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COURT OF APPEALS

STATE OF NEW YORK

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STACY GREENE, ET AL.,

Appellants,

-against-

NO. 6

ESPLANADE VENTURE PARTNERSHIP, BLUE  
PRINTS ENGINEERING, P.C. AND MAQSOOD  
FARUQI,

Respondents.

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20 Eagle Street  
Albany, New York  
January 6, 2021

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

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1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 6, Greene v.  
3 Esplanade Venture Partnership.

4 (Pause)

5 MR. RUBINOWITZ: Good afternoon, Your Honor.

6 CHIEF JUDGE DIFIORE: Good afternoon. Let's wait  
7 a moment until your colleague appears on the screen, and we  
8 get Judge Feinman back.

9 JUDGE FEINMAN: I'm back.

10 CHIEF JUDGE DIFIORE: Okay, great. Thank you.

11 Good afternoon. This is appeal number 6, Greene  
12 v. Esplanade. Counsel?

13 MR. RUBINOWITZ: Good afternoon, Your Honor. Ben  
14 Rubinowitz from Gair Gair Conason, for the plaintiff-  
15 appellant. Your Honor, I respectfully request two  
16 additional minutes for rebuttal.

17 CHIEF JUDGE DIFIORE: You'll get two minutes for  
18 rebuttal, sir.

19 MR. RUBINOWITZ: Thank you. Your Honor, in this  
20 case, the unthinkable happened back in May of 2015. And  
21 the question is whether a grandmother, who was only sixty  
22 years old at the time, who witnessed her granddaughter  
23 crushed in front of her eyes, should be able to recover for  
24 the emotional damages, for the zone of danger damages.

25 CHIEF JUDGE DIFIORE: Counsel, is - - - why is



1 the bystander claim necessary here where the grandmother  
2 sustained her own injuries?

3 MR. RUBINOWITZ: Because it's not just her own  
4 injuries that matter. In witnessing the death of her  
5 grandchild, as - - - as has been stated by Judge Miller  
6 below, you would go through metaphysical gymnastics trying  
7 to separate what she is feeling - - - the emotional trauma  
8 in witnessing the granddaughter's death and separating that  
9 from her own emotional damages. They're all part of the  
10 same thing. And that's what the court actually spoke about  
11 in the Bovson case some thirty-eight years ago.

12 So when they said that you're entitled to recover  
13 for these emotional damages, for the negligent infliction  
14 of emotional distress, and they defined this by saying if  
15 you're within the immediate family you can recover for zone  
16 of danger damages, certainly a grandmother should be one  
17 who is in the immediate family.

18 And the Court of Appeals has never before  
19 answered the question as to whether or not a grandmother  
20 is. But if we take a look at what has happened in the  
21 thirty-eight years from the time that the Bovson court  
22 decided this, certainly the family structure has changed -  
23 - -

24 JUDGE RIVERA: Judge, if I may ask a question?

25 MR. RUBINOWITZ: Yes.



1 CHIEF JUDGE DIFIORE: Judge Rivera.

2 JUDGE RIVERA: Thank you.

3 So you said the court has never decided that  
4 grandparents don't fall within the - - - the immediate  
5 family. But doesn't Trombetta go against that position?  
6 Don't we have to overrule that part of Trombetta that said  
7 immediate family is limited to basically parents, siblings  
8 and children? Don't we have to overrule that, or is there  
9 a way to avoid that?

10 MR. RUBINOWITZ: I think you actually should be  
11 overruling the Trombetta case, because it is not in keeping  
12 with the Restatement of Torts, which was something that was  
13 relied on when we take a look at the Bovson court, and we  
14 take a look at what really did happen.

15 In Trombetta, you did have an aunt who raised the  
16 child. And what I'm saying is here, if we take a look at  
17 what the Restatement of Torts Third is saying, they're  
18 saying close family member. Every other state that has  
19 allowed - - -

20 JUDGE STEIN: Judge, may I - - - may I inquire?

21 CHIEF JUDGE DIFIORE: Please.

22 JUDGE STEIN: I - - - I - - - I'm confused. Why  
23 - - - why do we need to adopt the Restatement? Now, I - -  
24 - I understand there's a - - - there's policy arguments  
25 about - - - about different kinds of families and - - - and



1 all of that. But that's not what we have here.

2           Couldn't we just fit the grandparents into our  
3 current framework, which is immediate family member within  
4 the zone of danger, and - - - and because of changes in our  
5 law - - - even assuming Trombetta says what you say it says  
6 - - - which I don't necessarily think is true - - - but why  
7 can't we say because of changes in our law, recognizing  
8 grandparents as a special class - - - why can't we do that  
9 without throwing out years, and years, and years of very  
10 careful, deliberate, expansion of this area of law, and  
11 wait for the next case to come before us in which maybe  
12 it's not a grandparent, maybe it's something else?

13           I just - - - I don't - - - I don't understand why  
14 we have to take a giant step in this case, when there's  
15 another way to grant relief, if that's what we think is  
16 appropriate.

17           MR. RUBINOWITZ: So Judge Stein, you ask a very  
18 good question. I happen to agree completely - - -  
19 completely with you. If we take a look at the standard set  
20 forth in Bovson, which is immediate family member, a  
21 grandmother certainly falls within immediate family member.  
22 And the reason I say that is because of the reality of  
23 today.

24           We don't have a - - - a stay-at-home mom anymore.  
25 We have nontraditional families, where the grandmothers



1 take care of the grandchildren while the mothers work. And  
2 in fact, they're part of the immediate family. So I happen  
3 to agree completely with you. We don't have to undo that  
4 at all, if we follow the "immediate family member" as laid  
5 out in the Bovson case itself.

6 All I was saying with respect to the American Law  
7 Institute was when they take a look at the Restatement of  
8 Torts, they now have gone away from "immediate family  
9 member", and they say "close family member". But I happen  
10 to agree with - - -

11 JUDGE STEIN: But don't they say - - -

12 MR. RUBINOWITZ: - - - you.

13 JUDGE STEIN: - - - get away - - - don't they  
14 also get away from the zone of danger rule, when they - - -  
15 when they talk about perceiving an event and - - - and - - -  
16 - I mean, to me, that's a pretty big jump.

17 MR. RUBINOWITZ: Well, what they're also saying  
18 is that the zone of danger, for those - - - for those  
19 individuals who are within the zone of danger, they  
20 certainly say that a grandparent is part of that.

21 And they've made it very clear. Just as we're  
22 saying when you take a look at the law in New York - - - if  
23 you take a look at the domestic relations law, you could  
24 see immediate family mem - - -

25 JUDGE FEINMAN: Chief, if I may?



1 CHIEF JUDGE DIFIORE: Yes, Judge Feinman.

2 JUDGE FEINMAN: Mr. Rubinowitz, I - - - I think  
3 what Judge Stein is getting at is, is there a way to give  
4 you the relief that you want, that is incremental, without  
5 eliminating the zone of danger requirement, which I think  
6 everybody concedes is satisfied here, and - - - and then  
7 leave some of these other issues to the next case? And - -  
8 - and how would you do that?

9 MR. RUBINOWITZ: So Judge Feinman, what I would  
10 say is this. The immediate family member, if I understand  
11 your question correctly, what you're saying is, yes, a  
12 grandparent is an immediate family member, and that would  
13 leave the law intact. And certainly what I'm saying and  
14 what Judge Stein asked - - - I happen to agree completely  
15 with what Judge Stein said - - - yes, a grandmother is  
16 within the immediate family members.

17 And that would certainly leave the law intact.  
18 But what we're saying is you can't say that a title alone:  
19 grandparent, therefore we're going to say if it was a  
20 mother it's okay but if it's a grandparent no, it - - - it  
21 ignores the reality of what's going on.

22 If for example, a mother died during childbirth,  
23 and raised by the grandparent, the grandmother, certainly  
24 that grandparent is part of the immediate family member and  
25 has to be. And that's why I happen to agree with what





1 Judge Stein said and Your Honor just - - -

2 JUDGE RIVERA: Judge, if I may ask?

3 Counsel that sounds a lot like "close family  
4 member". That sounds a lot like what the Restatement Third  
5 is trying to do, which is expand the understanding of  
6 nuclear family, the family that would - - - a family member  
7 who would most react to - - - as you were saying - - - a  
8 horrible witnessing of harm to another family member. It  
9 sounds a lot like the same thing.

10 MR. RUBINOWITZ: I - - - I understand your  
11 question, Your Honor. And what I'm saying, Judge Rivera,  
12 is this. Yes, if you take a look at it, certainly within  
13 the standard set forth in Bovson, Susan Frierson as a  
14 grandmother, should be able to recover for zone of danger  
15 damages.

16 I happen to agree with you that yes, the  
17 Restatement Third does expand it when they say - - - when  
18 they say, for example, "close family member" as opposed to  
19 "immediate family member". I'm saying either way, in this  
20 case, this grandmother should be able to recover,  
21 certainly.

22 JUDGE RIVERA: Okay. Let me - - - let me ask you  
23 this, because I just want to clarify. With respect to your  
24 understanding of our zone of danger test and jurisprudence  
25 - - -



1 MR. RUBINOWITZ: Um-hum.

2 JUDGE RIVERA: - - - does the zone of danger  
3 require that the (audio interference) --

4 JUDGE FAHEY: I lost - - -

5 JUDGE GARCIA: Yeah. You're out.

6 JUDGE FAHEY: - - - Judge Rivera.

7 CHIEF JUDGE DIFIORE: Judge Rivera, we can't hear  
8 you.

9 JUDGE RIVERA: I'm sorry. My apologies.

10 Does the zone of danger test, as New York has  
11 adopted it, require - - - let's just take a parent to make  
12 it easy - - - that the parent themselves suffer an injury  
13 or they just have to be within the zone of danger,  
14 regardless of whether or not they suffered their own  
15 injury?

16 I just want to know your - - - your position on  
17 that.

18 MR. RUBINOWITZ: Okay. First I will point out  
19 that Susan Frierson, the grandmother here, did suffer an  
20 injury. But our position is, it is not necessary. And I  
21 refer the court to Battalia, for example - - - Battalia v.  
22 State, where, in fact, emotional damages had been allowed  
23 without a physical injury. And they've updated that since  
24 the - - - the doctrine many, many years ago - - - forty or  
25 fifty years ago.



1 JUDGE RIVERA: No injury at all to the  
2 individual?

3 MR. RUBINOWITZ: Yes.

4 JUDGE RIVERA: If - - - if - - - the only - - -  
5 let me put it this way. If the only damages that the  
6 individual is - - - the parent, in my hypothetical - - - is  
7 seeking is for the emotional disturbance they suffer as a  
8 consequence of witnessing the horrendous injury or - - - or  
9 fatality to the other family member?

10 MR. RUBINOWITZ: Yes.

11 JUDGE RIVERA: Your understanding is under our  
12 zone of danger standard and jurisprudence, they can  
13 collect? They need not have any physical or emotional  
14 injury unique to themselves, correct?

15 MR. RUBINOWITZ: That is correct. And in this  
16 case what I'm saying is, although I say that's correct,  
17 Susan Frierson did suffer injuries to both her knee and to  
18 her ankle when that debris fell eight stories from the - -  
19 - from the negligently maintained façade on that building.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.  
21 Counsel?

22 JUDGE FAHEY: Judge?

23 CHIEF JUDGE DIFIORE: Oh. I'm sorry. Judge - -  
24 -

25 JUDGE FAHEY: Can I ask Mr. Rubinowitz, because I



1 want to get this from both counsel.

2 CHIEF JUDGE DIFIORE: Yes. Yes, of course.

3 JUDGE FAHEY: What - - - what we're struggling  
4 here with is the nature of the barriers that we're trying  
5 to erect within the zone of danger and who it applies to.  
6 And is there a definition that you would point us to  
7 outside of the Third Restatement, for immediate family,  
8 that you'd want us to look at?

9 MR. RUBINOWITZ: Yes, Your Honor. I would ask  
10 you to take a look at, for example - - - knowing that many  
11 of you were, for example, district attorneys or assistant  
12 DAs, or you've worked in the criminal field - - - if you  
13 take at, for example, the penal law, defining murder in the  
14 first degree, an immediate family member of a witness to a  
15 crime includes a husband, a wife, a father, a mother, a  
16 daughter, son, brother, sister, grandparent, and  
17 grandchild. It says it specifically.

18 So what I'm saying is - - -

19 JUDGE FAHEY: Well - - -

20 MR. RUBINOWITZ: - - - if we take a - - - but - -  
21 - but there's more than that. If you take a look at the  
22 election law, it says the same. Grandparent is included.  
23 The public health law, it says the same. Grandparents are  
24 included. The domestic relations law recognizes the  
25 special relationship between a grandparent and a



1 grandchild. The Rent Stabilization Code refers to  
2 grandparent and grandchild. So does the compensation law -  
3 - -

4 JUDGE FAHEY: So let me ask you the next  
5 question. I get your point. But so let's say we can reach  
6 - - - grand - - - grandparent, actually, I find to be  
7 relatively easy. You have both a familiar or, if you wish,  
8 a genetic bond, and also a social bond that's usually  
9 pretty strong. And it's easy to include that person within  
10 the immediate family penumbra.

11 But what about - - - does this mean that we would  
12 go through the process with each type of relation that  
13 maybe suffered a negligent infliction of emotional distress  
14 with - - - within the zone of danger - - - let's say you  
15 come up with someone's - - - a cousin; you come up with  
16 someone's stepsister. Do we have to go - - - would we go  
17 through that analysis each time, or is there a rule we can  
18 point to that would include those kind of people or factors  
19 that we should look at that would include those kind of  
20 people if it will be appropriate to include them, within  
21 immediate family?

22 You know, my experience of family in my lifetime  
23 is that it's changed a great deal. And when I was a young  
24 man, it was June Cleaver; now it's Modern Family. And I  
25 think that that - - - that paradigm has been reflected in



1 all of our lives.

2 And so I'd like us to not deal with each relative  
3 one at a time in the Court of Appeals, that we'd have some  
4 rule and some guidance for the trial court that we can  
5 offer them. I'm wondering if you have one for us?

6 MR. RUBINOWITZ: Yes, Your Honor. I - - - I  
7 actually grew up about the same time that you did, so I  
8 understand those two analogies, and they're - - -

9 JUDGE FAHEY: Another old man, huh?

10 MR. RUBINOWITZ: I guess so. But - - - but my  
11 point is this. I see what you're saying. And you'd be  
12 struggling with a qualitative analysis where we - - - where  
13 we try and evaluate the quality of the relationship for  
14 each specific case. In other words, let's look at the  
15 quality, let's look at the integrity of that relationship.

16 And I said, we don't even have to do that here,  
17 because here we do have a grandmother who is within the  
18 immediate family, which is what Bovson said originally.  
19 And I'm saying - - -

20 JUDGE FAHEY: Um-hum.

21 MR. RUBINOWITZ: - - - if we take a look at that,  
22 certainly, this grandmother falls within the immediate  
23 family. We don't even have to go to the Third Restatement  
24 of Torts. We don't have to go to a - - - a qualitative  
25 analysis to determine whether or not the quality of that



1 relationship - - -

2 JUDGE FAHEY: And how do we, as a court, deal  
3 with that problem of each individual family relationship  
4 that over time, may fall within a negligent infliction of  
5 emotional distress claim, they have damages - - - they're  
6 within the zone of danger? How - - - is there a way to do  
7 that so that we don't have to relitigate this every single  
8 time there's a different familial relationship that we're  
9 confronted with?

10 MR. RUBINOWITZ: I think - - - I think the way to  
11 do it is to get away from the title, if you really wanted  
12 to.

13 JUDGE FAHEY: Um-hum.

14 MR. RUBINOWITZ: And instead of saying the title,  
15 let's take a look at the nature and the extent of the  
16 relationship; let's take a look at the quality of that  
17 relationship; and let's take a look at the integrity of  
18 that relationship.

19 JUDGE FAHEY: Um-hum.

20 MR. RUBINOWITZ: Because whether you choose to  
21 call it a grandmother, grand - - - a grand-person, or you  
22 choose to call it, for example, somebody who is actually  
23 there as a part of that nuclear family, are they really  
24 there? Are they really offering the quality, that - - -  
25 that integrity? Is it part of that relationship? And I



1 think - - -

2 JUDGE FEINMAN: Chief, if I may follow up?

3 CHIEF JUDGE DIFIORE: Judge Feinman.

4 JUDGE FEINMAN: If that be - - - if that becomes  
5 the rule, then, you basically could never grant summary  
6 judgment on, you know, the relationship, because by  
7 definition, those are all going to be fact-intensive  
8 inquiries, correct?

9 MR. RUBINOWITZ: I - - - I understand your  
10 question, Judge Feinman. And the answer to your question  
11 is yes. I'm saying here we don't even have to do that,  
12 because Susan Frierson - - -

13 JUDGE FEINMAN: I understand in this case.

14 MR. RUBINOWITZ: Right, right. But - - -

15 JUDGE FEINMAN: But Judge Fahey is getting to  
16 trying to create a more general rule of general  
17 applicability. And so what I'm trying to figure out, if  
18 there's some sort of rule that provides guidance but allows  
19 courts to weed out, either at the motion to dismiss or the  
20 summary judgment stage, those claims that maybe shouldn't  
21 go to a jury.

22 MR. RUBINOWITZ: And - - -

23 JUDGE FEINMAN: The way I understand your  
24 articulation of the rule, summary judgment would have to be  
25 denied in every single case, or the motion to dismiss would





1 have to be denied in every case.

2 MR. RUBINOWITZ: That - - - that, I believe, is  
3 why the Restatement actually went to "close family member"  
4 to answer the exact question that you're asking right now.  
5 Because what they're saying is here take a look at that  
6 relationship. Are they close?

7 What I'm saying is here, in our case, with Susan  
8 Frierson witnessing the death of Greta, who was two years  
9 old, when she was sixty, I'm saying you don't even have to  
10 go that far.

11 But certainly if you follow the Restatement,  
12 which is what the Bovson court did some thirty-eight years  
13 ago, the Restatement now says "close family member", and  
14 every other state that follows it, allows - - -

15 JUDGE GARCIA: Chief, may I ask - - -

16 MR. RUBINOWITZ: - - - grandmothers - - -

17 JUDGE GARCIA: - - - a question? I know we're  
18 over time. Chief, may I ask a question? I know we're  
19 over.

20 CHIEF JUDGE DIFIORE: Please. Yes, Judge Garcia.

21 JUDGE GARCIA: Counsel, I think with that kind of  
22 summing up here, it goes back to what Judge Rivera, I  
23 think, was getting at in a very early stage of this  
24 argument, which is you keep talking about Bovson, but the  
25 only marker of this court as laid down since Bovson was



1 really a case that pulled that back, in a way, and  
2 reemphasized the need to - - - Trombetta - - - to - - - to  
3 limit that type of liability.

4 So what you're asking us to do, I think, as Judge  
5 Rivera was saying, is to really overrule the one marker  
6 that came out ten years after Bovson, which unanimously - -  
7 - and Bovson, as Trombetta says, was a very closely divided  
8 court - - - but Trombetta, 7-0, said you know, we really  
9 have to be circumspect in expanding this type of liability;  
10 and I think, if it didn't do anything else, really closed  
11 off that kind of functional look at what role do you play  
12 in a family structure and went with categories.

13 Now, you know, I take Judge Fahey's point and  
14 your answer that that may have changed over time. But the  
15 only case, it seems to me, this court has decided since  
16 Bovson, put an end to that type of analysis.

17 MR. RUBINOWITZ: So Judge Garcia, I'll answer it  
18 this way. Yes, Trombetta was twenty-eight years ago, and -  
19 - - and you did anticipate this in your question to me, and  
20 I - - - I respect that, where you said the family has  
21 changed. And it has.

22 And that's why the Restatement has actually said  
23 we have to look at - - - we have to look at the close  
24 family relationship.

25 JUDGE GARCIA: But we rejected pretty much that



1 argument in Trombetta, because the argument was made there  
2 that - - - I think it was a niece and an aunt - - - that  
3 that was, in essence, a mother-daughter or a type of close  
4 family relationship that was similar to what we had said  
5 was okay in Bovson.

6 And I think we rejected that. So I think your  
7 argument, though, now, is we shouldn't reject that type of  
8 functional test. But it seems, for policy reasons, that's  
9 exactly what we rejected. It wasn't that we said that  
10 doesn't happen. It was we said we were not going to  
11 consider that for liability here.

12 MR. RUBINOWITZ: So once again I go back to the  
13 point that this is a grandmother, that was an aunt. But  
14 even with the aunt, I am saying with the things that have  
15 changed in the last twenty-eight years since Trombetta was  
16 decided, yes, we now have very different family structures.  
17 And because of that, what I am saying is that the law has  
18 to change and it has to keep up with it.

19 JUDGE GARCIA: But wouldn't that argue for even  
20 more of an adherence to Trombetta, because now you have an  
21 - - - an expanded pool who, under a functional test - - -  
22 you know, what role do you play with respect to this  
23 person, and does it emulate a father-son, mother-son, you  
24 know - - - now we have a larger pool of potential  
25 candidates.



1           And if you go to Trombetta saying, you know,  
2           there are very strong policy reasons to limit this  
3           liability, then your argument, to me, makes the Trombetta  
4           court's point stronger. Yes, there's even more people that  
5           could potentially qualify now.

6           MR. RUBINOWITZ: I - - - I'm saying here,  
7           specifically, this grandmother does qualify under Bovson,  
8           as it was written. But I'm also saying that certainly what  
9           happened in Trombetta with an aunt who was a de facto  
10          mother, we shouldn't just look at the title of somebody  
11          being an aunt or an uncle or a stepmother.

12          What I am saying is let's take a look at the  
13          relationship and let's take a look at the integrity of that  
14          relationship, because that's terribly important. And when  
15          some - - - something happens like this, there has to be a  
16          remedy under the law, because otherwise, it would result in  
17          such injustice, not to be able to do this.

18          This is something that is terribly, terribly  
19          important, where, for example, this grandmother witnesses  
20          her grandchild crushed in front of her. They did nothing  
21          wrong. Nothing to cause this. But the defendants submit a  
22          - - - a false inspection report.

23          JUDGE GARCIA: Counsel, we understand; and the  
24          facts in this case are compelling. But as I think Judge  
25          Fahey has been pointing out, we're - - - we're looking to



1 make a rule here. So you know, we have to consider, you  
2 know, the landscape well beyond the compelling facts that  
3 you're arguing to us now.

4 MR. RUBINOWITZ: So if I could suggest - - -

5 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank  
6 you, counsel.

7 Counsel?

8 MR. SHAUB: Good afternoon. May it please the  
9 court, Jonathan Shaub for the respondent, Esplanade Venture  
10 Partnership. I'd like to begin where Mr. Rubinowitz left  
11 off with the idea that this is an open question that  
12 grandparents are included in the immediate family test.  
13 It's not.

14 Trombetta, as Judge Rivera noted, limited  
15 immediate family to parents, spouses, and children. So  
16 proceeding from that point, what Mr. Rubinowitz is asking  
17 us to do is expand the orbit of duty in a carefully and  
18 narrowly recognized area of the law that this court has  
19 taken great pains to circumscribe liability to avoid - - -

20 JUDGE FAHEY: Well, let me - - -

21 MR. SHAUB: - - - creating - - -

22 JUDGE FAHEY: - - - ask you - - - can I ask  
23 something, Judge? Would it be all right?

24 CHIEF JUDGE DIFIORE: Yes, please.

25 JUDGE FAHEY: Mr. Shaub, what would the public



1 policy reason be to not include a grandmother as part of an  
2 immediate family?

3 MR. SHAUB: So the issue here becomes, this court  
4 drew a boundary in a very logical - - -

5 JUDGE FAHEY: No, I understand that. But let's  
6 address this case. Let's just say that we don't adopt the  
7 Third Restatement, but we do consider whether or not the  
8 grandmother's included within the immediate family  
9 jurisprudence of this court. What - - - is - - - what  
10 public policy reason would there be for us not to include a  
11 grandparent, forgetting the individual?

12 MR. SHAUB: So what we're doing here now is  
13 expanding the class of plaintiffs who can recover from - -  
14 - right now it's you have one spouse, two parents.

15 JUDGE FAHEY: Um-hum.

16 MR. SHAUB: And what that is now doing is  
17 doubling the number of people who are covered.

18 JUDGE FAHEY: Yeah, I get that. I get the  
19 numbers. But the normal public policy reasons that oppose  
20 this kind of action are a flood of litigation is claimed;  
21 emotional damages that can be faked; the damages are  
22 speculative.

23 I find no evidence of that. I - - - I don't  
24 think there's a state you can point to or empirical proof  
25 for any flood of litigation that takes place by an



1 expansion of - - - of this particular right to recover.  
2 And I - - - and there was none that anyone's offered as an  
3 argument in this case.

4 Emotional damages can be faked; that's a  
5 nineteenth century notion that is really outside of our  
6 jurisprudence. And things like PTSD should have really  
7 cured any court of ever thinking that emotional damages can  
8 be faked and they don't really exist.

9 So I - - - I - - - I guess what I'm saying is,  
10 just limit it to the grandmother, or the grandparents, how  
11 would this affect any of those normal public policy  
12 arguments against this?

13 MR. SHAUB: So I think the problem becomes if you  
14 start at grandparents and you moved the field of those core  
15 relationships, there's no limiting principle to the - - -

16 JUDGE FAHEY: So it's a thin edge of the wedge  
17 kind of argument, is that - - -

18 MR. SHAUB: Right, it - - -

19 JUDGE FAHEY: - - - is that what you're saying?

20 MR. SHAUB: - - - it - - - it's a slippery slope.  
21 And I would add, in the other jurisdictions - - -

22 JUDGE STEIN: Judge, can I - - - can I question  
23 MR. Shaub on that?

24 CHIEF JUDGE DIFIORE: Judge Stein.

25 JUDGE STEIN: Counselor, we - - - would you agree



1 that at least insofar as our fairly recent decision in  
2 Suarez is concerned, that we have given grandparents a  
3 special status in relation to - - - to children - - - to  
4 grandchildren? So wouldn't that possibly be a limiting  
5 factor?

6 MR. SHAUB: So the - - - the status that the  
7 grandparents have been afforded as it relates to  
8 grandchildren is - - - is as it relates to the best welfare  
9 of the child. We're talking about tort duties here. And  
10 in defining tort duties - - -

11 JUDGE STEIN: I understand - - -

12 MR. SHAUB: - - - what we're - - -

13 JUDGE STEIN: - - - but - - - but in - - - in  
14 talking about what one has to do to get custody of - - - as  
15 opposed to a - - - as opposed to a parent, we specifically  
16 recognized the special relationship that grandparents have  
17 in our society today and so on and so forth. So you know,  
18 I - - - I don't think it's just limited to the best  
19 interests of the child.

20 We - - - we made a statement about the role that  
21 grandparents play. And it's really not, you know - - -

22 MR. SHAUB: So I - - - I - - -

23 JUDGE STEIN: - - - a huge - - - it's not a huge  
24 step.

25 MR. SHAUB: I do not disagree that grandparents





1 play an important role in - - - in the modern society. In  
2 fact, my parents are watching my children right now. I - -  
3 - I completely agree with that and understand that.

4 But the point is, that relationship and that  
5 special relationship is still not akin to the relationship  
6 between a spouse, a parent, and a child. And those are  
7 recognized and afforded constitutional protections.

8 And if we start going down the road of looking at  
9 what statutes and cases except, it's going to be - - - will  
10 not be very long until the next plaintiff comes in pointing  
11 to some piece of legislation or some language in a decision  
12 saying there's a special relationship.

13 And this builds on another point. The  
14 legislature has considered this exact issue on three  
15 separate occasions, and considered - - - and bills to  
16 modify the General Obligations Law and the CPLR, to include  
17 grandparents as immediate family members. And on each and  
18 every one of those occasions, the bill has not passed,  
19 which demonstrates that they're not immediate family  
20 members for purposes of - - -

21 JUDGE STEIN: Well, it may demonstrate - - - it  
22 may demonstrate a lot of different things. But - - - but  
23 the definition and even the category of immediate family  
24 member in this context, has always come from the court.

25 So you know, I - - - I don't - - - I don't know



1 that I agree with you that this is a matter that the  
2 legislature has to address in order to - - -

3 MR. SHAUB: Respectfully, Your Honor, this court  
4 has recognized, though, in the areas of public policy, with  
5 expansive potential for liability, that is oftentimes with  
6 economic ramification, it is best left to the legislature  
7 to decide this.

8 And I think this court, with all - - -

9 JUDGE STEIN: But you could also say conversely  
10 that if the legislature didn't want this to be, the  
11 legislature could limit it.

12 MR. SHAUB: Correct. But as - - - as it exists  
13 now, there is the Guan case which shows that grandparents  
14 were not recognized as grandparents (sic). And in the face  
15 of that decision, the legislature has failed to pass this  
16 legislation.

17 So legislative inactivity is evidence that it is  
18 - - - or in this case it is activity, as the failure to  
19 pass it - - - it is evidence of the fact that the  
20 legislature is - - - is happy with - - -

21 JUDGE FEINMAN: Chief?

22 MR. SHAUB: I'm sorry. Is happy with - - -

23 JUDGE FEINMAN: If I may - - -

24 MR. SHAUB: I'm sorry, Judge.

25 CHIEF JUDGE DIFIORE: Judge?



1 MR. SHAUB: Is happy with where the line's been  
2 drawn.

3 JUDGE FEINMAN: Yeah. I - - - I want to turn to  
4 a different issue, which is if you can comment on something  
5 that came up in the discussion with Mr. Rubinowitz about in  
6 a situation like this, where there actually has been injury  
7 to the grandmother, how does a court go about talking to a  
8 jury about - - - and this goes back, I think, also to the  
9 Chief's very original question in this argument - - - the  
10 emotional damages that, you know, she may have suffered for  
11 her own injury versus the emotional damages that she  
12 suffered because of what she witnessed the grandchild go  
13 through?

14 I mean, you know, she gets up on the stand and  
15 she testifies I'm depressed, I have insomnia, I can't  
16 sleep, you know, sometimes I dream about my granddaughter,  
17 and - - -and relive the accident. Oh, no, you can't  
18 consider that. But practically, you know, how does that  
19 work?

20 MR. SHAUB: So - - - so I think as a practical  
21 matter, this goes to the issue of the trial judge's  
22 gatekeeper function. And evidence relating to that would  
23 not be admissible. It would - - - the testimony relating  
24 to this would be limited to her specific damages unrelated  
25 to those involving the death of - - -



1 JUDGE FEINMAN: So what if she says I - - - I - -  
2 - I'm an insomniac now, and I'm depressed and doesn't talk  
3 about, you know, I'm dreaming about the granddaughter?  
4 Does the judge have to give an instruction, you can only  
5 consider that as in relation to her own self, but don't  
6 think about the granddaughter? I mean - - -

7 MR. SHAUB: Well, I mean, there would be  
8 arguments - - -

9 JUDGE FEINMAN: The problem with the parsing is -  
10 - - is what I'm having.

11 MR. SHAUB: So but in that circumstance, there  
12 are always situations where the court limits the testimony.  
13 And our system is built on the notion that the jury can  
14 follow instructions. If - - - if we abandon that - - -  
15 that idea and that principle, there's far-reaching  
16 implications.

17 And that is not to say that we don't consider the  
18 jury's ability to follow the jury instructions. I - - - I  
19 don't think that that would be a problem. And I think this  
20 idea that they may be led down the path is avoidable if the  
21 evidence - - - and the trial judge carefully monitors the  
22 evidence and the argument that counsel makes in openings  
23 and summations - - - this really shouldn't be an issue that  
24 complicated.

25 JUDGE FEINMAN: So one - - - one last question



1 from me, anyway, which is: is there any data - - - you're  
2 making the floodgates or the wedge argument. But is there  
3 any data - - - with all these other states, you know - - -  
4 and I'm sure you've also done the fifty-state survey, and -  
5 - - and obviously the rules are a little different in many  
6 different states - - - but is there any data to - - - to  
7 really support this notion of we're going to have an  
8 overwhelming tidal wave, now, of new claims?

9 MR. SHAUB: So I think the - - - the issue is New  
10 York State - - -

11 JUDGE FEINMAN: Assuming, for my question, that  
12 we maintain the - - - the zone of danger, which you know,  
13 obviously is not an issue in this case.

14 MR. SHAUB: So I think, first, to - - - to answer  
15 your last question, Trombetta has said that the immediate  
16 family test is the key to avoiding the proliferation of  
17 claims, and it is the key to avoid enmeshing this court in  
18 - - -

19 JUDGE FEINMAN: What if they were wrong?

20 MR. SHAUB: - - - forecast - - -

21 JUDGE FEINMAN: That's my point. What's the  
22 data? What's the data? What's going on in the other  
23 states?

24 MR. SHAUB: Well, I don't think the other states  
25 serve as an accurate proxy, because New York is different



1           qualitatively and quantitatively than other states in terms  
2           of litigation loads and litigiousness, overall.

3                         But I would also add - - -

4                         JUDGE FEINMAN: Well, is there a big problem in  
5           California?

6                         MR. SHAUB: What?

7                         JUDGE FEINMAN: California is certainly bigger  
8           than New York. What's going on there?

9                         MR. SHAUB: But California had this kind of  
10          flexible notion of a test, and that was the Dillon case,  
11          and it had to abandon the flexible test, because the thing  
12          it said it created an unmanageable load of cases where  
13          there was no ability for defendants to understand what tri  
14          - - - what activity would trigger liability and created  
15          unworkable rules for courts.

16                         The other problem with trying to draw this type  
17          of analogy, is as you've identified, is the disparate  
18          nature of this type of claim across many jurisdictions. So  
19          there are other jurisdictions that impose more rig - - -  
20          rigorous rules, for example, that you have to have a  
21          physical impact or manifestation of a physical injury.  
22          Another example is New York says the injury is serious and  
23          verifiable; and other states require a far more robust  
24          showing to recover for this, being clear and convincing  
25          evidence for a severe injury.



1                   So it's hard to draw these analogies when we're  
2 not comparing tests that - - - states pick different points  
3 at which to limit the claim. New York has picked a very  
4 rational place at this line - - -

5                   JUDGE RIVERA: Judge, if I may ask a question?

6                   CHIEF JUDGE DIFIORE: Yes.

7                   JUDGE RIVERA: So - - - so counsel, your  
8 arguments are very much in the - - - in the well - - -  
9 well-traversed main of the concerns about liability and  
10 torts, right, a robust to - - - robust tort area or  
11 something else.

12                   So hasn't New York, though, already made a  
13 decision through the way we limit this liability, to  
14 address those concerns? And more importantly, aren't we  
15 really talking about a very small class - - - even if you  
16 expanded it, even if you went as far as the Third  
17 Restatement?

18                   Bystander liability, by the mere fact that you're  
19 going to keep it limited some - - - in some way, to someone  
20 who has a connection to the family - - - it's not really a  
21 - - - a pure bystander in the sense of a stranger - - -  
22 we're not talking about strangers being able to - - - to  
23 collect - - - aren't you really already talking about such  
24 a small number of cases, that this is not really the kind  
25 of area that those arguments you're making, that are valid



1 arguments in terms of torts writ large, really don't make  
2 sense here?

3 MR. SHAUB: So I think that these are the  
4 arguments - - - they - - - they do have application here.  
5 And Judge Kaye thoughtfully and cogently laid them out in  
6 the Bovson dissent in - - - in a manner far better than  
7 I'll be able to articulate it. And it was again  
8 articulated in Trombetta, that this is a concern with the  
9 proliferation of claims here.

10 But separate and apart from that, if we're  
11 talking about the relationships here, without an objective  
12 standard here, the court will now be in the business of  
13 measuring closeness of relationships - - -

14 JUDGE RIVERA: No, but those - - - those - - -  
15 no. But if - - - if we're just going to stick with sort of  
16 someone who is not a stranger, who has some family  
17 relationship, the reality is that there is, since 1993,  
18 when Trombetta is decided, since '84 when Bovson is decided  
19 - - - we can look to the other states. We can look to what  
20 else is going on.

21 And you are not incorrect about California, but  
22 California didn't then adopt the kind of test that you're  
23 advocating for. I mean, California does have a much  
24 broader test than we do. So again, we can look to them and  
25 the sky hasn't fallen.





1 MR. SHAUB: But - - - but again, I think that it  
2 was - - - it was a concern that was articulated earlier.  
3 And I think it may have been by Judge Fahey, that there's  
4 now no ability to limit these claims in any type of  
5 efficient way here, be it on summary judgment.

6 Because if we're going to look at the closeness  
7 of every single relationship, which is what California  
8 does, then that is going to enmesh the - - - the court in  
9 the business of - - - and on a case-by-case basis,  
10 determining whether someone is close with a - - -  
11 particular family member. And that's just not going to be  
12 amenable to summary judgment, and it's going to create an  
13 unworkable burden on the court.

14 JUDGE RIVERA: Again, I'm not - - - I'm not sure  
15 that that - - - I may not share the same concerns about  
16 that, given that in the area of torts, so much is not  
17 appropriate for a judge to resolve on a motion to dismiss  
18 or summary judgment, as it stands. It is usually a  
19 question of fact that goes to the trier of fact.

20 So I don't know that I share that concern. But I  
21 understand your point. Thank you.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 Counsel?

24 Good afternoon, Your Honor. It's Katherine Herr  
25 Solomon of Mauro Lilling Naparty, on behalf the defendant-



1 respondents Blue Prints Engineering and Maqsood Faruqi.

2 The Appellate Division's order should be  
3 affirmed, because there's no compelling reason for this  
4 court to stray from its precedent. Trombetta is the  
5 deciding case, and it limited the recovery to the immediate  
6 fam - - - the married or those related in the first degree  
7 of consanguinity.

8 The court - - - it already considered the  
9 competing policy considerations, and it had to - - - the  
10 result is the drawing of this line. And yes, there will be  
11 plaintiffs on the other side of the line, but - - -

12 JUDGE FEINMAN: So you don't - - - Chief, if I  
13 may?

14 CHIEF JUDGE DIFIORE: Judge Feinman.

15 JUDGE FEINMAN: So your - - - your position is  
16 that nothing's changed in the last thirty years about  
17 society's view of nontraditional families and others, and  
18 that it's still okay to limit recovery to spouses and  
19 first-degree blood relatives?

20 MS. HERR SOLOMON: Yes - - -

21 JUDGE FEINMAN: Is that your position?

22 MS. HERR SOLOMON: Yes. I mean, it's - - -

23 JUDGE FEINMAN: And yet we've done so many things  
24 in other areas of the law. So how - - - how does that  
25 promote the average person's understanding of who is a



1 close family member or who should be considered part of the  
2 immediate family, whichever term you want to use?

3 MS. HERR SOLOMON: It's - - - it's - - - this  
4 ruling is not - - - shouldn't be viewed as a statement of  
5 the importance of a particular family member. It's where -  
6 - - it's the competing policy limits.

7 The plaintiffs are - - - have been permitted this  
8 bystander recovery, and at the same time, the defendants  
9 have - - - there's a control on the degree of liability.

10 I mean, the - - - what was ignored by the  
11 Appellate Division dissent is that every time the court  
12 expands liability it expands - - - it costs - - - it  
13 expands the - - - the cost. And that cost is ultimately  
14 felt by the public.

15 JUDGE RIVERA: Judge, if I may ask?

16 CHIEF JUDGE DIFIORE: Judge Rivera.

17 JUDGE RIVERA: Yes, thank you.

18 So yes, I get your point, counsel, that the  
19 defendant always seeks to pass it off to someone else. I  
20 understand that point. But here - - - here - - - what I  
21 wanted to ask you is, under - - - under your understanding  
22 of our jurisprudence, are domestic partners covered? Could  
23 a domestic partner bring such a claim?

24 MS. HERR SOLOMON: I would - - - under the  
25 current state, if they adopted the child, or I guess you



1 mean domestic partners of each other.

2 JUDGE RIVERA: Let's just - - -

3 MS. HERR SOLOMON: One is the plaintiff - - -

4 JUDGE RIVERA: - - - stick to partner. Correct.

5 I'm not - - - not talking about children now.

6 MS. HERR SOLOMON: If they would be considered

7 married under the law, then they would be - - -

8 JUDGE RIVERA: No, they don't marry, but they're  
9 partners.

10 JUDGE FEINMAN: They're not married.

11 JUDGE RIVERA: That's the point.

12 MS. HERR SOLOMON: Then - - - then no, under the  
13 current state of law.

14 JUDGE RIVERA: Okay. Are - - - are stepchildren  
15 covered?

16 MS. HERR SOLOMON: No.

17 JUDGE RIVERA: No. Okay. So even though the - -  
18 - the kinds of family connections I've just identified are,  
19 first of all, as close as you get to the other legally  
20 recognized or biological connection, and in other ways, the  
21 law has recognized them, you would say, no, this is just a  
22 married couple - - - during the marriage, I assume. I  
23 assume after divorce they don't count, right? It has to be  
24 the married spouses, siblings, and their children?

25 MS. HERR SOLOMON: Right. That - - -



1 JUDGE RIVERA: Does it include the - - - the  
2 spouse of the sibling?

3 MS. HERR SOLOMON: Who is the injured party?

4 JUDGE RIVERA: Why does that matter?

5 MS. HERR SOLOMON: Well, because if it's the  
6 sibling and the spouse, they're married. So they would be  
7 covered.

8 JUDGE RIVERA: No, I'm sorry, the - - - the - - -  
9 yes, the spouse. If it's the - - - the parent of the  
10 sibling.

11 MS. HERR SOLOMON: Oh, so the father-in-law, in  
12 other words. Or the mother - - -

13 JUDGE RIVERA: Yeah, the in-laws. That's a good  
14 way; thank you.

15 MS. HERR SOLOMON: No, because it's not within  
16 the - - - if they're not married or within the first  
17 degree.

18 And I - - - I understand that it's arbitrary, but  
19 that's a product of the analysis and the - - - and the - -  
20 - defining the scope of the - - -

21 JUDGE RIVERA: Yes, and that - - - and that  
22 again, is - - - I understand our point. The - - - your  
23 focus, and - - - and the counsel that spoke before you, is  
24 we've got to limit liability, draw the arbitrary line, even  
25 if - - - there's - - - there's arbitrary and there's



1 arbitrary, right?

2 There's arbitrary where you just say, look,  
3 that's where the line has got to be drawn. And then  
4 there's arbitrary that is rather jagged, because what  
5 you're doing is eliminating people that in any logical  
6 sense are included.

7 In my example, spouses could be your defining  
8 line, but it makes no sense to keep out domestic partners  
9 if they - - - they are treated like spouses in every other  
10 way, right?

11 MS. HERR SOLOMON: Correct.

12 JUDGE RIVERA: That - - - that to me, is the  
13 difference between the real raw arbitrariness of something  
14 and an arbitrariness that has a - - - a function, that is  
15 to limit liability for a particular purpose. But I thank  
16 you.

17 MS. HERR SOLOMON: Right. I - - - I would just  
18 also say that in most of these cases, the plaintiff has  
19 other items of damages that they can recover, so that in  
20 most cases, they're not precluded from full recovery.

21 And I think that the reasoning in Trombetta in  
22 limiting liability and limiting the cost to ultimately the  
23 public, is even more relevant today when multimillion-  
24 dollar verdicts are now commonplace.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1 JUDGE FEINMAN: If I may - - - I'm sorry.

2 MR. RUBINOWITZ: Yes, Your Honor.

3 CHIEF JUDGE DIFIORE: Mr. Rubinowitz?

4 MR. RUBINOWITZ: Thank you, Your Honor, Your  
5 Honor. Thank you, Judge DiFiore.

6 I want to start with what Judge Stein said, and  
7 that was that grandparents enjoy a very special  
8 relationship, because that factors into exactly what Judge  
9 Fahey said when he asked the question, what is the pol - -  
10 - public policy reason to exclude grandparents. And there  
11 was no answer to that. And there is no answer to that.

12 As far as the flood of litigation, there cannot  
13 be a flood of litigation, and the reason is, this is not a  
14 separate action in and of itself, it's merely another cause  
15 of action to be added. It will add no - - -

16 JUDGE RIVERA: Judge, if I - - -

17 MR. RUBINOWITZ: - - - cost at all.

18 JUDGE RIVERA: - - - if I may ask a question?

19 I - - - I appreciate what you're saying about  
20 grandparents, but it - - - I'm hard pressed to believe that  
21 in 1993, when Trombetta was decided, people didn't  
22 appreciate, and as a society we didn't appreciate, the role  
23 of grandparents.

24 MR. RUBINOWITZ: So what I'm saying is this.  
25 Grandparents should obviously be part of the immediate



1 family. I don't even have to go to the Restatement Third.  
 2 But what I am saying also is, to answer the questions that  
 3 you were asking, Judge Rivera, about for example, the  
 4 partners, yes they should be able to recover. They  
 5 certainly should be able to recover, if in fact, they  
 6 suffered zone of danger damages that were negligently  
 7 inflicted.

8 That negligent infliction of emotional distress  
 9 has to be - - - has to be redressed. And tort law actually  
 10 does allow for redress in our courts.

11 That's why Broadnax, the Court of Appeals,  
 12 actually carved out a common-law exception. They actually  
 13 said we need to solve this and we have to solve it, and  
 14 they did.

15 And this court actually did solve that problem.  
 16 So what I'm saying here is yes, grandparents do play an imp  
 17 - - - a terribly important role in their - - - in the lives  
 18 of their grandchildren. And yes, as time has moved by,  
 19 things have changed tremendously.

20 If you take a look at - - - for example, gay  
 21 marriages are now recognized, and they should be. But to  
 22 say what happened forty years ago, to try and foist that  
 23 type of reasoning in today's world does not work. And  
 24 that's why we're saying here, certainly, there should be a  
 25 remedy for a grandmother who witnesses her granddaughter





1           crushed in front of her eyes. And they should - - -

2                       CHIEF JUDGE DIFIORE: Thank you, counsel.

3                       MR. RUBINOWITZ: - - - be able to recover. Thank  
4 you, Your Honor.

5                       CHIEF JUDGE DIFIORE: Thank you, counsel.

6                       (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Stacy Greene, et al. v. Esplanade Venture Partnership, Blue Prints Engineering, P.C., and Maqsood Faruqi, No. 6, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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