# NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS IN NORTH CAROLINA: RECENT DECISIONS LEAVE THIS THEORY IN DISTRESS

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## I. INTRODUCTION

Imagine an unfortunate automobile accident in which your thirteen year-old son while riding his bike is severely injured by the negligence of a third party driver. Assume that you are not present at the time of the accident, but immediately upon learning of the accident by telephone, you rush to the accident scene. Upon arrival at the accident scene you witness your deceased child covered with a sleeping bag lying along the side of the road. The fear, anguish, and anxiety you feel is almost overwhelming.[1] Next, imagine a situation in which your pregnant wife is involved in a serious car accident caused by the negligence of another driver. You receive word of the accident and rush to the scene. There you find your wife trapped in the twisted wreckage with emergency personnel attempting to free her. Finally she is freed and rushed to the hospital. The next day she gives birth to your stillborn son. Seven weeks later she dies from her injuries.[2] It would be difficult to describe the impact of such catastrophic events on the surviving loved ones.

Should the traumatized family member be entitled to recover from the person who negligently caused the accident, even though the plaintiff did not witness the accident and obviously did not suffer any personal physical impact or bodily injury? How would damages be calculated? North Carolina courts have recently decided cases based

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[1] These facts are based on Butz v. Holder, 112 N.C. App. 116, 434 S.E.2d 862 (1993).

[2] These facts are based on Anderson v. Baccus, 335 N.C. 526, 439 S.E.2d 136 (1994).

on the above facts. Claims such as these are perplexing in that allowing broad recovery invites emotional and potentially pretended or fraudulent claims[3] with extremely difficult measurement of damages problems because of the intangible nature of the loss.[4] On the other hand, to say that these persons have not suffered as a result of the negligence of another is quite a calloused approach.

Across the country courts are struggling with negligent infliction of emotional distress (NIED) claims similar to the situations previously described.[5] Other examples of litigated NIED claims include (1) property owners who sued their careless home builder for mental anguish,[6] (2) a check writer who was wrongfully imprisoned when a merchant improperly failed to stop bad check charges,[7] (3) parents of a stillborn child who sought to recover from allegedly negligent physicians,[8] (4) passengers of airlines who experienced the fright of a

[3] ***See*** Donna L. Shumate, ***Tort Law: The Negligent Infliction of Emotional Distress—Reopening Pandora's Box—Johnson v. Ruark Obstetrics,*** 14 Campbell L. Rev. 247 (1992).

[4]***See*** Randy J. Cox, ***Boldly into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress,*** 53 Mont. L. Rev. 197 (1992); James L. Isham, Annotation, ***Recovery of Damages for Grief or Mental Anguish Resulting from Death of Child— Modern Cases,*** 45 A.L.R. 4th 234 (1986).

[5] ***See*** Michael K. Steenson, ***The Anatomy of Emotional Distress Claims in Minnesota,*** 19 Wm. Mitchell L. Rev. 1 (1993); Debra Pilcher, ***Oregon Rejects Negligent Infliction of Severe Emotional Distress Through the Back-Door Policymaking of Judicial Restraint,*** 71 Or. L. Rev. 219 (1993); David Crump, ***Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?,*** 34 Ariz. L. Rev. 439 (1992); Julie A. Greenberg, ***Negligent Infliction of Emotional Distress: A Proposal for a Consistent Theory of Tort Recovery for Bystanders and Direct Victims,*** 19 Pepp. L. Rev. 1283 (1992).

[6] In discussing a recent California Court of Appeals case one author states that:

> [I]t is hardly reaching to conclude that a builder of homes should foresee that the construction of a defective foundation may not only result in significant property damages, but induce emotional distress as well. Given that home ownership is often referred to as the essence of the American dream, the homeowner's stress at first learning that her home was defectively constructed and there after being forced to live in a borderline uninhabitable state until all the problems were remedied was quite foreseeable. Moreover, this is not the type of emotional distress the homeowner should be expected to absorb. The homeowner was compelled to endure continuous apprehension about the safety, stability, and comfort of her home, and she experienced the disruption of moving to and living in temporary quarters. Her exposure to the unrectified defects extended over a seven-year period during which it was not known when the problems would be ultimately corrected ... The purchase of a home is much more than an economic investment.

Stephanie B. Goldberg, ***Trends in the Law,*** 79 A.B.A. J. 79, 79 (Dec. 1993).

[7] Johnson v. Supersave Markets, 211 Mont. 465, 686 P.2d 209 (1984).

[8] Johnson v. Ruark Obstetrics, 327 N.C. 283, 395 S.E.2d 85 (1990).



near accident,[9] and (5) potential victims who feared future physical problems after exposure to toxic materials.[10]

North Carolina courts have grappled with this tort theory for many years.[11] Recently there has developed an obvious and rather intense difference of opinion regarding NIED claims between the North Carolina Court of Appeals and the North Carolina Supreme Court. In a number of recent cases the court of appeals has shown a willingness to allow much broader relief than that being allowed by the supreme court.[12] Most of the recent litigation has centered around NIED claims arising out of auto accidents where family members desire to sue negligent drivers for their emotional distress, even though they were not present at the accident scene at the time of the accident.[13] These cases arise from emotional distress created from a concern for another person.

## II. NIED CLAIMS IN NORTH CAROLINA

### A. JOHNSON V. RUARK OBSTETRICS

NIED claims, stemming first from a case decided in 1890,[14] have been pursued in North Carolina for over one hundred years. Early cases were highly successful to the point of burdening the legal system.[15] Then there was a shift in the approach of establishing prerequisites which made recovery more difficult.[16] Prior to 1990, plaintiffs had to establish either a physical impact, a physical injury, or a physical manifestation of distress.[17] These requirements severely limited successful NIED claims.

[9] See Eric A. Cunningham, ***Negligent Infliction of Emotional Distress in Air Crash Cases: A New Flight Path,*** 70 Wash.U.L.Q. 935 (1992)

[10] ***See generally*** Cox, ***supra*** note 4, at 209. A. J. Katz, ***Two Immediate Causes of Action for West Virginians Exposed to Toxic Substances: Medical Surveillance and Emotional Distress Damages,*** 95 W. Va. L. Rev. 1247 (1993).

[11] ***See generally*** Robert A. Byrd, ***Recovery for Mental Anguish in North Carolina,*** 58 N.C. L. Rev. 435 (1980) (tracing the development and history of NIED claims in North Carolina).

[12] The approaches of the North Carolina Court of Appeals and the North Carolina Supreme Court will be contrasted and critiqued in this article.

[13] Of course if a distressed plaintiff observes an accident caused by the negligence of a defendant, the plaintiff will have a much easier task of proving the elements of a NIED claim, than if the plaintiff was not present. ***See infra*** notes 21-24 and accompanying text.

14. Young v. Western Union Tel. Co., 107 N.C. 370, 11 S.E. 1044 (1890).

[15] In Bowers v. Western Union Tel. Co.,135 N.C. 504, 47 S.E. 597 (1904), the supreme court noted that only Texas had more distress claims filed than North Carolina.

[16] ***See generally*** Byrd, ***supra*** note 11, at 435-37.

[17] See Shumate, ***supra*** note 3, at 248.

Then in 1990, the North Carolina Supreme Court decided the case ***of Johnson v. Ruark Obstetrics***,[18] wherein the court seemed to expand the NIED theory. This case involved a NIED claim by the parents of a stillborn child against their doctors.[19] In ***Ruark,*** the supreme court reviewed the three most common theories being used in the United States in NIED cases.[20] The court noted that the first test used in some states is one which has a requirement that emotional distress be accompanied by a ***physical impact*** to the plaintiff.[21] The second test used in some states is called the ***zone of danger*** test which requires that plaintiff be placed in imminent danger of physical harm and then have suffered a subsequent physical manifestation of emotional distress.[22] The final test originated in a California case and is referred to as the ***Dillon test.***[23] The Dillon test adopts a ***foreseeable plaintiff test*** and emphasizes three main factors (***the Dillon factors).*** The three factors are (1) the proximity of the plaintiff to the physical site to the alleged negligent act, (2) whether or not the plaintiff's emotional distress was caused by observing the negligent act, as opposed to distress caused by learning of the act via some intermediary, and (3) the relationship between the plaintiff and the victim.[24]

In ***Ruark*** the supreme court declined to adopt specifically any one of the three tests.[25] The court did, however, clarify what must be established to recover on a NIED claim in North Carolina. The initial elements of a NIED claim that must be established by the plaintiff are that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, (3) the conduct did in fact cause the plaintiff severe emotional distress.[26] In order to establish the second element, the plaintiff must allege that severe emotional distress was the fore

[18] 327 N.C. 283, 395 S.E.2d 85 (1990).

[19] Plaintiffs commenced this lawsuit against doctors who provided prenatal care to the mother from the first trimester of pregnancy through the delivery of the stillborn child. Plaintiffs alleged that the doctors failed to treat the mother's diabetic condition and thereby caused the child to die from malnutrition. The doctors had informed the parents prior to delivery that there was no heart tones, so the parents went through delivery knowing that the fetus was dead. ***Id.*** at 286-87, 395 S.E.2d at 87-88.

[20] ***Id.*** at 289-90, 395 S.E.2d at 88-89.

[21] ***Id. See also*** Douglas Bryan Marlowe, Comment, ***Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,*** 33 Vill. L. Rev. 781, 792 n.59 (1988) (listing current physical impact states).

[22] ***Id.*** at 796 n.91.

[23] ***Id.*** at 803. ***See also*** Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal Rptr 72 (1968).

[24] Dillon v. Legg, 68 Col.2d 728, 740, 441 P.2d 912, 920, 69 Cal.Rptr. 72, 80 (1968).

[26] Johnson v. Ruark Obstetrics, 327 N.C. 283, 290, 395 S.E.2d 85, 89 (1990)

[26] ***Id.*** at 304, 395 S.E.2d at 97.



seeable and proximate result of the negligent act.[27] Even though the supreme court did not adopt the Dillon test, the court did specifically note that to establish proximate cause and foreseeability, ***some*** of the factors to be considered would be the Dillon factors.[28] The supreme court held that foreseeability is to be determined under all of the facts presented and is to be resolved on a case by case basis. In ***Ruark*** the supreme court held that the foreseeability requirement was established since the parents were in close proximity and observed many of the events surrounding the death of the fetus and its stillbirth.[29]

What was particularly important about ***Ruark*** was that the supreme court held that the parents need not allege or prove any ***physical impact, physical injury, or physical manifestation*** of emotional distress in order to recover,[30] if the plaintiff has established that he or she has suffered severe emotional distress as a proximate result of the defendant's negligence. The ***Ruark*** case did establish that the distress had to be truly severe, and that "mere temporary fright, disappointment or regret will not suffice."[31] Rather, the plaintiff has to show an "emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals."[32] Following ***Ruark,*** expert psychiatric testimony is crucial to successful NIED claims.[33]

[27] ***Id.***

***28.Id.*** at 305, 395 S.E.2d at 98. The court did not adopt the Dillon factors by a verbatim restatement of the California requirements. The court stated that:

> [F]actors to be considered on the question of foreseeability in cases such as this include the plaintiffs 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. Questions of foreseeability and proximate cause 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.***

[29] ***Id.*** at 306, 395 S.E.2d at 98.

[30] ***Id.*** at 304, 395 S.E.2d at 97.

[31] ***Id.***

[32] ***Id.***

[33] One commentator has observed that:

> ... the court expressed its apparent confidence in modern psychiatry and psychology ... The court seems convinced that modem psychiatry and psychology can detect when emotional distress is being feigned. The long-stand- ing requirement of showing a physical impact or injury or a physical manifestation in order to authenticate one's emotional distress is no longer required to safeguard against successful litigation of fraudulent claims.

Shumate, ***supra*** note 3, at 256.

Even with the requirement that the distress be severe, fear has been expressed that the ***Ruark*** case would open the floodgates for NIED claims by removing the requirement of physical impact or physical manifestation.[34] This does not now seem likely because on several occasions in the past two years the supreme court has overturned decisions of the court of appeals which would have allowed broad recovery for NIED plaintiffs.[35] Subsequent to ***Ruark,*** the North Carolina Supreme Court has now established new foreseeability requirements which make it virtually impossible to recover on a NIED claim unless the plaintiff personally witnessed the negligent act of the defendant.[36]

In addition to the ***Ruark*** decision, present North Carolina case law has been shaped and defined primarily by two companion North Carolina Supreme Court decisions decided on October 8, 1993. The cases are ***Sorrells v. M.Y.B. Hospitality Ventures***[37] and ***Gardner v. Gardner,™*** both of which reversed decisions of the appeals court which were favorable to NIED claims. Both of these cases, therefore, are important and present perplexing fact situations for the legal system.

### B. SORRELS V. M.Y.B. HOSPITALITY VENTURES

***Sorrells v. M.Y.B. Hospitality Ventures***[39] involved a NIED claim by parents of a twenty-one-year-old college student who died in a one- car crash after drinking at the defendant's restaurant.[40] The parents alleged that the defendant's business had negligently continued serving the deceased even after friends had told the business that Sorrells had had too much to drink and would be driving himself home.[41] The parents further alleged that "when they learned of their

[34] ***Id.***

[35] Sorrells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 435 S.E.2d 320 (1993); Gardner v. Gardner, 334 N.C. 662, 435 S.E.2d 324 (1993); Andersen v. Baccus, 335 N.C. 526, 439 S.E.2d 136 (1994).

[36] Gardner v. Gardner, 334 N.C. 662, 435 S.E.2d 324 (1993); Anderson v. Baccus, 335 N.C. 526, 439 S.E.2d 136 (1994).

[87] 334 N.C. 669, 435 S.E.2d 320 (1993).

[38] 334 N.C. 662, 435 S.E.2d 324 (1993).

[39] 108 N.C. App. 668,424 S.E.2d 676 (1993).

***40.Id.*** at 669, 424 S.E.2d at 678.

[41] The court of appeals recitation of the facts did not include the allegation that friends had told the defendant's employees that Sorrells had already had enough to drink and would be driving home. This fact was noted by the supreme court's recita tion of the facts in Sorrells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 671, 435 S.E.2d 320, 321 (1993).



son's accident that his body had been mutilated, it had a devastating emotional effect upon them and constitutes mental anguish and suffering".[42] As a result, the parents claimed to have suffered sickness, helplessness, and frailty, and to have undergone grief, worry, loss of enjoyment of life, a wrecked nervous system, depression and emotional grief.[43]

The trial judge had dismissed the NIED claim, but the court of appeals reversed, holding that there was a fact question for the jury to decide as to whether or not the parents had suffered "foreseeable emotional distress",[44] which is the second element of a NIED claim. The court specifically noted some factors which would be important in determining if an emotional injury was foreseeable. The factors noted included whether or not (1) the injury was reasonably close in both time and location to the defendant's act, (2) there was a relationship between the plaintiff and the injured person, (3) the plaintiff actually observed the negligent act, (4) recovery would place an unreasonable burden upon those engaged in similar activities, (5) recovery would open the way for fraudulent claims, and (6) it was too highly extraordinary that the act of the tort-feasor caused the injury.[45] The court specifically noted that there were no allegations that the parents were present at the scene of the accident ***or*** that they saw the body soon after death. The court was still moved to allow the case to go to the jury, stating:

> [W]e are not prepared to hold as a matter of law that any severe emotional distress sustained by the parents of a twen- ty-one-year-old son, after learning that their son had been killed in a serious automobile accident and his body mutilated, is not foreseeable by a defendant who negligently serves alcohol to the son, which was a proximate cause of the son's death. Consequently, the question of foreseeability is one for the jury in this case.[46]

The supreme court, however, reversed the court of appeals[47] and held that the parents' claim was too remote to be reasonably foreseeable.[48] The court briefly reviewed the history of NIED claims. The court noted that in ***Ruark*** it had reviewed various mechanical and

[42] ***Sorrells,*** 108 N.C. App. at 669, 424 S.E.2d at 678.

***43.Id.***

[44] *Id.*

***45.Id.*** at 672, 424 S.E.2d at 679.

[46] ***Id.*** at 672, 424 S.E.2d at 679.

[47] Sorrells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 435 S.E.2d 320 (1993).

48.Id. at 674, 435 S.E.2d at 323.

arbitrary tests used in other jurisdictions, but discarded them as not being previously used in North Carolina, and hence, not appropriate.[49] The court preferred to rely on a case by case basis to determine whether or not the foreseeability requirement was met. When seeking to recover for emotional distress for injuries to another, the plaintiff . . must prove that he or she has suffered such severe emotional distress as a proximate and foreseeable result of the defendant's negligence."[60] The court did proceed to give guidance as to what factors would be considered in making the foreseeability determination. These factors include, but are not limited to (1) the plaintiffs proximity to the negligent act causing the injury to the other person, (2) the relationship between the plaintiff and the other person, and (3) whether or not the plaintiff personally observed the negligent act.[61] These are the Dillon factors first articulated by the California Supreme Court in ***Dillon v. Legg.***[52]

The North Carolina Court of Appeals in its earlier decision had compiled a longer list of foreseeability factors. That list included the three Dillon factors plus several others including whether or not (1) recovery would place an unreasonable burden upon those engaged in similar activities, (2) recovery would open the way for fraudulent claims, and (3) it was too highly extraordinary that the act of the tortfeasor caused the injury.[53] After noting the three Dillon factors and ***ignoring*** the additional factors mentioned by the court of appeals, the court went on to specifically state that the presence or absence of any one of these factors is not determinative in all cases.[64] The court refused to set up mechanical requirements, such as a zone of danger, and specifically stated that plaintiffs do not have to view the ***crucial negligent act*** for purposes of determining foreseeability.[66]

The court then did a curious thing which became important in ***Gardner v. Gardner***The court discussed the fact that the negligent tavern had no actual knowledge of the relationship between the deceased son and his parents or that the parents even existed.[57] This factor was never articulated in the ***Dillon*** case or in any other cited

[49]***Id.*** at 672, 435 S.E.2d at 321.

***50.Id.*** at 672, 435 S.E.2d at 322.

[51]***Id.***

[52] 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (1968). ***See also supra*** notes 23-24 and accompanying text.

[53]***Sorrells,*** 108 N.C. App. at 671, 424 S.E.2d at 679.

[54]***Sorrells,*** 334 N.C. at 672, 435 S.E.2d at 322.

*55.Id.*

[56]334 N.C. 362, 435 S.E.2d 324 (1993). For a more thorough discussion of this case ***see infra*** notes 72-88 and accompanying text.

[57]***Sorrells,*** 334 N.C. at 674, 435 S.E.2d at 323.



case. The court noted that it was ***not*** sufficient merely to presume that any person is likely to have parents or friends, and that such parents or friends may suffer emotional distress if that person is severely injured or killed.[68] These factors again were not determinative on the issue of foreseeability. Why the court felt that knowledge of the parent/child relationship by the negligent party was important was not explained.

Finally the court rather hastily summarized that it was simply too remote to permit a finding of foreseeability based on the possibility that the defendant's negligence in serving alcohol to the deceased would combine with the decedent's driving while intoxicated to result in a fatal accident which, in turn, would cause the decedent's parents, if he had any, to suffer severe emotional distress.[69] The court further noted that the parents did not observe any negligent act attributable to the defendant, but it was promptly stated that that fact alone was not a determinative factor in their decision.[60]

In summary, ***Sorrells*** holds that NIED claims must be supported by a finding that it is reasonably foreseeable that negligent conduct would cause severe emotional distress. Foreseeability is to be decided on a case by case basis, and witnessing the negligent act is not mandatory. The Dillon factors are some of the factors which are to be used to determine if the foreseeability requirement has been met. The holding of ***Sorrells*** is not particularly alarming as the actions of the defendant appear somewhat removed or remote since the wrongdoing was based on the serving of alcohol rather than on a direct act inflicting immediate injury, such as the negligent operation of a vehicle. That type of activity is what gave rise to the next case decided by the supreme court on the same date, ***Gardner v. Gardner.****[1]

### C. GARDNER V. GARDNER

***Gardner*** involved another tragic car accident. A thirteen-year-old boy was riding with his father on a rural road near Greenville, North Carolina.[62] The father negligently lost control of the truck and struck a bridge abutment.[63] The boy was taken to a hospital emergency room. The plaintiff in this case was the boy"s mother who arrived at the emergency room five minutes before the ambulance arrived. The

[58]Id.

59.Id.

[60]***Id.*** (citing ***Ruark,*** 327 N.C. at 305, 395 S.E.2d at 89).

[61]106 N.C. App. 635, 418 S.E.2d 260 (1993).

[62]***Id.*** at 636, 418 S.E.2d at 261.

*63.Id.*

mother saw her son on a stretcher with all but his hands and feet covered.[64] The mother waited at the hospital but did not see her son again until after he died later that day.[66] The mother sued the father on a NIED theory.

The parties stipulated to the first and third elements of a NIED claim. The fact that there had been a negligent act and that the plaintiff had suffered severe emotional distress were established, leaving only a dispute as to the foreseeability issue. The court of appeals looked to the ***Ruark*** case and other general tort cases for guidance on this question.[66] After briefly discussing the basic concept of proximate cause[67] the court went on again to point out factors to be considered in determining foreseeability. These factors to be considered were the plaintiffs proximity to the negligent act, whether or not the plaintiff personally observed the negligent act, and the relationship between the plaintiff and the other person,[68] that is, the three Dillon factors mentioned previously.[69] The court discussed proximity and stated that in the court's opinion ***Ruark*** did not require plaintiffs to be at the scene or to arrive shortly after the negligent act.™ In a moving statement the court asserted sympathy for NIED claims.

> In common experience, a parent who sees its mortally injured child soon after an accident, albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than that of a parent who is actually exposed to the scene of the accident. Thus, we hold that the defendant, in this case, could have reasonably foreseen that his negligence might be a direct and proximate cause of the plaintiffs emotional distress.[71]



The supreme court was not nearly as compassionate. In fact, its decision in ***Gardner"***[72] is a much more troublesome one than its decision in ***Sorrells.***[73] Once again the supreme court reversed the court of appeals and dismissed the NIED claim since the court felt that the plaintiff failed to meet the foreseeability requirement of a NIED claim. In focusing again on the foreseeability issue,[74] the court returned to the three factors mentioned in ***Ruark*** which are to be considered when deciding the foreseeability issue (the Dillon factors): the plaintiffs proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether or not the plaintiff personally observed the negligent act.[76] These three facts again were not to be prerequisites or determinative, but rather ***some*** facts that could be particularly relevant.[76]

The court's analysis to this point was logical and consistent with ***Ruark*** and ***Sorrells,*** but then the court took several unexpected turns. The court noted that the first and third factors mentioned above were not met. The plaintiff-mother was not in close proximity to the accident and she did not observe the defendant's negligent act.[77] The plaintiff was several miles away at her home at the time of the accident.[78] After repeatedly stating in earlier cases that this was not determinative, the court now emphasized the fact that the plaintiff was not physically present and was "not able to see or hear or otherwise sense the collision or to perceive immediately the injuries suffered by her son ... while not in itself decisive, militates against the foreseeability of her resulting emotional distress. '[19]

64.When the plaintiff first saw her son he was prone on a stretcher and rescue personnel were applying resuscitative efforts. She did not see him alive again. ***Id.***

***65.Id.***

[66]***Id.*** at 638, 418 S.E.2d at 263 (citing Azzolino v. Dingfelder, 315 N.C. 103, 111, 337 S.E.2d 528, 534 (1985)).

[67]***Id.*** The court cited with approval Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 311 S.E.2d 559 (1984) wherein it was stated that '... proximate cause is a cause which produced the plaintiffs injuries, and 'one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed' ***Id.*** at 233, 311 S.E.2d at 564.

[68]***Gardner,*** 106 N.C. App. at 638, 418 S.E.2d at 262.

[69]See ***supra*** notes 23-24 and accompanying text.

70.The court of appeals noted that in other jurisdictions there is a requirement that the plaintiff in cases involving a concern for others show that he was in such close proximity to the accident as to produce a sensory perception of the event. Being on the scene or arriving promptly after the accident is necessary to gain a recovery. The court of appeals noted that proximity under ***Ruark*** is not that narrow. ***Gardner*** 106 N.C. App. at 638-39, 418 S.E.2d at 262-63.

***71.Id.***

[72]334 N.C. 662, 435 S.E.2d 324 (1993).

[73] Gardner is troublesome because of the creation of new foreseeability requirements which make recovery very difficult. See ***generally*** sources cited ***infra*** note 84.

[74]The trial court in Gardner had dismissed the action with prejudice after finding as a matter of law that the plaintiff could not establish a NIED claim because she did not witness the accident nor was she in sufficiently close proximity to meet foreseeability requirements. ***Gardner,*** 334 N.C. at 664, 435 S.E.2d at 326.

[75]See ***supra*** notes 22-24 and accompanying text.

[76]***Gardner,*** 334 N.C. at 666, 435 S.E.2d at 327.

[77] Plaintiff was informed of the accident and did not go to the accident scene, but rather went straight to the hospital. ***Id.*** at 663, 435 S.E.2d at 326.

[78] Plaintiff was residing with her grandparents who lived several miles from the accident scene.

[79]***Id.*** at 667, 435 S.E.2d at 328.

Although the parties had stipulated that the plaintiff had suffered severe emotional distress and that the appeal was to center on the foreseeability issue, the supreme court proceeded to discuss whether or not the plaintiff had indeed suffered "severe emotional distress".[80] The court noted that to establish a NIED claim the plaintiff must allege and prove that severe emotional distress was a foreseeable and proximate result of the negligent act. The distress must be a neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition recognized by professionals.[81]

The court noted that any parent in this circumstance would suffer "some emotional distress—'temporary disappointment' ... or regret", but more than that would be required.[82] The court stated that NIED claims require reasonable foresight of an emotional or mental disorder or other severe and disabling emotional or mental condition. The court then established a bizarre requirement to establish foreseeability. The court stated that:

> [H]ere, there was neither an allegation nor forecast of evidence ***that the 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 and its consequence. Absent such knowledge, such an outcome cannot be held to be reasonably foreseeable,*** and plaintiff has failed to establish a claim for NIED.[83] ***(Emphasis added).***

That the supreme court might desire to limit NIED claims to truly severe distress situations is understandable.[84] However, it is unclear why the court came up with a requirement that the defendant know that the plaintiff was subject to distress in order to recover on a NIED claim.[85] This is especially questionable under the facts of

[80] ***Id.***

***81.Id.***

[82]***Id.***

[83] ***Id.***

84.Many articles urge caution in allowing NIED claims. ***See*** James C. Maroulis, ***Can HTV-negative Plaintiffs Recover Emotional Distress Damages for Their Fear of Aids?,*** 62 Fordham L. Rev. 225 (1993); Edmund C. Baird, III, ***No Pain, No Gain: The Third Circuit's Sufficient Indicia of Genuineness Approach" to Claims of Negligent Infliction of Emotional Distress Under the Federal Employers' Liability Act:*** Gottshall v. Consolidated Rail Corp., 988 F.2d 355 (1993), 71 Wash. U. L.Q. 1255 (1993); Charles E. Cantu, ***Boyles v. Kerr: The Wrong Decision at the Right Time: Implications for Mental Anguish Damages under the DTPA,*** 45 Baylor L. Rev. 827 (1993); M. Bowen, ***Perceptions of Liability for the Negligent Infliction of Emotional Distress to a Bystander,*** 11 Behavioral Sci. & L. 193 (1993).

[85]It is worth noting that the court did not cite any authority for this newly created requirement.



***Gardner,*** since the plaintiff was the mother of the deceased and the defendant was the father. If a father cannot reasonably foresee that a mother would suffer severe distress if the father negligently killed the son, it is difficult to imagine any situation where foreseeability or knowing susceptibility could be established to the satisfaction of the North Carolina Supreme Court.[86] In most accident situations, tortfeasor defendants do not know the victims, let alone the identity and emotional status of potentially distressed family members.

The court noted that the plaintiff did suffer severe distress upon seeing her son in the emergency room and upon learning of his death; however, recovery could not be allowed since reasonable foreseeability was not present. In a particularly insensitive quote from a Wyoming decision, the court noted, "Part of living involves some unhappy and disagreeable emotions with which we must cope without recovery of damages".[87] Since the plaintiff was not present at the scene and since the plaintiff failed to show that the defendant ***knew*** she was susceptible to an emotional or mental disorder as a result of the negligence and its consequences, the injury was deemed to be unforeseeable.[88] The most unfortunate factor to come out of the ***Gardner*** decision is the requirement that defendants in NIED claims ***know*** that the plaintiff is susceptible to emotional disorders.

### D. Subsequent Decisions

The court of appeals appears to be grudgingly applying the holdings of the supreme court and appears dissatisfied with the requirement of a knowing susceptibility by the tortfeasor. In ***Butz v. Holder***,[89] the first case decided by the court of appeals after the ***Sorrells*** and ***Gardner*** decisions were rendered by the supreme court, the driver of a car negligently struck and killed a thirteen-year-old bicyclist who was riding on a rural road about one-half mile from his home.[90] A neighbor went to the decedent's home and told the father about the accident. The father rushed to the scene where he saw his deceased

[86] The court did not indicate what kind of knowledge would have to be shown for a plaintiff to meet this new foreseeability requirement. One could speculate that the court is looking for knowledge by a defendant that the plaintiff was emotionally unstable or already suffering from some sort of emotional illness which is being treated by a professional psychologist or psychiatrist.

***87.Gardner,*** 334 N.C. at 667, 435 S.E.2d at 328 (quoting Gates v. Richardson, 719 P-2d 193, 198 (Wyo. 1986)).

[88]***Id.*** at 667-68, 435 S.E.2d at 328.

[89]113 N.C. App. 156, 437 S.E.2d 672 (1993).

90.***Id.*** at 157, 437 S.E.2d at 673.

son covered with a sleeping bag.[91] The mother and brother separately arrived at the scene shortly thereafter.[92] The mother subsequently sought psychiatric care and the father suffered from hypertension.[93] The court of appeals held in favor of the mother and father on a NIED claim against the driver on its first review.[94] However, ***Sorrells*** and ***Gardner*** were subsequently decided giving rise to a petition for rehearing in light of the new decisions from the supreme court.[96]

The court of appeals analyzed the case by once again citing the three elements of a NIED claim and then proceeded to note the three Dillon factors dealing with foreseeability.[96] In a short opinion, the court of appeals noted that in light of ***Sorrells*** and ***Gardner,*** the claims by the parents were not foreseeable; therefore, they could not recover on their NIED claim.[97] The court of appeals noted that under its reading of ***Gardner,*** in order for a plaintiff to recover under a NIED claim, the plaintiff must allege, and through a forecast of evidence show, that defendant knew that the plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional

[91] ***Id.***

[92] It appears that the brother and mother also witnessed the deceased lying at the accident scene. ***Id.*** Most of the litigation in North Carolina has involved lawsuits by adults commenced as a result of injuries suffered by spouses or children. In Hickman By and Through Womble v. McKoin, 109 N.C. App. 478, 428 S.E.2d 251 (1993) the court of appeals decided a case commenced by two minor children whose mother was injured in a car accident. The mother was severely injured and was not expected to survive. The plaintiffs, ages twelve and fifteen, did not see the accident, but did go to the hospital where they were told their mother would probably not survive. The children saw their mother suffer tremendous pain and saw her attached to feeding tubes and intravenous medication tubes. The mother did survive but faced future surgeries. The children alleged severe emotional distress. The younger son dropped out of school. The court of appeals reversed the trial court and found that the plaintiffs' emotional distress could have been foreseeable to the defendant since the plaintiffs saw their mother in the hospital after the accident and they continue to suffer distress by the mother's severe injuries and ongoing difficulties.

[93] ***Butz,*** 113 N.C. App. at 157, 437 S.E.2d at 673.

94. Butz v. Holder, 112 N.C. App. 116, 434 S.E.2d 862 (1993). In the court of appeal's first decision in this case, the court dismissed the claim of the decedent's brother, noting that there was no evidence in the record that the brother had suffered any emotional or mental disorder. The court did find that foreseeability was an issue for the jury since the mother and father had arrived at the scene shortly after the accident, thus the "defendant could have reasonably foreseen that negligence on defendant's part might be a direct or proximate cause of plaintiff parents' emotional distress". ***Id.*** at 118, 434 S.E.2d at 864.

[95] ***Butz,*** 113 N.C. App. at 156, 437 S.E.2d at 673. The second decision by the court of appeals was issued only three months after the first decision.

[96] ***Id.*** at 157, 437 S.E.2d at 673.

[97] ***Id.*** at 159, 437 S.E.2d at 674.



or mental condition in order to find that the consequences of the negligence was reasonably foreseeable.[98] Although the court of appeals does not specifically so state, it appears that it feels that this is an unworkable approach to NIED claims.[99]

In the most recent supreme court NIED case, ***Anderson v. Baccus,***[100] which arose out of an automobile accident, the court chose to uphold the ***Sorrells*** and ***Gardner*** decisions and dismissed the NIED claim as a matter of law. In this case, a husband commenced a NIED claim against the defendant driver of an automobile who struck the automobile of the plaintiff's wife.[101] The defendant struck the plaintiff's wife after swerving to avoid a third vehicle driven by an unknown person.[102] The husband did not observe the crash, but arrived at the accident scene before his wife was freed from the wreckage. On the day following the accident, the wife delivered a stillborn child and approximately seven weeks later died from the car crash injuries.[103]

The supreme court briefly reviewed the history of ***Sorrells*** and ***Gardner.***[104] The court again listed the three elements of a NIED claim and the three Dillon factors which are relevant in determining foreseeability.[105] The court solidified its holding in ***Gardner*** by holding that the plaintiff husband failed to establish foreseeability. The court noted that even though the husband arrived at the scene in

[98] ***Id.***

99. The court of appeals stated that:

> [I]t appears from this language in ***Gardner*** that the Supreme Court has held that in any claim for NIED, the plaintiff must allege and through a forecast of evidence show that defendant ***knew*** that the plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition to say that the consequences of the alleged tortfeasor's negligence were reasonably foreseeable. In the instant case, there is neither allegation nor forecast of evidence that the defendant ***knew*** plaintiff patents were subject to emotional or mental disorders or other severe and disabling emotional or mental conditions as a result of defendant's negligence. Therefore, pursuant to ***Gardner,*** the emotional distress suffered by plaintiff parents was not a foreseeable consequence of the actions of the defendant.

***Id.***

[100] 335 N.C. 526, 439 S.E.2d 136 (1994).

[101] ***Id.*** at 527, 439 S.E.2d at 137.

[102] The third vehicle was identified as a Ford station wagon. This vehicle did not stop at the accident, and the driver was never identified. ***Id.***

[103] ***Id.***

[104] ***Id.*** at 530-31, 439 S.E.2d at 138-39.

[105] ***Id.***

time to observe his wife before she was freed, the plaintiff did not observe the negligent act of the defendant, if there was one.[106]

Incredibly the court again noted, as in ***Gardner,*** that the defendant did not know of the plaintiff-husband's existence.[107] Therefore the defendant tortfeasor could not know that the husband was susceptible to emotional distress. The court noted that the defendant did not know who was in the car and had never met the deceased spouse. The supreme court held that the mere possibility that the injured party might have a spouse or parent who might live close enough to be brought to the accident scene and might be susceptible to suffering severe emotional distress as a result of the defendant's negligent driving, is too speculative to be foreseeable.[108]

Although not acknowledged by the supreme court, under the reasoning of ***Gardner*** and ***Baccus*** it appears that in reality, the only time a plaintiff can recover under a NIED claim in North Carolina is if the plaintiff is at the scene of the negligent act and personally observes the negligent act which injured the primary victim. This is true even though on a number of occasions the supreme court has stated that it is not mandatory that the plaintiff witness the negligent act.[109] If the plaintiff does witness the negligent act, then the first and third requirements of the Dillon factors will be met.[110] It is also likely that the negligent tortfeasor could be deemed on notice that the plaintiff would be susceptible to distress since the plaintiff was accompanying the primary victim of the negligent act when the injury occurred. Without witnessing the negligent act, a plaintiff simply will not be able to meet the foreseeability requirement of a known susceptibility created by the supreme court.

## III. A CRITIQUE AND RECOMMENDATION

As noted previously, the fact that the North Carolina Supreme Court wishes to take a cautious approach to NIED claims is not objectionable.[111] NIED claims are often speculative and can be fraudulent in

[106]/d. at 532, 439 S.E.2d at 140.

[107]/d. at 533, 439 S.E.2d at 140.

[108]/d.

[109]The supreme court in all of its recent decisions has consistently stated that plaintiffs do not have to view the negligent act. ***See Ruark,*** 327 N.C. at 305, 395 S.E.2d at 98; ***Sorrells,*** 334 N.C. at 672, 435 S.E.2d at 322; ***Gardner,*** 334 N.C. at 666-67, 435 S.E.2d at 328; ***Anderson,*** 335 N.C. at 532, 439 S.E.2d at 139.

[110]See ***supra*** notes 23-24 and accompanying text.

[111]***See supra*** note 84 and accompanying text.



nature.[112] Feigned injuries are a distinct possibility with NIED claims. There should be sufficient limits placed on this theory to avoid unjust results.[113]

It is alarming, though, when the limitations created to avoid inappropriate claims are unsound and irrational. It would be certainly difficult to explain to the husband in ***Baccus*** the reasoning supporting why the supreme court disallowed his claim. He witnessed his pregnant wife being freed from a car wreckage, then suffered through the stillbirth of his child, and the subsequent death of his wife.[114] He is told by the supreme court that the reason he cannot recover is primarily because the negligent driver of the car did not ***know*** he would suffer distress.

It appears that the supreme court could develop a more logical way of limiting recovery than this unsupportable approach. If the court wishes to allow a NIED recovery only by plaintiffs who are in a close relationship with the victim and who witness the negligent act, then the supreme court should expressly so hold.[116] Creating a requirement of knowledge of susceptibility by the defendant is a requirement which simply negates the entire NIED theory, unless the plaintiff views the negligent act. Since the court has repeatedly said that it is not necessary to view the accident to recover, this is not an acceptable approach. It appears that the supreme court had established a potentially workable approach to NIED claims until it mistakenly included knowledge of susceptibility to distress as a factor needed to establish foreseeability. Removal of this unwarranted requirement is essential.

A brief summary of the North Carolina approach so modified reflects a more logical approach. To establish a NIED claim the plaintiff needs to establish the three requirements under ***Ruark,*** that is, that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff

[112] There are additional reasons to place limits on NIED claims as one commentator has noted:

> [T]he court based its holding ... on policy limitations on California s trend toward unlimited liability. These policy considerations included the need to limit the potential for liability out of proportion to culpability, the intangible nature of the loss, the inadequacy of monetary damages to make the loss whole, the difficutly in measuring damages, and the societal cost of attempting to compensate the plaintiff Greenberg, ***supra*** note 5, at 1288.

***3See supra*** note 84 and accompanying text.

[114]***Baccus,*** 335 N.C. at 526, 439 S.E.2d at 136.

[115] Support for this approach can be found in the dissenting opinions in ***Ruark, Sorrells,*** and ***Gardner. See, e.g., Ruark,*** 327 N.C. at 307, 395 S.E.2d at 99 (Meyer, J,, dissenting); ***Sorrells,*** 334 N.C. at 675, 435 S.E.2d at 323 (Meyer, J., dissenting); ***Gardner,*** 334 N.C. at 668, 435 S.E.2d at 328 (Exum, J., dissenting).

severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress.[116] Pursuant to ***Ruark,*** the plaintiff does not have to show a physical impact or physical manifestation.[117] Assuming the plaintiff can establish the first and third requirements, the difficulty will always be in deciding if the plaintiff has met the foreseeability requirement under the second element of a NIED claim.

The foreseeability requirement can be met if the Dillon factors can be established. Once again the Dillon factors are (1) the plaintiffs proximity to the negligent act, (2) the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and (3) whether or not the plaintiff personally observed the negligent act.[118] These three factors have no correlation with the requirement of ***Gardner*** and ***Baccus*** that the plaintiff show that the defendant knew that the plaintiff was susceptible to emotional distress. The California court that created the Dillon factors never included anything remotely close to the North Carolina requirement.[119] The Dillon factors did require that there be a close relationship between the plaintiff and the primary victim of the negligent act. Most states limit recovery to situations where the primary victim is in a marital or intimate familial relationship.[120] This requirement logically limits

[116]Johnson v. Ruark Obstetrics, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

[n]***Id.***

[118] See ***supra*** notes 23-24 and accompanying text.

[113] California has adopted different approaches for bystanders and direct victims pursuing NIED claims. For a closer review of the Dillon approach and its problems ***see generally*** Greenberg, ***supra*** note 5. Problems with the Dillon approach are also noted in Shumate, ***supra*** note 3, at 259-60, wherein the author states:

> The ***Dillon*** factors attempt to avoid unlimited defendant liability by limiting foreseeability. However, in consideration of the problems discussed above, such limitation on foreseeability seems unlikely if factors are mere considerations rather than strict requirements. As Justice Meyer points out in his dissent in the ***Johnson*** case, "California, that jurisdiction with the greatest experience in permitting wide latitude for recovery of serious emotional distress, 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."***
>
> In ***Thing v. La Chusa,*** the California Supreme Court admitted that many difficulties had been encountered with the ***Dillon*** factors and that California found them unmanageable. Consequently, California adopted strict requirements based on the ***Dillon*** factors in hopes of solving some of the uncertainties in recovery.

***Id.***

[120] See ***generally*** Marlowe, ***supra*** note 21. See ***also*** Elden v. Sheldon, 46 Cal.3d 267, 250 Cal.Rptr. 254, 758 P.2d 582 (1988) (unmarried cohabitant denied recovery); Quesada v. Oak Hill Improvement Co., 213 Cal.App.3d 596, 261 Cal.Rptr. 769 (1989) (niece given an opportunity to prove sufficiently close relationship).



emotional distress claims where a large group of people view a gruesome accident, but are not related to the primary victim. This limits recovery to plaintiffs who are most deserving of recovery since they are the ones who suffer the greatest emotional harm.[121] Without this type of limitation, clearly the floodgates would be left wide open. Requiring that there be a close relationship between the plaintiff and the primary victim is distinctly different than requiring that the defendant be aware that the plaintiff was susceptible to emotional distress.

If the supreme court feels that additional factors beyond ***Dillon*** should be created to test foreseeability properly, the court could look again at the court of appeals decision in ***Sorrells*** wherein that court identified additional relevant factors which could be used to eliminate speculative or remote claims which are not foreseeable. The complete list of factors specified by the court of appeals provides more adequate guidance for effective jury instructions for NIED claims arising out of a concern for others. The court of appeals factors from ***Sorrells*** are whether or not (1) the injury was reasonably close in both time and location to the defendant's act, (2) there was a relationship between the plaintiff and the injured person, (3) the plaintiff actually observed the negligent act, (4) recovery would place an unreasonable burden upon those engaged in similar activities, (5) recovery would open the way for fraudulent claims, and (6) it was too highly extraordinary that the act of the tortfeasor caused the injury.[122] These last three factors may be used to increase the likelihood that improper claims are not granted.

If the supreme court feels that these foreseeability factors are still too weak to prevent unjustified claims, it appears that the court has no reasonable alternative than to follow the recommendation of the dissenting opinion in ***Sorrells.*** Justice Meyer suggested that the supreme court place some limitations on the "nebulous 'foreseeability' rule adopted by the majority".[123] Justice Meyer noted that North Carolina should follow the overwhelming majority of other jurisdictions which create restrictions based on "the relationship of the claimant to the injured or deceased person and the proximity of perception as well as the severity of the claimant's mental or emotional injury."[124] He proceeded to cite a number of cases from across the country in which courts allowed family members to recover, but not cohabitants. He noted a number of cases in which courts have denied

[121]See Greenberg, ***supra*** note 5, at 1286.

122.***Sorrells,*** 108 N.C.App. at 671-72, 424 S.E.2d at 679.

[123]***Sorrells,*** 334 N.C. at 675, 435 S.E.2d at 323.

***124.Id.***

recovery because the plaintiff did not witness the accident or was present, but had no sensory perception of the events surrounding the accident.[126] Further, Justice Meyer cited a case which held that the plaintiff in a NIED claim must be at the scene of the accident or arrive shortly thereafter.[126] One final recommendation of Justice Meyer in his dissent was that any NIED claim pursued must be joined with any underlying wrongful death or personal injury claim. He felt that this would avoid inconsistent verdicts and double recoveries. It is indeed difficult to find fault with this recommendation.[127]

Even if the supreme court is not inclined to add additional factors to clarify the foreseeability requirement, the elimination of the requirement of known susceptibility from ***Gardner*** and ***Baccus*** is critical. The beauty of the law of negligence is that it can be applied to any set of circumstances, and the requirements of proximate cause and foreseeability can properly limit recovery to justifiable claims. This is true if the judicial system does not interfere with the effectiveness of the jury by creating artificial or improper foreseeability factors.

The more cases that the supreme court decides under current precedent, the more difficult it will be to correct this questionable approach. Hopefully the court will recognize the consequences of these rulings and alter its course. If the supreme court refuses to do so, one can only hope that the legislature would be willing to take action. If legislative action were to be taken, it may be easiest to adopt an arbitrary rule requiring that NIED claims arising out of a concern for another be limited to situations where the plaintiff observed the negligent act or arrived at the accident shortly thereafter. This would allow a grievous situation like that involved in ***Baccus*** to result in a successful claim, while removing the risk of recovery through a remote claim.

[125] ***Id.*** at 675-76, 435 S.E.2d at 323-24.

[126] ***Id.*** at 676, 435 S.E.2d at 324 (citing Gain v. Carroll Mill Co., 114 Wash.2d 254, 787 P.2d 553 (1990)).

[127] ***Sorrells,*** 334 N.C. at 676, 435 S.E.2d at 324.