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 PLAINTIFF

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1. Whether the trial court erred by granting summary judgment dismissing Marc Chartier's bystander emotional distress claims against all defendants based on the time interval between the defendants' negligent acts and Mr. Chartier's contemporaneous perception of his wife's fatal event and ultimate death.[1]

2. Whether the trial court erred by denying the plaintiff's motion for reconsideration asking the court to reconsider its order granting summary judgment dismissing Marc Chartier's bystander emotional distress claims.[2]

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[1] The trial court ruled this way despite the fact that the parties' briefing focused entirely on other points. The plaintiff argued he had a valid cause of action in his objections to the defendants' motion for partial summary judgment, Apx. at 147-216 and 217-226; and he specifically argued that the trial court erred in ruling the way it did in his motion for reconsideration. Apx. at 271-281.

[2] This issue was raised in the plaintiff's motion for reconsideration. Apx. at 271-281.

STATEMENT OF THE CASE

On January 17, 2018, Marc and Lisa Chartier went out for dinner for the first time in a long time. 37-year-old Lisa had undergone routine arthroscopic knee surgery twelve days earlier. Despite experiencing post-surgical calf discomfort, a classic sign of a potentially fatal blood clot, Lisa and Marc had been reassured by three different medical care providers at various points over the previous five days that she was merely experiencing normal post-operative soreness. After seeing a movie at a local pub, Marc and Lisa got into their car for the short drive home. Over the next hour, Marc Chartier endured the most shocking series of events that a husband can possibly experience, as the three medical providers all turned out to be wrong and his wife died a horrific death as he watched helplessly.

Now, nearly four years later, Marc remains constantly haunted by the events he witnessed on January 17, 2018. He still undergoes mental health counseling and he has been evaluated by a forensic psychologist, who will testify that he has experienced severe emotional distress manifested by physical symptoms. Despite this, the trial court granted the defendants' motion for partial summary judgment and ruled that Marc does not have a valid bystander emotional distress claim because too much time elapsed between the three defendants' negligent acts, when they each told Lisa that she did not have a deadly blood clot, and the horrific hour Marc subsequently endured as the untreated clot blocked her circulatory system and stopped her heart.

The plaintiff's motion for reconsideration was summarily denied. He moved for permission to file an interlocutory appeal and the trial court, on its own motion, raised the issue whether this matter was appropriate for

treatment under Superior Court Rule 46(c). After special briefing from the parties, the trial court entered an order ruling that this matter is appropriate for handling under Rule 46(c) and permitting the plaintiff to take a direct appeal under Supreme Court Rule 7 of the partial summary judgment and reconsideration orders, while the underlying medical negligence case proceeds in discovery.

STATEMENT OF FACTS

Background

Lisa and Marc Chartier were married in September of 2010. Apx. at 230, ¶1. They settled together in Londonderry, New Hampshire. After a few years working in the pharmaceutical industry, Lisa changed course and became a veterinary technician at a local practice. Apx. at 234, ¶16.

Lisa's Knee Injury and Risk Factors

In August of 2018, Lisa injured her knee while watering plants in the yard. Apx. at 234, ¶17. At the time, she was 37 years old, she was overweight, and she took oral contraceptives. Id. Lisa was evaluated by Dr. Heather Killie, a board-certified orthopedic surgeon, who recommended surgery to repair Lisa's knee injury. Apx. at 234, ¶18. Dr. Killie knew that arthroscopic knee surgery carries an increased risk for a potentially-deadly blood clot – known as a deep vein thrombosis or DVT – even in patients without additional risk factors. Id. In light of Lisa's obesity and oral contraceptive use, Dr. Killie has conceded she was well aware of Lisa's elevated risk for DVT when she operated on Lisa's knee. Apx. at 235, ¶20.

Knee Surgery and Post-Operative Medical Visits

Dr. Killie performed knee surgery on Lisa on January 5, 2018. Apx. at 235, ¶21. Lisa was discharged home that night in a long leg brace. Id. Within a couple of days, Lisa developed calf soreness in the same leg that had been operated on. Apx. at 235, ¶22.

Lisa's first post-operative medical appointment was a physical therapy evaluation that took place at Apple Therapy of Londonderry on January 12, 2018, one week after the surgery. Apx. at 236, ¶26. Marc went to the appointment with Lisa and waited in the lobby while she was

evaluated by Jessica Bolster, an experienced physical therapist. Id.

Ms. Bolster was aware when she evaluated Lisa that a DVT was the most common complication of the knee arthroscopy Lisa had recently undergone. Apx. at 236-37, ¶27. She also knew that Lisa had a multitude of very serious risk factors for DVT. Apx. at 237, ¶28.

Ms. Bolster's note from Lisa's January 12 evaluation reports that Lisa told her she had been experiencing mild calf pain for the past five days. Apx. at 237, ¶29. Ms. Bolster knew that a knee surgery patient experiencing five days of calf pain was very concerning for a DVT. Apx. at 237-38, ¶30.

Even though her physical therapy office was in the same building as Dr. Killie's office and the physical therapists were "just down the hall" from Dr. Killie, Ms. Bolster did nothing to notify Dr. Killie of Lisa's potentially fatal presentation. Apx. at 239, ¶34. Instead, Ms. Bolster took it upon herself to decide that Lisa's "very concerning" symptoms were nothing more than normal post-operative tightness. Apx. at 239, ¶35. Ms. Bolster actually reassured Lisa that she did not have a DVT. Id.

Lisa attended her first post-operative visit with Dr. Killie three days later on January 15, 2018. Apx. at 241, ¶40. The appointment took place in the same building as Lisa's physical therapy evaluation three days earlier. Id. Marc accompanied Lisa and was present in the small examination room with her throughout the appointment. Id. Marc recalled the following interaction during this visit:

> The doctor did a lot of the same things that the nurse had done prior, doing range of motion, asked Lisa how she was feeling, if anything felt off, and Lisa told her about her calf being sore. And the doctor had Lisa sit up and kind of dangle her feet over the edge of the examination table, and then the

> doctor really worked Lisa's calf, like manipulated it quite a bit. And what I do remember is saying to myself -- not out loud, but in my head -- that she was kind of rough, like really kind of manipulating her leg, and she did that for quite some time. And then said -- the doctor said -- I'm paraphrasing, but the doctor had said that she was in Lisa's knee pulling and tugging so she's not surprised that her calf was sore.

Apx. at 241-42, ¶41.

Both Lisa and Marc were reassured when Dr. Killie told them Lisa's calf soreness was not surprising and was a normal effect of the surgery Dr. Killie had performed ten days earlier. Apx. at 242, ¶42. According to Marc, Dr. Killie simply told Lisa to keep doing what she was doing. Id.

Dr. Killie denies that Lisa reported calf pain during the January 15 appointment. However, she testified that "if someone postoperatively complains of soreness or calf pain, I have a very low threshold for ordering an ultrasound," and she concedes that, if Lisa did report calf symptoms as her husband recalls, she would have had an obligation to send Lisa for an ultrasound to rule out a DVT. Apx. at 242, ¶43.

After being reassured by Ms. Bolster and Dr. Killie, Lisa continued to experience calf soreness. Apx. at 242-43, ¶44. Her next medical encounter was two days later on January 17th when she had her second physical therapy visit. Id. Marc drove her to the appointment and waited in the lobby while another experienced physical therapist, Danielle Temmen, worked on her. Id. Afterwards, Lisa told Marc that she had advised Ms. Temmen of her ongoing calf soreness. Id.

Ms. Temmen's note in the chart describes Lisa's complaint of "mid left calf pain since Sunday/Monday." Apx. at 243, ¶45. Like her colleague Jessica Bolster, Ms. Temmens did not contact Dr. Killie when she learned

about Lisa's complaints of post-operative calf soreness nor did she recommend ultrasound testing of Lisa's calf. Apx. at 243, ¶46.

The Evening of January 17, 2018

Later that evening after the second physical therapy appointment, Marc and Lisa decided to go to a local brewery that was showing a movie. Apx. at 243, ¶47. As they were leaving their home, Lisa told Marc that she felt a little winded after making her way to the car using her crutches. Id. She recovered quickly and they watched the movie as planned. Id. The events that followed after Marc and Lisa got in the car to drive home are described in heartbreaking detail in Marc's deposition testimony.

According to Marc's testimony, Lisa told him she felt hot upon entering the car and sitting in the passenger seat. Apx. at 244, ¶49. Marc rolled down her window and as he was starting to drive Lisa made a terrible noise, she passed out, and she continued to make terrifying noises associated with her breathing. Id. Lisa briefly regained consciousness, told Marc something was wrong, and then made the same noise and passed out again. Id. Marc reached across the seat and shook her until she awoke. Id. She was scared, confused, and breathing heavily so Marc decided to drive her to a medical center for help. Id.

He drove to a nearby urgent care facility but it was closed so he parked and called 911. Id. Lisa was alert at this point sitting in the passenger seat and Marc was standing in the parking lot next to her door. Id. As Marc spoke with the 911 operator, Lisa said she was going to vomit and the operator told him to get her out of the car and lay her down flat on the ground. Id. Marc did so and Lisa vomited. Id.

Records show that the ambulance was dispatched at 10:03pm and it arrived on scene at 10:11pm. Apx. at 244-45, ¶50. During that time, Marc testified that he tried to clean Lisa up after she vomited and he reassured her that help was on the way. Id. The ambulance departed the scene with Lisa at 10:28pm and it arrived at Parkland Medical Center at 10:37pm. Apx. at 245, ¶51. Marc was not allowed to ride in the ambulance with Lisa but he followed in his car and arrived in time to watch her being brought in unconscious. Id. As they wheeled her in on a stretcher, Marc heard the EMTs tell the hospital staff that she needed to go to a cardiac room immediately so he knew something was seriously wrong. Id.

Marc followed and stood in the threshold of the room while Parkland staff worked on Lisa. Apx. at 245, ¶52. When they noticed she was wearing a knee brace, someone asked Marc if she had recently undergone knee surgery. Id. When he said yes, "the gentleman looked at me and said, 'It's a clot. I'm sorry, it's a clot.'" Id. According to Marc, the man then asked him "what do you want to do?" and Marc replied, "Save her." Id.

Marc watched as the hospital staff brought out a machine he described as a jackhammer that mechanically administered violent chest compressions in an attempt to save Lisa's life. Apx. at 245-46, ¶53. Eventually, Marc says, "they let me hold her hand and then they turned the machine off." Id. Lisa was declared dead at 11:15pm, approximately 75 minutes after Marc's 911 call and 38 minutes after she arrived at the hospital. Apx. at 246, ¶54. Marc was present with her for all but the nine minute ambulance ride. Id.

Civil Lawsuit

Marc Chartier filed suit against Apple Therapy of Londonderry, Dr. Killie, and her employer, New Hampshire Orthopaedic Center, on March 7, 2019. Apx. at 004-013. Marc sued in his capacity as administrator of Lisa's estate and also in his individual capacity. The complaint alleges medical negligence/wrongful death claims on behalf of the estate and spousal consortium and bystander emotional distress claims on Marc's behalf. In support of his bystander emotional distress claim, Marc disclosed an expert forensic psychologist who will testify that Marc experienced severe emotional distress through his contemporaneous perception of the events described above and, as a result, has developed physical symptoms. Apx. at 246, ¶55.

The defendants moved for partial summary judgment seeking dismissal of Marc's bystander emotional distress claim. Apx. at 014-141 and 142-146. They focused entirely on the question whether a bystander plaintiff like Marc must have been present for the alleged negligent acts of the defendants in order to state a valid emotional distress claim. In response, the plaintiff argued that there is no such requirement under New Hampshire law, but even if there is, Marc was present at the three medical appointments where the defendants improperly reassured Lisa that she did not have a DVT. Apx. at 147-216.

The trial court heard oral arguments, Apx. at 253-70, and issued an order dated December 1, 2020 granting the defendants' motion. Addendum to Plaintiff's Brief at 43-47. Despite the parties' focus on Marc's presence during the defendants' negligent acts, the trial court held that Marc's bystander emotional distress claim was barred because, regardless of

whether he was present for the negligent conduct, too much time had elapsed between the alleged negligent acts and the shocking events that Marc subsequently witnessed when Lisa experienced her final event. Addendum at 46-47.

The plaintiff timely moved for reconsideration, Apx. at 271-281, and the trial court denied that motion without additional analysis. Addendum at 48. The plaintiff then moved for permission to file an interlocutory appeal, Apx. at 287-95, and the trial court, on its own motion, raised the issue whether this matter was appropriate for treatment under Superior Court Rule 46(c). Apx. at 303. After special briefing from the parties, Apx. at 304-11 and 312-318, and oral argument, the trial court entered an order ruling that this matter is appropriate for handling under Rule 46(c) and permitting the plaintiff to take a direct appeal under Supreme Court Rule 7 of the partial summary judgment and reconsideration orders, while the underlying medical negligence case proceeds in discovery. Addendum at 49-52. The parties are currently completing expert depositions in preparation for trial. The trial court has not set a trial date.

SUMMARY OF ARGUMENT

The plaintiff submits that the trial court erred in two independent ways: (a) by applying an isolated statement of decades-old dicta, which has never been relied upon by this Court, as a mandatory requirement for bystander emotional distress recovery; and (b) by holding as a matter of law that the period of time between the three defendants' alleged negligent acts and Lisa's death was too long to permit recovery. The statement of dicta, which the trial court interpreted to impose a mandatory requirement that the defendant's negligent act must occur simultaneously with the injury-occurring event, is not an accurate statement of New Hampshire law, which focuses on foreseeability. Rather than ruling out foreseeability, as the language of the dicta states, the passage of time between the defendants' negligent acts in this case and Lisa Chartier's fatal event actually supports a finding of foreseeability because there was a preexisting relationship between the defendants, Lisa, and Marc, and what happened here is exactly what a reasonable person in the defendants' position would have expected. The trial court erred, therefore, when it granted partial summary judgment dismissing the plaintiff's bystander emotional distress claims.

Even if the dicta relied upon by the trial court does state a mandatory rule of New Hampshire law, the trial court erred in holding as a matter of law that the elapsed time between the three medical care providers' negligent acts and Lisa's final event prevented a finding of foreseeability. That issue should have been left for the jury.

The plaintiff also urges the Court to take this opportunity to clarify New Hampshire bystander emotional distress law to resolve a clear split of opinion among trial court judges regarding the meaning of the word

"accident" as that word is used in Corso and subsequent cases. The plaintiff urges this Court to replace the word "accident" with "injury-occurring event" to clarify that a bystander need not witness any wrongful conduct by the defendant in order to satisfy foreseeability and state a valid emotional distress claim.

ARGUMENT

A. STANDARD OF REVIEW:

"We review the trial court's grant of summary judgment *de novo*. Summary judgment is appropriate when the evidence is devoid of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. We consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Burnap v. Somersworth Sch. Dist., 172 N.H. 632, 636 (2019) (citations omitted).

B. THE TRIAL COURT ERRED BY RELYING ON DICTA THAT IS CONTRARY TO THIS COURT'S BYSTANDER EMOTIONAL DISTRESS HOLDINGS:

It is the plaintiff's position that the trial court mistakenly relied upon an isolated statement of dicta that does not accurately reflect New Hampshire law when it granted the defendants' motions for partial summary judgment. To explain why the statement relied upon by the trial court is not an accurate expression of New Hampshire law, a brief history of the bystander emotional distress cause of action is necessary.

1. BRIEF HISTORY OF NEW HAMPSHIRE BYSTANDER EMOTIONAL DISTRESS LAW

When this Court adopted the bystander emotional distress cause of action forty-two years ago in Corso v. Merrill, 119 N.H. 647 (1979), it rejected its own settled precedents and the majority view throughout the country, and it did so based entirely on one simple conclusion: "the orderly and normal functioning of a man's mind is as critical to his well-being as physical health." Id., 119 N.H. at 652 (quoting Comment, Negligently Inflicted Emotional Distress: The Case for an Independent Tort, 59

GEORGETOWN L.J. 1237, 1237 (1971)). A common law cause of action for bystander emotional distress applicable to bystanders outside the zone of danger was necessary, according to the Court, because a bystander's freedom from mental distress is an interest that is worthy of legal protection. Id.

The Corso Court reached this conclusion even though neither of the bystanders actually saw their loved one being injured. Instead, Mr. and Mrs. Corso were in the kitchen of their home when the mother heard a loud thud and looked outside to see her eight-year-old daughter lying seriously injured in the street. Id., 119 at 649. The father was standing in the kitchen next to his wife when he heard her scream that their daughter had been hit by a car. He then ran out the door and saw the young girl lying in the street. Id. Neither of the Corsos saw the events leading up to the collision, nor did they have any preexisting relationship with the defendant, who was a stranger driving through the neighborhood, so they did not know what caused the crash. They could not have known whether their young daughter suddenly darted out into the road; whether the driver swerved to avoid an animal or an obstruction in the street; whether the vehicle experienced a mechanical issue; whether the driver suffered an acute medical event; whether the driver intentionally struck their daughter in a road rage incident; or whether the driver simply was driving too fast and failed to maintain a proper lookout.

At the outset of its opinion, the Corso Court described the question to be decided as "whether parents who perceive through their senses that their child has been seriously injured and immediately observe the child at the accident scene can recover for emotional distress." Id., 119 N.H. at 649.

In framing the issue, the Court did not mention anything about the parents contemporaneously perceiving any negligent acts or being aware of any wrongful conduct; it focused entirely on the parents' immediate perception of their child being injured.

After an extensive analysis covering a dozen pages in the New Hampshire Reports, the Court held as follows:

> a mother and father who witness or contemporaneously sensorially perceive a serious injury to their child may recover if they suffer serious mental and emotional harm that is accompanied by objective physical symptoms.

Id., 119 N.H. at 659. In articulating this holding, the Court focused on the parents' contemporaneous perception of the injury-ocurring event (the impact between the defendant's vehicle and the child), and not on their perception or awareness of any negligent conduct by the defendant.

The foundation for the Court's holding was the familiar concept of foreseeability, which best served the balance between the bystander's interest in a remedy and society's interest in preventing unlimited liability. Id., 119 N.H. at 653. Because foreseeability can be a broad concept, the Court borrowed three criteria from the California Supreme Court's seminal decision in Dillon v. Legg, 441 P.2d 912 (Cal. 1968). Specifically, the Corso Court adopted the following requirements:

1. The plaintiff must be located near the scene of the accident as contrasted with one who was a distance away from it.

2. The plaintiff's shock must have resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.

3. The plaintiff and the victim must be closely related, as contrasted with an absence from relationship or the presence of only a distant relationship.

Corso, 119 N.H. at 653-54 (quoting Dillon, 441 P.2d at 920).

The Court articulated these criteria as the proper test to determine "whether . . . the manner in which the parents became aware of the injury was reasonably foreseeable to cause them harm . . ." Id., 119 N.H. at 657. Once again, the Court did not connect these criteria to the defendant's negligent conduct, or the bystander's awareness of any wrongful acts. Those factors were never considered in the opinion. Instead, the Court concluded that the Corsos were entitled to recover because, when they heard their daughter being hit by a car from inside their home, they contemporaneously perceived a closely-related loved one being injured from a nearby location.

To provide further assistance with the contours of this new cause of action, the Corso Court explained that the second Dillon factor – contemporaneous perception of the accident – imposes a time limitation so 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. The Court did not suggest that the time limitation in the second Dillon requirement is connected to the defendant's negligent acts.

In the end, the Corso Court recognized a bystander emotional distress cause of action if the bystander can prove that his injury was foreseeable, that the defendant was at fault, and that the bystander's injury directly resulted from the accident. Id., 119 N.H. at 656. It emphasized that "[r]ecovery should not be barred for the serious emotional injury to parents who contemporaneously perceive or witness a serious injury to their child

that is caused by the defendant's negligence." Id., 119 N.H. at 658. The only limitations on the cause of action were: (a) a close relationship between the bystander and the victim; (b) spatial proximity and contemporaneous observation of the loved one being injured, as opposed to first perceiving the loved one after the injury occurred; and (c) expert testimony establishing that the bystander's emotional distress is susceptible to objective medical determination.

Midway through the majority opinion in Corso, the Court wrote, "[t]he test of foreseeability requires a relatively close connection in both time and geography between the negligent act and the resulting injury." Id. The Court did not cite any authority for this statement, nor did it explain how these factors impact foreseeability either in general or in that particular case. And, despite the language chosen by the Court, it did not mention or consider the proximity between the location of the negligent acts and the injury-occurring event or the passage of time between the negligent acts and the resulting injury.

The most likely explanation for the stray statement regarding the temporal and geographical proximity of the defendant's negligent acts is that the Court meant to acknowledge the importance of the temporal and geographical proximity between the bystander and the injury-occurring event. As the Court went on to explain, the Corsos' emotional distress was foreseeable because they were located near enough to the scene of the injury-occurring event to experience it first-hand and they contemporaneously perceived the injury as it was occurring, rather than after it had occurred. The Court did not suggest that the location and timing of the defendant's negligent acts had anything to do with foreseeability in

that case and the Corsos were permitted to recover even though neither of the them observed or perceived any negligent acts by the defendant driver, or were even aware of any of the conditions that led to the collision.

The next bystander emotional distress case decided by this Court after Corso was Nutter v. Frisbie Memorial Hospital, 124 N.H. 791 (1984), where a medical malpractice victim's parents sought to recover even though they did not witness the child's death, but first viewed her body in the hospital after she died. Id., 124 N.H. at 793. The Nutters conceded before this Court that it would have to expand the boundaries of liability set forth in Corso in order to rule in their favor. Id., 124 N.H. at 794. This Court declined to do so, and reiterated that recovery will be denied if the bystander does not perceive the accident first hand, but rather sees the victim after the injury or death has already occurred. Id., 124 N.H. at 795-96 (quoting Corso, 119 N.H. at 657).

Although it had nothing to do with the case before it, this Court in Nutter wrote that "foreseeability and causation become attenuated very gradually as the harm to the plaintiff becomes further and further removed from the defendant's negligent act." Id., 124 N.H. at 795. Once again, the Court did not cite any authority for this proposition nor did it explain how it makes logical sense, and it did not apply that rule to decide the outcome of the Nutter case.

The next bystander emotional distress case was Wilder v. Keene, 131 N.H. 599 (1989), which arose from an automobile collision that killed an eight-year-old boy. The boy's parents sued the driver of the vehicle that collided with their son and also sued the City of Keene, alleging that the city was responsible for their son's death because it failed to prevent trees

and shrubs from obstructing the view of drivers, bicyclists, and pedestrians at the subject intersection and failed to warn roadway users of the obstructed view. Id., 131 N.H. at 600. Like the parents in Nutter, however, the Wilders did not actually perceive their son being injured, but instead saw him first at the hospital about an hour after the collision. Id. Predictably, this Court upheld the trial court's dismissal of the parents' emotional distress claims finding that "it is readily apparent that the plaintiffs do not fall within the standard of recovery set out in Corso." Id., 131 N.H. at 604.

Although the timing of the defendants' negligent acts was not at issue in Wilder, the Court reiterated its statement from Corso that foreseeabililty required, among other things, a relatively close connection in time between the negligent act and the resulting injury. Id., 131 N.H. at 602. This is the last time this Court has mentioned anything about the defendant's negligent act in a bystander emotional distress case. Like it did in Corso, the Wilder Court immediately clarified that the relevant time consideration was not actually associated with the defendant's negligent act, but instead required contemporaneous perception of the accident and immediate viewing of the victim. Id. The Court concluded that the proximity of time requirement had not been satisfied, but not because of the time that elapsed between the defendant's negligent act and the child's injury; rather because the parents did not contemporaneously perceive the child being injured, but only saw him an hour later in the hospital. Id., 131 N.H. at 604.

The next notable bystander emotional distress opinion was issued fourteen years later in Graves v. Estabrook, 149 N.H. 202 (2003), another automobile collision case in which the plaintiff was riding in a car behind her fiancé, who was driving a motorcycle in front of her, when the fiancé was hit by a car driven by the defendant and mortally injured. Id., 149 N.H. at 203. The trial court had dismissed the plaintiff's bystander emotional distress claim because she was not related by blood or marriage to the victim. The only issue on appeal was the application of the third Corso/Dillon foreseeability criterion.

The Court began by reconfirming that foreseeability remains the ultimate question, id., 149 N.H. at 204 (describing the fundamental question as "whether a defendant should reasonably foresee injury to a bystander"), and it rejected a bright-line rule in favor of a more flexible, nuanced approach. Id. Specifically, the Court rejected as arbitrary a bright-line foreseeability rule adopted by the California Supreme Court in Elden v. Sheldon, 758 P.2d 582 (Cal. 1988), which prohibited unmarried cohabitants from recovering for bystander emotional distress. This Court explained that "[r]ejecting the bright line rule in Elden . . . does not place an intolerable burden upon society or unfair burden upon a negligent defendant. Rather, it allows recovery for an eminently foreseeable class of plaintiffs." Id., 149 N.H. at 208. Thus, instead of requiring a blood relationship or a marriage certificate to establish a "close relationship," the Graves Court recognized that unmarried cohabitants can just as easily have a stable, enduring, substantial, and mutually supportive connection.

The Graves Court reversed the trial court's dismissal of the plaintiff's bystander emotional distress claim and instructed trial judges to look closely at the specific factors that touch on foreseeability in the case at hand, such as "the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements." Id., 149 N.H. at 209-10 (quoting Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994)).

Next, in O'Donnell v. HCA Health Services of N.H., Inc., 152 N.H. 608 (2005), this Court addressed the question whether the trial court erred by permitting the jury to award damages in a medical malpractice case for the emotional distress of the parents of a child injured during childbirth. The plaintiffs claimed that a treating physician negligently failed to obtain the mother's previous birth records and, as a result, was unaware that she tended to have larger than normal babies. The new baby subsequently became stuck during delivery and suffered serious injuries. Id., 152 N.H. at 610. The problem for the parents, however, was that they did not introduce any expert testimony at trial demonstrating that they suffered physical manifestations of their emotional distress. Id., 152 N.H. at 611. The Court disposed of this aspect of the appeal quickly, stating "Though the plaintiffs claim great suffering, we have held that expert testimony is required to recover damages for negligent infliction of emotional distress. Accordingly, the trial court erred when it ruled otherwise." Id., 152 N.H. at

612.

Even though the doctor's alleged negligent act had occurred months before the baby's traumatic birth, the Court did not comment on the passage of time between the wrongful conduct and the resulting injury or mention the dicta to that effect that it had included in Corso, Nutter, and Wilder.

Most recently, in St. Onge v. MacDonald, 154 N.H. 768 (2007), the Court considered another bystander emotional distress claim arising in the context of a motor vehicle crash. The plaintiff was riding as a passenger on a motorcycle being operated by her boyfriend when their motorcycle was forced off the roadway by a car driven by the defendant and the boyfriend was killed. Id., 154 N.H. at 769. The plaintiff's claim for bystander emotional distress was dismissed by the trial court because it found that the couple were not closely related enough under the criteria announced in Graves. This Court affirmed, although it reminded litigants and trial judges that the three Corso/Dillon criteria are not intended to be a rigid framework, but rather they are flexible tools to answer the fundamental question, "what an ordinary person under the circumstances should reasonably have foreseen." Id., 154 N.H. at 770. Nevertheless, the Court agreed with the trial judge that the plaintiff had failed to establish the necessary close relationship primarily because the couple had only been dating for a few months and had not committed to living together or marriage. Id., 154 N.H. at 771.

2. DICTA RELIED UPON BY THE TRIAL COURT IN THIS CASE

In its decision granting partial summary judgement to the defendants dismissing Marc Chartier's bystander emotional distress claim, the trial court relied exclusively on the isolated statement in Wilder that a bystander emotional distress claim requires "a close connection in time between the negligent act and the resulting injury." Addendum at 46 (citing Wilder, 131 N.H. at 602). This statement, which originated in Corso, constitutes non-binding dicta and inaccurately states New Hampshire law. Therefore, the trial court erred in relying on it and its order should be reversed.

Despite the language used in the isolated statement, the Corso Court never suggested that the location and timing of the defendant's ***negligent acts*** had anything to do with foreseeability in that case. When the temporal proximity between the defendant's negligent act and the resulting incident witnessed by a qualified bystander was briefly mentioned in Nutter, again it had nothing to do with the outcome of the case.[3] And the last time this Court mentioned the timing of the defendant's negligent acts in the bystander emotional distress context was thirty-two years ago in Wilder, where the timing of the defendant's negligent acts was not at issue.[4]

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[3] Notably, the statement in Nutter does not present the topic as a mandatory foreseeability requirement, but instead a broad observation. And unlike the statement in Corso, Nutter merely posits that a delay between the defendant's negligent act and the resulting injury affects foreseeability only ***very gradually***.

[4] Like it did in Corso, the Court followed up the statement in Wilder by immediately clarifying that the relevant time consideration was not associated with the defendant's negligent act, but instead required contemporaneous perception of the

The isolated, unsupported, unexplained, and never-applied statements in Corso, Nutter, and Wilder regarding the temporal proximity between the negligent act and the resulting injury were not essential to the Court's holding in those cases. Accordingly, those statements are mere dicta and the trial court in the present case erred in applying the Wilder statement as a definitive rule of New Hampshire law. See In re Estate of Norton, 135 N.H. 62, 64 (1991) (defining dicta as nonessential remarks in an opinion which are not necessary to the decision and explaining that dicta are "not deserving of the deference accorded by stare decisis to actual holdings."); Appeal of Town of Lincoln, 172 N.H. 244, 253 (2019) (a statement that qualifies as dicta is non-binding and does not control the outcome in a subsequent case).

The statement in Wilder that was relied upon by the trial court in this case that foreseeability requires a close connection in time between the negligent act and the resulting injury qualifies as dicta for several reasons. First, that "rule" was not applied in that case or in any other case decided by this Court, and, in fact, had no bearing whatsoever on the outcome of any case decided by this Court. Second, no authority has ever been identified that supports the rule that the statement purports to establish. And third, the statement and the topic of the defendant's negligent acts, have disappeared from this Court's bystander emotional distress jurisprudence over the last thirty-two years.

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accident and immediate viewing of the victim.

3. PROPER FORESEEABILITY CONSIDERATIONS IN THIS CASE

Since this Court's recent bystander emotional distress opinions confirm that the overriding question is what an ordinary person in the position of the defendant should reasonably have foreseen, St. Onge, 154 N.H. at 770, the only relevant information is what the defendants each knew when they provided care for Lisa Chartier. Thus, the proper foreseeability considerations in this case are:

* Whether the defendants were aware that Lisa was married;

* Whether the defendants had met Lisa's husband and were aware of his close interest in Lisa's well-being;

* Whether the defendants were aware that post operative calf symptoms like those Lisa reported could represent a potentially fatal deep vein thrombosis;

* Whether the defendants were aware that the failure to diagnose and treat a deep vein thrombosis could result in a fatal event that would be shocking and emotionally distressing to Lisa's husband;

* Whether the defendants were aware that an undiagnosed DVT would not necessarily manifest itself immediately but could take days to cause a fatal event; and

* Whether the defendants were aware that a fatal event occurring days after surgery and outside of a medical setting would be even more traumatic to Lisa's husband than a fatal event occurring during surgery or in a medical facility.

Affirmative answers to these questions demonstrate that a person in the position of each defendant should reasonably have foreseen that a failure to provide proper medical care to Lisa would result in a shocking

event that would cause her husband to suffer severe emotional distress. The passage of time between the defendants' negligent acts and Lisa's final event does not break the chain of foreseeability under these circumstances because the time that elapsed is exactly what the defendants should have expected when they provided medical care to her.

4. THE TRIAL COURT'S ORDER SHOULD BE REVERSED BECAUSE IT RELIED ON DICTA THAT DOES NOT APPLY IN THIS CASE

Since the dicta statement in Corso and Wilder mistakenly imposes an arbitrary requirement in all bystander emotional distress cases this Court should disavow that statement and replace it with a more neutral recognition that the passage of time between the defendant's negligent act and the bystander's resulting emotional injury is merely one of many relevant considerations in deciding whether bystander emotional distress was reasonably foreseeable. The Court should explain that the time period between the defendant's negligent act and the resulting injury supports foreseeability if it is consistent with the time period a reasonable defendant in the same position would have expected. The time period only weighs against foreseeability when it is highly unusual due to an unforeseen condition or event.

Disavowing the arbitrary rule imposed by the Corso/Wilder dicta and clarifying the relevant foreseeability considerations would be consistent with this Court's recent bystander emotional distress cases. For example, in Graves, the Court expressly rejected an arbitrary bright line rule in favor of a more flexible, nuanced approach. It then instructed trial courts that the flexible, nuanced approach to foreseeability requires consideration of a variety of case-specific factors and it articulated the ones that were

important in that particular case. That is exactly what the plaintiff asks this Court to do here.

After Graves and St. Onge (which reiterated that arbitrary rules must yield to specific foreseeability facts), there is no room in New Hampshire bystander emotional distress law for an arbitrary, bright-line rule employed to bypass a full consideration of the specific factors bearing on what an ordinary person in the defendant's position should reasonably have foreseen. Thus, as it did in Graves, this Court should reject the Corso/ Wilder dicta and identify the meaningful foreseeability considerations that are relevant in the context of this case, which are described in the bullet points above.

When the specific facts of this case are considered, and arbitrary rules are discarded, it cannot be disputed that bystander emotional distress was far more foreseeable to the defendants in this case – who knew their patient was married to a man with a keen interest in her well-being and who knew that a mistaken diagnosis of their patient's glaring complaints would likely lead to a fatal pulmonary embolism in a matter of days – than it was to the defendants in Corso and Graves, who encountered their victims randomly on a public highway. Since the bystanders in those cases were permitted to recover, there is no principled basis for holding that Marc Chartier has failed to state a valid bystander emotional distress claim.

C. THE TRIAL COURT ERRED BY RULING AS A MATTER OF LAW RATHER THAN ALLOWING THE JURY TO DECIDE FORESEEABILITY

Even if the Corso/Wilder dicta were an accurate statement of New Hampshire law, the trial court erred in the manner in which it applied the rule. In granting partial summary judgment, the trial court found that: (a)

five days elapsed between Ms. Bolster's alleged negligent act and Lisa Chartier's final event; (b) two days elapsed between Dr. Killie's alleged negligent act and Lisa Chartier's final event; and (c) nine hours elapsed between Ms. Temmen's alleged negligent act and Lisa Chartier's final event. Addendum at 47. Based on these calculations alone, the trial court held, as a matter of law, that "the time between the negligent act[s] and the plaintiff's injury is simply too attenuated to recover for NIED." Id.

The plaintiff submits that the trial court erred when it decided this issue as a matter of law, rather than submitting it to the jury, and when it concluded without any analysis, that five days, two days, and nine hours were too long to support a bystander emotional distress claim under the unique facts of this case. As is explained above, the time that elapsed between the three defendants' separate negligent acts in this case and Lisa's final event is exactly what a reasonable medical care provider would have expected. Nothing about the time period between the defendants' negligent acts and Lisa's final event was unusual or detracted in any way from the obvious foreseeability of Marc witnessing his wife's suffering and death if she received substandard care for her post-operative complaints of calf pain.

D. THIS COURT SHOULD TAKE THIS OPPORTUNITY TO CLARIFY WHAT "ACCIDENT" MEANS IN THE BYSTANDER EMOTIONAL DISTRESS CONTEXT

In their briefing before the trial court, the parties focused on the question whether a bystander plaintiff like Marc Chartier must have been present for the alleged negligent acts of the defendants in order to state a valid emotional distress claim. It was the plaintiff's position that, since foreseeability is the ultimate touchstone and the fundamental question is "whether a defendant should reasonably foresee injury to a bystander,"

Graves, 149 N.H. 204, the only relevant considerations are what the defendant actually knew and what a person in the defendant's position reasonably should have known. Any information possessed by the bystander or anyone else cannot possibly affect what was capable of being foreseen by the defendant. Thus, the bystander's awareness of wrongdoing by a defendant is meaningless for purposes of assessing what was foreseeable to the defendant.

This issue had been litigated many times over the years and has resulted in a distinctive split among New Hampshire trial court judges; yet it has evaded review by this Court. The issue turns on the proper interpretation of the word "accident" that is used repeatedly in Corso and which originated with the seminal Dillon case. Rather than taking a position on that question, the trial court decided this case on a different point. However, the issue arises in every medical negligence case in which a close relative observes a loved one's tragic outcome and the trial court in this case recognized that this Court must clarify the meaning of "accident" in this context. Addendum at 51.

The trial court in this case was presented with fourteen different opinions from New Hampshire trial judges decided between 1990 and 2018 taking varying, and often contradictory, positions on the application of bystander emotional distress law in the medical negligence context and what qualifies as the relevant "accident" in such a case. Some judges believe that the bystander must be aware when the bystander perceives his or her loved one being injured that a defendant has breached a duty of care

or committed a negligent act.[5] Others believe that the bystander's awareness of a breach of duty is irrelevant as long as the bystander perceives a loved one being injured in a shocking event and can prove that the shocking event was caused by a defendant's negligence.[6] The former group believes that "accident" means the defendant's negligent conduct, while the latter believes that the "accident" is the shocking event during which the victim is being injured. The plaintiff urges this Court to adopt the position of those judges who realize that the relevant accident in the bystander emotional distress context is the shocking injury-occurring event

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[5] Bronson v. The Hitchcock Clinic, No. 89-C-95, Coos Superior (June 9, 1992)(Perkins, J.) (Apx. at 107-113); Kidder v. Newell, No. 96-254-M, USDC-NH (November 10, 1997)(Muirhead, MJ) (Apx. at 124-141); Farrington v. Cendron, No. 01-C-122, Grafton Superior (October 7, 2003) (Vaughn, J.)(Apx. at 100-105) ; Leach v. Ray, No. 219-2011-CV-38, Strafford Superior (November 11, 2011)(Wageling, J.) (Apx. at 092-098); Street v. Rhodes, No. 218-2015-CV-835, Rockingham Superior (March 24, 2017) (Delker, J.) (Apx. at 088-090).

[6] Aldrich v. Witkin, No. C-9-74, Belknap Superior (February 15, 1995) (Smukler, J.) (Apx. at 177-181); Hilber v. Horsley, No. 93-C-790, Hillsborough Superior South (May 2, 1995) (Murphy, J.) (Apx. at 183-185); Erickson v. Beech Hill Hospital, No. 98-C-638, Rockingham Superior (November 6, 1998) (Abramson, J.) (Apx. at 187-191); Roy v. Sarson, No. 213-2013-CV-168, Cheshire Superior (June 15, 2015) (Kissinger, J.) (Apx. at 193-201); Sears v. Opsahl, No. 213-2014-CV-0063, Cheshire Superior (August 24, 2015)(Kissinger, J.)(Apx. at 319-326); Billodeau v. Elliot Hospital, No. 216-2015-CV-290, Hillsborough Superior North (October 13, 2016) (Kissinger, J.) (Apx. at 203-209); Berk v. Losasso, No. 216-2017-CV-207, Hillsborough Superior North (July 18, 2018)(Nicolosi, J.) (Apx. at 211-216).

caused by the defendant's negligence and therefore that the bystander need not be aware of any negligent acts in order to state a valid claim.

The foreseeability criteria adopted by this Court in Corso, borrowed from the Dillon case, state, *inter alia*, that a bystander must be located near "the accident" and must contemporaneously perceive "the accident" in order to recover damages for emotional distress. Corso, 119 N.H. at 653 (quoting Dillon, 441 P.2d at 920). In medical negligence cases, defendants routinely argue that, to be located near and contemporaneously perceive "the accident," a bystander must observe the defendants' negligent acts but that is clearly not true.

This Court has consistently described the relevant injury in a bystander case, ***not*** as an emotional reaction arising from awareness of another's fault, but as an emotional reaction stemming from "witness[ing] or contemporaneously sensorially perceiv[ing] a serious injury" to a loved one. Id., 119 N.H. at 659. See also Nutter, 124 N.H. at 795 (describing "the injury being compensated" as "the plaintiff's emotional reaction to an injury suffered by someone else."); Wilder, 131 N.H. at 603 (quoting Corso, 119 N.H. at 659).

The facts of Corso demonstrate that a bystander need not be aware of a defendant's wrongful conduct in order to state a valid emotional distress claim. When the Corsos heard the horrific, life-changing sounds they heard, they had no idea ***why*** their child had been harmed. They had no idea whether the vehicle had been negligently entrusted to an unfit driver, whether the owner of the vehicle had knowingly failed to fix a set of faulty brakes, whether the vehicle slid on water or ice, or whether the driver had intentionally run over their child in a fit of road rage. All that mattered was

that, as a result of the defendant's negligence, the parents had experienced a discrete and lasting emotional injury when they perceived their child being injured. Just as the child's body had been forever altered by the collision, the parents' orderly and normal functioning of their minds had been forever altered when they were forced to endure the torture of perceiving their loved one ***being injured*** and they would have to live with the memory for the rest of their lives.

In the numerous trial court orders ruling on a medical malpractice defendant's argument that a bystander must contemporarily perceive the alleged negligent acts, the outcome invariably depended on the judge's interpretation of the word "accident" as that word is used in Corso. The plaintiff urges this Court to adopt the reasoning of the judges who view the "accident" as the shocking event witnessed by the bystander, rather than the defendant's negligent act.[7] In particular, three recent opinions from Judge Kissinger are especially compelling.

The first case was Roy v. Sarson, a medical negligence case arising from the pediatric treatment of the plaintiff's four year old daughter. After carefully examining the competing decisions from other trial judges, Judge Kissinger concluded that

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[7] See e.g. Aldrich (wife witnessed the requisite "accident" for Corso purposes when she watched her husband suffer a fatal heart attack well after his heart condition had been negligently misdiagnosed) (Apx. at 179); Hilber (the "accident" was the child's premature birth) (Apx. at 184); Erickson (the "accident" was the patient's suicide by hanging) (Apx. at 189); Berk (the "accident" was the patient's aortic dissection) (Apx. at 216).

> a plaintiff need not be present during the negligent acts to recover for negligent infliction of emotional distress. The "contemporaneous observance of the accident" requirement from Corso exists to ensure that the emotional harm to a plaintiff is foreseeable, not to create an arbitrary, inflexible requirement about what the plaintiff must observe.

Apx. at 199. He then held that the victim's mother had stated a valid bystander emotional distress claim because "the 'accident' should be considered the worsening of [the patient's] condition that was allegedly caused by the malpractice, not the malpractice itself." Id.

A few months later, in Sears v. Opsahl, Judge Kissinger ruled in a different medical negligence case that "the accident was [the decedent's] heart attack allegedly caused by the malpractice, not the negligent act of malpractice itself." Apx. at 325. This interpretation, he said, was "consistent with the common sense understanding of the term 'accident.'" Id. He further explained that "sending a spouse home with a negligently misdiagnosed heart condition will foreseeably cause the surviving spouse emotion distress if an injury later occurs. With or without being present for the alleged negligent misdiagnosis, it is likely foreseeable that Ms. Sears may experience significant emotional distress witnessing Mr. Sears suffer a heart attack caused by alleged malpractice." Id.

Lastly, in Billodeau v. Elliot Hospital, a case remarkably similar to this one, Judge Kissinger reviewed his previous decisions and the other Superior Court orders cited above, and concluded that the accident in that case was the pulmonary embolism allegedly caused by Elliot Hospital's medical negligence, not Elliot Hospital's alleged medical negligence. Apx. at 209. The patient in Billodeau, like Lisa Chartier, reported symptoms consistent with a DVT after undergoing surgery. Apx. at 204. Despite this,

the patient's medical care providers discharged him home without DVT prophylaxis or instructions. Id. Three days later, his wife found him unable to breathe at home and called 911. He became unresponsive while awaiting the arrival of emergency responders and life-saving efforts were unsuccessful. Apx. at 205. On these facts, Judge Kissinger denied the defendant's motion for partial summary judgment because the wife experienced extreme emotional distress as she observed her husband suffering from this medical event and ultimately dying. Apx. at 209.

In accordance with these decisions, and the relevant foreseeability principles most recently articulated by this Court, it follows that, to contemporaneously perceive the relevant "accident," an emotional distress plaintiff need not witness any negligent acts or recognize that their loved one was being injured by negligent acts. The bystander need only perceive the loved one ***being injured*** due to the defendants' negligence.

The trial court orders accepting the argument that "accident" means the defendant's wrongful acts simply do not give appropriate weight to the importance of foreseeability and do not recognize that the parents in Corso were permitted to recover even though they did not observe any negligent acts. Those orders do not cite any case in which this Court denied recovery to a bystander because he or she failed to observe the defendants' negligence. No such case exists.

The plaintiff urges this Court to clarify New Hampshire law by replacing the word "accident" in the first two Corso/Dillon foreseeability criteria with the phrase "shocking injury-occurring event." This will explain to trial courts and litigants that a bystander's awareness of wrongful conduct is not a mandatory requirement in order to state a valid emotional

distress claim. Doing so would be consistent with the common meaning of the word "accident" as well as its intended meaning in Corso. In this context, an injury-occurring event takes place when the negligence of another manifests itself in harm to a victim in a shocking event perceived by a loved one. In the medical malpractice context, an injury-occurring event can be a heart attack, stroke, pulmonary embolism, cardiac arrest, suicide, an incident requiring life support measures, or any other condition where a victim shockingly deteriorates or transitions from alive to dead in the presence of a loved one.

E. CONCLUSION

For the reasons set forth above, the plaintiff respectfully submits that the trial court erred when it granted partial summary judgment to the defendants on the plaintiff's bystander emotional distress claim. Rather than applying an isolated, unsupported statement in a previous case as a mandatory rule of New Hampshire law, the trial court should have ignored that statement as non-binding dicta. Since the trial court's ruling was based entirely on a mistaken interpretation of New Hampshire law, it should be reversed. The fundamental issue of foreseeability should not be decided as a matter of law but should instead be left to a properly instructed jury.

In addition, this Court should clarify New Hampshire bystander emotional distress law by replacing the word "accident" in the current Corso/Dillon foreseeability criteria with the phrase "shocking injury-occurring event" to confirm that a bystander need not contemporaneously perceive the defendant's alleged negligent acts in order to state a valid cause of action.

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

The plaintiff requests oral argument.

CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)(i)

I hereby certify that copies of the decisions appealed from are included in an addendum at the end of this brief.

CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(10)

I hereby certify that on this date a copy of the foregoing brief was delivered to opposing counsel via the Court's electronic filing system.

Respectfully submitted,

Marc Chartier

By His Attorneys:

ABRAMSON, BROWN & DUGAN

DATED: November 9, 2021 By: /s/ Jared R. Green

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ADDENDUM TO PLAINTIFF'S BRIEF

Decisions Appealed From

DESCRIPTION **PAGE**

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2019-CV-00147

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

ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff, Marc Chartier, has filed this complaint arising out of the death of his wife, Lisa Chartier ("Lisa"). Currently pending before the Court is the defendants' motion for partial summary judgment,[1] to which the plaintiff objects. The Court held a hearing on this motion on September 29, 2020. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Standard of Review

The Court decides summary judgment motions by considering "the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." SegTEL, Inc. v. City of Nashua, 170 N.H. 118, 120 (2017) (quotation omitted). If this "review of the evidence does not reveal any genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law," then summary judgment is proper. Id. (quotation omitted); see also RSA 491:8-a, III.

Factual Background

The Court draws the following relevant information from the parties' statement of material facts and from the record. On January 5, 2018, Dr. Killie performed a medial

[1] Defendant Apple Therapy of Londonderry, LLC initially filed the motion. (See Court Index #20.) The other two defendants then joined in the motion. (See Court Index #21.) For the sake of simplicity, the Court will refer to the motion and the arguments as belonging to all defendants.

meniscal repair surgery on Lisa's left knee. The plaintiff drove Lisa to the surgery center and remained there during the procedure. Following the surgery, Dr. Killie told the plaintiff that it "went well." Lisa went home that same day wearing a long leg brace. Due to Lisa's weight, use of contraceptives, and the trauma to her knee, she had an elevated risk for developing deep vein thrombosis ("DVT") following the surgery. In the days that followed, Lisa developed calf soreness in her left leg, which is a sign of DVT.

On January 12th, Lisa began physical therapy at Apple Therapy of Londonderry, LLC ("Apple Therapy"). The plaintiff drove Lisa to this appointment and stayed in the lobby. Three days later, Lisa went to her first post-operative visit with Dr. Killie. The plaintiff accompanied Lisa and was present in the room when Dr. Killie examined Lisa's leg. At that appointment, Lisa informed Dr. Killie of the calf soreness. Dr. Killie then began "manipulating" Lisa's leg "for quite some time." Dr. Killie informed Lisa that the soreness was "a normal effect of the surgery" and "to keep doing what she was doing."

On January 17th, Lisa went to a second physical therapy appointment at Apple Therapy in the morning. (Am. Compl. ¶ 12.) The plaintiff again remained in the lobby during this appointment. After the appointment, the plaintiff brought Lisa home and then went to his job. At 7:00 p.m. that evening, the Chartiers went to a brewery. While leaving the house, Lisa reported that she was "a little bit out of breath" after walking to the car with her crutches, but she seemingly recovered on the drive to the brewery. At 9:30 p.m., the Chartiers left the brewery. At that time, Lisa felt "fantastic."

However, Lisa's condition quickly deteriorated. During the drive back to their home, Lisa told the plaintiff that she was hot and made terrible noises associated with her breathing before passing out twice in the passenger seat of the car. The plaintiff

drove to an urgent care center, but it was closed. The plaintiff then called 911. The operator directed the plaintiff to lay Lisa on the ground. Paramedics and firefighters arrived at the urgent care center shortly after and an ambulance brought Lisa to a hospital. The plaintiff followed the ambulance in his car. Once Lisa arrived at the hospital, the staff performed chest compressions using a "jackhammer" machine. The plaintiff was in the hospital room with Lisa as the staff tried to revive her. Unfortunately, the hospital staff was unable to do so, and Lisa died at 11:15 p.m. Following Lisa's death, the medical examiner determined that Lisa died from "cardiovascular collapse due to pulmonary thromboembolism due to [DVT] due to immobilization following [the] surgical repair of [her] torn meniscus." This action followed.

Analysis

In his amended complaint, the plaintiff brings five separate counts: (1) medical negligence against Apple Therapy; (2) medical negligence against Dr. Killie; (3) vicarious liability for Dr. Killie's negligence against Four Seasons Orthopaedic Center, PLLC;[2] (4) loss of consortium against all defendants; and (5) negligent infliction of emotional distress ("NIED") against all defendants.[3] Relevant to this motion, in Count V, the plaintiff alleges that he "contemporaneously perceived the suffering and death [Lisa] causing him to experience severe emotional distress manifested by physical symptoms." (Am. Compl. ¶ 37.) The defendants now move for summary judgment as to Count V. They argue that the undisputed facts show that "there was no immediate connection between the alleged negligence at issue and [the plaintiff's emotional

[2] The amended complaint alleges that Dr. Killie is "an employee, agent, apparent agent, or co-joint venturer with Four Seasons Orthopaedic Center, PLLC." (Am. Compl. ¶ 29.)

[3] The plaintiff brings the first three claims in his capacity as the executor of Lisa's estate. He brings the fourth and fifth claims in his personal capacity.

distress] days or hours later," and therefore he cannot recover for NIED. (Apple Therapy's Mot. Partial Summ. J. ¶ 36.) In response, the plaintiff contends that he can recover for NIED because he suffered emotional distress after connecting the defendants' alleged negligence to Lisa's "horrific suffering." (Pl.'s Obj. Joinder ¶ 26.)

"Establishing the boundaries of liability for [NIED] to bystanders has proven to be a vexing issue for courts." O'Donnell v. HCA Health Servs. of N.H., 152 N.H. 608, 611 (2005). However, there are clear elements for such a claim, including: "(1) causal negligence of the defendant; (2) foreseeability; and (3) serious mental and emotional harm accompanied by objective physical symptoms." Id. In addition, as part of the foreseeability element, a bystander NIED claim requires "a close relationship between the plaintiff and the victim, geographic proximity to the accident scene and a close connection in time between the negligent act and the resulting injury" to the plaintiff. Wilder v. City of Keene, 131 N.H. 599, 602 (1989) (emphasis added); see also Corso v. Merrill, 119 N.H. 647, 657 (1979) ("[F]oreseeability requires a relatively close connection in both time and geography between the negligent act and the resulting injury." (emphases added)); Marvin v. Wentworth-Douglass Hosp., No. 03-C-016, 2004 WL 5323484 (N.H. Super. Mar. 18, 2004) (NIED claim "allow[s] bystanders to recover when they witness the negligence that causes the death or injury and are immediately impacted by it." (emphasis added)). Thus, to satisfy the temporal requirement, "[a] plaintiff's emotional distress must follow closely on the heels of the negligent act." Miles v. Edward O. Tabor, M.D., Inc., 443 N.E.2d 1302, 1305 (Mass. 1982).

Here, the alleged negligent acts are the defendants' failures to diagnose Lisa's DVT, despite her complaints of DVT symptoms to Dr. Killie and her physical therapists.

Although not explicitly stated in the complaint or in the plaintiff's pleadings, it seems that the "resulting injury" at issue—the plaintiff's alleged emotional distress—first surfaced on the evening of January 17th when he began witnessing Lisa's deterioration on their way home from the brewery. Based on these facts, the Court concludes that the time between the negligent act and the plaintiff's injury is simply too attenuated to recover for NIED. Lisa last saw Dr. Killie on January 15th—two days before the onset of the alleged emotional distress. Likewise, Lisa last saw an Apple Therapy physical therapist on the morning of January 17th, which was at least nine hours before the onset of the alleged emotional distress. Given the lapse of time between the alleged misdiagnosis and the plaintiff's injury, the Court concludes that there is no "close connection in time between the negligent act[s] and the resulting injury" as a matter of law. Wilder, 131 N.H. at 602.[4] As such, the plaintiff cannot recover for NIED. The defendants' motion for partial summary judgment is accordingly GRANTED.

So ordered.

Date: December 1, 2020

Hon. Charles S. Temple,
Presiding Justice

[4] See also Bernard v. Cendron, No. 2001-C-0122, 2003 WL 26562923, at *3 (N.H. Super. Oct. 07, 2003) (granting summary judgment on NIED claim premised on medical negligence where only one hour elapsed between negligent act and plaintiff's emotional distress); McHugh v. Miner, Hillsborough Cnty. Super. Ct. S. Dist., No. 97-C-97, at 4 (Feb. 3, 1998) (Order, Hollman, J.) (dismissing NIED claim premised on medical negligence where "[t]he parents . . . failed to plead facts that they suffered emotional distress contemporaneously with the negligent act" (emphasis in original)); Nelson v. Flanagan, 677 A.2d 545, 548 (Me. 1996) (because father's "after-the-fact emotional distress [was] not the result of an immediate perception of [defendant's] alleged misdiagnosis" father could not recover for NIED); Frame v. Kothari, 560 A.2d 675, 681 (N.J. 1989) (affirming reversal of NIED award where plaintiffs were present during misdiagnosis but "[t]he diagnosis . . . did not manifest itself in an immediate injury . . . until four hours later [when plaintiffs] discovered their son in a moribund condition"); Miles, 443 N.E.2d at 1305 (affirming entry of JNOV on NIED claim premised on medical negligence where there was "insufficient evidence of emotional distress experienced by [plaintiff] at the time of the doctor's negligence in the delivery room to permit her to recover" because plaintiff did not begin to experience emotional distress until two months later when infant died).

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2019-CV-147

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

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT ON HIS CLAIMS FOR BYSTANDER EMOTIONAL DISTRESS

NOW COMES the plaintiff, by and through his attorneys, Abramson, Brown & Dugan, and moves this Court as follows:

INTRODUCTION

The plaintiff respectfully submits that this Court misapprehended New Hampshire law in two ways. First, despite dicta in two early cases, New Hampshire law does not require a close connection in time between a defendant's breach of the standard of care and the bystander's contemporaneous perception of his loved one being injured. And second, even if New Hampshire law did require a close connection between those two events, whether that occurred in this case should be left to a properly instructed jury rather than decided by the Court as a matter of law. The plaintiff requests, therefore, that the Court reconsider its Order dated December 1, 2020 and, upon reconsideration, deny the defendants' motions for partial summary judgment.

LEGAL ISSUE

Forty-one years ago our Supreme Court changed New Hampshire law, rejecting its own settled precedents and the majority view throughout the country, based entirely on one simple

Denied pursuant to Superior Court Rule 12(e).

Honorable Charles S. Temple
December 28, 2020

Clerk's Notice of Decision
Document Sent to Parties
on 12/28/2020

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2019-CV-00147

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

ORDER

The plaintiff, Marc Chartier, has filed this complaint seeking damages arising out of the death of his wife, Lisa Chartier ("Lisa"). On December 1, 2020, the Court issued an order granting the defendants' motion for summary judgment on the plaintiff's claim for negligent infliction of emotional distress ("NIED") under a bystander theory (the "Order"). The plaintiff thereafter moved for reconsideration of the Order, which the Court denied on December 28, 2020. Subsequently, the plaintiff sought to appeal the Order on an interlocutory basis. He filed a motion requesting the Court's signature on a proposed interlocutory appeal statement, to which the defendants objected. The Court held a hearing on the interlocutory appeal issue on February 26, 2021. At that hearing, the Court sua sponte raised the issue of whether it should classify the Order as a "final decision on the merits" pursuant to Superior Court Rule 46(c). The parties have since filed briefs addressing that issue. The plaintiff contends that the Court should certify the Order as a final decision on the merits pursuant to Rule 46(c), thereby allowing him to immediately appeal. Predictably, the defendants maintain that Rule 46(c) certification is not appropriate under the circumstances. After considering the record, the arguments, the procedural posture of this case, and Rule 46(c), the Court finds and rules as follows.

Analysis

Superior Court Rule 46(c), entitled "Judgment on Multiple Claims or Involving Multiple Parties," provides, in pertinent part:

> (1) When, in a civil action that presents more than one claim for relief – whether as a claim, counterclaim, cross-claim, or third party claim – or where multiple parties are involved, the court enters an order that finally resolves the case as to one or more, but fewer than all, claims or parties, the court may direct that its order, or a portion of its order, be treated as a final decision on the merits as to those claims or parties if the court:
>
> (A) explicitly refers to this rule;
> (B) identifies the specific order or part thereof that is to be treated as a final decision on the merits;
> (C) articulates the reasons and factors warranting such treatment; and
> (D) finds that there is an absence of any just reason for delay as to the party or claim that is to be severed from the remainder of the case.

This rule "authorizes the Superior Court to designate certain orders that do not conclude the proceedings before it as final decisions on the merits that can be immediately appealed to the Supreme Court." Super. Ct. R. 46 comment. Upon an appeal of such an order, the supreme court "may review the trial court's reasons and factors warranting treating the order as a final decision on the merits," and can dismiss the appeal if it finds that the trial court "clearly erred" in classifying its decision as a final one on the merits. Super. Ct. R. 46(c)(2)(B).

After much consideration, the Court concludes that Rule 46(c) certification is appropriate in this case for several reasons. See Super. Ct. R. 46(c)(1)(C). First, the Order addresses a discrete claim pursuant to which the plaintiff seeks damages that are wholly independent of any other claim in the case. As such, an appeal of the NIED bystander claim will not affect the remaining claims in the case. Indeed, the Court anticipates that discovery will continue on all of the remaining claims.

Second, as the parties have discussed in their summary judgment pleadings, there are a number of conflicting superior court decisions regarding the viability of bystander claims for NIED in medical malpractice cases. While the Court believes that it correctly followed controlling precedent as well as persuasive authority from other jurisdictions, the Court nonetheless recognizes that there is a divergence of opinion among New Hampshire Superior Court judges on this issue. See Schaefer-Larose v. Eli Lilly and Co., No. 1:07–cv–1133–SEB–TAB, 2010 WL 3892464, at *4 (S.D. Ind. Sep. 29, 2010) (where "there [was] a split of opinions among several other courts" on issue, court invited parties to address whether it should certify its order under Rule 54(b) and then ultimately granted certification). By certifying its Order as a final judgment on the merits, the plaintiff can take an immediate appeal and the supreme court can finally address this long-litigated but unsettled issue. This will benefit not only the litigants in this case, but also litigants in future cases. It will also aid settlement negotiations because the parties will no longer need to predict the circumstances under which these types of NIED bystander claims will be recognized.

Third, due to the COVID-19 pandemic, this Court has not presided over a jury trial since early 2020. When jury trials do resume,[1] criminal cases will take priority over civil matters. Based on the current backlog of cases and the nature of this case, a jury will not be available resolve this matter for at least another year even under the most optimistic view of the docket. Thus, the Court is confident that, if its Order is immediately appealed, the supreme court can resolve this issue in a timely manner and the appeal will not affect the scheduling of the jury trial.

[1] Presently, there are two criminal cases scheduled for jury trials during the weeks of May 3 and May 10, 2021.

Fourth, allowing the supreme court to decide this issue before trial eliminates the risk of a retrial should the supreme court conclude that the Court erred in granting the defendants' motion for summary judgment. This could potentially preserve the Court's limited resources as well as eliminate the need for a costly and time-consuming second trial. See generally Bartholomew v. Wis. Patients Comp. Fund, 717 N.W.2d 216, 242 (Wis. 2006) (recognizing "that medical malpractice cases are very expensive to litigate").

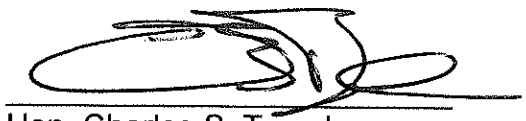
The Court further finds that there is "an absence of any just reason" for delaying the appeal of the plaintiff's bystander NIED claim for largely the same reasons articulated above. Super. Ct. R. 46(c)(1)(D).

Conclusion

For the foregoing reasons, the Court finds that its December 1, 2020 Order granting the defendants' motion for summary judgment and, to the extent necessary, its December 28, 2020 order denying the plaintiff's motion to reconsider, shall be treated as final decisions on the merits pursuant to Rule 46(c). Super. Ct. R. 46(c)(1)(A). This finding extends to the entirety of both orders, as both orders only address one claim—the plaintiff's bystander NIED claim. See Super. Ct. R. 46(c)(1)(B). In light of this ruling, the plaintiff's motion for the Court's signature on his interlocutory appeal statement (Court Index #34) is MOOT.

So ordered.

Date: April 20, 2021



Hon. Charles S. Temple,
Presiding Justice