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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# REPLY BRIEF FOR THE PLAINTIFF

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Jared R. Green, Esquire
(NHBA No. 10000)
ABRAMSON, BROWN & DUGAN
1819 Elm Street
Manchester, NH 03104
(603) 627-1819
jgreen@arbd.com

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### Current New Hampshire Law Properly Limits The Universe Of Valid Bystander Emotional Distress Claims

This Court has recognized that a bystander's freedom from mental distress is an interest worthy of legal protection. In order to balance that important interest with the need to protect against a theoretically unreasonable expansion of liability, New Hampshire law currently includes a number of requirements before a person like Marc Chartier can state a valid cause of action for emotional distress:

(a) a close relationship between the bystander and the victim;

(b) unreasonable conduct by the defendant which must be proven by expert testimony in the medical negligence context;

(c) a causal connection between the defendant's unreasonable conduct and the victim's injury, established by expert testimony in the medical negligence context;

(d) the bystander's presence and contemporaneous perception of the victim being severely injured or killed, as opposed to learning of the injury or death from someone else after it occurred;

(e) expert testimony that the bystander suffered severe emotional distress as a result of his contemporaneous perception of the victim being injured or killed;

(f) expert testimony that the bystander's severe emotional distress is manifested by physical symptoms; and

(g) proof that a reasonable person in the position of the defendant should have reasonably foreseen emotional injury to a bystander.

These existing requirements effectively limit the universe of valid bystander claims. Thus, four of the six bystander claims that have reached this Court have been rejected. There is absolutely no evidence that defendants in this State have been exposed to excessive or unwarranted bystander liability in the four decades since Corso was decided.

**Defendants' Drastic Changes Are Not Necessary**

Despite this, the defendants in this case ask this Court to drastically change New Hampshire law by adding mandatory requirements that: (a) the defendant's negligent conduct must occur simultaneously with the injury-occurring event; and (b) the bystander must have contemporaneously perceived the defendant's negligent conduct when it occurred, and must have been aware that the defendant's conduct was negligent when it occurred.

Neither of these requirements has ever been applied by this Court and both are illogical, arbitrary, and unnecessary. In essence, the defendants are asking this Court to encroach upon the legislative function by imposing new arbitrary restrictions for no reason other than to protect the wealth of negligent, highly-paid, and universally-insured medical care providers at the expense of innocent citizens, like Marc Chartier, who suffer debilitating harm deserving of legal protection through no fault of their own.

**The Passage Of Time Between The Defendant's Negligent Conduct And the Injury-Occurring Event Does Not Rule Out Foreseeability**

First, the defendants ask this Court to affirm the trial judge's reasoning and adopt a rule that bystander emotional distress is only compensable if the defendant's negligence occurred simultaneously with the shocking injury-occurring event witnessed by the bystander. While this Court mentioned the temporal connection between the defendant's negligent act and the resulting injury in dicta in three early cases, it has never applied a mandatory rule requiring the defendant's negligence and the bystander's emotional harm to occur simultaneously like the trial court did

in this case. The defendants now advocate for this Court to adopt this simultaneous temporal requirement as a stand-alone rule of law that would deny recovery whenever there is any delay between the defendant's negligence and the shocking event that the bystander perceived. The Court should decline this invitation.[1]

The reason why this Court has never actually required a close connection between the defendant's negligence and the shocking event is that such a connection is not necessary to make bystander emotional distress foreseeable to the defendant. In fact, the passage of time between negligence and injury only detracts from foreseeability when something so unusual occurs after the negligence as to render the outcome incapable of having being expected. C.f. Reid v. Spadone Mach. Co., 119 N.H. 457, 465 (1979) (superseding event only breaks the chain of causation when it was not reasonably foreseeable).

[1] One commentator has stated that "no need exists to require a time element in the evaluation of the plaintiff's observation." Burley, "CASE COMMENT: Dillon Revisited: Toward a Better Paradigm for Bystander Cases," 43 Ohio St. L.J. 931, 943 (Fall 1982).

If New Hampshire law required the injury to be simultaneous with the defendant's negligence, this Court would have said so in cases where time passed between the negligence and the injury, such as Nutter (malpractice), Wilder (claim against city); and O'Donnell (malpractice).

The most that can accurately be said is that, in some rare circumstances, the temporal connection between negligence and injury may be a relevant factor on the matter of foreseeability, but only where there is evidence of an unusual intervening event. Otherwise, if the resulting injury occurs in the manner that should have been expected by the defendant, the passage of time has no bearing on foreseeability, much less rules it out entirely. In this case, nothing unusual happened during the time that passed between the defendants' negligent acts (recklessly assuring Lisa that she did not have a clot) and Lisa's final event to make what happened unforeseeable.[2]

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[2] The most important fact establishing foreseeability in this case is the defendants' pre-existing awareness that their patient was married to Marc and that he had a keen interest in her well-being, having accompanied her to all three of their post-operative visits. According to one commentator, a pre-existing relationship strongly supports a finding of foreseeability. "This prior contact is crucial because it allows a defendant to foresee that particular conduct may emotionally harm a particular plaintiff, and because this foreseeability allows the defendant to constrain his or her behavior to avoid inflicting

**A Rule Requiring The Bystander To Be Present For And Aware Of The Nature Of The Defendant's Negligence Is Illogical And Unnecessary**

The defendants' only other argument is that this Court should impose a new requirement barring recovery unless the bystander is present for the defendant's negligent conduct and aware at that time that the conduct is negligent. Contrary to the defendants' assertion, this Court's use of the word "accident" in Corso and subsequent cases does not support the imposition of this rule.[3]

As an initial matter, the defense offers no logical explanation for why the Court would use the word "accident" when it really meant "negligent conduct." Moreover, why would the Court refer ***separately*** to the "accident" and the defendant's negligent conduct in Corso if those

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distress on that plaintiff." Appleberry, "NOTES AND COMMENTS: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: A FOCUS ON RELATIONSHIPS," 21 Am. J. L. and Med. 301, 313 (1995) (footnotes omitted).

[3] The plaintiff's opening brief explains in detail why the word "accident" really means the injury-occurring event, such as the seventy minute period on January 17 when Lisa's undiagnosed clot progressed to a pulmonary embolism and caused her excruciating death.

words were interchangeable? The two words mean very different things and it would be incredibly imprecise to use them interchangeably.

If this Court intended for the words to be interchangeable that would mean that New Hampshire law requires a bystander to contemporaneously perceive the defendant's negligence in order to state a valid emotional distress claim. That has never been true. If it were, the Corsos' claims necessarily would have been rejected because they could not possibly have perceived the defendant's negligent conduct or recognized it as such, since all they heard was a thump outside their house.

Similarly, if this Court intended "accident" to mean negligence in this context it would have said so in subsequent cases where the bystanders did not perceive any negligence when it occurred, such as Nutter, Wilder, and O'Donnell.

The real reason why this Court has not treated "accident" as synonymous with "negligence" is that it simply does not matter whether the bystander knew that the horrific, shocking event he or she was perceiving was caused by negligence. This Court has repeatedly recognized that compensable emotional distress arises from perceiving a loved one being

injured in a shocking event, ***not*** from anger or some other emotional reaction from the knowledge that the injury was caused by the defendant's negligence. Corso, 119 N.H. at 659; Nutter, 124 N.H. at 795; Wilder, 131 N.H. at 603.

Since there is no logical basis for equating "accident" with negligence and thereby denying recovery unless the bystander is aware of the defendant's negligence as it is occurring, the defendants' proposed change is both unnecessary and arbitrary, like the rule this Court expressly rejected in Graves, 149 N.H. at 208 (rejecting as arbitrary a bright-line foreseeability rule adopted by the California Supreme Court because doing so "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.").

The rule sought by the defense is purely arbitrary, like the California rule rejected in Graves, because it does not serve the fundamental issue of foreseeability. Nor is it justified as a means of preventing unlimited liability as one commentator has observed:

> The only justification for requiring that the plaintiff observe the tortious act is to limit the number of potential plaintiffs. This rule excludes a wide spectrum of claims in which the act is not observed in any manner, or worse, is nonobservable. A limitation on the number of cases can be achieved by erecting distinctions that have more merit than the act-result dichotomy .[4]

Another commentator has explained that the contemporaneous perception of negligence requirement "serves no purpose (other than to arbitrarily restrict the sheer number of potential plaintiffs) . . . The requirement is unrelated to the validity and severity of a plaintiff's emotional harm and draws the line between valid and invalid claims on fortuitous factual circumstances . . ." Appleberry, 21 Am. J. L. and Med. at 322.[5]

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[4] Burley, 43 Ohio St. L.J. at 945 (footnotes omitted).

[5] Another commentator agrees: "The rigid application of the observation requirement, especially in medical malpractice omission cases, has resulted in arbitrary application of the law." Kaplan, "TORTS - Negligent Infliction of Emotional Distress and Bystander Recovery in Medical Malpractice Omissions - *Love v. Cramer*, 606 A.2d 1175 (Pa. Super. Ct. 1982)," 66 Temp. L. Review 643, 643 (Summer, 1993).

This Court's rejection of a California foreseeability rule as arbitrary in Graves, and its subsequent reiteration of the importance of flexibility in St. Onge, 154 N.H. at 770, disposes of the defense argument here that this Court should adopt California's post-Dillon requirement that the bystander must perceive and appreciate the nature of the defendant's negligent conduct. The only rational explanation for such a rule in California or elsewhere is that conditions must be markedly different in those states than they are in New Hampshire.

The adoption of such an illogical, arbitrary restriction here would only be justified if there were clear evidence of an extraordinary crisis that can only be solved by taking money out of a deserving and innocent bystander's pocket and adding it to the existing wealth of the negligent medical care provider or her insurance carrier.

The defendants in this case have offered no evidence of a crisis in New Hampshire. Despite a seemingly favorable legislative landscape, it has been decades since significant malpractice reform has even been on the General Court's docket, and more than forty years since this Court had to

reign in the legislature's overreaching malpractice reform in Carson v. Maurer, 120 N.H. 925 (1980).

Health care providers simply do not need additional protection in this State. Even if they did, bystander emotional distress is so rare and so obviously secondary to the direct harm suffered by the patient that it represents only a small portion of a health care provider's possible liability and it would be an odd place to turn for meaningful relief.

Moreover, the non-economic justifications offered by other courts and relied upon by the defense are not persuasive under the current state of New Hampshire's bystander emotional distress law.

For instance, the defense suggests that arbitrary restrictions on bystander recovery in New Hampshire are necessary to distinguish between distress caused by the ultimate outcome (injury or death) and distress caused by the defendant's conduct. Defs' Brief at 18; 41; 42-45 (quoting Squeo Norwalk Hospital Ass'n, 113 A.3d 932 (Conn. 2015)).

Whatever may be true in Connecticut and the other states cited by the defense, this problem does not exist in New Hampshire because bystander emotional distress is only compensable if it arises from proven negligent

conduct. See Corso, 119 N.H. at 658 ("Recovery 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.***") (emphasis added). Nor is there any evidence that, in the forty-three years since Corso, New Hampshire judges and juries have had trouble distinguishing between compensable emotional distress resulting from negligence and non-compensable emotional distress resulting from natural conditions.

One commentator has rejected the defendants' argument for these very reasons:

> The right to recover does not arise simply because one person caused another emotional distress. Rather, that distress must arise from conduct that rises to a culpable level, or falls below the norm in some way. It is simply not true that, if courts allow recovery for NIED generally, defendants will be liable every time they cause emotional distress.[6]

Next, the defense asserts that arbitrary restrictions are necessary because there is a manifest difference in misdiagnosis cases between observing or perceiving conduct alleged to have caused harm and the

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[6] Appleberry, 21 Am. J. L. and Med. at 313.

subsequent harm alleged to have resulted from that conduct. Defs' Brief at 19. The simple answer to this argument is that Marc Chartier is not seeking damages for distress attributed to an awareness that the defendants acted negligently, nor could he under current New Hampshire law. Rather, he is seeking damages for the distress he suffered because he watched his wife die, an event that occurred only because of the defendants' negligence. This is precisely what led to the holding in Corso.

The defense goes on to argue that its arbitrary restrictions are necessary to prevent "unwarranted and expansive medical provider liability to non-patients." Defs' Brief at 24. Similarly, the defense later claims that its restrictions are consistent with "the general reluctance to enlarge the common law to extend the duty of healthcare providers to non-patients." Id. at 41.

The defense does not cite any authority in support of such a general reluctance. Indeed, this Court has consistently permitted non-patients to sue for malpractice for over a hundred and twenty years. See Edwards v. Lamb, 69 N.H. 599 (1899) (wife of patient); Hewett v. Woman's Hospital Aid Association, 73 N.H. 556 (1906) (student nurse); Powell v. Catholic

Medical Center, 145 N.H. 7, 15 (2000) (phlebotomist injured by patient). Nor has New Hampshire's medical injury statute, R.S.A. 507-E, ever limited malpractice lawsuits to patients only.

The defense next argues that its arbitrary restrictions are necessary because "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." Defs' Brief at 42. Yet the defense does not offer any evidence that the relatively rare possibility of bystander emotional distress liability is actually causing health care providers in New Hampshire to divert their attention to accommodate the sensitivities of non-patients, and that seems counterintuitive at best. After all, how could a health care provider avoid bystander liability by accommodating the sensitivities of her patient's close relatives? The best way to avoid bystander liability would be to provide reasonable care to the patient.

**The Plaintiff Is Still Entitled To Recover Even If The Court Adopts Some Of The Defendants' Drastic Changes**

Even if this Court were to impose a requirement that the bystander must be aware of the defendant's negligence when he or she perceives the shocking injury-occurring event[7], Marc Chartier can still state a valid claim. Marc was aware when he watched his wife die that she was dying from a blood clot because a hospital provider told him so, Apx. at 68; Apx. at 245, ¶52, and he knew that each of the defendants had mistakenly told her she did not have a clot. Apx. at 157, ¶34; Apx. at 241-42, ¶41 and ¶42; Apx. at 220, ¶14; Apx. at 262-63. Therefore, Marc contemporaneously perceived, when he was watching Lisa die, that the defendants had acted negligently and that her death was being caused by the defendants' negligence.

**Conclusion**

This Court should reverse the trial court's order granting partial summary judgment to the defendants and continue to apply existing New

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[7] Some jurisdictions apply a rule whereby "[a] plaintiff could . . . satisfy the observation requirement by showing that she observed the traumatic consequences of a doctor's negligence to a loved one, and was contemporaneously aware that the consequences were the result of that same negligence." Kaplan, 66 Temp. L. Rev. at 658 (footnote omitted).

Hampshire law. It should also clarify for those trial judges who believe otherwise that: (a) the injury observed by a bystander need not occur simultaneously with the defendant's negligent conduct; and (b) that the accident that a bystander needs to perceive is the injury-occurring event, so that a bystander need not be aware that the defendant's conduct was negligent when he or she observes the injury producing event.

## 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.

## CERTIFICATION PURSUANT TO SUPREME COURT RULE 26(7)

I hereby certify that the foregoing reply brief complies with the 3,000 word limitation (exclusive of table of contents and table of authorities) in Supreme Court Rule 16(11).

Respectfully submitted,

Marc Chartier

By His Attorneys:

ABRAMSON, BROWN & DUGAN

DATED: January 18, 2022 By: /s/ Jared R. Green

Jared R. Green, Esquire
(NHBA No. 10000)
1819 Elm Street
Manchester, NH 03104
(603) 627-1819
jgreen@arbd.com