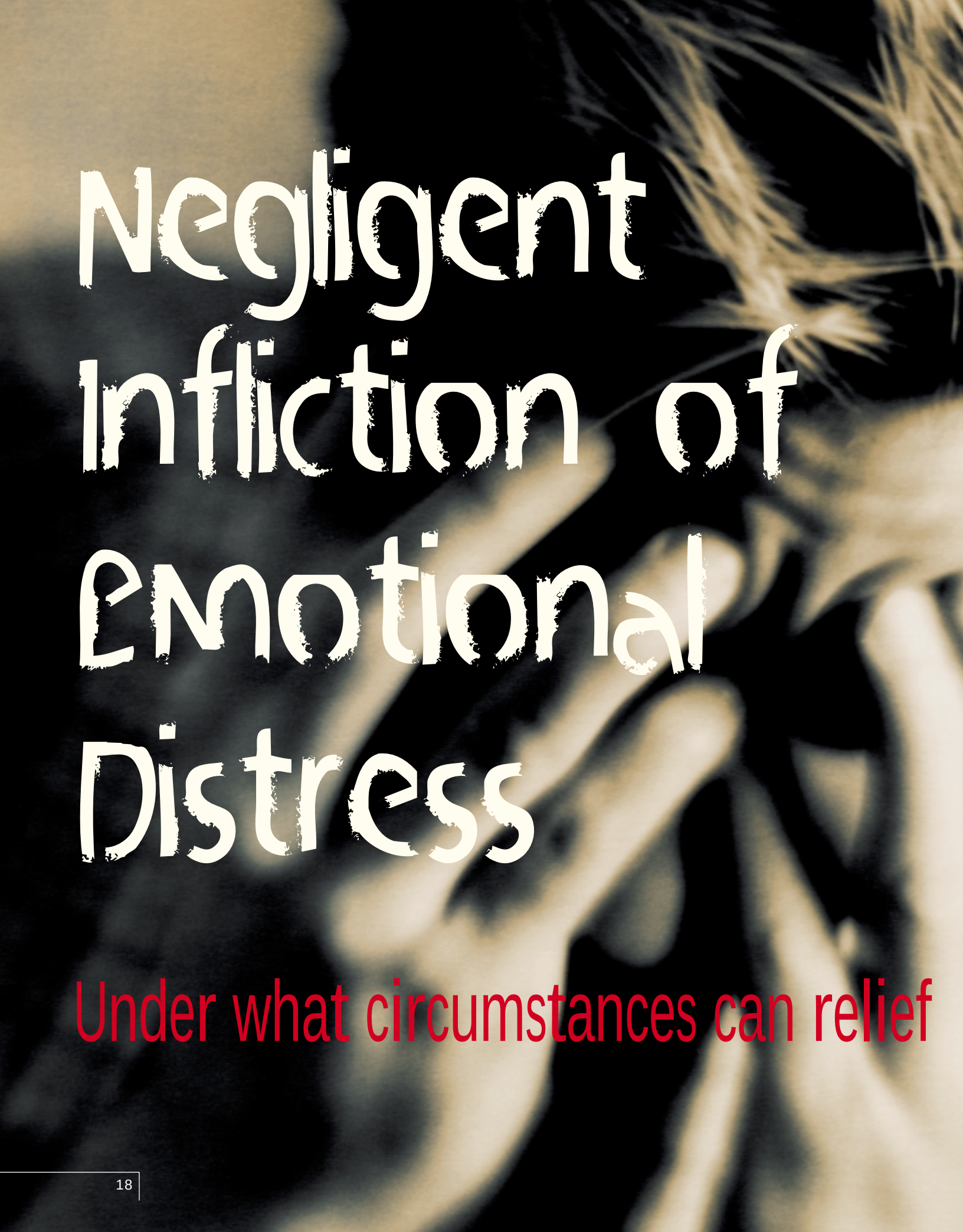

Negligent Infliction of Emotional Distress

Under what circumstances can relief

be found?

"The whole of what we know is a system of compensations. Each suffering is rewarded; each sacrifice is made up; every debt is paid."[1]

Essayist and poet Ralph Waldo Emerson could have been describing the emergence and evolution of the modern-day tort of negligent infliction of emotional distress. Whether an individual can ever truly be monetarily compensated for emotional distress, such as heartbreak, grief, terror, and the like, is a metaphysical subject for poets, philosophers, and ultimately, the individual, not the courts. Nonetheless, the courts have fashioned this unique cause of action in an attempt to address this difficult and sensitive issue.

Negligent infliction of emotional distress is the predictable, probable, and anticipated serious emotional consequence to negligent conduct, without physical contact, which results in physical injury to the plaintiff.[2] The emotional distress can ensue from a series of immediate "traumatic events,"[3] the fear, "horror," or "shock" from witnessing a sudden event,[4] or from the threat of immediate personal physical harm.[5] Recovery of damages for emotional distress has always been available in connection with negligence cases in which the plaintiff sustained physical injury or when some other independent basis for tort liability existed.[6] However, when the defendant's negligence caused emotional distress alone, courts denied recovery for "stand-alone" emotional harm, to guard against fraudulent claims and increased litigation on the basis that the defendant owed no duty to the plaintiff.[7] Furthermore, the courts found it difficult to evaluate proximate cause and assign a monetary value to mental disturbance.[8]

The "notable exception" to this general rule was the "special" duty imposed on common carriers, innkeepers, and telegraph companies who were required to exercise civility toward customers, and the negligent mishandling of corpses.[9] Another exception to the rule against recovery for "independent" emotional distress occurred when the plaintiff sustained severe immediate physical consequences or physical injury as a result or manifestation of the emotional harm.[10] However, even this exception was sometimes subject to limitation, specifically the requirement of a literal contemporaneous physical "impact" on the person, ostensibly to ensure that the mental disturbance was genuine.[11]

BY RENEE BIRNBAUM

Thus, prior to 1970, Michigan courts did not recognize a claim for "independent" emotional distress unless the party sustained some physical injury or "physical impact."[12] The corollary to this "no impact, no recovery" rule, was the "zone of danger" concept, which required that the party be close enough to the tortious activity to justifiably fear a physical impact, or fear for his or her own safety.[13] The "time-worn no impact—no recovery rule,"[14] was rejected and overruled in *Daley v LaCroix*.[15]

In *Daley*, the defendant's vehicle "sheared off" a utility pole causing high voltage lines to strike the electrical lines leading into the plaintiffs' house; a "great electrical explosion" followed, resulting in property damage to the plaintiffs' home.[16] Plaintiffs (minors) sought recovery for property damages as well as damages for "traumatic neurosis, emotional disturbance . . . nervous upset," and "nervousness."[17] The *Daley* court held:

> *[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff . . . may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock.*
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> ****
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> *Further, plaintiff has the burden of proof . . . . that the physical harm complained of is a natural consequence of the alleged emotional disturbance, which in turn is proximately caused by defendant's conduct.*[18]

Thus, after *Daley*, "physical impact" was "no longer the sine qua non for recovery," for independent emotional distress.[19] Shortly thereafter, in *Toms v McConnell*, the court also abolished the "hopeless artificiality and harshness of the 'zone-of-danger' rule" as a prerequisite for recovery.[20] The *Toms* court held that "a parent [the mother] may maintain a cause of action for mental anguish resulting in a definite and objective physical injury generated by witnessing the negligent infliction of injuries upon its child."[21] Accordingly, a party could maintain an action for emotional distress arising out of fear for his or her own personal safety as a result of the defendant's negligent act,[22] as well as in the capacity of a "bystander" who witnesses or observes the negligent infliction of tortious injury upon an immediate family member.[23]

The latter, known as the "bystander recovery rule" applies when the plaintiff is a "bystander" and not a "direct victim" of the defendant's negligence. Under the "bystander recovery rule," in a "bystander" claim for negligent infliction of emotional distress, the plaintiff must be a member of the victim's immediate family.[24] The rationale for this rule is that (1) it is not "reasonably foreseeable" that a bystander other than a close relative would suffer emotional distress as a result of witnessing an immediate family member's accident or injury, and that (2) permitting recovery by bystanders other than immediate family members would subject a defendant to unlimited disproportionate liability.[25]

Furthermore, initially the "bystander," must have actually witnessed the accident or continuously personally observed the negligent act or event to maintain an action.[26] In *Gustafson v Faris*, this "witness" requirement characterized as "nothing but a poor arbitrary rule at best," was relaxed and supplemented by an admittedly equally "arbitrary" rule that was "a little less restrictive;"[27] the alternate "fairly contemporaneous" requirement.

In *Gustafson*, the parents of a five-year-old son did not witness their son's fatal bicycle-automobile accident but the mother arrived at the accident scene shortly thereafter.[28] *Gustafson* suggested that a bystander need not actually witness the accident to maintain a viable cause of action for negligent infliction of emotional distress:

> *It is clear that the injury threatened or inflicted upon the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff, and that the shock must result in physical harm. The action might, at least initially, well be confined to members of the immediate family of the one endangered, or perhaps to husband, wife, parent, or child, to the exclusion of mere bystanders, and remote relatives. As an additional safeguard, it might be required that the plaintiff be present at the time of the accident or peril, or at least that the shock be fairly contemporaneous with it, rather than follow when the plaintiff is informed of the whole matter at a later date.*[29]

Thus, the "fairly contemporaneous" rule provides for recovery if the bystander does not witness the accident, but experiences the emotional distress "fairly contemporaneously with the accident or injury to the third person."[30] Courts have defined "fairly contemporaneous" as "on the scene moments later,"[31] viewing the third party's injuries "within moments" of the incident,[32] and seeing a newborn's "disabilities . . . immediately after her birth,"[33] but it does not include being "informed of the matter at a later date."[34]

Additionally, *Gustafson*'s requirement of "a sudden, brief, and inherently shocking accidental event,"[35] and its reinforcement of *Daley*'s requirement that the plaintiff's mental disturbance result in a "definite and objective physical injury," or "actual physical harm,"[36] "must be examined on a case-by-case basis in order to determine whether it is foreseeable that mental distress to the individual parents is likely to result."[37]

Gustafson thus established the present-day limitations and parameters for "bystander" negligent infliction of emotional distress. Currently, a party can establish a viable claim for negligent infliction of emotional distress when the party proves four elements: (1) that the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) that the shock must result in actual physical harm; (3) that the plaintiff is a member of the third person's immediate family, i.e., a parent, child, husband or wife, and (4) that the plaintiff must actually be present at the time of the accident or injury, or

fast facts:

Negligent infliction of emotional distress is the predictable, probable, and anticipated serious emotional consequence to negligent conduct, without physical contact, which results in physical injury to the plaintiff.

A party could maintain an action for emotional distress arising out of fear for his or her own personal safety as a result of the defendant's negligent act, as well as in the capacity of a bystander who witnesses or observes the negligent infliction of tortious injury upon an immediate family member.

suffers shock "fairly contemporaneous" with the accident or injury.[38]

Today, negligent infliction of emotional distress is a separate and distinct independent cause of action, with special characteristics and restrictions.[39] Yet, there is still evidence that some Michigan courts are reluctant to adopt it or recognize it as a vehicle of recovery.[40] Certainly however, Michigan courts do allow recovery for negligent infliction of emotional distress under the appropriate circumstances and provide some relief to an emotionally injured individual. ✦

Renee Birnbaum is a trial attorney with the Ann Arbor office of Garan Lucow Miller, P.C. She is a former litigation partner at Shumaker, Loop & Kendrick in Toledo, Ohio, and a former Clinical Assistant Professor of Law at the University of Michigan Law School. Ms. Birnbaum is a summa cum laude graduate of Bowling Green State University, Bowling Green, Ohio, and a graduate of the University of Cincinnati College of Law, where she served as an editor and member of the Law Review.

Footnotes

1. Ralph Waldo Emerson, *Essays:* First Series. *Compensation*, 1841.
2. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75 (1986).
3. Id. at 81.
4. *Toms v McConnell*, 45 Mich App 647, 649 (1973).
5. *Maldonado v National Acme Co*, 73 F3d 642, 646–647 (CA 6 (Mich), 1996); *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75 at 88.
6. *Daley v LaCroix*, 384 Mich 4, 8 (1970); *McClain v University of Michigan Bd of Regents*, 256 Mich App 492, 503 (2003).
7. *Daley v LaCroix*, 384 Mich 4 at 9–10 (citing to and relying on Prosser, *Torts* (3d ed), Section 55, p 346); Dan B. Dobbs, *The Law of Torts*, 824, 836 (2001).
8. Id.
9. *Daley v LaCroix*, 384 Mich 4 at 8; Dobbs, supra at 824–825; *Allinger v Kell*, 102 Mich App 798 (1981), rev'd in part by 411 Mich 1053 (1981); *Rauhe v Langeland Memorial Chapel*, 30 Mich App 665 (1971). Both *Allinger* and *Rauhe* relied on the abolition of the "impact rule," infra.
10. Dobbs, supra at 825; *Daley v LaCroix*, 384 Mich 4 at 8–10.
11. Id. at pp 9–10. "'Impact' has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke. The requirement has been satisfied by a fall brought about by a faint after a collision, or the plaintiff's own wrenching of her shoulder in reaction to the fright . . ." Id. at p 12, n 9 quoting from Prosser, *Torts* (3d ed), pp 350–351.
12. *Manie v Matson Oldsmobile-Cadillac Co*, 378 Mich 650 (1967); *Ellsworth v Massacar*, 215 Mich 511 (1921); *Nelson v Crawford*, 122 Mich 466 (1899); *Alexander v Pacholek*, 222 Mich 157 (1923). *Ellsworth*, *Nelson* and *Alexander* were subsequently overruled in part by *Daley v LaCroix*, 384 Mich 4 (1970).
13. *Toms v McConnell*, 45 Mich App 647 at 652; *Maldonado v National Acme Co*, 73 F3d 642 at 644–646.
14. *Toms v McConnell*, 45 Mich App 647 at 654.
15. *Daley v LaCroix*, 384 Mich 4 (1970).
16. Id. at 6–7.
17. Id. at 7. The *Daley* plaintiffs did not "witness" the accident.
18. Id. at 13–14.
19. *Perlmutter v Whitney*, 60 Mich App 268, 272 (1975).
20. *Toms v McConnell*, 45 Mich App 647 at 653, 654.
21. Id. at 657.
22. *Maldonado v National Acme Co*, 73 F3d 642, at 646–647. See also, *Selph v Gottlieb's Financial Services, Inc*, 35 F Supp 2d 564, 569–570, n 5 (WD Mich SD 1999) (observing that "a claim based upon fear of one's own safety exists apart from the other species of negligent infliction of emotional distress which is based upon the plaintiff's status as a bystander . . ."); *Nugent v Bauermeister*, 195 Mich App 158, 162 (1992) (implying that a plaintiff can maintain a bystander emotional distress claim and for "fearing for his personal safety," as a direct victim); *Parnell v Booth Newspapers, Inc*, 572 F Supp 909, 916–917 (WD Mich SD 1983) (finding that a plaintiff's "emotional shock" which is "felt directly by the plaintiff," is within the "scope" of negligent infliction of emotional distress).
23. *Toms v McConnell*, 45 Mich App 647 at 657; *Maldonado v National Acme Co*, 73 F3d 642 at 644–645.
24. *Maldonado v National Acme Co*, 73 F3d 642 at 647. See also, *Gustafson v Faris*, 67 Mich App 363, 368 (1976) (confining bystander recovery to members of the immediate family of the one endangered, i.e., husband, wife, parent, or sibling); *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81 (1986) (mother and son); *Henley v Dep't of State Highways & Transportation*, 128 Mich App 214, 218 (1983), lv den 418 Mich 965 (1984) (parents and son); *Detroit Automobile Inter-Ins Exchange v McMillan*, 159 Mich App 48 (1987) (mother and daughter); *Pate v Children's Hosp of Michigan*, 158 Mich App 120, 123 (1986) (sister and sister); *Williams v Citizens Mut Ins Co*, 94 Mich App 762, 764 (1980) (mother and daughter); *Miller v Cook*, 87 Mich App 6, 10–11 (1978) lv den 406 Mich 890 (1979) (parents and son).
25. *Nugent v Bauermeister*, 195 Mich App 158 at 161–162 (observing that "class of persons entitled to . . . bystander recovery is extremely limited . . . , and does not include a 'close friend' of the injured or deceased third party"). See also, *Idemudia v Consolidated Rail Corp*, 895 F Supp 162, 165 (ED Mich SD 1995) (finding courts "stringently follow the limitations enunciated in *Gustafaston*" and denying recovery for maternal aunt's emotional distress for nephew's injury); *Lingle v Berrien County*, 206 Mich App 528, 529 (1994) (rejecting bystander claim of parents and sister against county as operator of mental health clinic).
26. *Perlmutter v Whitney*, 60 Mich App 268, 273 (1975). The *Perlmutter* plaintiffs were the parents of a daughter who was involved in an automobile accident. They did not witness the accident and did not sustain any resultant physical injuries as a result of learning about the accident. Id. at 271–272.
27. *Gustafson v Faris*, 67 Mich App 363, 367–368 (1976); *Henley v Dep't of State Highways & Transportation*, 128 Mich App 214 at 218–219; *Pate v Children's Hospital of Michigan*, 158 Mich App 120, 123–124 (1987).
28. *Gustafson v Faris*, 67 Mich App 363 at 365–366.
29. Id. at 368–369 quoting from and relying on Prosser, *Torts* (4th ed) Section 54, pp 334–335. Courts have rigidly adhered to the "witness" or "fairly contemporaneous" requirement. *Duran v Detroit News, Inc*, 200 Mich App 622, 629 (1993); *Taylor v Kurapati*, 236 Mich App 315, 360–361 (1999); *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581, n 6 (1999).
30. *Gustafson v Faris*, 67 Mich App 363 at 367–368.
31. *Henley v Dep't of State Highways & Transportation*, 128 Mich App 214 at 219.
32. *Gustafson v Faris*, 67 Mich App 363 at 370.
33. *Taylor v Kurapati*, 236 Mich App 315 at 360.
34. *Williams v Citizens Mutual Ins Co*, 94 Mich App 762 at 765. See also, *Bernier v Bd of County Road Com'rs for the County of Ionia*, 581 F Supp 71, 79 (WD Mich 1983) (denying recovery when mother learns of son's accident and death two hours after the incident); *Gustafson v Faris*, 67 Mich App 363 at 369 (citing with approval California case which denied recovery when mother saw daughter 30–60 minutes after accident); *Henley v Dep't of State Highways & Transportation*, 128 Mich App 214 at 219 (finding no cause of action when parents learned of son's accident and resultant paralysis five hours after incident); *Detroit Automobile Inter-Ins Exchange v McMillan*, 159 Mich App 48 at 54–55 (denying recovery when mother views accident scene over one hour after incident and daughter thereafter).
35. *Pate v Children's Hospital of Michigan*, 158 Mich App 120 at 123–124 (finding that sister's death resulting from defendant's alleged medical malpractice two days prior to decedent's decedent's death was not an "inherently shocking event.")
36. *Gustafson v Faris*, 67 Mich App 363 at 369; *May v William Beaumont Hospital*, 180 Mich App 728, 750 (1989); *Taylor v Kurapati*, 236 Mich App 315 at 360.
37. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75 at 85–86. See also, *Toms v McConnell*, 45 Mich App 647 at 657 (finding a continued "state of depression" sufficient for physical injury requirement); *Daley v LaCroix*, 384 Mich 4 at 7 (finding an allegation of "nervousness," "weight loss, irritability, traumatic neurosis," sufficient); *Henley v Dep't of State Highways & Transportation*, 128 Mich App 214 at 219; *Parnell v Booth Newspapers, Inc*, 572 F Supp 909 at 917–918 (finding allegations of "lost appetite, nausea, . . . tremor and shakes . . . [in] a continual daze as if in a comatose state" sufficient); *Apostle v Booth Newspapers, Inc*, 572 F Supp 897, 901 (WD Mich SD 1983) (finding allegations of "involuntary grinding" of teeth, "high blood pressure," and "chest pains" sufficient).
38. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75 at 81.
39. *Auto Club Ins Assoc v Hardiman*, 228 Mich App 470, 475 (1998).
40. See, e.g., *Rouse v Pepsi-Cola Metropolitan Bottling Co, Inc*, 642 F Supp 34, 36–37 (ED Mich SD 1985); *Hesse v Ashland Oil, Inc*, 466 Mich 21, 24, n 6 (2002); *Smith v Teledyne Indus Inc*, 578 F Supp 353, 355 (ED Mich SD 1984).