IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CT-561

K.G., by her Parent and Next Friend, Melody Ruch, and Melody Ruch, Individually,
Appellants (Plaintiffs below)

–v–

Morgan Smith, New Augusta North Public Academy, and Metropolitan School District of Pike Township,
Appellees (Defendants below).

Argued: September 16, 2021 | Decided: December 22, 2021

Appeal from the Marion Superior Court,
No. 49D02-1908-CT-34744
The Honorable Timothy Oakes, Judge

On Petition to Transfer from the Indiana Court of Appeals,
No. 20A-CT-1802

Opinion by Justice Goff

Chief Justice Rush and Justice David concur.
Justice Slaughter dissents with separate opinion in which Justice Massa joins.

Goff, Justice.

Our existing common-law rules permit the recovery of damages for the negligent infliction of emotional distress only in three circumstances: The impact rule applies when the plaintiff suffered a direct physical impact resulting in physical injury. The modified-impact rule applies when the plaintiff suffered a direct physical impact and the defendant's negligence resulted in the injury or death of a third party. Finally, the bystander rule applies when the plaintiff witnessed a relative's death or severe injury or viewed the immediate aftermath of the incident.

This case requires us to examine the limitations imposed by these rules and to determine whether a narrow expansion of our common law is required to do justice and to meet the reasonable expectations of the millions of Hoosiers governed by our legal system. We conclude that it is. We thus hold that, when a caretaker assumes responsibility for a child, and when that caretaker owes a duty of care to the child's parent or guardian, a claim against the caretaker for the negligent infliction of emotional distress may proceed when the parent or guardian later discovers, with irrefutable certainty, that the caretaker sexually abused that child and when that abuse severely impacted the parent or guardian's emotional health.

Because Ruch has satisfied the elements of this rule, and while the trial court issued its decision without the benefit of our new test, we hold that summary judgment is improper for the School on Ruch's emotional-distress claim. We also hold that the trial court improperly dismissed Ruch's individual claim for economic damages. We therefore remand this case for further proceedings consistent with this opinion.

Facts and Procedural History

Melody Ruch gave birth to her daughter, K.G., on August 22, 2004. K.G. is blind, nonverbal, limited in her mobility, and unable to communicate reciprocally—the result of various congenital disorders, including cerebral palsy, quadriplegia, epilepsy, and microcephaly. To accommodate these disabilities, K.G. attended the New Augusta North Public Academy in

Pike Township, where she received instructional and special-needs services. These services included regular diaper changes by one of the School's instructional assistants, Morgan Smith.

At some point between October 2015 and January 2016, Smith sexually abused K.G. while changing her diaper. Around this time, K.G. started suffering from sleeplessness and night terrors and she became combative toward her caregivers. Ruch noticed these changes in K.G.'s demeanor but never learned of the sexual-abuse incident until April 2018, when Smith confessed to her actions. Smith eventually pled guilty to level-3 felony child molesting, a crime for which she received a sentence of thirteen years in prison, all suspended to probation.

In August 2019, Ruch, individually and in her capacity as parent and next friend of K.G., sued Smith, the school, and the Metropolitan School District of Pike Township (collectively, the School). In her individual capacity, Ruch alleged that she suffered emotional distress as a result of the sexual abuse to K.G., ultimately compromising her ability to care for her daughter at home and forcing her to incur expenses for K.G.'s placement in a chronic-care facility. The School moved for summary judgment on Ruch's individual claims, arguing that Ruch's failure to satisfy either the modified-impact rule or the bystander rule precluded her from recovering for emotional distress. While conceding that her claim met neither of those rules, Ruch asked the court to fashion a "bright line rule" allowing her to recover damages for emotional injury under the "unique circumstances" of the case. App. Vol. 2, pp. 73, 76, 77. With no hearing, the trial court ruled for the School, dismissing all claims raised by Ruch in her individual capacity.

The Court of Appeals affirmed in part and reversed in part. *K.G. by Next Friend Ruch v. Smith*, 164 N.E.3d 829, 834 (Ind. Ct. App. 2021). On Ruch's emotional-distress claim, the panel, while recognizing incremental change in our common law, "decline[d] to expand a tortfeasor's liability for the [negligent] infliction of emotional distress beyond the traditional impact rule, the modified impact rule, and the bystander rule." *Id.* at 832. The panel reversed on the issue of economic damages related to K.G.'s placement and long-term care, concluding that the School moved for

summary judgment only on Ruch's claim for emotional damages. *Id.* at 834.

After reviewing the parties' briefs and hearing oral argument, we now grant transfer, vacating the Court of Appeals decision. *See* Ind. Appellate Rule 58(A).

Standard of Review

This Court reviews a grant of summary judgment de novo. *G&G Oil Co. of Indiana, Inc. v. Continental Western Insurance Co.*, 165 N.E.3d 82, 86 (Ind. 2021). We "resolve all questions and view all evidence in the light most favorable to the non-moving party." *Id.* (quotation marks omitted). Summary judgment is appropriate only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

Discussion and Decision

There's no dispute here that Ruch's emotional-distress claim falls beyond the confines of our modified-impact and bystander rules. The issue, as Ruch frames it, is whether we should broaden our jurisprudence by devising a "bright-line rule" to permit a damages claim "limited to the specific facts presented in this case." Appellant's Br. at 9. To limit emotional-distress claims to our existing legal framework, she contends, "imposes an impossible condition on [her] access to the courts and pursuit of a tort remedy." Pet. to Trans. at 8. The School, of course, rejects the idea of expanding tortfeasor liability for the negligent infliction of emotional distress beyond our traditional rules. To "carve out an exception for parents of children who have been sexually molested," the School insists, would "open the floodgates to claims" of a similar nature. Appellees' Br. at 11.

We agree with Ruch that the extraordinary circumstances here warrant a proper remedy. In reaching this conclusion, we begin our discussion by

examining the evolution of our common-law rules governing emotional-distress claims and the policy reasons behind those rules. *See* Pt. I, *infra.* We then go on to explain why the circumstances here compel further, albeit limited, change and why our narrow rule implicates no public-policy concerns. *See* Pt. II, *infra.* We then apply our new rule to Ruch's claim, concluding that she satisfies the elements of our test. *See* Pt. III, *infra.* Finally, as a separate issue, we address—and ultimately reject—the School's argument that Ruch failed to properly plead her claim for economic damages. *See* Pt. IV, *infra.*

I. Our common-law rules governing claims for the negligent infliction of emotional distress reflect a jurisprudence of incremental change.

Nationally, state courts have adopted a variety of tests to evaluate the merits of an emotional-distress claim. These tests may follow the impact rule, the modified-impact rule, the foreseeability rule, the zone-of-danger rule, or some other "bright line" rule. *Ritchhart v. Indianapolis Pub. Sch.*, 812 N.E.2d 189, 192 (Ind. Ct. App. 2004).

A. The Impact Rule

In 1897, Indiana adopted the most restrictive of these alternatives: the impact rule. In *Kalen v. Terre Haute & Indianapolis Railroad Co.*, the plaintiff, travelling in a horse-drawn buggy with her husband and infant child, came to a stop at the railroad tracks. 18 Ind. App. 202, 203, 47 N.E. 694, 694–95 (1897). As they proceeded to cross the tracks, the railroad watchman inadvertently lowered the gate, striking the buggy, frightening the horse into a frantic gallop, and drawing the family down the road "at a great and dangerous speed." *Id.* at 203, 47 N.E. at 695. Kalen sued the railroad company, seeking damages for "severe nervous shock" and "great mental pain and anxiety." *Id.* at 204, 47 N.E. at 695.

While careful to avoid suggesting that the plaintiff's injuries were "imaginary or conjectural," the Appellate Court of Indiana ultimately

rejected her claim. *Id.* at 213, 47 N.E. at 697. In so ruling, the court—upon surveying the "great variety and contrariety [of] views taken upon the subject" in other states—formally adopted the "general doctrine that mental suffering alone, not accompanied by any physical injury, cannot be the foundation for the recovery of damages." *Id.* at 206, 209, 47 N.E. at 695, 696. To permit recovery for "nervous injuries" alone opens the door to "opportunities for simulation very difficult to be dealt with," the court explained, "and considerations of policy may well disallow any claim in respect of injury purely subjective." *Id.* at 210, 47 N.E. at 697. But "[w]hen the physical frame is visibly affected," the court added, "considerations of this kind are no longer paramount." *Id.* What's more, the court reasoned, without such a physical impact, the courts "would be given to increase of litigation" with "much danger of frequent injustice." *Id.* at 213, 47 N.E. at 698.

Indiana's impact rule, applicable to claims of both negligent and intentional infliction of emotional distress, stood undisturbed for well over a century. *Little v. Williamson*, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982); *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991).

B. The Modified-Impact Rule

In 1991, this Court decided two cases that altered the course of our jurisprudence. The first of these two cases, *Cullison v. Medley*, involved the intentional variation of the tort. 570 N.E.2d 27, 30 (Ind. 1991). In disposing of the impact rule to permit recovery for emotional distress "sustained in the course of a tortious trespass," the Court "conclude[d] that the rationale for this rule, whatever its historical foundation, is no longer valid." *Id.* "The mere fact of a physical injury, however minor," the Court reasoned, "does not make mental distress damages any less speculative, subject to exaggeration, or likely to lead to fictitious claims." *Id.* Finding a jury no less "qualified to judge someone's emotional injury" than "to judge someone's pain and suffering or future pain and suffering," the Court concluded, "and the presence or absence of some physical injury does nothing to alleviate the jury's burden in deciding whether the elements of mental suffering are present." *Id.*

Less than six months later, this Court found "no reason under [the] appropriate circumstances to refrain from extending" the rule in *Cullison* to cases "where the distress is the result of a physical injury negligently inflicted on another." *Shuamber*, 579 N.E.2d at 455. *Shuamber* involved a mother and daughter who suffered physical injuries from a car accident in which an immediate relative died. *Id.* at 453. The survivors sued, seeking to recover for their mental anguish, not based on emotional trauma resulting from their own physical injuries, but, rather, "as a result of observing a member of their immediate family sustain mortal injuries in an automobile collision." *Id.* The defendant moved for partial summary judgment on grounds that, under the factual circumstances there, Indiana recognized no right of recovery for the negligent infliction of emotional distress. *Id.* The trial court agreed, and the Court of Appeals affirmed. *Id.* at 453–54.

In reversing summary judgment, this Court deemed the traditional policy concerns behind the impact rule—avoiding excessive litigation, preventing fraudulent claims, and ensuring causality—as "no longer valid" in claims involving the negligent infliction of emotional distress. *Id.* at 455. Under the Court's new modified-impact rule, a plaintiff may recover damages when he or she, having suffered no physical injury, "sustains a direct impact by the negligence of another and," because "of that direct involvement sustains an emotional trauma" serious enough to affect a "reasonable person." *Id.* at 456. The modified rule still requires "direct physical impact," we clarified in a subsequent opinion, but "the impact need not cause a physical injury to the plaintiff and the emotional trauma suffered by the plaintiff need not result from a physical injury caused by the impact." *Conder v. Wood*, 716 N.E.2d 432, 434 (Ind. 1999).

C. The Bystander Rule

Almost a decade after our decision in *Shuamber*, this Court expanded the modified-impact rule by permitting, under certain circumstances, a bystander to recover for emotional trauma even in the absence of direct impact. In *Groves v. Taylor*, an eight-year-old girl witnessed her younger brother's body roll off the highway after the defendant's vehicle had

struck the boy. 729 N.E.2d 569, 571 (Ind. 2000). In her wrongful-death claim, the girl, along with her parents as next friends, alleged emotional distress from having witnessed the accident. *Id.* Defendants argued that *Shuamber* precluded the plaintiff's claim because she suffered no "direct physical impact as a result of the accident involving her brother." *Id.* The trial court agreed, and the Court of Appeals affirmed. *Id.*

On transfer, we acknowledged that the plaintiff suffered no direct impact, as *Shuamber* required, to recover as a bystander for emotional distress. *Id.* at 572. But given the rationale for the modified-impact rule is to prevent spurious claims, we reasoned, "logic dictates that there may well be circumstances" in which the plaintiff, while having sustained no direct impact, "is sufficiently directly involved" in the traumatizing event to raise a legitimate claim. *Id.* We went on to identify an alternate basis, consisting of three factors, for distinguishing a legitimate claim of emotional distress from a spurious one: (1) serious injury or death to the victim; (2) a close familial relationship between the victim and the plaintiff; and (3) direct observation of the incident, or its immediate "gruesome aftermath," rather than learning of it by indirect means. *Id.* at 572–73 (citing *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 444–45 (Wis. 1994)). Based on these factors, we held, a bystander may show "direct involvement" in a traumatizing incident by proving that he or she "actually witnessed or came on the scene soon after the death or severe injury" to "a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tort[i]ous conduct." *Id.* at 573.

In *Smith v. Toney*, this Court, responding to a federal certified question, considered whether the proximity requirement under *Groves* was "a matter of time alone or also of circumstances."[1] 862 N.E.2d 656, 658, 662 (Ind. 2007). In *Toney*, the plaintiff's fiancée died after colliding with the defendant's vehicle. *Id.* at 658. The plaintiff, unable to reach her fiancée,

[1] The Court also considered whether, under *Groves*, a fiancée qualified as a relationship analogous to a spouse. 862 N.E.2d at 660. The Court held that it did not. *Id.*

unwittingly passed the scene of the accident while driving and observed the wreckage less than ten minutes after the emergency-response team had left with the fiancée's body. *Id.* The plaintiff, who neither stopped at the scene nor recalled seeing the body, learned of the death about an hour later when she learned of it indirectly from her fiancée's family. *Id.*

In its analysis, the *Toney* Court focused its discussion on *Bowen*, a Wisconsin decision from which the *Groves* bystander rule emerged. *Bowen*, the *Toney* Court observed, permitted "recovery only by claimants who witnessed the accident or experienced the 'gruesome aftermath' of the accident 'minutes' after the accident occurred." *Id.* at 662 (quoting *Bowen*, 517 N.W.2d at 445). This proximity requirement, the *Toney* Court ultimately held, is both "temporal" and "circumstantial." *Id.* at 663. The temporal element requires the plaintiff to have witnessed the injury "at or immediately following the incident." *Id.* The circumstantial element applies if the plaintiff arrives immediately after the incident, in which case the scene "must be essentially as it was at the time of the incident, the victim must be in essentially the same condition," and the plaintiff "must not have been informed of the incident before coming upon the scene." *Id.* Because any person may learn of a traumatic event indirectly, the Court explained, the proximity requirement places reasonable limits on a defendant's liability and ensures that claims are genuine. *Id.*

We applied the proximity requirement in *Clifton v. McCammack*. In that case, a father, after viewing a news story about a nearby fatal car crash, drove to the scene of the accident, fearing his son was involved. 43 N.E.3d 213, 215 (Ind. 2015). By the time the father had arrived, the unsuccessful resuscitation efforts had ended, and emergency responders had removed and covered the son's body, obscuring any signs of physical injury. *Id.* "Given these undisputed facts," we held that the father, "despite his undoubtedly genuine grief and shock," could not, as a matter of law, recover for his emotional-distress claim under Indiana's bystander rule "because none of the three circumstantial factors were met." *Id.* This rule, we reasoned, "strikes the appropriate balance between allowing authentic claims to proceed" while limiting "open-ended liability, fraudulent claims, and the ubiquity of this type of injury." *Id.* at 220. While acknowledging that this Court has, over the years, "expanded the class of persons who

may seek emotional distress recovery," we ultimately decided that "any further expansion would be too likely to raise the amalgam of policy problems we seek to avoid." *Id.*

II. In some cases of child sexual abuse, a parent or guardian need not show proximity to the tortious act to raise an emotional-distress claim.

Each of the cases discussed above share a common factual trait: the commission of a violent tort in open view, directly observable by the plaintiff (whether the victim or the bystander) either when it occurs or soon after.

By contrast, the type of injury inflicted here—the sexual molestation of a child—typically occurs under a shroud of secrecy. *See Steward v. State*, 652 N.E.2d 490, 492 (Ind. 1995). And because the injury often remains hidden through "affirmative acts of concealment," *Sloan v. State*, 947 N.E.2d 917, 921 (Ind. 2011), rarely—if ever—will a bystander witness the harm or stumble upon its "gruesome aftermath." Still, this lack of proximity to the tortious act in no way reduces a parent or guardian's shock of learning of the traumatic event. To the contrary, most everyone would agree that the "emotional trauma" experienced by a parent or guardian upon discovering that abuse—even indirectly—is so "compelling as to warrant compensation." *See Groves*, 729 N.E.2d at 573.

Considering the "extraordinary circumstances surrounding the plaintiff's discovery of the injury," *Bowen*, 517 N.W.2d at 445, and considering the remedial limitations imposed by our existing legal framework, justice compels us to fashion a rule permitting a claim for damages limited to circumstances like those presented here. Under that rule, when a caretaker assumes responsibility for a child, and when that caretaker owes a duty of care to the child's parent or guardian, a claim against the caretaker for the negligent infliction of emotional distress may proceed when the parent or guardian later discovers, with irrefutable certainty, that the caretaker sexually abused that child and when that abuse severely impacted the parent or guardian's emotional health.

A. Our narrow rule includes sufficient protections against spurious claims and open-ended liability.

Sometimes, a "court may decide, as a matter of law, that considerations of public policy require dismissal of the claim." *Toney*, 862 N.E.2d at 659. (quotation marks omitted). Other times, we may come to the opposite conclusion. *See id.* Either way, public-policy considerations are "an aspect of legal cause," the application of which "is a function *solely* of the court." *Id.* (quotation marks omitted).

Our carve-out exception to the bystander rule's proximity requirement, we believe, includes sufficient protections against the public-policy concerns underlying an emotional-distress claim: spurious claims and open-ended liability. Of course, the "plaintiff's proximity to the tortious conduct **could** serve to authenticate the plaintiff's claim of emotional distress." *Bowen*, 517 N.W.2d at 438 (emphasis added). But, under circumstances like those present here, we decline to impose it as a prerequisite to recovery for such claims.

To begin with, our rule today either meets or exceeds the first two requirements identified in *Groves*: (1) serious injury to the victim[2] and (2) a close familial relationship between the victim and the plaintiff. *See* 729 N.E.2d at 572–73. Few would question whether the sexual abuse of a child

[2] Our bystander rule contemplates the degree or severity of physical injury to the victim. *See Groves*, 729 N.E.2d at 572–73 (noting that, while a "fatal injury or a physical injury that a reasonable person would view as serious can be expected to cause severe distress to a bystander," a "[l]ess serious" harm "would not ordinarily result in severe emotional distress" to a person of "average sensitivity"). But we decline to require a similar balancing of harm to the child-victim in our rule today. The harm inflicted on the child-victim of sexual abuse is difficult to measure and may not become apparent for years—or even decades—following the offense. *See* Jodi Leibowitz, *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse*, 25 Cardozo L. Rev. 907, 937 (2003) (observing that "victims of child sexual abuse may suppress memories of the trauma for many years"). *See also* Ind. Code §§ 35-41-4-2(a), (e) (extending the limitation period for prosecuting the crime of child molesting from five years after the commission of the crime to any date before the alleged victim's thirty-first birthday). Therefore, to the extent that it can be quantified, the degree or severity of injury to the child, in our opinion, is better suited to the issue of damages than it is to whether an emotional-distress claim may proceed to begin with.

injures that child. Indeed, our statutory law reflects this normative consensus. *See, e.g.*, Ind. Code § 35-42-4-3 (criminalizing child molestation). And by limiting the class of potential plaintiffs to parents and guardians, specifically those with an established and loving relationship with their child, our rule ensures a comparatively greater degree of direct involvement to help "distinguish legitimate claims from the mere spurious." *Cf. Groves*, 729 N.E.2d at 573 (expanding the class of potential plaintiffs to a spouse, parent, child, grandparent, grandchild, sibling, or other person with an "analogous" relationship).

Second, just as we've limited the class of potential plaintiffs, our carve-out rule restricts the universe of tortfeasors. A parent or guardian's claim for the negligent infliction of emotional distress may proceed only against those with a duty of care to the child's parent or guardian, ensuring protection against open-ended liability.

Third, our test requires irrefutable certainty of the tort's commission. Irrefutable certainty entails more than just a third-party revelation of the sexual abuse to the child's parent or guardian; it requires an admission to the abuse by the caretaker to a person of authority, a finding of abuse by a judge, or the caretaker's conviction for the abuse.

Finally, the discovery of the sexual abuse must have severely impacted the parent or guardian's mental health. Evidence of severe impact may include mental-health treatment from a medical or psychiatric professional, a lack of basic day-to-day functioning, or dramatic changes to the parent or guardian's demeanor toward family and friends.

As an added layer of protection against potentially specious claims, we consider our juries "equally qualified to judge someone's emotional injury as they are to judge someone's pain and suffering or future pain and suffering," and the absence of a parent's physical proximity to the scene of the incident "does nothing to alleviate the jury's burden in deciding whether the elements of mental suffering are present." *See Cullison*, 570 N.E.2d at 30.

Taken together, these factors, we believe, form a reliable "alternate basis for distinguishing legitimate claims of emotional distress from the mere spurious." *See Groves*, 729 N.E.2d at 572.

B. Our narrow rule follows the measured growth of our common law and trails a path charted by other states.

Because our rules governing claims for the negligent infliction of emotional distress have evolved from the common law, we consider it "fully within this Court's authority and responsibility to alter the rule[s]" when circumstances so require. *Shuamber*, 579 N.E.2d at 456. Indeed, the common law "should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Gunderson v. State, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1188 (Ind. 2018) (internal citation and quotation marks omitted).

This is a process of incremental change, as our discussion above illustrates. In some cases, we've determined "that we should not change or further expand our precedent." *Clifton*, 43 N.E.3d at 219. But in other cases, the circumstances lead us to conclude that a "rule needs to be re-examined." *Shuamber*, 579 N.E.2d at 455. Our decision today follows this latter path. By carving out an exception to the bystander rule, we adapt our common law "to the conditions of the present so that the ends of justice may be reached." *Liggett & Myers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 430, 194 N.E. 206, 210 (1935).

Beyond our common-law authority to modify a rule, we may look to "whether the rule has been accepted, acted on, and acquiesced in by other courts." *See* Bryan A. Garner et al., The Law of Judicial Precedent 406 (2016). *See, e.g.*, *Kalen*, 18 Ind. App. at 206, 47 N.E. at 695 (looking to other jurisdictions in adopting the impact rule); *Shuamber*, 579 N.E.2d at 455 n.1. (applying the same method in modifying the impact rule); *Groves*, 729 N.E.2d at 572 (drawing on Wisconsin precedent in adopting the bystander rule).

Indiana isn't the first state to eliminate the proximity requirement in emotional-distress claims involving the sexual abuse of a child.

In *Croft by Croft v. Wicker*, the Supreme Court of Alaska held that the parents of a fourteen-year-old girl raised a valid emotional-distress claim where the defendant sexually molested their daughter near their home, though not within their view, and they witnessed her severe distress soon after the incident. 737 P.2d 789, 790, 792 (Alaska 1987). While the plaintiffs in that case would arguably satisfy the temporal element of our bystander rule's proximity requirement, the *Wicker* Court acknowledged that the need for "sensory and contemporaneous observance" of the incident "is not a rigid requirement." *Id.* at 791 (internal citation and quotation marks omitted).

In *Bishop v. Callais*, the plaintiffs sought damages for emotional distress after their minor son endured sexual abuse "while confined at defendants' facility" for psychiatric treatment. 533 So. 2d 121, 121 (La. Ct. App. 1988). Finding it "reasonable to conclude that a duty to the parents *may* exist," the court permitted their claim to proceed. *Id.* at 123.

Finally, in *Doe Parents No. 1 v. Department of Education*, the Supreme Court of Hawai'i held that, where a school had negligently permitted one of its teachers to molest several grade-school girls, the parents—despite never having witnessed the abuse—could recover for their emotional harm. 58 P.3d 545, 579 (Haw. 2002), *as amended* (Dec. 5, 2002). A plaintiff may recover on such a claim, the court reasoned, "absent any physical manifestation . . . or actual physical presence within a zone of danger where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 580 (cleaned up).

To be sure, the tide of precedent tends to flow in the opposite direction. *See, e.g.*, *Nancy P. v. D'Amato*, 517 N.E.2d 824, 826 (Mass. 1988) (denying recovery for mother's emotional-distress claim because she "did not learn of the harm inflicted on her daughter until many months after the last incident of sexual abuse"). But at least one decision recognizes a potential exception to the general rule under certain circumstances. In *Maguire v. State*, the Supreme Court of Montana rejected the plaintiff's emotional-

distress claim after her severely autistic daughter had been assaulted and raped, outside of the mother's presence, by an employee of a treatment center. 835 P.2d 755, 757, 762 (Mont. 1992). While recognizing that damages may be "recoverable when the defendant owes a duty of care to the plaintiff," the court concluded that the treatment center had "not assume[d] a duty towards" the mother. *Id.* at 762.

At the end of the day, we acknowledge that most states have refrained from disposing of a proximity requirement. *See generally* D. Gilsinger, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 99 A.L.R.5th 301 (2002) (collecting cases). But, while Indiana often assumes a "cautiously progressive" approach to its law, "more than once the state has taken a road less traveled." David J. Bodenhamer & Randall T. Shepard, *The Narratives and Counternarratives of Indiana Legal History*, 101 Ind. Mag. Hist. 348, 349, 350 (2005).

III. Because Ruch satisfied the elements of our new rule, summary judgment is improper.

To reiterate our new rule, when a caretaker assumes responsibility for a child, and when that caretaker owes a duty of care to the child's parent or guardian, a claim against the caretaker for the negligent infliction of emotional distress may proceed when the parent or guardian later discovers, with irrefutable certainty, that the caretaker sexually abused that child and when that abuse severely impacted the parent or guardian's emotional health. To satisfy this rule, the parent or guardian must show (A) that the tortfeasor had a duty of care to the parent or guardian; (B) that there is irrefutable certainty of the act's commission; (C) that the tortious act is one rarely, if ever, witnessed by the parent or guardian; and (D) that the abuse severely impacted the parent or guardian's emotional health.

Ruch's claim satisfies all four of these requirements.

A. The School owed a duty of care to Ruch.

"When determining a duty's existence for the first time," we often apply the three-part test in *Webb v. Jarvis*. *Doe #1 v. Indiana Dep't of Child Servs.*, 81 N.E.3d 199, 206–07 (Ind. 2017) (citing 575 N.E.2d 992 (Ind. 1991)). This test balances (1) the parties' relationship, (2) the foreseeability of harm, and (3) public policy. *Id.*

Here, the School owed a duty to Ruch as K.G.'s parent.

First, this duty arises from the custodial relationship that a school assumes when a parent, by state mandate, relinquishes control of their child. *See* I.C. § 20-33-2-28 (requiring, with certain exceptions, a parent to "send the parent's child to a public school for the full term"). *See generally* I.C. § 20-25-8-2 (requiring all IPS schools to "develop a written compact among" itself, the student, the student's teachers, and the student's parents outlining the "expectations" for all). This relationship carries significant weight when it comes to ensuring the student's health and safety. *See, e.g.*, I.C. § 20-34-4-3 (imposing on school a duty to notify parents of state immunization requirements); I.C. § 20-34-8-6 (requiring schools to inform the parents of student-athletes of the risk of cardiac arrest); I.C. §§ 20-34-7-2, -3 (requiring schools to inform "parents of student athletes of the nature and risk of concussion and head injury"); I.C. § 20-34-5-16 (permitting a school nurse to assist in carrying out an "individualized health plan" for students with diabetes "only if the parent or legal guardian" agrees).

Second, the harm here was foreseeable. When it comes to foreseeability, "we examine what forces and human conduct should have appeared likely to come on the scene, and we weigh the dangers likely to flow from the challenged conduct in light of these forces and conduct." *Kramer v. Cath. Charities of Diocese of Fort Wayne-S. Bend, Inc.*, 32 N.E.3d 227, 234 (Ind. 2015) (internal citation and quotation marks omitted). "Foreseeability does not mean that the exact hazard or precise consequence should have been foreseen, but it also does not encompass anything that might occur." *Id.* (internal citation and quotation marks omitted). Here, as the primary caregiver responsible for changing K.G.'s diaper, Smith was regularly exposed to K.G.'s genitalia. And because Smith carried out this

responsibility in private and with no supervision, the risk of improper touching was certainly there. *See* I.C. § 20-26-5-10 (requiring schools to "adopt a policy concerning criminal history information for" persons "likely to have direct, ongoing contact with children within the scope of the[ir] employment").

Finally, public-policy considerations weigh heavily in favor of imposing a duty. Beyond the statutory requirements cited above, our Indiana Code, for example, requires schools to conduct an "expanded criminal history check" for their teachers; subjects a caregiver to a level-5 felony offense when his or her neglect "results in bodily injury" to a dependent; requires a person convicted of child molesting to register as a sex offender; and prohibits dissemination of pornographic material to minors. *See* I.C. § 20-28-5-22.1; I.C. § 35-46-1-4; I.C. § 35-42-4-11; I.C. § 35-49-3-3. Based on these (and other) codified social norms, a parent should expect their child to be safe from sexual assault when placed in the care of school officials.

In short, we conclude that—based on the parties' relationship, the foreseeability of sexual molestation, and public-policy considerations—the School owed a duty of care to Ruch. *See Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386–87 (Ind. 2016) (the existence of a duty is a question of law for the courts). Whether the School breached that duty is a question for the trier of fact. *See Rogers v. Martin*, 63 N.E.3d 316, 327 (Ind. 2016).

B. There's irrefutable certainty that the abuse occurred.

Smith, K.G.'s primary caregiver, confessed to the sexual molestation to authorities and later pleaded guilty to level-3 felony child molesting. This evidence is enough to show that the abuse occurred with irrefutable certainty. *See Cox v. Paul*, 828 N.E.2d 907, 911–12 (Ind. 2005) ("The question of the breach of a duty is usually one for the trier of fact," but "if any reasonable jury would conclude that a specific standard of care was or was not breached, the question of breach becomes a question of law for the court.").

C. Smith's sexual abuse of K.G. was hidden from Ruch.

As noted above, the sexual molestation of a child almost always takes place under a shroud of secrecy. *See Steward*, 652 N.E.2d at 492. And because the injury often remains hidden through "affirmative acts of concealment," *Sloan*, 947 N.E.2d at 921, rarely—if ever—will a bystander witness the act or stumble upon it soon after.

This case is no exception. Responsible for changing K.G.'s diapers at school, and while beyond the supervision of Ruch and others, Smith seized the opportunity to exploit her role as primary caretaker. Smith then concealed the sexual molestation for two years. Indeed, because K.G. was unable to communicate the injury to her mother, Ruch would never have learned of the incident had Smith never confessed.

Because this evidence, viewed most favorably to Ruch as the nonmoving party, demonstrates that Smith's sexual abuse of K.G. was hidden from Ruch, it is enough to survive summary judgment.

D. Ruch's discovery of the sexual abuse severely impacted her mental health.

Finally, Ruch testified to having suffered emotional distress from knowing that K.G.—especially with her physical and mental disabilities—had been sexually abused. App. Vol. 2, p. 37. Following periods of erratic behavior from K.G., including sleeplessness and combativeness toward her caregivers at school, Ruch, upon learning of the molestation, sought out counseling because she "was not really functioning as [her] normal self." *Id*. at 64. *Cf. Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 999 (Ind. 2006) (plaintiff acknowledging "that neither he nor his spouse have sought medical or mental health treatment for their mental or emotional distress"). She became angry and would lash out at her children and husband. And even after completing her counseling, Ruch testified, she still struggled to control these emotions.

Because this evidence, taken in the light most favorable to Ruch as the nonmoving party, sufficiently demonstrates that the sexual abuse severely

impacted Ruch's emotional health, it is enough to survive summary judgment.

IV. The trial court improperly dismissed Ruch's individual claim for economic damages.

We must also resolve Ruch's claim for economic damages.

The School argues that Ruch failed to properly plead her "derivative" claim for economic damages. Resp. to Trans. at 9. Citing *Howard County Board of Commissioners v. Lukowiak*, the School insists that such claims must "be separately spelled out and sufficient to put the defendant on notice." *Id. See* 813 N.E.2d 391, 393 (Ind. Ct. App. 2004). Beyond lack of sufficient notice, the School contends that, because Ruch never objected to the School's summary-judgment motion (or its proposed order), which addressed "all claims" she raised individually, Ruch ultimately waived her claim on this issue. Resp. to Trans. at 10.

In response, Ruch argues that she properly pled her claim for economic damages because she specifically claimed those damages in her complaint. Appellant's Reply Br. at 5, 12 (citing App. Vol. 2, p. 17). And by designating herself as a plaintiff in an individual capacity (as well as in her capacity as K.G.'s parent and next friend), her complaint, she asserts, substantially complied with Indiana's notice requirements. *Id.* at 11–12. What's more, Ruch submits, under our summary-judgment standard, the School, as movant, carried the burden of showing the absence of a genuine fact-issue related to her economic-damages claim. *Id.* at 14. The School's failure to make this showing, she contends, relieved her, as the non-movant, of designating contrary evidence for her claim to survive. *Id.*

We agree with Ruch.

To begin with, the issue here centers on the adequacy of Ruch's complaint, not the sufficiency of a tort-claim notice, as in *Lukowiak*. *See* 813 N.E.2d at 393 (holding that plaintiff's tort-claim notice to county was inadequate to permit personal-injury damages in excess of claimed

medical expenses).[3] The latter requires "a short and plain statement [of] the facts on which the claim is based," along with "the circumstances which brought about the loss, the extent of the loss," and "the amount of the damages sought," among other things. *See* I.C. § 34-13-3-10. A complaint, by contrast, must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Ind. Trial Rule 8.

Here, Ruch's complaint for damages alleged that "[s]he has incurred expenses for the placement of [K.G.] in a chronic care facility." App. Vol. 2, p. 17. This statement is sufficiently distinguishable from Ruch's allegation that she "has suffered emotional distress as a result of the sexual abuse of her daughter, and lost the ability to care for her daughter in her home." *See id.* In short, the "operative facts" of her complaint for economic damages sufficiently "compl[y] with the requirements of notice pleading under Indiana Trial Rule 8." *See Eads v. Cmty. Hosp.*, 932 N.E.2d 1239, 1246 (Ind. 2010).

Second, the School's summary-judgment motion and proposed order addressed only Ruch's emotional-distress claim, **not** her claim for economic damages. *See* App. Vol. 2, pp. 8, 22–23. While both the motion and the order referred to "all claims," the School made no effort, as our summary-judgment standard requires, to show the absence of a genuine fact-issue related to her economic-damages claim. *See Gaff v. Indiana-Purdue Univ. of Fort Wayne*, 51 N.E.3d 1163, 1167 (Ind. 2016) (emphasizing that it's the movant's "burden to affirmatively negate the plaintiff's claim" and "not the plaintiff's burden to make a prima facie case").

For these reasons, the trial court improperly dismissed Ruch's individual claim for economic damages.

[3] Even if *Lukowiak* were applicable, this Court has since disapproved of it in holding that, absent a requirement to the contrary under the Indiana Tort Claims Act, the plaintiff need not have listed or described her injuries in her notice to properly raise a personal-injury claim. *City of Indianapolis v. Buschman*, 988 N.E.2d 791, 795 (Ind. 2013).

Conclusion

Because Ruch has satisfied the elements of our new carve-out exception to the bystander rule, and while the trial court issued its decision without the benefit of our new test, we hold that summary judgment is improper for the School on Ruch's emotional-distress claim. We also hold that, because the School's summary-judgment motion addressed only Ruch's emotional-distress claim, the trial court improperly dismissed Ruch's individual claim for economic damages. As a result, we remand this case for further proceedings consistent with this opinion.

Rush, C.J., and David, J., concur.
Slaughter, J., dissents with separate opinion in which Massa, J., joins.

ATTORNEYS FOR APPELLANTS
James H. Young
Young & Young
Indianapolis, Indiana

Amina Anne Thomas
Cohen & Malad, LLP
Indianapolis, Indiana

ATTORNEY FOR APPELLEES
Caren L. Pollack
Pollack Law Firm, P.C.
Carmel, Indiana

Slaughter, J., dissenting.

This heart-rending case illustrates the adage that hard cases make bad law. A mother entrusted her profoundly disabled daughter to a local public school to provide instructional and special-needs services, which included changing the girl's diaper. Though nearly a teenager, the girl is blind, mute, and quadriplegic, and she suffers from cerebral palsy, epilepsy, and microcephaly. Instead of caring for the girl, one of the school's instructional assistants sexually abused her. The assistant eventually pleaded guilty to child molesting, a level-3 felony, and received a suspended sentence. The mother sued the assistant, the school, and the school district on behalf of her daughter and herself. Under prevailing law, the mother's claim for her own emotional-distress damages fails, as the trial and appellate courts correctly held.

Our Court, however, recognizing this hurdle, announces a new rule of law resurrecting the mother's claim. Though our emotional-distress doctrine has evolved over the past 125 years, as the Court recounts, a core principle had remained unchanged throughout that time—until today. That principle required a claimant seeking emotional-distress damages to have witnessed the tortious conduct and resulting injury directly as they occurred or in their immediate aftermath. But this requirement of temporal and physical proximity is missing here. The mother did not observe her daughter's sexual abuse or even learn of it until years later. Thus, the Court must fashion a new rule to revive her claim, but this new rule creates an unequal result. It permits recovery for a mother who did not witness her child's sexual abuse, but denies recovery to a father, whose emotional distress was equally sincere, when his son died in a car accident. See *Clifton v. McCammack*, 43 N.E.3d 213 (Ind. 2015). Because "every person could be expected at some point to learn of the death or serious injury of a loved one through indirect means", *Smith v. Toney*, 862 N.E.2d 656, 663 (Ind. 2007), "[t]here must be a point at which a defendant's exposure to liability for negligent infliction of emotional distress ends", *Clifton*, 43 N.E.3d at 223.

The Court admits this abrupt change in our law represents the minority view. "At the end of the day, we acknowledge that most states have

refrained from disposing of a proximity requirement." *Ante*, at 15. See also *id*. at 14 ("To be sure, the tide of precedent tends to flow in the opposite direction."). But the Court proceeds anyway, striking what it considers just the right balance between the competing policy goals of expanding our emotional-distress doctrine to "do justice" for this mother and to "meet the reasonable expectations of the millions of Hoosiers governed by our legal system", *id*. at 2, while avoiding "spurious claims and open-ended liability", *id*. at 11. Only time will tell whether today's watershed rule is so narrow and fact-specific that it proves to be a one-way ticket for this ride only—or whether, as I suspect, it is the proverbial camel's nose under the tent, with the rest of the camel soon to follow.

Even if I am wrong and the limited scope of today's expanded rule holds, a further question remains: what principle justifies drawing the line here and not elsewhere? The Court's desire to avoid a slippery-slope descent toward an "open-ended" regime of emotional-distress liability is commendable. But it is no more principled than others' desire to ski on. The fine-tuning we announce today is more a legislative than a judicial function. The legislature is better suited to weigh the competing value judgments that suffuse today's opinion on when claimants can recover inherently subjective emotional-distress damages. If the Court is right that today's rule reflects "the reasonable expectations of the millions of Hoosiers governed by our legal system", *id.* at 2, then their elected representatives in our legislature should be the ones to say so.

For these reasons, I respectfully dissent.

Massa, J., joins.