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Understanding New York's 'Zone of Danger' Rule in Non-Automobile Situations

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UNDERSTANDING NEW YORK'S 'ZONE OF DANGER' RULE IN NON-AUTOMOBILE SITUATIONS

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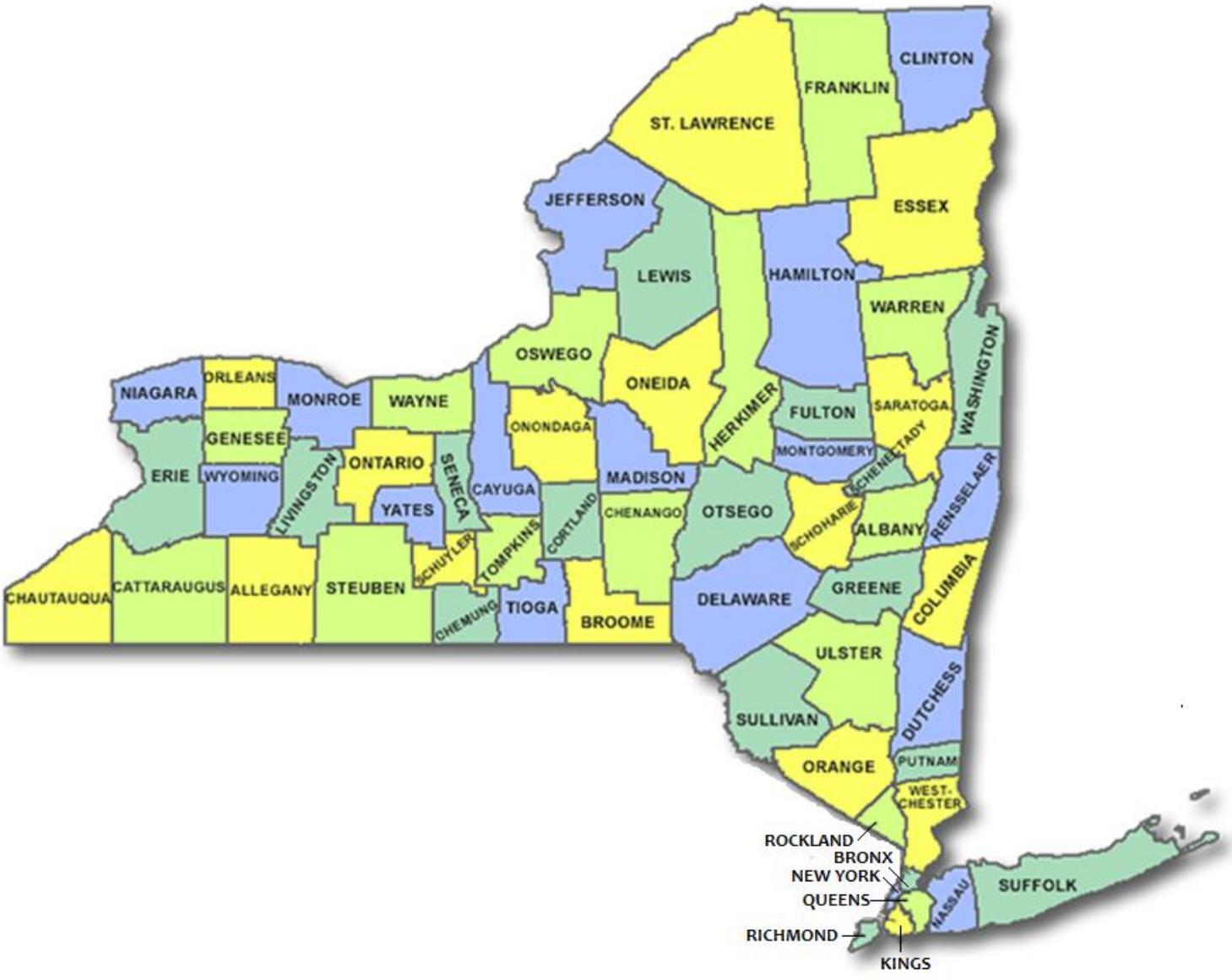

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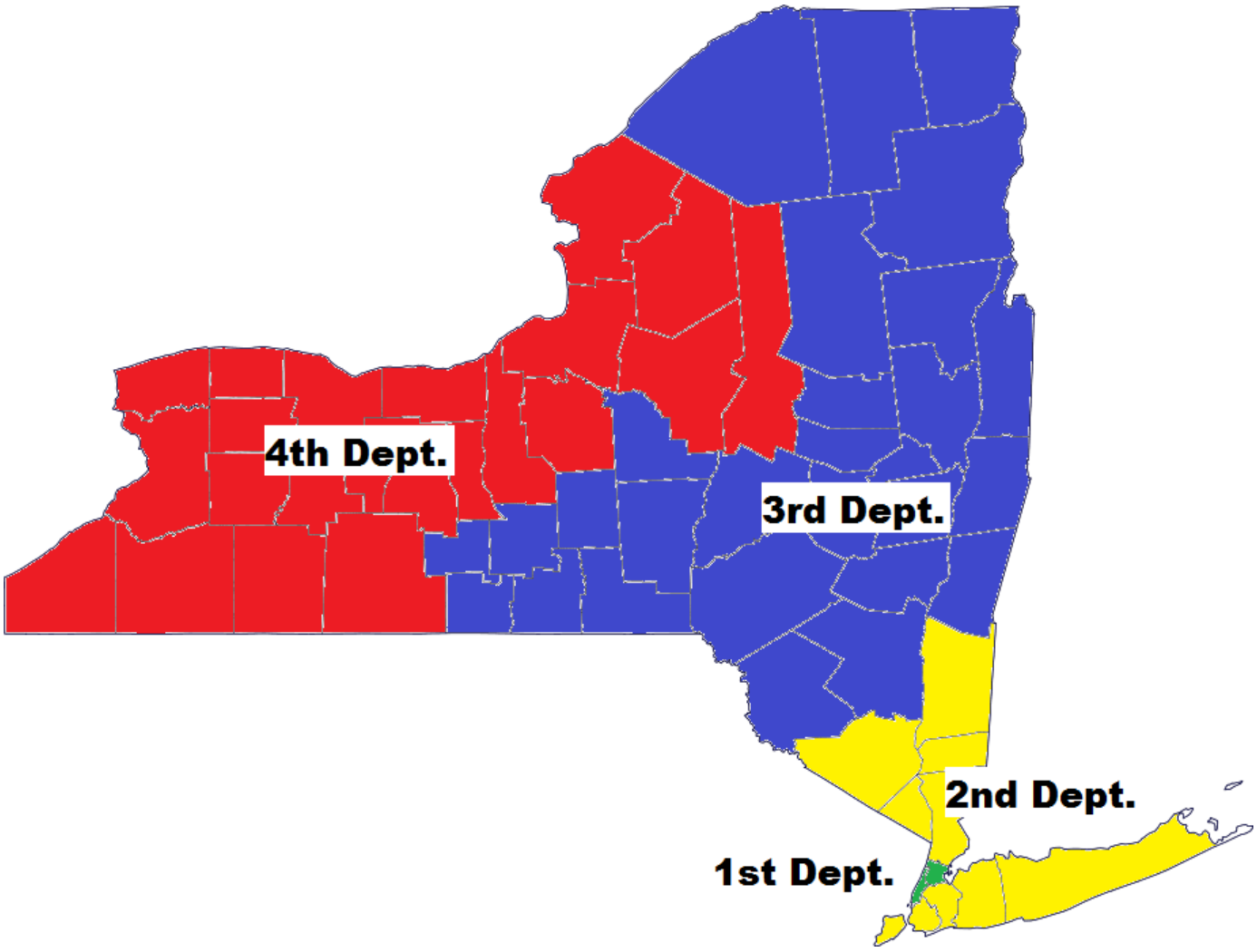

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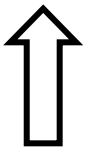

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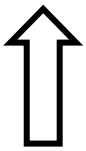

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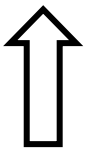

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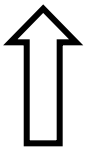

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UNDERSTANDING NEW YORK'S "ZONE OF DANGER" RULE IN NON-AUTOMOBILE SITUATIONS

In the Zone of Danger

Plaintiffs asserting claims for negligent infliction of emotional distress must establish that they were owed a duty by a defendant, that such duty was breached and, because of the breach, they were exposed to an unreasonable risk of bodily injury or death. In New York, the general rule is that bystanders are not owed a duty and cannot assert such a claim; however, New York recognizes an exception to this principle: the "zone of danger" rule. The exception is premised on the concept that the defendant breached a duty owed to the plaintiff.

> Where a defendant's [negligent conduct creates] an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence, the plaintiff may recover damages for such

injuries[i].

Although the rule is commonly associated with automobile accidents, claims have been sustained in cases involving house fires, assaults and elevator accidents. These non-auto claims are the subject of this article.

The zone of danger rule was first recognized by the New York Court of Appeals in *Bovsun v. Sanperi.*[ii] In that case, the plaintiff was inspecting the rear of his family's vehicle when another vehicle crashed into the car, pinning him between the two vehicles and causing serious injuries. The Court ruled that plaintiff's wife and daughter, who were in the vehicle at the time, were within the zone of danger, even though they did not actually see the collision, as they were "subjected to an unreasonable risk of bodily injury" by defendant's negligent conduct, were instantly aware of the impact, feared for their immediate family member's safety and immediately observed his serious injuries.

In *Wallace v. Parks Corp.*,[iii] a fire erupted in plaintiff's home, trapping plaintiff until she escaped through cellar stairs. The Fourth Department found that plaintiff's husband and two sons were able to recover for negligent infliction of emotional distress because they were in the zone of danger as they were exposed to the fire and attempted to rescue their wife/mother. The court acknowledged that individuals who attempt to rescue "a loved one" from an unreasonable risk of bodily harm are within the zone of danger.[iv]

For this reason, the court denied recovery to plaintiff's daughter who ran out of the house when the fire began and was never in the zone of danger.

In *Hackert v. First Alert, Inc.*,[v] a fire ignited in the middle of the night at plaintiff's home, causing the death of plaintiff's sister and father. Although the plaintiff did not witness the injuries to his family members, he became instantly aware of their injuries when he heard his sister and father cry out "Oh, my God. Oh, my God" and "Fire, fire, help!," respectively, as he simultaneously discovered that he could not leave his room due to the intense heat and smoke. Plaintiff was in the zone of danger because he was "threatened by the same fire which [ultimately] killed his father and sister."[vi] Because plaintiff was instantaneously aware of his family members' injuries while in the zone of danger, the Northern District Court of New York denied defendants' motion for summary judgment as to plaintiff's claims for emotional distress.

In *DiMarco v. Supermarkets Gen. Corp.*,[vii] the Second Department reinstated an infant plaintiff's zone of danger cause of action in a case involving an assault on plaintiff's father. The court reasoned that although the infant plaintiff was not physically injured by the assault upon his father, his attempt to stop the assault and his "contemporaneous observation of [his father's] serious physical injury" caused by defendant's conduct placed plaintiff within the zone of danger.[viii]

The Supreme Court Albany County allowed a plaintiff to amend her complaint to include a claim based on the zone of danger rule when she witnessed her daughter get her finger caught in the comb plate of an escalator, which caused her daughter serious injury. The court in *Collesides v. Westinghouse Electric Corp.* explained that the zone of danger rule "does not require physical contact in addition to emotional or psychological injury" and the mother's "haunting experience in witnessing her daughter's horror and her attempt to assist her" were enough to sustain a claim under the zone of danger rule.[ix]

In *Valdez v. City of New* York,[x] the Supreme Court Bronx County upheld a verdict that awarded damages for negligent infliction of emotional distress to the infant plaintiffs based on witnessing their mother's shooting. The court found that the children were within the zone of danger as they were near their mother when she was shot, close enough that they could have been struck by the bullets. Ultimately, the decision was reversed because plaintiff did not establish that a special relationship existed between her and the defendant police department and thus no duty was owed to her. Normally a municipality is not liable for injuries sustained from its failure to provide police protection. However, there may be liability where the police formed a special relationship with the plaintiffs. A special relationship can be formed when police assume a duty to act. The Court of Appeals left open the issue of whether the infant plaintiffs were in the zone of danger, had a special relationship been established.[xi]

Outside the Zone

If the elements of the rule are not established, the courts will dismiss the zone of danger claim. Claims based on the rule are often denied because plaintiff's location at the time of the accident did not place plaintiff at risk of physical harm.

In *Diaz v. Little Remedies Co., Inc.*,[xii] plaintiff's two-year-old son sustained chemical burns after plaintiff treated him with a laxative which resulted in the suspicion that plaintiff had scalded her son. Plaintiff was arrested on child abuse charges. The Fourth Department acknowledged that plaintiff was arguably in the zone of danger because she was exposed to defendant's product when she applied the laxative to her son; however, the emotional distress that she suffered was related to her arrest, not to witnessing the physical harm to her son.

The Supreme Court Richmond County in *Li v. Super 8 Worldwide, Inc.*[xiii] dismissed plaintiffs' zone of danger causes of action, even though plaintiffs witnessed their immediate family member drown in a pool. Plaintiffs' complaint did "not state how the plaintiffs' physical safety was 'endangered,' or what, if anything, caused them to fear for their own physical safety."[xiv] Thus, plaintiffs were not in the zone of danger and their claims for emotional distress were dismissed. The mere witnessing of the death or serious injury to an immediate family member is insufficient without being close enough to the

accident to experience a sense of endangerment.

In *Colombini v. Westchester County Health Care Corp.,*[xv] the Supreme Court Westchester County dismissed a father's claim for negligent infliction of emotional distress based on witnessing his son's death. Plaintiff's son was undergoing an MRI when he was killed by a metal oxygen tank that was drawn to the machine's magnet. The court dismissed the claim in part because the plaintiff did not allege that defendants owed a duty to him and also because there was no proof that plaintiff feared for his own safety or that he "suffered any genuine and serious mental distress stemming from his fear of injury to *himself*."[xvi]

The Second Department in *Marcial v. Maldonado*[xvii] held that a mother of a child bitten by a dog could not recover damages for emotional distress because there was no evidence presented that the mother was within the zone of danger at the time the child was bitten. The Fourth Department in *McDonald v. Jarrabet*[xviii] dismissed a mother's cause of action based on the zone of danger rule because she did not witness the sexual abuse of her daughter by defendant. In *O'Sullivan v. Duane Reade, Inc.,*[xix] plaintiff cut himself while shaving and "freaked out" when he realized he was using a used or defective razor, at which point his wife ran to him to see what had happened. The Supreme Court New York County dismissed the wife's negligent infliction of emotional distress claim because she did not witness her husband cut himself.

In *Gonzalez v. New York City Housing Authority*,[xx] plaintiff's daughter attempted to exit the elevator that she and plaintiff were riding in together when the doors closed and the elevator started going up. Before plaintiff, who had been situated in the rear portion of the elevator, could reach her daughter, who had attempted to exit the elevator cab, another woman held plaintiff back and covered her eyes and then the plaintiff fainted. Plaintiff did not become aware of her daughter's death until she regained consciousness. The First Department held that plaintiff was not within the zone of danger because the zone of danger "clearly consisted of the area from the elevator doors to the wall outside the elevator," and plaintiff was in the back of the elevator.[xxi] Plaintiff herself was neither in physical danger at the time of the accident, nor did she witness the tragic event.

The Northern District Court of New York, in *Mortise v. United States*,[xxii] dismissed a wife's cause of action for negligent infliction of emotional distress for witnessing her husband unknowingly become a "target" of a National Guard war game exercise. Plaintiffs were recreationally riding ATVs when the husband accidentally triggered a trip flare, a part of the exercise, and was immediately surrounded by armed men who pointed their weapons at him, told him he was a prisoner and fired blanks. The court denied recovery to the wife because her own physical safety was never threatened and her husband was not physically injured.

And finally, in *Fernandez v. Abalene Oil Co., Inc.*,[xxiii] the Second Department denied plaintiff's cause of action under Labor Law § 240(1). Plaintiff claimed that he sustained emotional damages as a result of witnessing his brother fall from a cellular tower to his death, while plaintiff at the same time was avoiding being struck by dislodged steel step bolts. It appeared that the elements of the zone of danger rule were satisfied, but the court held that to apply the zone of danger rule to a Labor Law § 240(1) cause of action "'would, in effect, extend the owner's nondelegable duty to a person who was not injured by the particular hazard the statute was designed to guard against.'"[xxiv] The statute was specifically designed to protect workers who might be hurt by unsafe conditions and not the immediate family members who suffer emotional damages as a result of the conditions. The court explained that plaintiff's "psychological injuries…were not a direct consequence of a failure to provide adequate protection to him against a risk arising from a physically significant elevation differential."[xxv]

Conclusion

What appears to be simply a concept of "zone of danger" is actually more complicated upon review. To successfully make a claim for negligent infliction of emotional distress based on the zone of danger rule, a plaintiff must prove:

- Defendant's negligent conduct created an unreasonable risk of bodily harm to the plaintiff;
- Plaintiff observed, contemporaneously with the accident, an immediate family member suffer serious physical injury or death as a result of the defendant's conduct; and
- Plaintiff suffered an injury "in consequence of shock or fright" as a direct result of witnessing the accident.

Despite the rule's limitations, attorneys should be aware that claims based on the zone of danger rule can be asserted in a variety of cases, not just those involving automobiles.

UNDERSTANDING NEW YORK'S "ZONE OF DANGER" RULE IN NON-AUTOMOBILE SITUATIONS (Published New York Law Journal August 11, 2021)

INTRODUCTION

In New York, the mechanism for a bystander-plaintiff to recover damages for emotional distress is the "zone of danger" rule. To recover under a "zone of danger" theory, a plaintiff must show: (1) the defendant's conduct threatened the plaintiff with an unreasonable risk of bodily injury or death; (2) the plaintiff suffered an emotional injury from viewing or contemporaneously observing the serious injury or death of a third-party

victim resulting from defendant's conduct; and (3) the plaintiff and third-party victim are immediate family members. While the "zone of danger" rule is often associated with automobile accidents, this article analyzes how the rule is applied in non-automobile situations.

INSTITUTING THE MODERN RULE

The "zone of danger" rule was initially introduced by the New York Court of Appeals in *Bovsun v. Sanperi*, 461 N.E.2d 843, 847-48 (N.Y. 1984). While stopped on the side of the road, the Bovsun's vehicle was struck by the defendant's car, pinning Mr. Bovsun between the two vehicles. Ms. Bovsun and their daughter were inside the car at the time of the incident. The Court determined the mother and daughter sufficiently established a claim for emotional distress finding that, as a result of the defendant's negligence, they were at risk of serious physical harm; the victim was a member of their immediate family; and they were instantaneously aware of the victim's injuries.

REQUIREMENT ONE: PLAINTIFF WAS THREATENED WITH SERIOUS BODILY INJURY OR DEATH

The "zone of danger" test "is premised on the traditional negligence concept that by

unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her." *Bovsun*, 461 N.E.2d at 847. The test does not create a new duty, rather it broadens an existing duty to avoid inflicting bodily harm to others. For example, in *Hackert v. First Alert, Inc.*, 2005 U.S. Dist. LEXIS 46141 (N.D.N.Y. 2005), aff'd, 271 Fed. Appx. 31 (2d Cir. 2008), a mother and son claimed emotional distress against the manufacturer of their home's smoke detectors after a fire killed the family's father and daughter. The court denied defendant's motion for summary judgment reasoning that "a jury may find that [the plaintiff] was in the zone of danger when the injury to his family members occurred" since he "was threatened by the same fire that killed his father and sister." *Id.* at *30.

Further, a plaintiff who voluntarily places himself or herself in a threatened position, such as to rescue a family member from harm, will not be precluded from utilizing the "zone of danger" rule. In *Wallace v. Parks Corp.*, 629 N.Y.S.2d 570 (4th Dept 1995), a fire engulfed plaintiff's home due to defendants' faulty products. Three of the plaintiffs could have escaped the burning house but chose to remain and rescue a trapped family member. The court stated, "A plaintiff may be placed in the 'zone of danger' when he or she attempts to rescue a loved one." *Id.* at 577; *see DiMarco v. Supermarkets Gen. Corp.*, 524 N.Y.S.2d 743 (2d Dept 1988) (finding plaintiff was within the "zone of danger" after attempting to stop an assault on the plaintiff's father).

On the other hand, a claim will fail if the defendant's conduct does not unreasonably threaten the plaintiff with physical injury or death. *See Shepherd v. Whitestar Dev. Corp.*, 977 N.Y.S.2d 844 (4th Dept 2014) (granting motion to dismiss negligent infliction of emotional distress claim as plaintiff failed to allege her physical safety was unreasonably endangered when her brother was crushed by a garbage compactor); *Parker v. Jones*, 2020 N.Y. Misc. LEXIS 10740 (Sup. Ct. Warren Cnty. 2020) (finding plaintiff mother could not recover for emotional distress against defendant father who killed their infant son as she was neither in the "zone of danger" nor witnessed the attack); *Li v. Super 8 Worldwide*, 2012 N.Y. Misc. LEXIS 5379 (Sup. Ct. Richmond Cnty. 2012) (watching family member drown in pool was insufficient to show plaintiff faced any threat of physical harm).

REQUIREMENT TWO: PLAINTIFF OBSERVED THE DEATH OR SERIOUS INJURY OF THIRD-PARTY VICTIM

The plaintiff's emotional injury must stem from viewing or contemporaneously observing the serious injury or death of a third-party victim as a result of defendant's conduct. *See Bovsun*, 461 N.E.2d at 850; *Hackert*, 2005 U.S. Dist. LEXIS 46141 (hearing desperate cries for help from family members in burning home was sufficient to satisfy "observation" requirement).

Conversely, mere awareness of events directly before or after the incident alone will not suffice. For example, in *Coleson v. City of New York*, 24 N.E.3d 1074 (N.Y. 2014), a child hid in a closet while his mother was stabbed by her abusive husband. Though the child did not witness the attack itself, he saw the husband approach with a knife, heard screams for help, and saw his mother after the stabbing in a pool of blood. The Court of Appeals determined "the child was not in the zone of danger because he was in a broom closet while his mother was stabbed, and thus neither saw the incident nor was immediately aware of the incident at the time it occurred." *Id.* at 1079; *see Diaz v. Little Remedies Inc.*, 918 N.Y.S.2d 281 (4th Dept 2011) (affirming motion to dismiss for defendant as, among other reasons, plaintiff's emotional injuries did not directly result from observing family member's serious injury); *O'Sullivan v. Duane Reade, Inc.*, 910 N.Y.S.2d 763 (Sup. Ct. N.Y. Cnty. 2010) (granting motion to dismiss for defendant since plaintiff did not observe the victim's injuries until after the incident occurred).

REQUIREMENT THREE: PLAINTIFF AND VICTIM ARE IMMEDIATE FAMILY MEMBERS

The "zone of danger" requires an immediate family relationship between the plaintiff and third-party victim. New York interprets the term "family" quite narrowly and has yet to expand the definition to individuals outside the family unit. *See, e.g.*, *Matter of*

Kmiotek v. Sachem Cent. Sch. Dist., 111 N.Y.S.3d 322 (2d Dept 2019) (dismissing negligent infliction of emotional distress claim brought by three high school football players against their school district after witnessing a teammate incur fatal injuries while participating in weight training exercises since plaintiffs and decedent were not immediate family).

Further, New York does not recognize all close-knit familial relationships under the "immediate family" requirement. *Compare Trombetta v. Conkling*, 82 N.Y.2d 549 (1993) (refusing to extend "immediate family" requirement to an aunt-niece relationship despite the aunt raising and caring for the niece), *with Greene v. Esplanade Venture P'ship*, 36 N.Y.3d 513 (2021) (expanding the definition of "immediate family" to include grandmothers because of "increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense").

Although analyzing the relationship between the plaintiff and third-party victim is useful in determining the genuineness of the plaintiff's claim, New York's rule is highly constrictive. Many states take a more inclusive approach to the requirement. For instance, New Jersey requires "a marital or intimate, familial relationship between plaintiff and the injured person," Texas and California ask that the plaintiff and victim be "closely related," and Indiana demands the relationship be "analogous to a spouse, parent, child, grandparent, grandchild, or sibling." *Id.* at 536 (Rivera, J., concurring) (citations omitted).

While still other jurisdiction do not require any particular degree of consanguinity or marriage. *See Graves v. Estabrook*, 818 A.2d 1255 (N.H. 2003) (refusing to adopt a "bright line rule" that uses relationship labels to deny recovery for emotional distress); *Leong v. Takasaki*, 520 P.2d 758, 766 (Haw. 1974) ("Neither should the absence of a blood relationship between victim and plaintiff-witness foreclose recovery."); *Lourcey v. Est. of Scarlett*, 2003 Tenn. App. Lexis 477, at *11 (Tenn. Ct. App. 2003) ("[A] plaintiff need only prove proximity and awareness of the injury-producing event and the seriousness of the third party's injury to have a cause of action."). But even in jurisdictions that use more flexible standards, the vast majority of courts have denied recovery when the third-party victim is merely an acquaintance or stranger.

New York has proved hesitant to add new classes of persons to its "immediate family" definition. Nevertheless, the Court of Appeals in *Greene* refused to rule out which family relationships it will or will not acknowledge in the future. The *Greene* decision, while narrow, may be indicative of a future trend towards loosening the family member relationship requirement.

ALTERNATE APPROACH TO THE "ZONE OF DANGER" RULE

In most cases, the "zone of danger" test is premised on the negligence concept that

the defendant owes a basic duty to avoid harming others and then breaches this duty by threatening the plaintiff's physical safety. However, some defendants, such as municipalities and police officers, do not owe a duty to the general public absent a special relationship. Therefore, to bring a "zone of danger" claim against a municipality for failing to provide services, the plaintiff must show the defendant assumed a duty to act by creating a special relationship.

Under such circumstances, the "zone of danger" requirements differ slightly and could be described as follows: (1) defendant undertook a duty to act by creating a special relationship with the plaintiff; (2) plaintiff's physical safety was threatened because the defendant failed to act or acted negligently; (3) the plaintiff suffered an emotional injury from viewing or contemporaneously observing the serious injury or death of a third-party victim as a result of the defendant's conduct; and (4) the plaintiff and third-party victim were immediate family members. However, this method is difficult to prove and rarely implemented. *See Valdez v. City of New York*, 873 N.Y.S.2d 238 (Sup. Ct. Bronx Cnty. 2008), *rev'd*, 901 N.Y.S.2d 166 (1st Dept 2010), *aff'd* 960 N.E.2d 356 (N.Y. 2011); *Coleson*, 24 N.E.3d 1074.

CONCLUSION

New York's "zone of danger" rule is narrowly applied, highly fact-specific, and

implemented in a variety of situations other than automobile accidents. To be within the "zone of danger," a plaintiff must show that the defendant unreasonably threatened him or her with serious bodily injury or death and, as a result of defendant's conduct, the plaintiff suffered an emotional injury from viewing or contemporaneously observing the serious injury or death of an immediate family member.

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[i] *Id.* at 223-24. Emotional injury includes shock or fright, even if such shock or fright "is not due to any fear for [plaintiff's] own safety but to fear for the safety of [a] spouse or child." Hass v. Manhattan & Bronx Surface Transit Operating Auth., 204 A.D.2d 208, 208-09, 612 N.Y.S.2d 134 (1st Dept 1994). Immediate family members include one's mother, father, spouse, son, daughter, brother, or sister. *See, e.g.*, Trombetta v. Conkling, 82 N.Y.2d 549, 626 N.E.2d 653 (1993) (holding that an aunt is not an immediate family member). The zone of danger rule does not apply where there is a close bond or relationship, such as a friendship, between the plaintiff and the victim. *See* Casale v. Unipunch, Inc., 177 A.D.2d 1029, 578 N.Y.S.2d 46 (4th Dept 1991).

[ii] 61 N.Y.2d 219, 461 N.E.2d 843 (1984); *see also* Kugel v. Mid-Westchester Indus. Park, Inc., 64 N.Y.2d 883, 476 N.E.2d 1004 (1984).

[iii] 212 A.D.2d 132, 629 N.Y.S.2d 570 (4th Dept 1995).

[iv] *Id.* at 142 (emphasis added).

[v] 2005 U.S. Dist. LEXIS 46141 (N.D.N.Y. 2005), *aff'd*, 271 Fed. Appx. 31 (2d Cir. 2008).

[vi] *Id.* at *30.

[vii] 137 A.d.2d 651, 524 N.Y.S.2d 743 (2d Dept 1988).

[viii] *Id.* at 651.

[ix] 125 Misc. 2d 413, 414-15, 479 N.Y.S.2d 475 (Sup. Ct. Albany Cnty, Special Term, 1984).

[x] 21 Misc. 3d 1107(A), 873 N.Y.S.2d 238 (N.Y. Sup. Bronx Cnty 2008), *rev'd*, 74 A.d.3d 76, 901 N.Y.S.2d 166 (1st Dept 2010), *aff'd*, 18 N.Y.3d 69, 960 N.E.2d 356 (2011).

[xi] Valdez v. City of New York, 18 N.Y.3d 69, 960 N.E.2d 356 (2011).

[xii] 81 A.D.3d 1419, 918 N.Y.S.2d 281 (4th Dept 2011).

[xiii] 2012 WL 6065828 (N.Y. Sup. Richmond Cnty 2012).
[xiv] *Id.*
[xv] 24 Misc. 3d 1222(A), 899 N.Y.S.2d 58 (Sup. Ct. Westchester Cnty 2009).
[xvi] *Id.* at 15.
[xvii] 288 A.D.2d 357, 733 N.Y.S.2d 461 (2d Dept 2001).
[xviii] 188 A.D.2d 1045, 591 N.Y.S.2d 676 (4th Dept 1992).
[xix] 27 Misc.3d 1215(A), 910 N.Y.S.2d 763 (Sup. Ct. New York Cnty 2010).
[xx] 181 A.D.2d 440, 580 N.Y.S.2d 760 (1st Dept 1992).
[xxi] *Id.* at 440.
[xxii] 910 F. Supp. 74 (N.D.N.Y. 1995), *aff'd*, 102 F.3d 693 (2d Cir. 1996).
[xxiii] 91 A.D.3d 906, 938 N.Y.S.2d 119 (2d Dept 2012).
[xxiv] *Id.* (citing Del Vecchio v. State, 246 A.D.2d 498, 500, 667 N.Y.S.2d 401 (2d Dept 1998)).
[xxv] *See id.* at 909.