Case Brief: *Newman v. Stepp*[*]

INTRODUCTION

It is every parent's worst nightmare—their small child comes across a loaded gun. In a flash, tragedy strikes. To compound the psychological toll of losing their child under these circumstances, imagine it happens at the home of someone entrusted with the care of their child. The question becomes: Can the parents sustain a claim of negligent infliction of emotional distress ("NIED") for the suffering bound to ensue? It was precisely this question that the Supreme Court of North Carolina addressed in *Newman v. Stepp*[1] on December 18, 2020.

To state a claim for negligent infliction of emotional distress in North Carolina, 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.[2] In *Newman*, the Supreme Court of North Carolina addressed problems with the trial court's review and decision regarding the second element. The Supreme Court of North Carolina held that in evaluating an NIED pleading, "the question of reasonable foreseeability must be determined under all of the facts presented and should be resolved on a case-by-case basis instead of mechanistic requirement[s] associated with the presence or absence of the *Johnson* factors."[3]

FACTS OF THE CASE

On the morning of October 26, 2015, Delia Newman took her two-year-old daughter "Abby" to the residence of Heather and James Stepp, within which the two were providing an unlicensed day care that regularly cared for Abby and other children.[4] Unbeknownst to Delia, James Stepp had failed to put away a loaded 12-gauge shotgun he used for hunting the previous day, leaving it instead on the kitchen table.[5] The shotgun was not secured by safety, trigger lock, or any other mechanism.[6] At about 8:00 AM, Abby and several of the Stepps' minor children entered the kitchen.[7] One of the Stepps' children under

1. 376 N.C. 300, 852 S.E.2d 104 (2020).

2. Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

3. *Newman*, 376 N.C. at 313, 852 S.E.2d at 113.

4. *Id.* at 301, 852 S.E.2d at 106.

5. *Id.*

6. *Id.*

7. *Id.*

the age of five somehow discharged the shotgun, striking Abby in the chest at close range.[8] Heather Stepp then contacted emergency services for help.[9]

Jeromy Newman, who was Abby's father and a volunteer firefighter, heard a report about the incident over his citizens band radio, and, upon hearing the address of the incident, drove toward the Stepps' home while also contacting Delia by phone.[10] While en route, Jeromy passed an ambulance which he learned contained his still-alive daughter and followed it to the hospital, where he then observed Abby being taken inside.[11] Delia arrived shortly thereafter; however, unfortunately, Abby had already died by this time.[12] Delia was subsequently allowed to hold Abby's body for an extended period of time.[13]

Following their daughter's death, both parents alleged that they incurred severe emotional distress.[14] The Newmans filed a complaint including, inter alia, a claim for negligent infliction of emotional distress.[15] However, the trial court dismissed all of the Newmans' claims.[16] On appeal, the dispositive issue in the case was whether the Newmans' allegations regarding foreseeability were sufficient to support a claim for negligent infliction of emotional distress as a result of Abby's shooting and resulting death.[17] In a divided opinion, a majority of the North Carolina Court of Appeals panel held that the "plaintiffs properly alleged severe emotional distress to support foreseeability," reversing the trial court decision and remanding.[18] The dissent, utilizing the same case law, would have found the claim insufficient.[19] The Stepps appealed on the basis of the dissent; nevertheless, the Supreme Court of North Carolina ultimately affirmed the decision of the court of appeals.[20]

LEGAL ISSUES AND OUTCOME

As stated previously, a claim for negligent infliction of emotional distress can only be sustained if, inter alia, "it was reasonably foreseeable that such

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 302, 852 S.E.2d at 106.
12. *Id.*
13. *Id.*
14. *Id.* at 303, 852 S.E.2d at 107.
15. *Id.* at 302, 852 S.E.2d at 106.
16. *Id.* at 303, 852 S.E.2d at 107.
17. Newman v. Stepp, 267 N.C. App. 232, 833 S.E.2d 353 (2019), *aff'd*, 376 N.C. 300, 852 S.E.2d 104 (2020).
18. *Id.* at 233, 833 S.E.2d at 355.
19. *Id.* at 243–44, 833 S.E.2d at 361 (Tyson, J., dissenting) ("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 . . . [thus they] cannot sustain a claim for negligent infliction of emotional distress." (emphasis in original)).
20. *Newman*, 376 N.C. at 313, 852 S.E.2d at 113.

conduct would cause the plaintiff severe emotional distress."[21] In making a determination on foreseeability, *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*[22] asserted "[f]actors to be considered on the question of foreseeability . . . include 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."[23] The *Johnson* court went on to state foreseeability and proximate cause determinations are fact specific and "should be resolved on a case-by-case basis."[24] The *Newman* court cited another case that illuminated that "'the 'factors to be considered' include, *but are not limited to*'" those enumerated in *Johnson*.[25] The *Newman* court also leaned heavily into the court's previous position that the factors "'are not mechanistic requirements'" and that their "'presence or absence . . . is not determinative.'"[26] To the *Newman* court, factual nuance was determinative, not the factors themselves.

In *Newman*, the court proceeded to address the two cases the defendants relied on as factually analogous, *Gardner v. Gardner*[27] and *Andersen v. Baccus*,[28] while also discussing *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*[29] at length. In *Gardner*, the Supreme Court of North Carolina found the plaintiff's

21. Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) ("[M]ere temporary fright, disappointment or regret will not suffice. In this context, the term 'severe emotional distress' means any emotional or mental disorder . . . ." (citation omitted)). With regard to the other elements, the *Newman* court stated "it is apparent that the first and third elements of a claim for negligent infliction of emotional distress as articulated in *Johnson* exist in the present case." *Newman*, 376 N.C. at 305, 852 S.E.2d at 108.

22. 327 N.C. 283, 395 S.E.2d 85 (1990).

23. *Id.* at 305, 395 S.E.2d at 98.

24. *Id.*

25. *Newman*, 376 N.C. at 305, 852 S.E.2d at 108 (quoting Sorrells v. M.Y.B. Hosp. Ventures of Asheville, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993)).

26. *Id.* at 306, 852 S.E.2d at 109 (quoting *Sorrells*, 334 N.C. at 672–73, 435 S.E.2d at 322).

27. 334 N.C. 662, 435 S.E.2d 324 (1993). In *Gardner*, the plaintiff, the mother of a thirteen-year-old son, sued the child's father for negligent infliction of emotional distress after the youngster, while riding in a truck being operated by the father, was seriously injured when the father negligently drove the vehicle into a bridge abutment. *Id.* at 663, 435 S.E.2d at 426. The mother was alerted of the accident, rushed to the hospital, saw her child wheeled into the emergency room, and was subsequently informed of his death. *Id.* at 663–64, 435 S.E.2d at 326.

28. 335 N.C. 526, 439 S.E.2d 136 (1994). In *Andersen*, the plaintiff husband filed a complaint, which included a claim for negligent infliction of emotional distress, against the defendant as a result of a traffic accident in which the vehicle being driven by the defendant collided with the vehicle being operated by the plaintiff's wife after the defendant maneuvered to avoid a collision with a third vehicle. *Id.* at 527, 439 S.E.2d at 137. While the plaintiff did not see the accident, he was at the scene as his pregnant wife was removed from the car. *Id.* Once hospitalized, the wife proceeded to give birth to a stillborn son and subsequently died of injuries received in the accident. *Id.* at 528, 439 S.E.2d at 137.

29. 334 N.C. 669, 435 S.E.2d 320 (1993). In *Sorrells*, plaintiff parents sued a bar for negligent infliction of emotional distress after their twenty-one-year-old son was negligently served alcohol and subsequently died when his loss of control of his motor vehicle caused him to strike a bridge abutment. *Id.* at 670–71, 435 S.E.2d at 321.

allegations were insufficient to state a claim by heavily emphasizing that "[the mother's] absence from the scene at the time of defendant's negligent act, *while not in itself decisive*, militate[d] against the foreseeability of her resulting emotional distress."[30] In *Sorrells*, the court found that despite the parent-child relationship of the plaintiffs to the decedent, the series of events leading from negligently serving alcohol to the plaintiffs' child to the potential infliction of "severe emotional distress" on the parents was "simply . . . a possibility too remote to permit a finding that it was reasonably foreseeable."[31] Leaning upon the facts in *Gardner* and *Sorrells*, the court in *Andersen* stated the lesson from those cases was that a "family relationship between plaintiff and the injured party for whom [the] plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability," and that, on the *Andersen* facts, the possibility a family member may be brought to the scene of an accident and suffer emotional distress was "entirely too speculative to be reasonably foreseeable."[32]

Rather than rule as the court had in these factually analogous cases, the *Newman* majority instead focused on perceived factual differences. The majority's main takeaway from *Gardner* was its "focus on the importance of flexibility regarding the pertinent factors to be considered in evaluating allegations of foreseeability."[33] The court went on to conclude that

> [a]lthough we held in the cited series of cases that the foreseeability factor of *Johnson* did not exist due to such circumstances as the defendant's lack of knowledge of plaintiff's existence, the prospect of parents suffering "severe emotional distress," and the inability of the defendant to know the identity of the fatally injured party, conversely we hold that the foreseeability factor of *Johnson* does exist in the case at bar because defendants have knowledge of plaintiffs' existence, there is the prospect of plaintiffs suffering severe emotional distress, and defendants were able to know the identity of the fatally injured party Abby.[34]

In countering the dissent's assertion that indeed the dissent was the one considering all the facts, the majority pointed out a big component of the current case was that the "plaintiffs and defendants knew each other to such a degree that plaintiffs allowed their young child to spend appreciable amounts of time in defendants' home."[35] The majority further concluded that "[f]undamentally, . . . the concept of the foreseeability of the infliction of

30. *See Gardner*, 334 N.C. at 667, 435 S.E.2d at 328 (emphasis added).
31. *Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323.
32. *Andersen*, 335 N.C. at 533, 439 S.E.2d at 140.
33. *See* Newman v. Stepp, 376 N.C. 300, 308, 852 S.E.2d 104, 110 (2020).
34. *Id.* at 312, 852 S.E.2d at 112.
35. *Id.*

emotional distress resulting from defendants' negligent act of leaving a loaded and unsecured shotgun in an unattended state within reach of a group of young children" was indisputably governed by the *Johnson* factors and, thus, must be placed before a jury.[36]

The primary arc of Justice Newby's dissent was that the majority failed to follow a clear line of cases establishing precedent.[37] Justice Newby pointed out that "[i]n each of these cases we held that the alleged NIED was not foreseeable."[38] In rejecting the majority's argument regarding the relationship between the plaintiffs and defendants, Justice Newby claimed that the mother in *Gardner* surely had an even stronger case for foreseeability.[39] Justice Newby further noted that the majority deviated from precedent because the court "never previously focused on the nature of the negligent act" and "analysis of the egregious nature of the negligent act is not mentioned as a foreseeability factor in any of our prior cases,"[40] leading to a conclusion that the majority had added a new factor to foreseeability determinations. With only a differentiating basis in whether "leaving a loaded shotgun accessible to minors was involved" to guide future litigants, Justice Newby warned this "uncharted territory" could "open a floodgate of new NIED claims," whereas the "*Johnson* factors have worked well for thirty years."[41]

BRIEF ANALYSIS AND POTENTIAL IMPACT

As the case law cited in *Newman* shows, a North Carolina plaintiff suing for negligent infliction of emotional distress stemming from injuries to another person has historically been a difficult case to win. In particular, the foreseeability of the ensuing emotional distress has consistently proven to be the death knell of these claims when the plaintiff is not in the presence of the negligent act. In making its decision, the majority in *Newman* (1) distinguished the *Newman* facts from previous NIED cases, (2) denied a mechanistic application of the *Johnson* factors, and (3) considered the nature of the negligent act, decidedly not an existing *Johnson* factor. On the other hand, Justice Newby in dissent both argued that he was not making a mechanistic determination while also arguing for strict adherence to the existing factors, which Justice

36. *Id.* at 311, 852 S.E.2d at 112.

37. *See id.* at 313–14, 852 S.E.2d at 113 (Newby, J., dissenting).

38. *Id.* at 313, 852 S.E.2d at 113.

39. *Id.* at 316, 852 S.E.2d at 115 ("Certainly a husband would have been in a better position to know of any particular susceptibility of his wife to suffer severe emotional distress than a daycare owner interacting with a child's parents.").

40. *Id.* at 314, 852 S.E.2d at 116.

41. *Id.* at 319, 852 S.E.2d at 116.

Newby argued all precedential cases had done.[42] As one commentator put it, "[d]espite the court's statements that there are no mechanistic tests for foreseeability, it is unlikely that a plaintiff will recover without meeting the requirements of one of these categories."[43]

In *Newman*, the Supreme Court of North Carolina emphasized that a foreseeability determination is a fact intensive one, unbound by fixed factors. *Newman* has built upon *Johnson* and existing precedent by creating what it deemed to be a unique factual situation that satisfies the requisite foreseeability. If defendants have knowledge of plaintiffs' existence and are able to know the identity of the fatally injured party, there is the prospect of plaintiffs suffering severe emotional distress.[44] Those facts, combined with the "act of leaving a loaded and unsecured shotgun in an unattended state within reach of a group of young children,"[45] now create an NIED foreseeability claim strong enough to withstand summary judgment. The court's decision in *Newman* inevitably creates the window Justice Newby cautioned against due to the majority's combination of determinative facts. On the one hand, in theory, any caretaker with a relationship with a family and their child may be subject to negligent infliction of emotional distress should something terrible happen while they look after the child. It would seem on these grounds, a mechanical application of the *Johnson* factors is an impossibility, as proximity to the accident need not apply. Furthermore, consideration of the negligent act itself creates the need for future litigation to parse out what negligent acts do and do not create the requisite foreseeability. The *Newman* court's deviance from its historical approach in applying *Johnson* more rigidly leaves future litigants in the "uncharted territory" that Justice Newby wisely warned of.

GEORGE DYLAN BOAN**

42. *Id.* at 314, 852 S.E.2d at 113 ("We have never previously focused on the nature of the negligent act. Generally, foreseeability requires plaintiffs to be present during the negligent act and perhaps observe the resulting injury.").

43. John M. Logsdon, *The Rise and Fall of Bystander Recovery for Negligent Infliction of Emotional Distress in North Carolina*, 21 N.C. CENT. L.J. 319, 342 (1995).

44. *See Newman*, 376 N.C. at 312–13, 852 S.E.2d at 112.

45. *Id.* at 311, 852 S.E.2d at 112.

** J.D. Candidate, Class of 2022.