IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-112

Filed: 3 September 2019

Henderson County, No. 18 CVS 1052

DELIA NEWMAN, ET UX, Plaintiffs,

v.

HEATHER STEPP, ET UX, Defendants.

Appeal by plaintiffs from order entered 9 January 2019 by Judge Gregory Horne in Henderson County Superior Court. Heard in the Court of Appeals 22 May 2019.

F.B. Jackson & Associates Law Firm, PLLC, by Frank B. Jackson, for plaintiffs-appellants.

Ball Barden & Cury P.A., by Ervin L. Ball, Jr., and J. Boone Tarlton, for defendants-appellees.

BRYANT, Judge.

Where plaintiffs properly alleged severe emotional distress to support foreseeability in their claim of negligent infliction of emotional distress, we reverse the trial court's ruling for judgment on the pleadings in favor of defendants and remand this case for further proceedings.

Plaintiffs Delia Newman and Jeromy Newman (collectively "plaintiffs") appeal from the trial court's judgment on the pleadings in favor of defendants Heather Stepp and James Stepp (collectively "defendants"), whose negligence caused the death of plaintiffs' two-year-old daughter, "Abby." Plaintiffs filed their complaint asserting

claims for negligent infliction of emotional distress ("NIED"), intentional infliction of emotional distress ("IIED"), violation of a safety statute, and loss of consortium. Defendants filed an answer—denying negligence and wrongdoing—which contained a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure.

According to the complaint, on 26 October 2015, plaintiff Delia Newman (hereinafter "Delia") left Abby in the temporary care of defendants at their residence while she attended class for her Ultrasound Technician degree. Defendants operated an unlicensed childcare facility at their residence and regularly cared for other children, including Abby, during the day. At the time of the incident, about 8:00 a.m. that morning, the kitchen was left unattended with no adult supervision. Abby and defendants' minor children were present and had "unfettered access to [a] loaded shotgun which was lying on the kitchen table." The loaded 12 gauge shotgun was owned by defendants, and defendant Heather Stepp had not completed a firearms safety course. Defendants also had not utilized the safety or trigger guard to prevent discharge.

The shotgun was discharged in Abby's direction by one of defendants' children, who was under the age of five. Abby was struck at close range and the shotgun blast penetrated her chest causing her to bleed profusely. Abby was transported to a

nearby hospital, where she was pronounced dead upon arrival due to the chest wound she sustained.

Plaintiff Jeromy Newman (hereinafter "Jeromy") heard about Abby's shooting over a CB radio—her injury was dispatched as a "young female child [who] was critically wounded by the discharge of a shotgun at close range at the babysitter's home and that her condition was extremely critical." Jeromy heard defendants' address over the radio and proceeded to defendants' house. While on the way to their house, Jeromy saw the ambulance that he learned "contain[ed] his daughter who was still alive at the time" and followed it to the hospital. He observed Abby as she was removed from the ambulance. When Jeromy inquired about Abby's condition, he was told that Abby had died in the ambulance or immediately after arriving at the hospital. Delia arrived at the hospital shortly after the incident due to the close proximity of her school to the hospital. Upon arrival, she was informed of Abby's death. Delia held Abby's lifeless body until she was forced to leave the room.

On 3 December 2018, a hearing was held on defendants' 12(c) motion in Henderson County Superior Court before the Honorable Gregory Horne, Judge presiding. Judge Horne, after reviewing the pleadings and hearing arguments of counsel, dismissed plaintiffs' claims with prejudice.[1] Plaintiffs timely appeal.

[1] The trial court's memo refers to cases cited in a trial brief by defendant's counsel, seemingly in regard to the foreseeability issue, as critical to his decision. However, defendant's counsel's trial brief was not made a part of the record.

On appeal, plaintiffs contend the trial court erred by entering judgment on the pleadings in favor of defendants. Plaintiffs appear to only challenge the trial court's ruling as to the NIED claim; therefore, the remaining claims are not subjects of this appeal.

We consider whether plaintiffs asserted the claim in their complaint with sufficient specificity to withstand judgment on the pleadings, and review "[the] trial court's order granting a motion for judgment on the pleadings *de novo*." *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 241, 742 S.E.2d 803, 807 (2013).

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* (citation omitted). In considering a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "All well[-]pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* "When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.*

In the instant case, plaintiffs alleged severe emotional distress resulting from Abby's tragic death and sought recovery of damages for NIED. The dispositive issue surrounding plaintiffs' claim for NIED is foreseeability.

North Carolina has long recognized claims of NIED arising out of concern for another person. *See Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916) (holding that the plaintiff can bring a cause of action for emotional distress after the death of his wife arising from his concern for another person). To establish a claim for NIED, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). "Further, a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, if the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.*

Our Supreme Court has stated:

> In making this foreseeability determination, the factors to be considered include, *but are not limited to*: (1) the plaintiff's proximity to the negligent act causing injury to the other person, (2) the relationship between the plaintiff and the other person, and (3) whether the plaintiff personally observed the negligent act.

> However, such factors *are not* mechanistic *requirements* [such that] the absence of which will inevitably defeat a claim for negligent infliction of emotional distress. The presence or absence of such factors simply is not determinative in all cases. Therefore, North Carolina law forbids the mechanical application of any arbitrary factors—such as a requirement that the plaintiff be within a zone of danger created by the defendant or a requirement that the plaintiff personally observe the crucial negligent act—for purposes of determining foreseeability.
>
> Rather, the question of reasonable foreseeability under North Carolina law must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury.

Sorrells v. M.Y.B. Hosp. Ventures of Asheville, 334 N.C. 669, 672–73, 435 S.E.2d 320, 322 (1993) (internal citations and quotation marks omitted). "[A]bsent reasonable foreseeability, the defendant will not be liable for the plaintiff's severe emotional distress." *Riddle v. Buncombe Cty. Bd. of Educ.*, __ N.C. App. __, __, 805 S.E.2d 757, 760 (2017).

Here, plaintiffs asserted factual allegations in their complaint that set forth a proper claim for NIED showing: 1) defendants engaged in negligent conduct, 2) it was foreseeable that such conduct would cause severe emotional distress to plaintiffs, and 3) their conduct did in fact cause severe emotional distress. The factual allegations are as follows:

> 32. Defendants failed to unload the firearm prior to laying it on the kitchen table, where it was readily available to the minor children that had unfettered access to the entire home.

33. Defendants failed to "check" the firearm to [ensure] it was unloaded prior to allowing the [p]laintiffs' child inside their home.

34. Defendants failed to properly educate their young children regarding firearms and the dangers involved with "playing" with said firearm.

35. Defendants failed to [ensure] that they had the proper training prior to possessing such a firearm.

36. Defendants failed to properly supervise the minor children that were in their home.

37. That the actions of the [d]efendants were a direct and proximate cause of the injuries and death of [Abby.]

. . .

39. It was reasonably foreseeable that the conduct of the [d]efendants, and the wounding and death of [Abby] would cause the [p]laintiffs severe emotional distress, including but not limited to:

a. Both [p]laintiffs have incurred severe emotional distress. The mother [Delia] has incurred such severe emotional distress that she has been under constant psychiatric care and has been placed on numerous strong anti-depressants as well as other medications.

b. The mother has had etched in her memory the sight of her lifeless daughter in her arms at Mission Hospital.

c. The mother has convinced herself that she also is going to die, because God would not allow her to suffer as she has suffered without taking her life also.

> d. The mother is still unable to deal with the possessions of her dead daughter but has kept every possession in a safe place.
>
> e. At times[,] the mother has wished death for herself.
>
> f. The mother has not been able to tend to her usual household duties and has stopped her efforts to obtain the degree she had sought[.]
>
> g. There are days the mother has trouble leaving her home.
>
> h. Both [p]laintiffs have lost normal husband and wife companionship and consortium.
>
> i. As a result of all the aforesaid, the mother has been rendered disabled for periods of time since her daughter's death.

Taking these allegations as true, plaintiffs sufficiently stated facts, which set forth their severe emotional distress as a direct, reasonable, and foreseeable result of defendants' negligence, to enable them to proceed with a claim for NIED.

The relevant facts show that plaintiffs arrived at the hospital within minutes of the shooting incident and observed Abby wounded by the shotgun blast—Jeromy, in particular, observed Abby as she arrived at the hospital and was transported from the ambulance to the hospital. Delia arrived immediately thereafter and held her fatally wounded two-year-old in her arms for as long as hospital personnel would allow. Plaintiffs—who, as parents to Abby, experienced the events immediately prior to and following Abby's death in the aftermath of her arrival at the hospital—

asserted severe emotional distress from the manner in which they suffered the death of their daughter. The existence of the close parent-child familial relationship, of which defendants were well aware of, supports foreseeability.

"Common sense and precedent tell us that a defendant's negligent act toward one person may proximately and foreseeably cause emotional distress to another person and justify his recovering damages, depending upon their relationship and other factors present in the particular case." *Ruark*, 327 N.C. at 300, 395 S.E.2d at 95. Thus, we reject defendants' erroneous contention that plaintiffs cannot support a NIED claim because they were not physically present to observe the actual shooting of Abby, and therefore, their injury was not reasonably foreseeable. *See id*. at 291, 395 S.E.2d at 89 ("[O]ur law includes no arbitrary requirements to be applied mechanically to claims for negligent infliction of emotional distress.").

Further, granting judgment on the pleadings was inappropriate, especially where, as here, plaintiffs allege defendants' negligence was *in fact* the foreseeable and proximate cause of plaintiffs' severe emotional distress. We note that defendants admitted the following, in relevant part, in their answer: 1) they operated an unlicensed child care facility, 2) they had young children in their home, 3) defendant James Stepp owned the shotgun, 4) the loaded shotgun was on the kitchen table, 5) the shotgun was discharged at their residence, 6) Abby was shot and bled from the wound caused by the discharge of the shotgun, and 7) Abby died as a result of the

shotgun blast. However, allegations regarding whether defendants' negligence was in fact the foreseeable and proximate cause of plaintiffs' injury are proper questions for the jury to decide. *See id.* at 292, 395 S.E.2d at 90 ("The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, . . . and it is better it should be left to them, under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy." (citation omitted)).

Therefore, we conclude that plaintiffs sufficiently alleged a claim for NIED as the facts as set forth in the complaint support foreseeability. Additionally, since plaintiffs' claim for loss of consortium was sufficiently pled and derived from the claim for NIED, we recommend that on remand the trial court re-evaluate its ruling on the loss of consortium claim as well. *See Nicholson v. Hugh Chatham Mem'l Hosp., Inc.,* 300 N.C. 295, 304, 266 S.E.2d 818, 823 (1980) ("[A] spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries.").

The dissenting opinion erroneously contends a loss of consortium claim is only properly brought with a claim under the wrongful death statute and relies on this

Court's ruling in *Keys v. Duke Univ.*, 112 N.C. App. 518, 435 S.E.2d 820 (1993). In *Keys*, the plaintiff sought to bring an independent claim for loss of consortium and wrongful death. *Id.* This Court emphasized that a loss of consortium claim is derivative in nature and that, where the loss of consortium claim is covered under the wrongful death statute, the plaintiff could not independently bring a separate claim for loss of consortium. Thus, it is incorrect to say that a claim of loss of consortium is *only* properly asserted under a wrongful death statute. As *Nicolson* recognized, an action for loss of consortium based on the negligent act of a third party may be joined in *any* suit by a spouse to recover for personal injuries. *See Nicholson*, 300 N.C. at 304, 266 S.E.2d at 823.

Accordingly, for the foregoing reasons, we reverse the trial court's judgment on the pleadings for defendants and remand this case for further proceedings as to plaintiffs' claim for NIED and loss of consortium.[2]

REVERSED AND REMANDED.

Judge ZACHARY concurs with separate opinion.

Judge TYSON dissents with separate opinion.

[2] Although dicta, we note for plaintiffs' benefit that the trial court's ruling regarding the IIED claim appears to be a proper ruling, as plaintiffs failed to plead the IIED claim with specificity.

ZACHARY, Judge, concurring.

In the instant case, it is clearly alleged that Defendants' negligence proximately caused the shooting death of Plaintiffs' minor daughter, Abby, and that Plaintiffs suffered severe emotional distress as a result. The issue before us is whether it was reasonably foreseeable that Defendants' actions would cause Plaintiffs' severe emotional distress, as they allege in the complaint.

Plaintiffs did not observe, nor were they in close proximity to, their daughter's shooting by another young child at Defendants' residence. This "militates against [Defendants] being able to foresee . . . that [Plaintiffs] would subsequently suffer severe emotional distress" as a result of Defendants' negligence. *Gardner v. Gardner*, 334 N.C. 662, 667, 435 S.E.2d 324, 328 (1993).

Nevertheless, as our Supreme Court has consistently reiterated, the *Ruark* factors are neither elements nor "requisites nor exclusive determinants in an assessment of foreseeability[.]" *Id.* at 666, 435 S.E.2d at 327; *accord Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) ("[S]uch factors *are not* mechanistic *requirements* the absence of which will inevitably defeat a claim for negligent infliction of emotional distress."). To the contrary, the *Ruark* factors are exactly what they claim to be: factors. In setting forth these factors, the *Ruark* Court "focused on *some* facts that could be particularly relevant in any one case in determining the foreseeability of harm to the plaintiff." *Gardner*, 334 N.C. at

666, 435 S.E.2d at 327. But "[t]he presence or absence of such factors simply is not determinative in all cases." *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 322. Under North Carolina law, questions of reasonable foreseeability "must be determined *under all the facts presented*, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Id.* at 673, 435 S.E.2d at 322 (emphasis added) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 305, 395 S.E.2d 85, 98, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)).

Viewing all facts and permissible inferences in the light most favorable to Plaintiffs, as we must do, I believe that the allegations in Plaintiffs' complaint are sufficient to withstand Defendants' motion for judgment on the pleadings. In addition to those allegations set forth in the majority opinion, Plaintiffs' complaint also alleges, *inter alia*:

> 9. At approximately 8:00 a.m. on October 26, 2015, the Mother delivered the temporary care of [Abby] to the Defendants at their residence . . . [in] Hendersonville, North Carolina.
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> 10. The Defendants were engaged in keeping other people's children during the day at their home . . . for a fee.
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> 11. Upon information and belief, the Defendants were not licensed in child care services[.]
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> 12. The Defendants themselves had young children who roamed in the Stepp home . . . .
>
> 13. A loaded 12 guage [sic] shotgun was left on the kitchen table of the Stepp residence . . . .

> 14. No safety or trigger guard was engaged on the aforesaid shotgun.
>
> 15. Upon information and belief, said shotgun was owned and possessed by the Defendants on the morning of October 26, 2015.
>
> 16. The Stepp children had unfettered access to the loaded shotgun which was lying on the kitchen table on the morning of October 26, 2015.
>
> 17. Upon information and belief, the Defendant Heather Stepp had not completed a firearms safety class.
>
> 18. [Abby] had access to the kitchen area of the Stepp home on the morning of October 26, 2015.
>
> . . . .
>
> 21. No adult was present to observe or supervise the children, either the Stepp children or [Abby] on October 26, 2015 at about 9:00 a.m[.] in the room where the shotgun was lying on the kitchen table.
>
> . . . .
>
> 23. Both Defendants knew or should have known that the loaded shotgun was left on the kitchen table but took no action to secure the gun such that it would be unavailable to the children, both their own and [Abby].

In my view, the facts alleged in these paragraphs tend to favor the foreseeability of Plaintiffs' severe emotional distress. It is evident that the parties in this case were not strangers, but were instead well acquainted with one another. *Cf. Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323 ("[T]he plaintiffs' alleged *severe* emotional

distress arising from their concern for their son was a possibility 'too remote' to be reasonably foreseeable. Here, it does not appear that the defendant had any actual knowledge that the plaintiffs existed."). Moreover, although not licensed in childcare services, Defendants "were engaged in keeping other people's children during the day at their home . . . for a fee."

It is in this context—considering *all* of the facts presented—that we must determine whether it was reasonably foreseeable that (1) Defendants' negligence in leaving a loaded, safety-off shotgun unattended (2) in a location readily accessible to a group of young, unsupervised children (3) would result in Abby's fatal shooting by another young child present at Defendants' home, (4) which would, in turn, cause Plaintiffs to suffer severe emotional distress. *Cf. id.* ("We conclude as a matter of law that the *possibility* (1) the defendant's negligence in serving alcohol to Travis (2) would combine with Travis' driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause Travis' parents (if he had any) not only to become distraught, but also to suffer 'severe emotional distress' as defined in *Ruark*, simply was a possibility too remote to permit a finding that it was reasonably foreseeable."); *Robblee v. Budd Servs., Inc.*, 136 N.C. App. 793, 797, 525 S.E.2d 847, 850 ("Budd's negligence in failing to retrieve the access card and Shipley's emotional distress are simply too attenuated to support a finding of reasonable foreseeability. There is no evidence that Budd was told, or had any specific notice of the relationship between

Shipley and Antilak which would support an inference that Budd could have taken actions to prevent this specific injury to Shipley. The possibility that (1) defendant's negligence in failing to retrieve the temporary access card (2) would combine with Antilak's rage against his former employer (3) to result in a workplace shooting (4) which would cause Shipley to suffer emotional distress, was, like the situation in *Sorrells*, too remote to permit a finding that it was reasonably foreseeable." (citation and quotation marks omitted)), *disc. review denied*, 352 N.C. 676, 545 S.E.2d 228 (2000).

Candidly, I am concerned by the need for limits on a defendant's liability under this tort. *See Sorrells*, 334 N.C. at 673, 435 S.E.2d at 322 ("[S]ome may fear that such reliance on reasonable foreseeability, if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering . . . ." (citation and quotation marks omitted)). However, "[i]f recovery is limited to instances where it would be generally viewed as appropriate and not excessive, then, by definition, the defendant's liability is commensurate with the damage that the defendant's conduct caused." *Ruark*, 327 N.C. at 306, 395 S.E.2d at 98.

Here, Plaintiffs allege that Defendants acted in a negligent manner, that it was reasonably foreseeable that Defendants' negligent conduct would cause severe emotional distress to Plaintiffs, and that Plaintiffs did, in fact, suffer severe emotional distress as a result. Viewing all facts and permissible inferences in the

light most favorable to Plaintiffs, judgment on the pleadings was prematurely granted in favor of Defendants.

Accordingly, I concur.

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TYSON, Judge, dissenting.

The shock and anguish suffered by plaintiffs upon learning of the wholly unexpected death of their young daughter is unfathomable to anyone not experiencing a similar loss. While nothing can change these facts nor restore the child plaintiffs have lost, the law affords these parents a claim and remedy of monetary compensation for damages they suffered through a claim for wrongful death. N.C. Gen. Stat. § 28A-18-2 (2017); *see Bailey v. Gitt*, 135 N.C. App. 119, 120, 518 S.E.2d 794, 795 (1999) ("To bring an action under G.S. § 28A-18-2 (the wrongful death statute), a plaintiff must allege a wrongful act, causation, and damages. Negligence is a 'wrongful act' upon which a wrongful death claim may be predicated.").

Plaintiffs' complaint and defendants' answer support the trial court's conclusion and its order is properly affirmed. The trial court properly reviewed the parties' arguments and authorities they cited, reviewed under Rule 12(c) and not Rule 12(b)(6). In the light most favorable, plaintiffs have not alleged and cannot prove it was reasonably foreseeable to defendants that plaintiffs would suffer severe emotional distress based upon defendants' negligence. Plaintiffs' allegations do not and cannot sustain a claim for negligent infliction of emotional distress ("NIED") to survive defendants' motion for judgment on the pleadings.

As tragic and compelling as the facts are before us, the trial court properly granted defendants' motion for judgment on the pleadings. N.C. Gen. Stat. § 1A-1, Rule 12(c). Plaintiffs failed to carry their burden to show any reversible error on appeal. I vote to affirm the trial court's Rule 12(c) dismissal of plaintiffs' claims. I respectfully dissent.

I. Factors of Reasonable Foreseeability

Nearly thirty years ago, the Supreme Court of North Carolina stated in order to establish a claim for negligent infliction of emotional distress, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) *it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress* . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (emphasis supplied) (citations omitted).

"Further, a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.* (emphasis in original) (citations omitted).

This Court recently held, "absent reasonable foreseeability, the defendant will not be liable for the plaintiff's severe emotional distress." *Riddle v. Buncombe Cty. Bd. of Educ.*, ___ NC. App, ___, 805 S.E.2d 757, 760 (2017). Since plaintiffs' alleged

emotional distress was caused by concern for the well-being of another, the "reasonable foreseeability" prong typically requires significant allegations, evidence, and analysis. *See id*. at ___, 805 S.E.2d at 760-61.

To properly show and analyze whether a defendant had "reasonable foreseeability", our Supreme Court in *Johnson* set forth and considered three factors including, but not limited to: "the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98.

Our Supreme Court has stated, "such factors are not mechanistic requirements [such that] the absence of which will inevitably defeat a claim for negligent infliction of emotional distress." *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993). Further, the Court stated, "North Carolina law forbids the mechanical application of any arbitrary factors." *Id.*

Plaintiffs' allegations in the complaint, as fully answered by defendants, and assertions on appeal provide no basis to support any finding of reasonable foreseeability that defendants' actions "would cause the plaintiff[s] severe emotional distress." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97.

Plaintiffs' allegations rely *solely* upon the existence of a parent-child relationship and the aftermath and effects they suffered from the wrongful death of

their child. The trial court properly concluded these allegations, taken as true, are insufficient as a matter of law to sustain a claim for NIED.

A. *Proximity and Personal Observation Factors*

Plaintiffs' complaint does not allege and the majority's opinion does not explain how both plaintiffs' absence from being in close "proximity *to the negligent act*" when it occurred or that either "plaintiff *personally observed* the negligent act" can sustain an NIED claim. *Johnson,* 327 N.C. at 305, 395 S.E.2d at 98.

The negligent act at issue occurred prior to the fateful moment: leaving a loaded shotgun on the kitchen table, the failure to keep the shotgun from being available to children, the lack of supervision of the children resulting in unfettered access to the loaded shotgun. Defendants' five-year-old child, who pulled the trigger discharging the weapon, is legally incapable of forming ill intent or culpability for the act. *See* N.C. Gen. Stat. § 7B-1501(7) (2017). Neither plaintiff can show either close proximity to or personal observation of any such negligence, only the wrenching experiences of its tragic aftermath.

Plaintiffs argue that a parent need not see either their child's injury or death in order to suffer severe emotional pain. That argument is correct, as applied to a child's wrongful death, but it cannot solely serve as a basis for *further* liability under a separate and distinct NIED claim, as alleged here. This is the reason our Supreme Court specifically preserved the independent "reasonable foreseeability" allegation

and proof factors to assert an NIED claim in *Johnson*. *See id.* at 307, 395 S.E.2d at 99 (Meyer, J., dissenting) (noting that reasonable foreseeability tests for bystander recovery under NIED "are conscientious efforts to avoid what would otherwise become a tort-feasor's unlimited liability to any bystander suffering foreseeable serious emotional distress.").

Plaintiff Jeromy Newman is the father of the deceased child. He alleges he overheard the 911 call while physically at work over a CB radio, which he carried as a volunteer firefighter. Upon hearing the nature of the call, plaintiff left work and headed towards defendants' home.

Nothing in the call specifically named his child nor indicated she had been injured, or that she was the child being transported in the ambulance. He followed the ambulance to the hospital, where he was told the child had died while in the ambulance or immediately upon arrival, but before he saw her. This fact is omitted and misrepresented in the majority's opinion, which intimates the child was alive and receiving emergency services after arrival at the hospital.

At no point in the pleadings does Jeromy assert that he recognized or identified the child as his daughter until *after* she had died. In their brief to this Court, plaintiffs specifically and candidly acknowledge they "were not physically present at the scene of the incident nor did they observe the incident" and they "did not see their child alive after the incident, but instead saw her immediately after her death." The

majority's opinion elides this fact, and implies Plaintiff knew the child inside the ambulance was his daughter before he arrived at the hospital. While the distinction of when Jeromy learned the fatally injured child was, in fact, his daughter is deeply relevant to the emotional trauma he suffered in that moment for a wrongful death claim, it is wholly irrelevant to the determination of "reasonable foreseeability" to support a valid NIED claim to survive judgment on the pleadings.

In the similarly tragic case of *Gardner v. Gardner*, our Supreme Court stated: "That plaintiff suffered severe emotional distress upon seeing her son in the emergency room undergoing resuscitative efforts a period of time after the accident, and upon learning subsequently of his death, is stipulated. Nevertheless, absent reasonable foreseeability, this is not an injury for which defendant is legally accountable." *Gardner v. Gardner*, 334 N.C. 662, 667, 435 S.E.2d 324, 328 (1993). The Supreme Court decided *Gardner* three years after that Court's decision in *Johnson*.

While plaintiffs unquestionably suffered a grievous sense of emotional suffering and loss from the wrongful death of their child, neither of the plaintiffs witnessed the negligent act, were physically present at the scene of the child's injuries, nor did either parent personally observe any suffering by or the death of their child to support a viable claim of NIED. *Id.*

B. *Relationship Factor*

Even though the relationship between a young child and her parents is obvious, the parent-child relationship, standing alone, is not *per se* proof of satisfying the second prong in *Johnson*. *See id.*; *see also Hickman v. McKoin,* 337 N.C. 460, 463-64, 446 S.E.2d 80, 83 (1994). The court in *Gardner* suggested an additional consideration: whether the defendant would have reasonable foreseeability or any reason to know that the plaintiff shared a close or familial relationship with the victim or that the plaintiff was susceptible to severe emotional distress brought about by the defendant's negligent actions. *Gardner,* 334 N.C. at 667-68, 435 S.E.2d at 328. The defendant's knowledge, or lack thereof, of the plaintiff's susceptibility has been applied to the facts in several cases since.

In *Gardner*, a child was riding inside his father's vehicle when the father crashed the vehicle. *Gardner,* 334 N.C. at 663-64, 435 S.E.2d at 326. The child's mother raced to the hospital upon hearing the news of the injury, only to witness a failed attempt to resuscitate the child. *Id.* at 664, 435 S.E. 2d at 326. The mother sued the father for damages resulting from his negligent conduct that caused her emotional distress over the well-being of another. *Id.*

Our Supreme Court held that the mother had failed to meet the first and third factors of the *Johnson* guidelines because, as both plaintiffs admitted here, she did not witness the accident, nor was she in close proximity to it. *Id.* at 667, 435 S.E. 2d at 328. Her emotional distress claim was held to be "too remote from the negligent

act itself to hold [the] defendant liable for such consequences." *Id.* at 668, 435 S.E.2d at 328. The Supreme Court reversed this Court's decision and remanded for the trial court to reinstate an order of summary judgment for defendant on plaintiff's claim for NIED. *Id.*

In *Riddle*, the plaintiff alleged defendants' negligent actions leading to the death of a third person legally and foreseeably caused his severe emotional distress, where he was physically present and witnessed the death, and that the defendants' actions had combined such that they were jointly and severally liable under NIED for his injuries. *Riddle v. Buncombe Cty. Bd. of Educ.,* ___ NC. App. ___, ___, 805 S.E.2d 757, 759 (2017). The defendants denied negligence and also filed a motion to dismiss for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Id.* The trial court granted the motion to dismiss for failure to state a claim. *Id.* at ___, 805 S.E.2d at 759-60.

On appeal, the plaintiff argued that the trial court erred by granting the motion to dismiss because he had sufficiently alleged NIED arising from concern for both himself and his brain-injured teammate and friend. *Id.* at ___, 805 S.E.2d at 760.

The only part of the plaintiff's claim in *Riddle* arising from concern for himself was his narrowly escaping being hit by a John Deere field vehicle, an allegation of temporary fright. *Id.* at ___, 805 S.E.2d at 761. However, allegations of "temporary fright" are also insufficient to satisfy the element of severe emotional distress. *Id.*; *see*

also Johnson, 327 N.C. at 303-04, 395 S.E.2d at 97 (mere temporary fright, disappointment or regret will not suffice to allege that severe emotional distress was the foreseeable and proximate result of such negligence). Temporary fear, such as hearing a call and riding behind an ambulance with an unidentified patient, is insufficient to sustain an NIED claim. *Id.*

Further, the plaintiff in *Riddle* cited no other cases allowing a bystander claim involving death to a third party, in which the relationship between the plaintiff and the person for whom he was afraid was merely a friend and teammate. *Id.* Nothing suggested how close their friendship was; simply being nearby and observing the victim getting killed was not enough. *Id.* at ___, 805 S.E.2d at 762. The Rule 12(b)(6) dismissal was affirmed. *Id.*

In another post-*Johnson* precedent, this Court in *Fields v. Dery* affirmed the trial court's granting defendant's motion to dismiss for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Fields v. Dery*, 131 N.C. App. 525, 509 S.E.2d 790 (1998). The narrative in this case, as in the present case, also asserted very compelling and egregious facts. The plaintiff filed suit for NIED, alleging "plaintiff was driving behind her mother's car, she witnessed the collision, and she was first person [sic] to reach her mother's side." *Id.* at 527, 509 S.E.2d at 791 (1998).

This Court concluded plaintiff had failed to allege or show reasonable foreseeability because the complaint contained "no 'allegation[s] nor forecast of

evidence' that defendant had knowledge of plaintiff's relationship to the decedent, nor that defendant knew plaintiff was subject to suffering severe emotional distress as a result of defendant's conduct." *Id.* at 529, 509 S.E.2d at 792. This Court relied upon our Supreme Court's holding in *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994). *Id.*; *see also Butz v. Holder*, 113 N.C. App. 156, 159, 437 S.E.2d 672, 674 (1993) (no allegation nor forecast of evidence that defendant knew plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence).

In *Andersen*, another case with horrific facts, the plaintiff's complaint alleged claims for wrongful death, NIED, and punitive damages after his near-term, pregnant wife was involved in a severe automobile accident. *Andersen*, 335 N.C. at 527-28, 439 S.E.2d at 137. The plaintiff did not witness the accident but arrived upon the accident scene prior to his wife's removal and rescue from the vehicle's wreckage and her subsequent transport to the local hospital. *Andersen*, 335 N.C. at 527, 439 S.E.2d at 137. The next day, the plaintiff's wife gave birth to a still-born baby and later died herself from injuries she had sustained in the accident. *Id.*

Despite the plaintiff's extreme suffering and distress dealing with the after-effect of both his wife's and child's wrongful deaths, the court granted defendant's motion for summary judgment on NIED, and held that plaintiff's severe emotional

distress was not reasonably foreseeable. *Id.* at 533, 439 S.E.2d at 140. The court reasoned:

> Both *Gardner* and *Sorrells* teach that the family relationship between plaintiff and the injured party for whom plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability. In this case as in *Sorrells* the possibility that the decedent might have a parent or spouse who might live close enough to be brought to the scene of the accident and might be susceptible to suffering a severe emotional or mental disorder as the result of [defendant's] alleged negligent act is entirely too speculative to be reasonably foreseeable.

Id.

The majority's and the concurring opinion makes no effort to analyze, distinguish, or reconcile these post-Johnson precedents with their decision to reverse. The reason for their failure to do so is that they cannot.

C. *Implementation of the Factors*

Before adoption of the three "reasonable foreseeability" considerations of proximity, personal observation of the event, and relationship to the injured party provided in *Johnson*, under prior law a plaintiff was required to prove: (1) the defendant's negligence caused emotional distress by physical impact or injury; or (2) the defendant's negligence caused extreme emotional distress followed by physical manifestations. Donna L. Shumate, *Tort Law: The Negligent Infliction of Emotional Distress - Reopening Pandora's Box* - Johnson v. Ruark Obstetrics, 14 Campbell L. Rev. 247, 248 (1992); *see, e.g.*, *King v. Higgins*, 272 N.C. 267, 158 S.E.2d 67 (1967)

(permitting recovery for emotional distress accompanying plaintiff's physical injuries in an auto collision); *Britt v. Carolina N. R.R.*, 148 N.C. 37, 61 S.E. 601 (1908) (holding mental suffering to be a proper element of damages where train severed plaintiff's leg); *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 42 S.E. 983 (1902) (allowing recovery for emotional distress caused by blasting damage to plaintiff's property followed by physical manifestations including sleeplessness and loss of attention).

Additionally under prior law, in order for a "bystander" plaintiff to recover in a claim for NIED for injuries or death to a third party, the plaintiff had to show: (1) he was within the "zone of danger"; and, (2) "suffered a subsequent manifestation of the emotional distress." Shumate, *Tort Law: The Negligent Infliction of Emotional Distress - Reopening Pandora's Box* - Johnson v. Ruark Obstetrics, 14 Campbell L. Rev. at 248.

Over time, several other states began to abandon the "zone of danger" and "impact" requirements, instead adopting a "foreseeable plaintiff" test or adopting a version of California's broad, factorial "*Dillon* test." *Johnson,* 327 N.C. at 289, 395 S.E.2d at 89. In *Johnson*, our Supreme Court concluded over sharp dissents; that a plaintiff need not allege or prove physical impact, injury, or manifestation of emotional distress in order to establish severe emotional distress as a foreseeable and proximate result of the defendant's negligence to recover on a claim for NIED. *Id.* at 304, 395 S.E.2d at 97.

Instead, the Supreme Court adopted the factors of proximity, personal observation of the event, and relationship to the injured party to analyze questions of foreseeability "under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Id.* at 305, 395 S.E.2d at 98.

As the majority's opinion notes, the above "guidelines" in *Johnson* are factors to consider and the "law includes no arbitrary requirements to be applied mechanically." *Id.* at 291, 395 S.E.2d at 89. Even so, and as shown above, North Carolina trial courts, this Court, and our Supreme Court have consistently applied these factors to NIED claims and decisions since *Johnson*. *See id.* Given the horrific facts before us, the majority's opinion does not and cannot reconcile these precedents applying *Johnson* with its holding here. The majority's opinion also does not acknowledge the challenge and consequences addressed in *Johnson* of imposing unlimited liability for unforeseen acts on unaware and attenuated defendants.

The Court in *Johnson* "noted that, '[a]s the courts have faced new and more compelling fact patterns, the tests have progressed in a linear fashion towards allowing greater degrees of recovery." *Id.* at 290, 395 S.E.2d at 89 (citation omitted). California itself "has found it necessary to strictly construe the *Dillon* requirements and has in fact begun a retreat from the broad rule set out in *Dillon*." *Id.* at 308-09, 395 S.E.2d at 100 (Meyer, J., dissenting) (citing *Thing v. La Chusa*, 771 P.2d 814

(1989) for the "difficulties encountered after *Dillon*" and "establishing strict requirements of physical presence, contemporaneous awareness that the event is causing injury, and close consanguine or marital relationship to the primary victim.").

The majority's opinion fails to acknowledge that other jurisdictions have found the consideration and application of these *Dillon*/*Johnson* factors to be ineffective in providing or reserving any real limits on foreseeability and liability.

The concurring opinion expressly admits, "[c]andidly, I am concerned by the need for limits on a defendant's liability under this tort. *See Sorrells*, 334 N.C. at 673, 435 S.E.2d at 322 ("[S]ome may fear that such reliance on reasonable foreseeability, if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering[.]" (citation and quotation marks omitted))." (Zachary J, concurring).

By disregarding or treating the three thresholds narrowly, rather than as factors of foreseeability, a plaintiff is allowed multiple "bites at the apple" to multiple unrelated acts and defendants to show that the plaintiff's emotional distress was "reasonably foreseeable" from the defendant's attenuated negligent act, without being physically present when the negligence occurred, without showing the relationship of the parties, and without witnessing the injury or death that results.

Without requiring plaintiffs to allege and satisfy the three factors of reasonable foreseeability, the majority's opinion broadens the scope and class of defendants for

liability and, as was warned in *Johnson,* has "reopened the Pandora's box of unlimited liability problems that one hundred years of case law had successfully closed." Shumate, *Tort Law: The Negligent Infliction of Emotional Distress - Reopening Pandora's Box* - Johnson v. Ruark Obstetrics, 14 Campbell L. Rev. at 260.

Also, the majority's reasoning disregards the teaching of one of the most quoted and basic tort cases addressing foreseeability that every law student learns. *Palsgraf v. Long Island R.R. Co,* 162 N.E. 99 (1928). (The question before the court was whether defendant could be held liable for negligence for actions that cannot be reasonably foreseen? No. The court held that under the foreseeability test, it was not reasonable to hold that the railroad's alleged negligence was the cause of the passenger's injuries. It concluded that a duty of care must be ascertained from the risk that can be reasonably foreseen. Long Island Railroad Company could not have reasonably foreseen that the package contained explosives and posed a threat to anyone. It was the explosion that was the proximate cause of the injury, and the railroad could not have reasonably expected such a disaster.) The order appealed from is properly affirmed.

II. Loss of Consortium

The majority's opinion also erroneously directs the trial court to "re-evaluate its ruling on the loss of consortium claim." The concurring opinion does not address

this issue at all. This purported "loss of consortium claim" is not even before us on appeal.

When a claim for loss of consortium is asserted as damages resulting from a death, it is properly brought only as an ancillary claim under the wrongful death statute. *Keys v. Duke University*, 112 N.C. App. 518, 520, 435 S.E.2d 820, 821 (1993). The plaintiff in *Keys* brought both a wrongful death claim and a loss of consortium claim following the death of her husband. *Id.* at 519, 435 S.E.2d at 821. The plaintiff appealed the dismissal of her loss of consortium claim. *Id.*

This Court concluded "that any common law claim which is now encompassed by the wrongful death statute must be asserted under that statute . . . loss of consortium is a common law claim." *Id.* at 520, 435 S.E.2d at 821 (citations and internal quotation marks omitted).

This Court further concluded that

> by the plain language of the wrongful death statute, and in light of the statement made by our Supreme Court in *Nicholson*, *supra*, the North Carolina wrongful death statute encompasses a claim for loss of consortium, and we hold, therefore, that plaintiff's claim in the present action should have been brought under that statute.

Id. at 522, 435 S.E.2d at 822.

Since plaintiffs' action for wrongful death is not before us on appeal, this Court cannot consider a stand-alone claim for loss of consortium as a result of a wrongful death. *Id.*

Our Supreme Court has also expressly limited claims and recovery for damages for loss of consortium to injuries to married individuals:

> If a loss of consortium is seen not only as a loss of service but as a loss of legal sexual intercourse and general companionship, society and affection as well, by definition any damage to consortium is limited to the legal marital partner of the injured. *Strangers to the marriage partnership cannot maintain such an action*, and there is no need to worry about extension of proximate causation to parties far removed from the injury.

Nicholson v. Hugh Chatham Mem'l Hosp., Inc., 300 N.C. 295, 303, 266 S.E.2d 818, 822-23 (1980) (emphasis supplied).

This holding was reaffirmed by our Supreme Court nine years later, when a party sought to expand the claim for loss of consortium to the parent-child relationship: "a child's claim for loss of parental consortium against one who is alleged to have negligently injured the parent ought not to be recognized." *Vaughn v. Clarkson*, 324 N.C. 108, 111, 376 S.E.2d 236, 238 (1989).

In the same analysis, a parent's claim for loss of consortium between married partners due to the wrongful death or loss of a child is not recognized under our precedents or statutes. *See id.*; *see also Edwards v. Edwards*, 43 N.C. App. 296, 302, 259 S.E.2d 11, 15 (1979) ("the relation of parent and child supports no legal right similar to that of consortium"), *Laughter v. Aventis Pasteur, Inc.*, 291 F. Supp. 2d 406, 413 (M.D.N.C. 2003) (interpreting North Carolina law as not recognizing purported claims of loss of consortium based on the death of children).

III. Conclusion

Without proof of the three factors of reasonable foreseeability set out in *Johnson* and applied in all cases since to support an independent tort, considering the horrific facts in this case, we are left with a claim solely based upon the undeniable aftermath and consequences of defendants' alleged negligence in the wrongful death of the plaintiffs' child.

These consequences and sufferings are the same any surviving parent must bear as the after-the-fact loss and reality arising from the tortious conduct of wrongful death, but not as a separate independent tort for NIED without allegations and a showing of the three required foreseeability factors in *Johnson*. *See id.*

Plaintiffs specifically and candidly acknowledge they "were not physically present at the scene of the incident nor did they observe the incident" and they "did not see their child alive after the incident, but instead saw her immediately after her death." Even considering the allegations and showing of shock, untimely death, and loss suffered to these facts, as well as those similar facts and consequences present in *Gardner*, *Sorrells*, *Riddle*, *Fields*, and *Andersen*, plaintiffs failed to allege or show any facts to support *Johnson*'s first or third foreseeability prongs, or to allege more than a parent-child relationship under its second prong, to survive defendant's Rule 12(c) motion for dismissal.

Reviewed in the light most favorable to them, plaintiffs' allegations and defendants' answer, arguments, and all authorities show the parents' loss and anguish suffered in the aftermath and struggles to survive the consequences all result from their child's wrongful death, and not from a separate tort of NIED.

I close with where I started: The shock and anguish suffered by plaintiffs upon learning of the wholly unexpected death of their young daughter is unfathomable to anyone not experiencing a similar loss. Unchallenged precedents and statutes compel me to vote to affirm the trial court's Rule 12(c) order dismissing the NIED claim. I respectfully dissent.