies with the prevailing standard of care. Moreover, the

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[14]The Supreme Court of Connecticut in allowing bystander NIED claims in medical malpractice actions only in limited circumstances was cognizant of various policies including that such a cause of action would: "(1) increase the financial burden on health care providers, in contravention of Connecticut public policy, (2) compel health care providers to curtail visitation rights in order to reduce the chance that there will be a witness to any particular instance of medical malpractice, (3) interfere with the provider-patient relationship, such as by forcing providers to attend to the needs and concerns of third parties at the expense of patient care, and (4) cause medical providers to second-guess their own professional judgments in favor of accommodating the needs and concerns of third parties." Squeo, 113 A.3d at 943.

provision of health care services is replete with uncomfortable, disturbing and, at times, even excruciating modalities and decisions that may be medically necessary and perfectly appropriate but that are beyond the ken of the lay observer. To a significant extent, then, medical malpractice differs from the typical bystander scenario, such as an automobile accident, in which a lay witness is able to simultaneously assess that (1) something has gone terribly awry, and (2) the error is the cause of the resulting injuries to the primary victim. In the health care setting, by contrast, bystanders may witness severe injuries that are deeply disturbing but that are not the result of negligence; conversely, bystanders may witness instances of professional negligence, the nature or results of which are not readily apparent. The second problem regarding causation is that, in a case of medical malpractice, it may be difficult, if not impossible, to determine whether the extreme emotional disturbance suffered by close relatives of a patient stems from their having witnessed the tortious conduct or simply from their natural concern over the illness and suffering of a loved one. Of course, this problem is not unique to the health care setting. Parents whose child is injured or killed by a negligent driver likely will suffer emotional distress regardless

> of whether they witness the accident directly. The problem is magnified in the medical arena, however, because many victims of medical malpractice are already suffering from some malady when the tortious conduct occurs; that is precisely why they have sought medical care. In some percentage of these cases, moreover, the malady would have culminated in severe injury or death regardless of any medical intervention or error. Thus, the trier of fact is faced with the daunting task of determining the extent to which the bystander's emotional distress is the result of witnessing professional negligence, as opposed to the ordinary distress a person feels when a loved one is ill.

Id. at 944-45.

D. THE TRIAL COURT PROPERLY APPLIED THE LAW AND PARTIAL SUMMARY JUDGMENT WAS APPROPRIATE.

Here, it is undisputed that there was no close connection in time between the alleged negligence and Decedent's arrest and death. The arrest and death occurred days and hours after the encounters with the Defendants.

Moreover, Plaintiff did not contemporaneously know of or appreciate any alleged negligence; injury producing conduct; and/or any failure to diagnose by the Defendants. Not only did Plaintiff not witness the actual physical therapy sessions, neither he nor his wife perceived that there was any wrongdoing at the time or that any

conduct or omission caused any injury or harm. There was thus no injury producing event or "accident" which was contemporaneously understood or perceived to have caused any harm or injury at the time of the care. In fact, the only evidence was that Decedent was happy after her last session. Consequently, Plaintiffs NIED claim is based entirely on being present at the time of the stroke which is not the same as being present for and contemporaneously perceiving the injury producing conduct of the defendant. Plaintiffs' presence at the result or outcome of the alleged negligence is not the same as presence and contemporaneous awareness of the putative conduct which here is alleged to be the failure to diagnose including the failure to conduct certain imaging. Indeed, Plaintiff did not witness the outcome or result until several days (in the case of the therapy on June 15th) or hours (in the case of the therapy on June 17th) later when his wife suffered her arrest, emergency treatment, and death. Plaintiff's Brief specifically indicates that Plaintiff is alleging distress from "the events he witnessed on January 17, 2018;" that is, his wife's arrest and death. See Pl.'s Br. at 7. This is grounds alone for affirming the Trial Court's decision.

There is also no evidence - - and nor could there be based on the undisputed facts - - that Plaintiff even associated his wife's arrest at the time with any conduct or omission of the Defendants. Plaintiff did not even know the cause of death until days later. Despite the fact that the consequences of the alleged negligence were more sudden, allowing NIED recovery under these circumstances would be inconsistent with Corso's strict requirements.

Even if, for the sake of argument, the applicable test were pure foreseeability (and it is not and should not be), there is no basis for claiming that a provider receiving a history of calf symptoms (even if true) following meniscal repair surgery should foresee that the patient will suffer a fatal pulmonary embolism days later in front of her spouse. Plaintiff lists a number of factors that purportedly increased risk to the patient, see Pl.s' Br. at 30, but similar factors are present in nearly every failure to diagnose case. For example, just because someone is at some small increased risk of a complication following surgery, does not somehow make the occurrence of a serious adverse event in front of a loved one foreseeable or for which liability should be imposed. Allowing liability in all such cases would ignore the balance at the heart of Corso between potentially unlimited liability/uncertainty and victim compensation. It would essentially allow bystander recovery every time the alleged negligent conduct resulted in a distinct event witnessed by a close relative. Such a stark expansion of the liability against medical care providers should be made by the legislature, not by judicial fiat.

CONCLUSION

For all of these reasons, the Trial Court properly granted summary judgment, and its decision should be affirmed.

REQUEST FOR ORAL ARGUMENT PURSUANT TO SUPREME COURT RULE 16(3)(H)

Defendants request oral argument.

CERTIFICATIONS

We certify that on this date a copy of the foregoing Brief was delivered to all counsel pursuant to Rule 26(2) and 26(3) via the Court's electronic filing system.

We certify pursuant to Rule 16(11) and 26(7) that this Brief complies with the applicable word count with 9,450 words.

Respectfully submitted,

Apple Therapy of Londonderry

By Its Attorneys,
Wadleigh, Starr, & Peters, PLLC

Dated: December 29, 2021

By: /s/ *Todd Hathaway*
Todd Hathaway, NHBA No. 12102
Gretchen W. Wade, NHBA No. 273726
95 Market Street
Manchester, NH 03101
(603) 669-4041
thathaway@wadleighlaw.com
gwade@wadleighlaw.com

Heather C. Killie, M.D. and
Four Seasons Orthopaedic Center,
PLLC d/b/a New Hampshire
Orthopaedic Center

By their Attorneys,
Morrison Mahoney, LLP

Dated: December 29, 2021

By: */s/ Tory Weigand*

Tory Weigand, Pro Hac Vice
Justin R. Veiga, NHBA No. 267600
250 Summer Street
Boston, MA 02210-1181
(617) 439-7500
tweigand@morrisonmahoney.com
jveiga@morrisonmahoney.com