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What the Supreme Court Giveth, the Supreme Court Taketh Away - Gardner v. Gardner

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I. INTRODUCTION

In Gardner v. Gardner the North Carolina Supreme Court closed the door on all but a few of the plaintiffs it had only recently invited to file claims for negligent infliction of emotional distress. The Gardner court held that it was unforeseeable, as a matter of law, that a parent who did not witness the accident which caused the death of her child would suffer severe emotional distress upon learning that her child had died. Thus, such a plaintiff cannot establish a claim for negligent infliction of emotional distress. The court based its ruling on two factors: 1) plaintiff’s “absence from the time and place of the tort” and 2) plaintiff’s “failure to show that the defendant knew she was susceptible” to severe emotional distress. By attaching so much importance to these factors, the court in Gardner severely limited the circumstances in which a plaintiff may establish a viable claim. The decision represents a major restriction of the court’s 1990 landmark decision in Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A., and rejects the North Carolina Court of Appeals broad interpretation of Ruark’s “foreseeability” test. However, by refusing to declare that these proximity and susceptibility factors are determinative while applying them as though they are, the court has created confusion and uncertainty in the law of tort.

This Note reviews the Ruark decision and the cases decided in the wake of its expansive “foreseeability” test. It then analyzes

2. Id. at 667, 435 S.E.2d at 328.
3. Id.
4. Id.
5. 327 N.C. 283, 395 S.E.2d 85 (1990). In Ruark, the court held that the only requisite allegations for a claim for negligent infliction of emotional distress are: “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.” Id. at 304, 395 S.E.2d at 97. The court went on to state that the factors to consider in making a foreseeability determination are “the plaintiff’s proximity to the negligent act”, “the relationship between the plaintiff and the injured person”, and “whether the plaintiff personally observed the negligent act.” Id., at 305, 395 S.E.2d at 98. The factors were not cited as elements of the claim. Id.
the court’s application of the factors established in Ruark to the facts of Gardner and questions the court’s failure to establish more specific standards for determining foreseeability in negligent infliction of emotional distress cases. Next, this Note explores the possible effects of Gardner. This Note concludes that the court should have set forth clearer standards to better guide the lower courts in deciding when a plaintiff has stated a proper claim and suggests how the “foreseeability” test could be limited to strike a balance between the extremes of compensating any person who suffers distress as a result of an injury to a family member and denying compensation to those who witness the injury or death of a close family member and as a result suffers severe emotional distress.

II. THE CASE

On August 18, 1990, thirteen-year-old Seth Campbell Gardner was fatally injured when the truck in which he was a passenger struck a bridge abutment. The vehicle was being driven by his father, Benjamin Gardner. At the time of the accident, Seth’s mother was at home several miles away. After learning of the accident by telephone, she went directly to the emergency room. She was present as her son was wheeled into the emergency room and observed rescue personnel attempting to resuscitate him. After her son was taken to a treatment room, Mrs. Gardner waited in a private room. She did not see her son again until after she was notified of his death.

As administratrix of her son’s estate, Mrs. Gardner filed a wrongful death action against Benjamin Gardner. In her individual capacity, she asserted a claim for negligent infliction of emotional distress. She claimed that she suffered severe emotional distress as a result of the defendant’s negligence and that it

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7. Id.
8. Id.
9. Id.
10. Id. at 663, 435 S.E.2d at 326.
12. Id.
was reasonably foreseeable that his conduct would cause her severe emotional distress.\(^\text{15}\)

The defendant denied that plaintiff’s severe emotional distress was reasonably foreseeable from his conduct and moved to dismiss the claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief could be granted.\(^\text{16}\) The parties stipulated for purposes of the motion that their son had died as a result of the defendant’s negligence and that the plaintiff had suffered severe emotional distress as a result of the accident and death of her son.\(^\text{17}\) Thus, the only issue before the court was whether it was reasonably foreseeable that the defendant’s conduct would cause the plaintiff severe emotional distress. The trial court ruled that, as a matter of law, the plaintiff could not establish a claim for negligent infliction of emotional distress because she had not witnessed the accident and was not in sufficiently close proximity to satisfy the “foreseeability factors” set forth in \textit{Ruark}.\(^\text{18}\) It entered summary judgment for the defendant on the negligent infliction of emotional distress claim.\(^\text{19}\)

The North Carolina Court of Appeals reversed the trial court’s entry of partial summary judgment on the negligent infliction of emotional distress claim and held that the “defendant could have reasonably foreseen that his negligence might be a direct and proximate cause of the plaintiff’s emotional distress.”\(^\text{20}\) In doing so, the court rejected the defendant’s contention that in \textit{Ruark} the North Carolina Supreme Court had adopted a “close proximity” requirement for foreseeability in the context of this tort.\(^\text{21}\) The court emphasized that under \textit{Ruark} close proximity was one of the

\begin{itemize}
  \item[15.] Id.
  \item[16.] Id. at 664, 435 S.E.2d at 326. The trial court considered matters outside the pleadings and treated the motion as one for summary judgment under Rule 56(c). Id.
  \item[17.] Id.
  \item[18.] Id.
  \item[20.] Id. at 664, 435 S.E.2d at 326.
  \item[21.] Gardner v. Gardner, 106 N.C. App. 635, 639, 418 S.E.2d 260, 263 (1992). In rejecting defendant’s argument, the court of appeals pointed to Justice Meyer’s dissent in \textit{Ruark}, in which he stated that he had been unable to persuade the majority to adopt a “close proximity” requirement. Id. Garner v. Gardner, 106 N.C. at 638-39, 418 S.E.2d at 262-63 (citing \textit{Ruark}, 327 N.C. at 309-14, 395 S.E.2d at 100-03 (Meyer, J., dissenting)).
\end{itemize}
factors to be considered on the question of foreseeability, but it was not a requirement of foreseeability.\footnote{22} Citing "common experience," the court stated that a parent who sees a dying child at the hospital after an accident may suffer as much distress as a parent who first sees the child at the scene of the accident.\footnote{23}

The North Carolina Supreme Court, however, reversed the court of appeals and affirmed the entry of summary judgment for the defendant on the plaintiff's claim.\footnote{24} Although the court agreed that the close proximity factor suggested in \textit{Ruark} was not a requirement, it held that "the plaintiff's injury was not reasonably foreseeable and its occurrence was too remote from the negligent act itself to hold the defendant liable for such consequences."\footnote{25}

\section*{III. Background}

Prior to the North Carolina Supreme Court's decision in \textit{Johnson v. Ruark}, negligent infliction of emotional distress claims in North Carolina were generally not permitted unless the emotional distress either resulted from physical injury or was severe enough to cause physical injury.\footnote{26} In \textit{Ruark}, however, the North

\footnote{22. Gardner v. Gardner, 106 N.C. App. at 638, 418 S.E.2d at 262. Judge Eagles dissented and agreed with the defendant that because plaintiff did not observe the accident and was not in close proximity to the negligent act, she "failed to establish the sufficient "proximity to satisfy the foreseeability requirements of Ruark." \textit{Id.} at 640, 418 S.E.2d at 263 (Eagles, J., dissenting).}

\footnote{23. \textit{Id.} at 639, 418 S.E.2d at 263.}

\footnote{24. \textit{Gardner,} 334 N.C. at 668, 435 S.E.2d at 328.}

\footnote{25. \textit{Id.} In ruling that the "common experience" relied on by the court of appeals was not enough, the court stated that "part of living involves some unhappy and disagreeable emotions with which we must cope without recovery of damages." \textit{Id.} at 667, 435 S.E.2d at 328. (quoting \textit{Gates v. Richardson}, 719 P.2d 193, 198 (Wyo. 1986)).}

Carolina Supreme Court abolished the physical injury requirement. 27

In Ruark, the plaintiffs were the parents of a child who was still born as a result of the defendant doctor's negligence. 28 After an extensive review of North Carolina's treatment of negligent infliction of emotional distress, the court held that "neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress." 29 The court held that to state a claim for negligent infliction of emotional distress, "a plaintiff must allege that 1) the defendant negligently engaged in conduct, 2) it was reasonably foreseeable that such conduct would cause plaintiff severe emotional distress, ... and 3) the conduct did in fact cause the plaintiff severe emotional distress." 30 The court defined severe emotional distress to include a wide range of disorders that are generally recognized and diagnosed by trained professionals. 31

The court identified three factors to be considered when determining the issue of foreseeability: 1) the plaintiff's proximity to the negligent act; 2) the relationship between the plaintiff and the...
injured person; and 3) whether the plaintiff personally observed
the negligent act. The application of the foreseeability concept,
the court explained, "must be determined under all the facts
presented and should be resolved on a case-by-case basis by the
trial court and, when appropriate, by a jury." Applying these
factors to the facts in Ruark, the court concluded that the plain-
tiffs' allegations of emotional distress were sufficient to support
their cause of action.

The Ruark decision was accompanied by a strongly worded
dissent by Justice Meyer which focused on the difficulties
presented by the "foreseeability" concept. Condemning the rule
adopted by the majority as "overbroad," Justice Meyer criticized
the majority for providing "no real limitation on foreseeability." He
predicted that the decision would invite a flood of litigation
which would have detrimental effects on the availability and price
of insurance and impose severe societal costs.

The Ruark decision sent shockwaves throughout the North
Carolina legal community. The "foreseeability" test adopted by
the court arguably converted North Carolina into one of the most
liberal jurisdictions in the country on the issue of recovery for neg-
ligent infliction of emotional distress. The reaction to Ruark

32. Id. at 305, 395 S.E.2d at 98.
33. Id. at 304, 395 S.E.2d at 98.
34. Id.
35. Id. at 309-14, 395 S.E.2d at 100-03 (Meyer, J., dissenting). Justice Meyer
also expressed strong reservations concerning the court's treatment of the
concepts of duty and proximate cause. Id. at 308-11, 395 S.E.2d at 100-01
(Meyer, J., dissenting). Justice Webb also filed a dissent on the grounds that the
majority's holding represented a marked departure from previous decisions and
that reversal of the prior decisions was not justified. Id. at 318, 395 S.E.2d at
106 (Webb, J., dissenting).
36. Id. at 313, 395 S.E.2d at 102 (Meyer, J., dissenting).
37. Id. at 309, 395 S.E.2d at 100 (Meyer, J., dissenting). Justice Meyer
criticized the court for failing to establish "any limitations whatsoever on the
duty not to negligently inflict foreseeably serious emotional distress" and
"provid[ing] no guidance to the judges and juries that must implement it." Id. at
312-13, 395 S.E.2d at 102 (Meyer, J., dissenting).
38. Id. at 312, 395 S.E.2d at 102 (Meyer, J., dissenting).
39. California at one time was thought to have the most liberal approach. See
Dillon v. Legg, 441 P.2d 912, (Cal. 1968) (en banc) (requiring consideration of: 1)
whether plaintiff was in close proximity to the scene; 2) whether the plaintiff's
emotional distress resulted from the "sensory and contemporaneous observance
of the accident"; and 3) whether the plaintiff was "closely related" to the victim).
The Ruark factors are similar to those enumerated in Dillon. When Ruark was
decided, however, Dillon had been narrowed significantly by the California

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was dominated by concerns that the case opened the door to unlimited liability for defendants.40 Members of the defense bar feared that the “foreseeability” test would make it too easy for plaintiffs to win large civil verdicts.41 In addition, there was concern over the court's failure to provide practical standards or adequate guidance to the lower courts.42 The broad “foreseeability” test adopted in Ruark had been rejected by a number of states in favor of more definite guidelines.43 Most notably, the California Supreme Court had recently rejected a standard substantially similar to that established in Ruark, characterizing the “foreseeability” test as “unworkable” and “confusing.”44 Following Ruark, the North Carolina courts were expected to encounter the same difficulties applying and interpreting the “foreseeability” test with the results being uncertainty in the courts and inequity for the parties.45

41. Id. Justice Webb noted that while the physical injury requirement is "somewhat arbitrary" it does serve to limit the potential liability of defendants. Ruark, 327 N.C. at 318, 395 S.E.2d at 106 (Webb, J., dissenting). As one commentator noted, “with respect to mental anguish claims . . . the fear of indefinite liability is a legitimate one, and the need to impose reasonable limits upon the extent of a defendant's responsibility clearly exists.” Byrd, supra note 26, at 448.
42. Ruark, 327 N.C. at 312-13, 395 S.E.2d at 102 (Meyer, J., dissenting).
43. Id. at 308-16, 395 S.E.2d at 99-104 (Meyer, J., dissenting).
44. See Thing, 771 P.2d at 918. Thing replaced the standards set forth in Dillon, with the following requirements: 1) the plaintiff must be closely related to the victim; 2) plaintiff must have been present at the scene of the injury at the time it occurred and had to be aware that the injury was occurring; and 3) the plaintiff must have suffered serious emotional distress beyond that which would be anticipated in a disinterested bystander. Thing, 771 P.2d at 829-30. See supra note 39.
45. The Ruark court appeared unconcerned by this, however, stating that “our trial courts have adequate means available to them for disposing of improper claims for negligent infliction of emotional distress and for adjusting excessive or inadequate verdicts.” Ruark, 327 N.C. at 306, 395 S.E.2d at 98. Contra Thing, 771 P.2d at 833 (Kaufman, J., concurring) (recognizing that
Justice Meyer's concerns were proven valid as the trial courts' attempts to apply the "foreseeability" test set forth in Ruark to negligent infliction of emotional distress claims were repeatedly reversed by the court of appeals. Whereas the trial courts narrowly applied the "foreseeability" test, the court of appeals applied it in such a way that allowed an almost unlimited number of plaintiffs to state a claim for emotional distress. The court of appeals held in five decisions that a plaintiff with a close familial relationship with a person who is injured or killed by the negligence of another may state a cause of action for negligent infliction of emotional distress without having been in close proximity to or having observed the negligent act of the defendant. Thus, under the court of appeals' interpretation of Ruark and its "foreseeability" test, any person with a close familial relationship (i.e., parent/child or husband/wife) to a person killed or injured by a defendant's negligence is a "foreseeable plaintiff" with a cause of action.

"Dillon's confident prediction that future courts would be able to fix just and sensible boundaries on bystander liability has been found to be wholly illusory—both in theory and practice".

46. See, e.g., Butz v. Holder, 112 N.C. App. 116, 434 S.E.2d 862 (1993); Hickman v. McKoin, 109 N.C. App. 478, 428 S.E.2d 251 (1993); Anderson v. Baccus, 109 N.C. App. 16, 426 S.E.2d 105 (1993); Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993); Gardner v. Gardner, 106 N.C. App. 635, 418 S.E.2d 260 (1992). In each of the post-Ruark decisions, the court of appeals reversed the trial court. This underscores the disagreement among the trial and appellate judges as they attempted to define the limits of Ruark. These cases also demonstrated that without clearer guidelines, trial courts would find it nearly impossible to dispose of negligent infliction of emotional distress claims through summary judgment.

47. See, e.g., Butz, 112 N.C. App. at 117, 434 S.E.2d at 863 (parents could state a claim for negligent infliction of emotional distress following death of child who was struck by a car while riding his bicycle); Hickman, 109 N.C. App. at 479, 428 S.E.2d at 252 (children who were not at the scene of the accident could state a claim for emotional distress following the injury of their mother in an automobile accident); Anderson, 109 N.C. App. at 25, 426 S.E.2d at 110 (husband who was not present at scene of accident could state a claim for negligent infliction of emotional distress following death of wife and unborn child in automobile accident); Sorrells, 108 N.C. App. at 672, 424 S.E.2d at 679 (parents who were not present at scene of accident could state claim against bar that served son alcohol for negligent infliction of emotional distress following death of son in drunk driving accident); Gardner, 106 N.C. App. at 639, 418 S.E.2d at 263 (mother who was not present at scene of accident could state a claim against father of her son who was driving at the time of the accident for emotional distress resulting from the death of her son).
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against the defendant for negligent infliction of emotional distress. 48

IV. ANALYSIS

In *Gardner*, the North Carolina Supreme Court had its first opportunity to reexamine its decision in *Ruark* and to provide some much needed guidance to the lower courts on the proper application of the "foreseeability" test enunciated in *Ruark*. On October 8, 1993, the court issued its decision in *Gardner* which reaffirmed its decision in *Ruark*. Applying *Ruark* to the facts in *Gardner*, the court held that "plaintiff’s injury was not reasonably foreseeable and its occurrence was too remote for the negligent act itself to hold the defendant liable for such consequences."49 *Gard­ner* makes it clear that a close familial relationship between the plaintiff and the injured person for whom the plaintiff is concerned, is insufficient standing alone to establish the element of foreseeability. *Gardner* thus significantly restricts the scope of *Ruark*.

Once again shockwaves were felt throughout the legal community. This time, however, the bulk of the criticisms came from plaintiffs’ attorneys who felt that the court had so narrowed the scope of *Ruark* as to make it difficult to ever succeed on a claim for emotional distress.

In *Gardner*, the court based its holding on two factors: proximity and susceptibility. The court noted that the mother was several miles away when the accident occurred and stated that while her absence from the scene of the accident is not determinative, it unquestionably "militates" against the foreseeability of her resulting emotional distress.50 The court reasoned that because she was not in close proximity to, nor did she observe, the defendant’s negligent act, she was not able “to see, hear or otherwise sense” the

49. *Gardner*, 334 N.C. at 668, 435 S.E.2d at 328. In the other part of a one­two punch delivered to plaintiffs by the court that day, the court ruled in *Sorrells* v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 674, 435 S.E.2d 320, 323 (1993), that two parents who suffered emotional distress when their son was killed after the defendant bar had served him too much alcohol had no claim. The court held that the possibility that the defendant’s negligence would lead to the son’s death and the parents’ anguish was too remote to be foreseeable. The reasoning in *Sorrell* is consistent with that in *Gardner*. The impact of *Sorrells*, however, will be more limited than that of *Gardner* because the facts in *Gardner* more closely match the factors set forth in *Ruark*.
accident or to perceive the injuries to her son. Furthermore, the court stated that "more important" than the mother's absence from the scene of the accident was that "there was neither [an] allegation nor [a] forecast of evidence that the defendant knew the plaintiff was subject to an emotional or mental disorder or other severe disabling emotional or mental condition as a result of his negligence and its consequences." Absent such knowledge, the court said, such an outcome cannot be held to be reasonably foreseeable and plaintiff failed to establish a claim.

A. Proximity

While categorically rejecting any notion that any of the three factors set forth in Ruark are determinative of foreseeability, the Gardner court placed great emphasis on the fact that the plaintiff, Mrs. Gardner, was not in close proximity to, nor did she observe, the defendant's negligent act. Although the court still adamantly insists that proximity is just one factor to be considered in determining foreseeability, Gardner and subsequent cases make it clear that nothing short of being present at the time the accident occurs or at least close enough to perceive the accident will support a claim for negligent infliction of emotional distress. For example, in Sorrells v. M.Y.B. Hospitality Ventures, the court refused to ground the decision solely on the plaintiffs' absence from the scene of the negligent act but did cite that absence as particularly relevant. Most recently, the court held in Anderson v. Baccus, that even though the plaintiff husband arrived at the scene shortly after the accident and personally observed his wife before she was removed from the wreckage, he was not in close proximity and, therefore, could not reasonably foresee the emotional distress that his wife suffered. In Sorrells, the plaintiffs sought to recover damages from the bar that had served their son alcohol prior to his death in a drunk driving accident.

51. Id.
52. Id. at 667, 435 S.E.2d at 328 (emphasis added).
53. Id.
54. Gardner, 334 N.C. 662, 667-68, 435 S.E.2d 324, 327-28 (1993). The court stated that the plaintiff's absence from the scene "unquestionably militated against the foreseeability of her emotional distress." Id. at 667, 435 S.E.2d at 327.
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56. Id. at 674, 435 S.E.2d at 323.
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58. On rehearing in Butz v. Holder, 113 N.C. App. 156, 437 S.E.2d 672 (1993), the court of appeals read Gardner broadly to strike the emotional distress claim even though the proximity factor was very strong.

59. See, e.g., Thing, 771 P.2d at 830 (recovery denied to mother who was neither present at the scene nor aware that son was being injured); Kelley v. Kokua Sales & Supply, Ltd., 532 P.2d 673, 676 (Haw. 1975) (physical proximity to scene is determining factor); Wilder v. City of Keene, 557 A.2d 636, 639 (N.H. 1989) (no recovery for parents who did not see nor hear the collision); Barris v. Grange Mut. Cos., 545 N.E.2d 83, 91 (Ohio 1989) (no recovery for parent who had no sensory perception of events surrounding accident); Gain v. Carroll Mill Co., 787 P.2d 553, 557 (Wash. 1990) (to recover plaintiff must be at the scene of the accident or arrive shortly after the accident).

60. Gardner, 334 N.C. at 667, 435 S.E.2d at 328.

61. See supra note 31.

62. Gardner, 334 N.C. at 667, 435 S.E.2d at 328. The court noted the distinction drawn in Ruark between "temporary fright, disappointment and regret," which by itself is not compensable, and "severe emotional distress" for which a plaintiff may recover. Id. The court then concluded that while anyone

proximity to and did not observe the defendant's negligent act and, thus, could not recover for emotional distress.58

Attorneys, thus, are faced with a court that insists that prox­imity is only a factor in, but treats it as determinative of, foresee­ability. As a result, an attorney who fails to bring a negligent infliction of emotional distress claim because the plaintiff was not on the scene of the accident may be committing malpractice. At the same time, however, in view of Gardner, Sorrells, and Anderson, such a claim likely will be dismissed resulting only in wasted time, money, and judicial resources. Rather than requiring liti­gants and trial courts to guess whether the proximity factor is strong enough in a given case to support a claim, the court should place some clear limits on proximity.59 For instance, the court could simply require that the plaintiff be on the scene when the party for whom the plaintiff is concerned is injured. This requirement would give litigants and lower courts a clear standard by which to make their decisions regarding negligent infliction of emotional distress claims. At the same time, it would not limit claims any more than they are presently limited under Gardner, Sorrells, and Anderson.

B. Susceptibility

Susceptibility was not mentioned in Ruark, but it played a key part in the Gardner decision.50 The court's basic premise is that it is not normal for a parent to experience severe emotional distress, as defined in Ruark,61 over the death of a child.62 There-
fore, the court concluded that a claim for emotional distress requires reasonable foresight that the plaintiff will not only become distraught, but also will suffer severe emotional distress. This requirement is unusual in that it is contrary to the notion that a defendant takes his victim as he finds him. Instead, it allows only the uncommonly sensitive family members to recover and then only if their unnatural susceptibility is known in advance to the defendant.

Applying this standard in Gardner, the court held that despite the fact that the plaintiff and defendant were married and the defendant thus presumably knew the plaintiff very well, plaintiff failed to show that the defendant knew she was susceptible to an emotional or mental disorder or other severe and disabling mental condition as a result of his negligence and its consequences.

Although the Gardner court characterized the three elements of negligent infliction of emotional distress set forth in Ruark, as the “only requisite allegations,” it appears that is not really what the court meant. Under Gardner, to establish the element of foreseeability, the plaintiff must also allege and offer evidence sufficient to show that the defendant knew that the plaintiff was susceptible to severe emotional distress as a result of his negligent act. In both Sorrells and Anderson the court based its decision to dismiss the plaintiffs’ negligent infliction of emotional distress claims in part on the fact that they did not show that the defendant knew they were susceptible to severe emotional distress.

After Gardner, Sorrells, and Anderson, it is clear that a plaintiff who merely alleges that the severe emotional distress they suffered was a reasonably foreseeable consequence of the defendant’s negligent conduct will almost certainly have their claim dismissed.

should foresee that virtually any parent will suffer some emotional distress ... to establish a claim for negligent infliction of emotional distress the law requires reasonable foresight of an emotional or mental disorder or other severe disabling emotional or mental condition."  
64. See supra note 5.
66. In Butz, 113 N.C. App. 156, 437 S.E.2d 672 (1993), the court of appeals interpreted Gardner to require plaintiffs to allege and prove knowledge of their susceptibility to severe emotional distress. Id.
67. See Sorrells, 334 N.C. at 674, 435 S.E.2d at 323; Anderson, 335 N.C. at 532, 439 S.E.2d at 140.
68. See, e.g., Elden v. She
It is not clear, however, what exactly the plaintiff must allege. For instance, it is unclear whether previous knowledge of susceptibility is required in all claims for negligent infliction of emotional distress or only when the plaintiff is absent from the scene of the negligent act. Furthermore, it will be the rare case in which a defendant has actual knowledge of an individual’s particular susceptibilities in advance of the negligent conduct. While it may be desirable to limit liability for negligent infliction of emotional distress, in Gardner the court appears to have drawn a line that essentially eliminates the claim altogether. If negligent infliction of emotional distress is to have any meaningful application, such knowledge cannot always be required.

The long-range effect of the susceptibility factor will depend in part on whether it is a strict test of foreseeability, or only one of several factors. Gardner appears to say that prior knowledge of susceptibility is a requirement. In Sorrells, however, the court was careful to point out that there are no requirements, only a number of factors to be considered. Regardless of the ultimate resolution, the court’s use of the “foreseeability” test is confusing. If the court’s purpose is to limit the application of negligent infliction of emotional distress, then it can do so without trying to fit prior knowledge of susceptibility under the “foreseeability” test. Restrictions could be based on the relationship between the plaintiff and the injured or deceased person and the proximity of the

70. The susceptibility factor has been applied only in cases where the plaintiff did not personally observe the defendant’s negligent act.
72. Sorrells, 334 N.C. at 674, 435 S.E.2d at 323.
73. See, e.g., Thing, 771 P.2d at 829-30, (mother of victim is “closely related”); Elden v. Sheldon, 758 P.2d 582, 587 (Cal. 1988) (unmarried cohabitant is not entitled to recover).
plaintiff to the negligent conduct.\textsuperscript{75} These requirements would sufficiently limit liability, but allow recovery for legitimate claims for negligent infliction of emotional distress.

V. Conclusion

In \textit{Gardner} the North Carolina Supreme Court held that, as a matter of law, a mother who suffered severe emotional distress as a result of the death of her son in an automobile accident, but who was not present at the scene of the accident, cannot recover damages for emotional distress from the defendant driver, her husband, because such damages are unforeseeable. In so ruling, the court severely limited the scope of \textit{Ruark} and the circumstances under which a plaintiff may recover for negligent infliction of emotional distress. The \textit{Gardner} court, however, insisted that the validity of negligent infliction of emotional distress claims be assessed on a case-by-case basis and refused to set any clear standards for determining whether the severe emotional distress complained of was foreseeable. The experience in other jurisdictions warns that vague "foreseeability factors" can cause confusion and uncertainty. The ad hoc approach the court has chosen to take will foster uncertainty and confusion among North Carolina courts and result in inconsistent treatment of cases. The trial courts and litigants need better guidance from the court as to when severe emotional distress is foreseeable. The court should clearly state that to recover for negligent infliction of emotional distress, a plaintiff must personally observe the negligent act of the defendant, be a close family member of the victim, and suffer severe emotional distress beyond that which one would expect to result from any similar tragedy. A plaintiff should not be required to show that the defendant knew of the plaintiff's susceptibility to suffer severe emotional distress. In the wake of \textit{Gardner}, unless these or similarly clear standards are adopted, the tort of negligent infliction of emotional distress will provide, if any, little remedy for plaintiffs.

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\textsuperscript{75} See supra note 59.