

***Ko v. Maxim Healthcare Services, Inc.* (Dec. 23, 2020, No. B293672) ___ Cal.App.5th___ [2020 Cal. App. LEXIS 1222]**

Under a claim for NIED, virtual presence through a real-time audiovisual connection to a nanny cam satisfies the requirement that plaintiffs are contemporaneously and physically present at the injury-producing event.

FACTS/PROCEDURE

Plaintiffs Dyana and Christopher Ko had a two-year-old son, Landon, with a genetic disorder called Rubinstein-Taybi Syndrome. Landon suffered from a number of health problems, including blindness in one eye, an inability to walk, difficulty hearing, severe developmental delays, and the need for a feeding tube. Since Landon required constant care and supervision, the Kos hired Thelma Manalastas, an in-home caregiver and vocational nurse, through Defendant Maxim Healthcare Services, Inc. (Maxim). On April 22, 2017, the Kos took their two older children to a youth basketball tournament and left Landon in the care of Manalastas. During the tournament, Dyana accessed a nanny cam she had installed earlier through a phone application to check in on Landon. Thereafter, the Kos watched as Manalastas physically assaulted Landon by acts including hitting, slapping, pinching, and shaking in a violent manner. The Kos called 911 and drove home where they gave police officers the video of Manalastas abusing Landon leading to her arrest. The Kos also reported the abuse to Maxim, which reassigned Manalastas but did not terminate her.

After Landon passed away, the Kos sued Defendants Maxim and Manalastas on behalf of Landon for battery, assault, negligence, and negligent infliction of emotional distress (NIED). Defendants demurred to the NIED claim and filed a motion to strike all references to allegations of Landon’s pain and suffering. The trial court sustained both demurrers and granted their motions to strike. With respect to the claim for NIED, the court held that, “NIED bystander liability is limited to circumstances where a plaintiff is physically ‘present at the scene of the injury producing event at the time it occurs.’” Since the Kos were not in physical proximity to Landon at the time of the abuse, the Kos could not bring a claim for NIED.

HOLDING/DISCUSSION

The Court of Appeal for the Second District reversed. Under *Thing v. La Chusa* (1989) 48 Cal.3d 644, a plaintiff may recover for a bystander NIED claim if three requirements are met: (1) the plaintiff is closely related to the injured victim; (2) the plaintiff is physically present at the scene of the injury-producing event at the time it occurs and is aware that it is causing injury to the victim; and (3) the plaintiff suffers severe emotional distress as a result. Here, the Kos urged the court to interpret the second *Thing* factor requiring contemporaneous presence to the injury-producing event to include virtual presence considering recent technological advancements. The court found for the Kos, holding that technological advancements have changed the manner in which families spend time with and monitor their children. Even without traditional physical presence, a livestream feed carries the same impact as personally observing the injury-producing event. This emotional distress is distinguishable from a plaintiff’s resultant distress when one learns of the injury or death of a loved one from another after the fact, which the *Thing* court sought to exclude from NIED claims. Therefore, the court held virtual presence satisfies the requirement for physical presence under an NIED claim, as long as the plaintiffs can show they still contemporaneously saw and heard the injury-producing event.