

STATE OF NEW HAMPSHIRE

Strafford,

SS.

Superior Court

Robert and Dawn Brauel

v.

**Gregory V. White, M.D. and
Gastroenterology Professional Association**

Docket No. 96-C-0238

ORDER ON DEFENDANTS' MOTION TO DISMISS

Background

On May 5, 1997, the court held a hearing on defendants' motion to dismiss count IV of plaintiffs' writ. Defendants claim that plaintiff Dawn Brauel may not recover for negligent infliction of emotional distress, since she was not present for and did not contemporaneously perceive Dr. White's negligent misdiagnosis of her husband's cancer. Plaintiff objects and asserts that in order to recover damages she need not be present during the misdiagnosis but rather her perception of the spread of cancer to her husband's liver and lymph nodes is sufficient to entitle her to relief. For the reasons stated in this order, defendants' motion is granted.

Facts

Plaintiffs allege the following facts: On September 20, 1993, Dr. Robert Ruben of the defendant Gastroenterology Professional Association examined Mr. Robert Brauel for irregularities in his bowel habits. As a result of the examination, Dr. Ruben scheduled Mr. Brauel for a barium enema radiology study and a flexible sigmoidoscopy to be conducted at Huggins Hospital the following week. Though Mr. Brauel arrived at Huggins Hospital as scheduled, only the barium enema radiology study was performed.

Defendant Dr. Gregory White performed the barium enema study and interpreted its results. He found no indications of cancer. Two years later, however, in June, 1995, Mr. Brauel was diagnosed with rectal carcinoma. Plaintiffs allege that Dr. White's failure to detect abnormalities present in the study prevented Mr. Brauel from seeking immediate treatment. As a result of Dr. White's negligence, Mr. Brauel's condition worsened and the cancer eventually spread to his liver and lymph nodes.

Plaintiff Dawn Brauel alleges that she has participated extensively in her husband's care and has observed the continued progression of her husband's disease and his resulting pain and suffering. As a result, she has endured severe emotional distress and psychological trauma for which she has received medical care and counselling.

Discussion

The only issue raised by a motion to dismiss is whether "the allegations are reasonably susceptible of a construction that would permit recovery." Royer Foundry & Mach. Co. v. N.H. Grey Iron, Inc., 118 N.H. 649, 651 (1978). The Court must assume the truth of all facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the plaintiff's favor. Collectramatic, Inc. v. Kentucky Fried Chicken Corp., 127 N.H. 318 (1985). A motion to dismiss for failure to state a cause of action will be granted where the plaintiff is not entitled to judgment upon any state of the facts pleaded in, or reasonably inferred from, the pleadings. Ferreira v. Bedford School District, 133 N.H. 785, 788 (1990). In this case, the Court finds that no state of the facts pleaded in plaintiffs' writ entitles Mrs. Brauel to recover for negligent infliction of emotional distress.

In a series of cases beginning with Corso v. Merrill, 119 N.H. 647 (1979), the Supreme Court has defined the parameters under which it will allow bystander recovery for emotional distress. A plaintiff may recover under this theory if all of the following requirements are met:

- (1) The plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it.
- (2) The shock resulted from a direct emotional impact

upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.

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

Corso, 119 N.H. at 653, 654 (citations omitted).

The Corso case arose out of a car crash in which the defendant's car struck the plaintiff's daughter, causing her to receive severe and permanent injuries. The Court ruled that, parents who "perceive through their senses the fact that their child has been seriously injured and immediately observe the child at the accident scene" are entitled to recover for negligent infliction of emotional distress. Corso, 119 N.H. at 649, 659. The Court permitted recovery even though the parents did not witness the crash itself.

In Corso, the negligent act and the accident were one and the same. Since the parents' injury was "directly attributable to the emotional impact of [their] observation or contemporaneous sensory perception of the accident and immediate viewing of the accident victim," they were entitled to recovery. Corso, 119 N.H. at 656.

The defendants here urge this court to find that the alleged act of misdiagnosis constitutes the "accident" for the purpose of determining whether the plaintiff has properly alleged negligent infliction of emotional distress. The plaintiffs argue that the spread of Mr. Ravel's cancer to his liver and lymph nodes, the

progression of which his wife witnessed, constitutes the "accident." The only issue raised, therefore, is whether and to what extent Corso applies in medical malpractice cases where the negligent act is not so readily apparent and often occurs well before visible injuries appear.

In Nutter v. Frisbie Memorial Hospital, 124 N.H. 791 (1984), the Supreme Court applied its Corso analysis to a medical malpractice claim. In Nutter the plaintiffs' three month old daughter, Amanda, was diagnosed with pneumonia. Several days later, while in the care of her babysitter, she developed complications. The babysitter called an ambulance and the child was brought immediately to the hospital. Shortly after her arrival she died, allegedly as a result of the defendants' malpractice. The plaintiffs sought to recover for the negligent infliction of emotional distress and claimed that their observation of Amanda in the emergency room immediately after her death entitled them to relief.

The Court ruled that the plaintiffs had not alleged a recognized cause of action and stated that Corso:
clearly limit[ed] bystander recovery to those plaintiffs whose injuries were most directly and foreseeably caused by the defendant's negligence. . . . This means that the parent had to be close enough to experience the accident first hand, and that "recovery will be denied if the plaintiff either sees the accident victim at a later time, or if the plaintiff is later told of the seriousness of the accident."

Nutter, 124 N.H. at 795, 796 (quoting Corso, 119 N.H. at 657).

Though Nutter does not appear to require observation of the negligent act to support a claim for negligent infliction of emotional distress, it does suggest that in medical malpractice cases observation of the resulting injury alone is insufficient.

Other jurisdictions considering the issue have determined that, in medical malpractice cases, where a sudden and distinct event is not immediately apparent, there must be "some observation of the defendant's conduct and the . . . injury and contemporaneous awareness [that] the defendant's conduct or lack thereof is causing harm." Ochoa v. Superior Court, 39 Cal.3d 159, 170 (1985)(court allowed recovery based on shock parents experienced when they actually observed son's medical needs being ignored, not on resulting death of their son); see also Nelson v. Flanagan, 677 A.2d 545, 548, 549 (Me. 1996) (applying same criteria as described in Corso, court dismissed plaintiffs' claims for negligent infliction of emotional distress in medical malpractice case; court found after-the-fact emotional distress was not result of immediate perception of defendant's misdiagnosis and found lack of contemporaneous awareness that defendant's conduct causing harm).

The court need not determine whether Corso permits recovery for negligent infliction of emotional distress in medical malpractice cases. Even assuming the Supreme Court recognized such a claim in Nutter, the facts presented here do not state a

cause of action. The plaintiff alleges that her observation of her husband's deterioration over the years since the defendants alleged misdiagnosis entitle her to claim negligent infliction of emotional distress. Corso, however, requires more than the direct observation of the progression of cancer. Although under Corso a plaintiff need not be present during the misdiagnosis, a plaintiff must witness a definable, perceivable event that ultimately results in injury. "Corso unqualifiedly requires a contemporaneous sensory perception of the accident, and not, as the plaintiffs argue, a perception of the injury sustained." Wilder v. City of Keene, 131 N.H. 599, 603 (1989).

The plaintiffs argue that to deny recovery here would allow doctors who negligently fail to provide information to escape liability for negligent infliction of emotional distress. Recovery for this tort, however, does not depend on the extent, nature or type of negligence, but rather on the drastic effects of observing the immediate consequences of a defendant's negligent act or negligent failure to act. No such immediacy occurred in this case. Though Mrs. Brauel clearly suffered serious distress as a result of the alleged malpractice, "pain at the death, illness or injury of a loved one is an emotional cost borne by everyone in society." Nutter 124 N.H. at 796 (citations omitted).

As such, "[t]he law intervenes only when the plaintiff bears an unusual or aggravated burden." Id. (internal quotations omitted).

Nor does this ruling prevent recovery in products liability cases as the plaintiff argues. Corso does not require observation of the negligent act; indeed, neither parent observed the crash. Thus, recovery would be allowed where the criteria of Corso are met. See Culbert v. Sampson's Supermarkets Inc., 444 A.2d 433, 438 (Me. 1982)(mother who witnessed son gag and choke on foreign substance contained in jar of baby food stated claim for negligent infliction of emotional distress; court applied Corso-type analysis and found foreseeable that mother would witness son eating food). As long as the parent or other close relative contemporaneously perceives a resulting accident, whether or not the actual negligence occurred during the manufacturing of a product, the plaintiff may recover.

Although the court is not without sympathy for Mrs. Brauel, the facts of this case are not readily distinguishable from any case in which a loved one observes the disturbing effects of a misdiagnosed and debilitating disease. Were the court to allow recovery here, recovery would be allowed in every medical malpractice case in which a plaintiff is closely related to the injured party. Corso does not contemplate such a broad application of its rule. Accordingly, the defendant's motion to dismiss is granted.

SO ORDERED.

Date: May 27, 1997

Tina L. Nadeau
Presiding Justice