

NO. A04-1445

State of Minnesota
In Supreme Court

Geralyn S. Engler,

Appellant,

v.

Illinois Farmers Insurance Company,
an Illinois corporation,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
LEGAL ISSUE	1
STATEMENT OF FACTS	2
I. INTRODUCTION AND LEGAL POSTURE	2
II. THE ACCIDENT	4
III. ENGLER'S EMOTIONAL DISTRESS INJURIES	5
IV. THE DISTRICT COURT'S ORDER AND COURT OF APPEALS DECISION	5
ARGUMENT	6
I. STANDARD OF REVIEW	6
II. HAVING "QUALIFIED" TO BRING A CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS BY (1) BEING WITHIN THE ZONE OF DANGER; AND (2) DEMONSTRATING PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS, THE LAW SHOULD ALLOW GERI ENGLER TO RECOVER <u>ALL</u> EMOTIONAL DAMAGES CAUSED BY THE TORTFEASOR'S NEGLIGENCE AND NOT LIMIT HER DAMAGES TO THOSE ARISING OUT OF THE "FEAR FOR HER OWN SAFETY"	6
A. THE ISSUE BEFORE THE COURT IS ONE OF FIRST IMPRESSION IN MINNESOTA CONCERNING THE SCOPE OF RECOVERABLE DAMAGES IN A <i>NIED</i> CASE	7
B. HAVING MET THE THRESHOLD PREREQUISITES FOR ASSERTING A <i>NIED</i> CLAIM, GERI ENGLER SHOULD BE ALLOWED, BY APPLICATION OF ESTABLISHED MINNESOTA TORT LAW PRINCIPLES, TO RECOVER DAMAGES FOR <u>ALL</u> OF HER EMOTIONAL DISTRESS PROXIMATELY CAUSED BY THE TORTFEASOR'S NEGLIGENCE	9

1.	MINNESOTA TORT LAW ON DAMAGE RECOGNIZES THE RIGHT TO RECOVER FOR ALL DAMAGES CAUSED BY THE TORTFEASOR'S NEGLIGENCE	10
2.	<i>NIED</i> CLAIMANTS ALREADY HAVE TO MEET A HEAVY BURDEN OF PROOF; IT NEED NOT BE MADE ANY MORE ONEROUS	14
3.	PROTECTING THE TORT <u>VICTIMS'</u> RIGHTS IS OF GREATER INTEREST THAN PROTECTING THE TORTFEASOR'S "RIGHTS."	14
C.	BY LIMITING THE SCOPE OF DAMAGES TO GERI ENGLER'S "FEAR FOR HER OWN SAFETY" THE DISTRICT COURT CREATED AN UNPRECEDENTED, UNREALISTIC, AND IMPOSSIBLE STANDARD THAT IN NO WAY REFLECTS THE FULL MEASURE OF THE EMOTIONAL DISTRESS CAUSED BY THE TORTFEASOR'S NEGLIGENCE	15
1.	§ 436 OF THE RESTATEMENT (SECOND) OF TORTS SUPPORTS A <u>FULL</u> RECOVERY FOR A CLAIMANT IN THE POSITION OF GERI ENGLER	16
2.	MANY JURISDICTIONS RECOGNIZE AND ALLOW RECOVERY FOR THE EMOTIONAL DISTRESS ARISING FROM WITNESSING THE SERIOUS INJURY OR DEATH OF AN IMMEDIATE FAMILY MEMBER	17
	CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

<u>Alcozer v. North Country Food Bank,</u> 635 N.W.2d 695 (Minn. 2001)	6
<u>Carlson v. Ill. Farmers Ins. Co.,</u> 520 N.W.2d 534 (Minn. Ct. App. 1994)	1, 7
<u>Christianson v. Chicago St. P. M. & O. Railroad Co.,</u> 69 N.W. 640 (Minn. 1896)	11
<u>Engler v. Wehmas,</u> 633 N.W.2d 868 (Minn. Ct. App. 2001)	1, 2, 6
<u>K.A.C. v. Benson,</u> 527 N.W.2d 553 (Minn. 1995)	6
<u>Okrina v. Midwestern Corp.,</u> 282 Minn. 400, 405, 165 N.W.2d 259 (1969)	11
<u>Stadler v. Cross,</u> 295 N.W.2d 552 (Minn. 1980)	1, 6, 7, 8

Persuasive Authorities:

<u>Asaro v. Cardinal Glennon Memorial Hospital,</u> 799 S.W.2d 595 (MO. 1990)	17
<u>Barnhill v. Davis,</u> 300 N.W.2d 104 (Iowa 1981)	17
<u>Bovsun v. Sanperi</u> 461 N.E.2d 843 (N.Y. 1984)	20
<u>Bowen v. Lumbermens Mutual Cas. Co.,</u> 517 N.W.2d 432 (Wis. 1994)	18,19,20
<u>Bowman v. Williams,</u> 165 A.2d 182 (M.D.App. 1933)	20
<u>Gates v. Richardson,</u> 719 P.2d 193 (Wyo. 1986)	17

<u>James v. Lieb</u> , 375 N.W.2d 109 (Neb. 1985)	17
<u>Nielson v. AT & T Corp.</u> , 597 N.W.2d 434 (S.D. 1999)	17
<u>Pierce v. Physicians Ins. Co. of WI, Inc.</u> , 692 N.W.2d 558 (Wis. 2005)	18,20
<u>Pieters v. B. Right Trucking, Inc.</u> , 669 F.Supp. 1463 (N.D.Ind. 1987)	17,20
<u>Portee v. Jaffee</u> , 417 A.2d 521 (N.J. 1980)	14
<u>Redepenning v. Dore</u> , 201 N.W.2d 580 (Wis. 1972)	18
<u>Williams v. Baker</u> , 572 A.2d 1062 (D.C. 1990)	20

Statutes and Rules:

Minn. Stat. § 169.14, subd. 2	4
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Secondary Authorities:

Restatement (Second) of Torts, § 436, subd. 3, cmt. f	16,20
Michael K. Steenson, <u>The Anatomy of Emotional Distress Claim in Minnesota</u> , 19 Wm. Mitchell L. Rev. 1, 8 (1993)	11,16
Prosser & Keeton, <u>On Torts</u> , 5th ed, § 54	13

STATEMENT OF LEGAL ISSUES

1. Where the plaintiff has asserted a claim for negligent infliction of emotional distress and is found to have

- a. been in the "zone of danger" of physical impact;
- b. experienced a reasonable fear for her own safety; and
- c. demonstrated physical manifestations of emotional distress,

may the plaintiff also recover damages for emotional distress caused by her fear for the safety of her son and from witnessing her son's injuries?

The trial court answered this question in the negative. Specifically, in his June 29, 2004, Order, District Court Judge Michael Roith's decision stated:

1. Plaintiff is not entitled to damages for emotional distress she may have suffered from as a result of either fearing for her son's safety, or witnessing her son's injury.
2. Plaintiff's recovery of damages is limited to the emotional distress she sustained as a result of fear for her own safety.
3. The Plaintiff's evidence shall be limited to evidence of Plaintiff's emotional distress sustained as a result of fear for her own safety.

Authorities:

Carlson v. Ill. Farmers Ins. Co.,
520 N.W.2d 534 (Minn. App. 1994).

Engler v. Wehmas,
633 N.W.2d 868 (Minn. App. 2001).

Stadler v. Cross,
295 N.W.2d 552 (Minn. 1980).

STATEMENT OF FACTS

I. INTRODUCTION AND PROCEDURAL POSTURE

This is an underinsured motorist (UIM) case. It evolved from an underlying third-party liability case, Engler v. Wehmas, 633 N.W.2d 868 (Minn. Ct. App. 2001) (hereinafter "Engler I"), a case that came before this court in 2002. See, Engler I decision (A.A. 1-14). To fully appreciate the issue presented, it is useful to understand the procedural history of both Engler I and the present UIM case.

On July 10, 1999, GERALYN Engler ("Engler") filed a Complaint in Anoka County District Court against Beverly Wehmas ("Wehmas") asserting a claim for **negligent infliction of emotional distress (NIED)** arising from a motor vehicle/pedestrian collision that occurred April 17, 1997. (A.A.15-19). It involved Wehmas, Engler, and her four and a half year-old son, Jeffrey Engler ("Jeffrey"). The matter was assigned to Judge John C. Hoffman.

Engler brought a pre-trial motion seeking the admission of photographs illustrating the nature and severity of Jeffrey's facial injuries caused by Wehmas' vehicle colliding into him. (A.A. 20-23). Engler asserted the photographs were relevant in support of her claim for emotional distress damages as they help convey the magnitude of the horror, anxiety, fear and distress she experienced as a result of watching her son be struck by Wehmas' car and seeing his lifeless, bloodied body immediately thereafter. (A.A. 20-23).

Wehmas responded with a memorandum which (1) opposed introduction of those photographs; and (2) contained the basis for a Motion for Summary Judgment to dismiss Engler's claim. (A.A. 24-31). In the alternative, Wehmas asked the trial court to certify the question of whether Engler may recover for emotional distress damages beyond those caused by her fear for her own safety, i.e. those damages caused by witnessing, while in the zone of

danger, a speeding, out of control car run into, throw and maim her son. (A.A. 24-25). The trial court denied Wehmas' Motion for Summary Judgment, but granted the motion for certification pursuant to Minn. R. Civ. App. P. 103.03(h). (A.A.32-45).

In a 2-1 decision, The Minnesota Court of Appeals (Judge Klaphake dissenting) answered the following certified question in the negative:

Where the plaintiff has asserted a claim for negligent infliction of emotional distress and is found to have:

1. been in the "zone of danger" of physical impact;
2. experienced a reasonable fear for her own safety; and
3. demonstrated physical manifestations of emotional distress, may the plaintiff also recover damages for emotional distress caused by her fear for the safety of her son and from witnessing her son's injuries? (A.A. 1-14).

Engler petitioned for review of the Court of Appeals decision. (A.A. 46-50.). Her petition was granted by The Minnesota Supreme Court in a decision filed December 19, 2002. (A.A. 51).

In January, 2002, before oral arguments were made to the Supreme Court, Wehmas' insurance company offered its \$50,000.00 liability policy limits to Ms. Engler. The case settled.

Engler then commenced this UIM lawsuit (A.A. 52-57). Engler brought a motion seeking clarification of the scope of her recoverable damages. Relying on Engler I, Judge Roith denied Engler's motion, and narrowly limited the scope of her recoverable damages (A.A. 58-63).

Judgment was entered on Judge Roith's Amended Order on June 29, 2004.(A.A. 64-66). Appellant's Petition for appeal was filed on August 6, 2004. (A.A. 67-72). The Court

of Appeals affirmed Judge Roith's holding on March 29, 2005. (A.A. 105-07)

II. THE ACCIDENT

At approximately 6:15 p.m. on April 17, 1997, Geri Engler ("Engler") was a passenger in a vehicle driven by her fiance, Brent Renner ("Renner"). (A.A. 76). Engler's two sons, Jacob and Jeffrey, were in the back seat. (A.A. 77) When four-and-a-half year old Jeffrey voiced a strong and immediate need "to go to the bathroom," Renner pulled the vehicle off to the side of the rural gravel road known as 221st Avenue Northwest in Oak Grove, Minnesota. (A.A. 77-78). Engler exited the vehicle and helped Jeffrey out of the passenger-side back seat. (A.A. 87). Jeffrey walked approximately 25 feet into the tree-line where he could have some privacy. (A.A. 89-90). Engler stood alongside the rear passenger door and waited for Jeffrey. (A.A. 88).

While Jeffrey was in the wooded area, Wehmas was driving her car westbound on 221st Avenue. As she approached Wehmas admits her car was traveling about 60 m.p.h. on the gravel-surfaced township road¹. (A.A. 101). Wehmas was hurrying to town for her league bowling match.

As the Wehmas' vehicle approached, Jeffrey pulled up his pants and started to walk back toward the Renner vehicle. (A.A. 89). Wehmas suddenly lost control of her vehicle. It began to fishtail, then swerve wildly. (A.A. 94-96). The Wehmas vehicle appeared to be headed directly at the Renner vehicle and Geri Engler. Just as the vehicle left the road surface it veered, **narrowly missing Geri Engler**. The last second swerve caused a spray of gravel and mud to hit and cover the front-end of the Renner vehicle. (A.A. 92-93).

In the moments Wehmas' vehicle was speeding towards her, Engler's immediate fear

¹Minnesota Statute § 169.14, Subd. 2 (3) mandates a speed limit of "55 miles per hour in locations other than those specified in this section" which reads to include 221st Avenue Northeast in Oak Grove, the location of the accident.

was that it was going to hit the Renner vehicle and not only injure Renner and her other son, Jake, but that the "impact would tip the car on top of [her] and Jeff and crush [them] both to death!" (A.A. 98, deposition correction sheet, line 20).

After Wehmas' out-of-control vehicle barely missed hitting Geri Engler and the Renner vehicle, it proceeded into the ditch where it hit Jeffrey and then flipped over on its roof. (A.A. 95-96). The impact threw Jeff approximately thirty feet, knocking him to the ground and causing many, severe facial lacerations. Extensive surgery was performed to his face. (A.A. 97). **When Geri Engler first saw Jeff laying bloody and motionless, she believed her son was dead. (Id.)**

III. ENGLER'S EMOTIONAL DISTRESS INJURIES

As a result of experiencing this harrowing event, Ms. Engler began experiencing symptoms of emotional distress. Most of her symptoms were in response to witnessing, helplessly, what happened to Jeffrey, including the effects of seeing his small, bloodied, lifeless body in the ditch. Emotionally she was out of control. She had difficulty coping with day-to-day responsibilities. She was diagnosed with, and continues to suffer from, Post-Traumatic Stress Disorder ("PTSD") and depression as a direct result of this incident. (A.A. 103-104). Her symptoms of PTSD currently include: anxiety, overprotectiveness, fear, nightmares, flashbacks, a 70 lb.+ weight gain and uncontrollable feelings of sadness. (A.A. 103-104). She has also been depressed since the accident, resulting in symptoms of irritability, decrease in sexual desire and lack of sociability. (Id.)

IV. THE DISTRICT COURT ORDER AND COURT OF APPEALS DECISION

See, A.A. 64-66 and page 1, supra for Judge Roith's Amended Order and from which this appeal is taken. See also, A.A. 105-07 for the Court of Appeals decision in Engler II in which the Court of Appeals affirmed its Engler I decision.

ARGUMENT

I. STANDARD OF REVIEW

This case presents an issue of first impression in this state. Other than this court's decision in Engler I (A.A. 1-14) there is no case law on point. The question before this Court asks only whether the District Court erred in its application of the law. This Court reviews questions of law de novo. See, Alcozer v. North Country Food Bank, 635 N.W.2d 695 (Minn. 2001). A de novo review means this Court need not give any deference to the lower court's analysis in deciding the legal issues before it.

II. **HAVING "QUALIFIED" TO BRING A CLAIM FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS BY (1) BEING WITHIN THE ZONE OF DANGER; AND (2) DEMONSTRATING PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS, THE LAW SHOULD ALLOW GERI ENGLER TO RECOVER ALL EMOTIONAL DAMAGES CAUSED BY THE TORTFEASOR'S NEGLIGENCE AND NOT LIMIT HER DAMAGES TO THOSE ARISING OUT OF THE "FEAR FOR HER OWN SAFETY"**

Minnesota law recognizes damages for negligent infliction of emotional distress ("NIED"). The most common situation where NIED is claimed occurs when a person suffers a traumatic blow or impact that causes bodily injury. If the impact and resulting injury also result in emotional distress then, in addition to claiming damages for the physical injury, the victim can also seek compensation for emotional distress damages.

However, a person need not suffer a physical impact with bodily injury in order to bring a claim for NIED. A person who, due to another's negligence, can prove they were (1) in the "zone of danger"² of physical impact; and (2) can demonstrate physical manifestations of emotional distress caused from being in the zone of danger, may also pursue a claim for

² "Zone of danger" is an objective test defined as being placed in a situation where the plaintiff clearly faced imminent peril and/or impact that would cause them to reasonably fear for their own safety. See, Stadler v. Cross, 295 N.W.2d 552, 553 (Minn. 1980) and K.A.C. v. Benson, 527 N.W.2d 553, 557 (Minn. 1995).

NIED. See, Carlson v. Farmers Ins. Co., 520 N.W.2d 534, 536 (Minn. App. 1994).

For purposes of this appeal there is no dispute between the parties that Geri Engler meets both prerequisites for bringing a claim for NIED, i.e. she was in the zone of danger and can demonstrate "physical manifestations of emotional distress," and is, therefore, entitled to make a claim for emotional distress damages.

Under Minnesota law, a claimant who meets their **burden of proof**³ on these elements:

1. That a third party's negligence caused the claimant;
2. To be placed into a "zone of danger" which caused the claimant to;
3. Suffer physical manifestations of severe emotional distress,

can then (and only then) make a claim for emotional distress damages. That brings the court to this case and the issue of first impression it presents.

A. THE ISSUE BEFORE THE COURT IS ONE OF FIRST IMPRESSION IN MINNESOTA CONCERNING THE SCOPE OF RECOVERABLE DAMAGES IN A *NIED* CASE.

The issue in question before the Court is this: What is the scope of recoverable emotional distress damages for a claimant who, like Geri Engler, meets the threshold prerequisites for bringing a NIED claim, and then witnesses and experiences the trauma and resulting flood of emotions from seeing her child be seriously injured? Should the scope of Geri Engler's recoverable damages be a full reflection of all the emotional distress she experienced? If so, the scope of damages must include all the elements that comprise the

³ There is a distinct difference between merely alleging emotional distress damages and actually proving them. The difference is called "burden of proof." It is a difference civil juries are, most often, quite adept at understanding and then determining whether the burden has been met. Any suggestions by Respondent that expanding the scope of recoverable damages in the limited situation before the court, will open the so-called "floodgates" for many new NIED tort claims fails to consider the stringent prerequisites NIED claimants must meet before they have any chance of recovering.

intense emotions and distress caused by witnessing what happened to Jeffrey, an experience that was directly caused by the defendant's negligence. Or, as the District Court and Court of Appeals held, should the emotional damages somehow be separated into tidy, distinct categories and then narrowly limited to just the emotional distress damages arising from Geri Engler's fear for her own safety?

The Minnesota Supreme Court has previously been presented with a case where parents suffered severe emotional distress from witnessing an immediate family member (their son) get hit and severely injured by an automobile. Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980). The parents in Stadler were "bystanders" located outside of the zone of danger. While the parents in Stadler experienced very real emotional distress from witnessing the incident, the court rejected the parents' claim for emotional distress damages. The court reasoned that since the parents were not in the zone of danger, they did not meet one of the essential prerequisites for recovering on a claim for NIED.

In Stadler the court seemed to acknowledge that the parents, if they had been in the zone of danger, would be entitled to recover emotional distress damages arising from the trauma of witnessing their child's injury/death.⁴

The Minnesota Supreme Court has never been presented a NIED case where the plaintiff is in the zone of danger, and then witnesses and experiences a trauma no person should ever experience: Helplessly observing a speeding, out-of-control car hit, kill (her initial belief) and maim her young son. This case presents those exact facts. As such, it is the case that finally enables this court to properly clarify the law governing the scope of damages in NIED cases and bring it into conformity with established Minnesota tort damages law.

⁴ It is important to remember that in Stadler, "fear for their own safety" was correctly cited as a test for determining whether the parents were located in the "zone of danger"; "fear for their own safety" was never used as a test for assessing damages.

For Minnesota's controlling law on damages to reflect logical, sensible, fair and truly good tort policy, this court must reverse the decisions of the District Court and Court of Appeals and recognize as compensable the full scope of recoverable damages for the kind of intense emotional distress caused by events like this.

This brief will address not only the illogical and unjust results caused by the lower court's decision but how the holding is (1) contrary to the Restatement of Torts; (2) contrary to the law in the majority of other states that have addressed this issue; and (3) contrary to established Minnesota tort law principles of foreseeability and proximate cause.

Finally, the lower court holdings represent extremely bad tort policy, i.e. protecting the negligent tortfeasor at the expense of the traumatized victim.

B. HAVING MET THE THRESHOLD PREREQUISITES FOR ASSERTING A *NIED* CLAIM, GERI ENGLER SHOULD BE ALLOWED, BY APPLICATION OF ESTABLISHED MINNESOTA TORT LAW PRINCIPLES, TO RECOVER DAMAGES FOR ALL OF HER EMOTIONAL DISTRESS PROXIMATELY CAUSED BY THE TORTFEASOR'S NEGLIGENCE.

In this case, the holding of the lower courts effectively limit Geri Engler's recoverable damages for emotional distress to those arising out of "her fear for her own safety." The arbitrary nature of this standard prevents a person in the position of Geri Engler from recovering any damages for the devastating flood of emotions and distress caused by witnessing the defendant's vehicle headed directly at her little boy, seeing the car hit Jeffrey, observing her son's bloody, lifeless (she thought) body in the ditch and having to see his beautiful young face ripped to shreds. Intellectually, it makes no sense to disallow recovery for the anxiety, stress, guilt, total helplessness, fear, despair and other emotions caused by such an event. How could anyone say such a result represents sound tort policy?

The District Court's holding would require Ms. Engler to separate her emotional

distress into two categories: (1) the distress from seeing and experiencing what happened to Jeffrey (major emotional trauma); and (2) the emotional distress arising from the fear she had for her own safety (very brief and minor trauma, especially when compared to the former). How can that even be done? The holding does not recognize the true nature of the damage; it creates a diminished, artificial reflection of what this tortfeasor's negligence actually caused Ms. Engler to experience.

"Fear for one's own safety" is only appropriate as a means of determining if a claimant was within a "zone of danger" created by an accident. Once a claimant establishes that they were within the "zone of danger", the concept of "fear for one's own safety" has no basis as a test for damages. Rather, existing Minnesota precedents, well-established tort principles, and public policy all dictate that damages should include all harm proximately caused by the negligence of the tortfeasor.

1. **Minnesota tort law on damage recognizes the right to recover for all damages caused by the tortfeasor's negligence.**

Article I, Section 8, of the Minnesota Constitution is entitled Redress of Injuries of Wrongs and states as follows:

Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may have received to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Minn. Const. art. I, § 8 (emphasis added). This provision grants an individual a constitutional right to seek redress for an injury to his or her person. Certainly in this case, Geri Engler sustained such an injury when she witnessed her son nearly killed right before her eyes.

All Geri Engler is seeking is the right, by law, to present a claim for the **FULL** extent of her emotional distress damages caused by the tortfeasor's negligent driving. It would be

a Pyrrhic victory if ever there was one if Geri Engler successfully meets her burden of proving the threshold prerequisites to bringing a NIED claim, i.e. being in the zone of danger and demonstrating physical manifestations of severe emotional distress, only to be allowed to recover damages for the fear she had for her own safety and nothing for the distress associated from the devastating, traumatic experience of being present to witness what defendant's actions did to her son, Jeffrey. There is no logical way to support such an artificial and absurd result.

Having met the stringent threshold prerequisites to asserting a NIED claim, **Geri Engler should be treated like all other tort victims in Minnesota.** She should be entitled to recover all provable emotional distress damages proximately caused by defendant's negligence. This principle of tort law is so basic it is often not given the thoughtful consideration it deserves. It was addressed and explained clearly and eloquently by this Court over 100 years ago in Christianson v. Chicago St. P. M. & O. Ry. Co., 67 Minn. 94, 97, 69 N.W. 640 (1896):

If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. **Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen.** (Emphasis added).

Id., at p. 641. See also, Steenson, The Anatomy of Emotional Distress Claims in Minnesota, 19 Wm. Mitchell L. Rev. 1, 8 (1993).

Moving forward seventy years, this Court applied this same proximate cause analysis in Okrina v. Midwestern Corp., 165 N.W.2d 259 (Minn. 1969). In Okrina, the plaintiff claimed emotional distress damages arising out of witnessing and hearing a department store

wall collapse. The plaintiff testified she heard a noise that sounded like a bomb. She thought the whole building was going to collapse on her (it didn't). While the plaintiff did not suffer a physical impact to her body, she did become very ill and required a five day hospitalization. She later developed persistent pains in her head, back and leg. Medical evidence was submitted that attributed her condition to the emotional shock she experienced from the fright she experienced when the wall collapsed.

The defense argued that plaintiff's emotional distress damages were not compensable because her emotional damages were not reasonably foreseeable to the defendant. The Supreme Court rejected defendant's argument and noted that:

. . . foreseeability is a test of negligence not of damages . . . [thus] if defendant can foresee some harm to one to whom he owes a duty, the exact nature and extent of the harm need not be foreseeable to permit recovery for all of the damages proximately caused.

Id., p. 263.

The Court held that the defendant, whose negligence caused the wall to collapse, should reasonably have foreseen that the wall collapse would cause harm to someone, i.e. the plaintiff, "notwithstanding her unusual susceptibility to the consequences of her fear." Id., p. 264.

Similarly in Purcell v. St. Paul City Ry. Co., Mrs. Purcell's miscarriage was found to be proximately caused by the defendant's negligence. Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N.W. 1034 (Minn. 1892). The defendant's negligence caused a dangerous situation, which caused Mrs. Purcell's nervous shock, which caused her miscarriage. The Court held that Mrs. Purcell was entitled to damages for all the harm proximately caused by the defendant's negligence. In both Okrina and Purcell, the Court rejected the argument that the sequence of proximate causation is interrupted by bodily harm evolving, not from a direct physical impact, but from emotional distress. This principle should be applied to the case at

hand. If a person is entitled to state a cause of action in negligence which includes a bodily injury, regardless if caused by direct physical impact or emotional distress, the law should then allow recovery for all damages proximately caused by the defendant's negligence.

In the present case it was reasonable to foresee that Wehmas' negligent operation of her automobile could result in her losing control of the vehicle. It is also reasonably foreseeable that an out-of-control vehicle could narrowly miss a person standing alongside of the road and then collide into a person walking alongside the road. While the defendant did not specifically foresee that her negligence would result in her automobile mowing down a 4 1/2 year old boy standing just a few feet away from his mother, that result is well within the realm of foreseeable results arising out of the negligent operation of her car.

It is further foreseeable to see a mother being emotionally damaged at the sight of her child being injured due to the negligence of another. As was stated in Prosser & Keeton On Torts, 5th ed, § 54

“It seems sufficiently obvious that the shock of a mother at danger or harm to her child may be both a real and a serious injury. If a duty to her requires that she herself be in some foreseeable danger, then it may fairly be argued that when a child is endangered it is not beyond contemplation that its mother will be some where in the vicinity, and thus may suffer serious shock.”

Unfortunately, the lower courts' interpretation and application of the law in this case works to protect the negligent tortfeasor by limiting the scope of the victim's recoverable damages. This protection of the tortfeasor results in denying the victim - Geri Engler - the very tort rights this Court has recognized and allowed for over 100 years. Why should the negligent tortfeasor be protected from, and not held responsible for, the most significant elements of damages caused by her negligence at the cost of denying a victim, like Geri Engler, emotional distress damages that reflect the entire traumatic experience caused by defendant's negligence?

2. NIED Claimants Already Have To Meet A Heavy Burden Of Proof; It Need Not Be Made Any More Onerous.

Claimants that assert emotional distress claims when they have not suffered a physical, bodily impact, are first required to meet two threshold prerequisites. After proving they were in the "zone of danger" they also must prove they have suffered "physical manifestations of emotional distress" (tantamount to a clinical diagnosis of post-traumatic stress disorder, a diagnosis reasonable medical clinicians do not provide unless there exists a solid foundation upon which to base the diagnosis). Once the claimant meets those initial prerequisites, the law should allow them to assert a claim for all emotional distress damages resulting from the traumatic event caused by the defendant's negligence. There should be no exception to the liability test of "foreseeability" and the damages test of "proximate cause" in the situation of a tort victim who can prove the prima facie elements of a NIED claim. Specifically, if some or all of the emotional distress resulting from defendant's negligence is caused by witnessing serious injury or death of a family member or loved one, then those elements of the victim's emotional distress should be recoverable under Minnesota law.

3. Protecting The Tort Victims' Rights Is Of Greater Interest Than Protecting The Tortfeasor's "Rights."

When considering whose interests the law should protect as between the negligent tortfeasor and the emotional interests of a traumatized mother who was caused to witness her child's serious injury or death because of the tortfeasor's negligence, the Court is encouraged to consider Portee v. Jaffee, 417 A.2d 521 (N.J. 1980). In Portee the New Jersey Supreme Court allowed a mother to recover damages for the emotional distress he experienced from witnessing her 7 year old son suffer and die when he became trapped in an elevator. The court first examined the mother-son relationship and states:

The interest assertedly injured is more than a general interest in

emotional tranquility. It is the profound and abiding sentiment of parental love. The knowledge that loved ones are safe and whole is the deepest wellspring of emotional welfare No loss is greater than the loss of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure. **The law should find more than pity for one who is stricken by seeing a loved one being critically injured or killed.**

Id. at p. 526 (emphasis added).

The Court proceeded to recognize the right to emotional distress tort redress for the mother but, at the same time, limited the tortfeasor's liability to situations involving close family members or "loved ones":

The interest in personal emotional stability is worthy of legal protection against unreasonable conduct. The emotional harm following the perception of death or serious injury to a loved one is just as foreseeable as the injury itself Ultimately, we must decide whether protecting these emotional interests outweighs an interest against imposing a new species of negligence liability. We believe that the interest in emotional stability we have described is sufficiently important to warrant this protection. At the same time we are confident that limiting judicial redress to harm inflicted on intimate emotional bonds by the death or serious injury of a loved one serve to prevent liability from exceeding the culpability of defendant's conduct.

Id., at p. 528 (emphasis added). Nothing more need be said.

C. BY LIMITING THE SCOPE OF DAMAGES TO GERI ENGLER'S "FEAR FOR HER OWN SAFETY" THE DISTRICT COURT CREATED AN UNPRECEDENTED, UNREALISTIC, AND IMPOSSIBLE STANDARD THAT IN NO WAY REFLECTS THE FULL MEASURE OF THE EMOTIONAL DISTRESS CAUSED BY THE TORTFEASOR'S NEGLIGENCE.

Appellant is unaware of any state's highest court that puts such an unrealistic and artificial limitation on a claimant's emotional distress damages. This Court can, and should, consider other authorities that offer a much more logical and practical method of recognizing the full depth of emotional distress damages experienced by a claimant in the position of Geri Engler.

1. §436 of The Restatement (Second) of Torts supports a full recovery for a claimant in the position of Geri Engler

§436 of the Restatement (Second) of Torts recognizes the right of a claimant in the position of Geri Engler, to recover full compensation for all emotional distress damages. In addressing essentially the same factual situation presented in this case §436 states:

- (1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.
- (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.
- (3) The rule stated in subsection 2 applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

§436 (2) and (3) would subject a tortfeasor like Wehmas to liability for all damages suffered by Geri Engler from emotional distress arising from fright or "other emotional disturbance" resulting from the defendant's negligent conduct. Subd. (3) recognizes the plaintiff should be entitled to recover for emotional distress/disturbance damages that result from observing harm or peril to an immediate family member that occurred in the presence of the plaintiff.

The American Law Institute explains the rationale for this:

... lies in the fact that the defendant, by his negligence, has endangered the plaintiff's own safety and threatened him with bodily harm so that the defendant is in breach of an original duty to the plaintiff to exercise care for his protection.

Restatement (Second) of Torts, §436, Subd. 3, Comment f.

Professor Michael Steenson, in his law review article addressing emotional distress claims, recognizes that, "Both the Restatement and the Minnesota proximate cause decisions

support recovery under a negligence theory by a claimant who was in the zone of danger and fears for the safety of either herself or a family member." Professor Steenson's article, *supra* at p. 11. To put it bluntly, to allow Geri Engler to recover for all damages proximately caused by Ms. Wehmas's negligence would "certainly be more accurate and complete, which is precisely the kind of recovery the law ought to give."⁵ Pieters v. B-Right Trucking, Inc., 699 F. Supp. 1463 (N.D. Ind. 1987).

2. Many jurisdictions recognize and allow recovery for the emotional distress arising from witnessing the serious injury or death of an immediate family member.

Many of Minnesota's neighboring states have recognized and allowed a cause of action for negligent infliction of emotional distress arising out of witnessing a serious injury or death to a close family member. While some of the states have a less stringent threshold prerequisite than Minnesota, i.e. they allow bystanders, who are not in the zone of danger, to recover emotional distress damages, the common thread to these cases is that the emotional distress arising out of the contemporaneous observation of serious injury or death of a third person with whom the claimant has a close relationship is recognized as a compensable form of emotional distress damages. See Nielson v. AT&T Corp., 597 N.W.2d 434, 440-442 (S.D. 1999); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Asaro v. Cardinal Glennon Memorial Hospital, 799 S.W.2d 595, 599-600 (MO. 1990); James v. Lieb, 375 N.W.2d 109 (Neb. 1985); and Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).

In Bowen v. Lumbermens Mutual Cas. Co., 517 N.W.2d 432 (Wis. 1994), the Wisconsin Supreme Court addressed the claim for negligent infliction of emotional distress

⁵ In Pieters, the court dismissed defendant's claims that allowing Ms. Pieters to claim damages for NIED as a result of witnessing her fiancé die in a car crash would flood courts with new litigation and that it would be too difficult to prove the causal connection between the NIED claim and the defendant's negligence.

brought by a mother who arrived on the scene of a serious accident minutes after it occurred. Upon arriving she saw her fatally injured 14 year old son's body entangled in the wreckage. In Bowen, the Wisconsin Supreme Court eliminated the "zone of danger" requirement and recognized traditional elements of a tort action in negligence - negligent conduct, causation and injury (severe emotional distress) - should serve as "the framework" for evaluating a claim of NIED. Using that "framework" the court allowed Mrs. Bowen to assert and recover on her claims for negligent infliction of emotional distress.

The analysis used by the court in Bowen is even more compelling when applied to this case where the mother was actually in the zone of danger and contemporaneously witnessed the severe physical injury to her child. This was exactly what happened in Redepenning v. Dore. Redepenning v. Dore, 201 N.W.2d 580 (Wis. 1972). In Redepenning, the Wisconsin Supreme Court recognized that it was "simply impossible to adequately segregate" the amount of the plaintiff's emotional distress that was caused by her injury in the accident from the amount caused by watching witnessing her daughter's death in the same accident. Redepenning at 588. Instead, the Court realized that all of the plaintiff's emotional distress was "caused by the accident" and therefore, the emotional distress claim was "not fabricated" nor did it "lack substantial basis in evidentiary fact." Id. In Pierce v. Physicians Ins. Co. Of WI, Inc., the Wisconsin Supreme Court even went as far as to describe the emotional distress claim of a mother who witnessed the death of her child while being in the "zone of danger" as "impossible for them to be compartmentalized" and to segregate the emotional injuries as a "Herculean task". Pierce v. Physicians Ins. Co. Of WI, Inc., 692 N.W.2d 558, 565-66 (Wis. 2005).

The Wisconsin Supreme Court's decision in Bowen is also enlightening on tort law policies and concerns that arise out of the tort of negligent infliction of emotional distress.

The court acknowledged some of these issues by saying:

Historically, the tort of negligent infliction of emotional distress has raised two concerns: (1) establishing authenticity of the claim; and (2) insuring fairness of the financial burden placed upon a defendant whose conduct was negligent . . . Three factors, taken together, help assure that the claim in this case is genuine, that allowing recovery is not likely to place an unreasonable burden upon the defendant, and that allowance of recovery will not contravene the other public policy considerations we have set forth.

First, the victim was seriously injured or killed.

Second, the plaintiff was the victim's mother. Sharon Bowen's severe emotional distress in this case stems from the fact that the fatally injured victim was her 14 year old son. The court concludes that a tortfeasor may be held liable for negligent infliction of emotional distress on a bystander who is the spouse, parent, child, grandparent, grandchild or sibling of the victim. We agree that emotional trauma may accompany the injury or death of less intimately connected persons such as friends, acquaintances, or a passerby. Nevertheless, the suffering that flows from beholding the agony or death of a spouse, parent, child, . . . is unique in human experience and such harm to a plaintiff's emotional tranquility is so serious and compelling as to warrant compensation⁶.

Limiting recovery to those plaintiffs who have the specified family relationships acknowledges the special qualities of close family relationships, yet places a reasonable limit on the liability of the tortfeasor.

Third, the plaintiff observed an extraordinary event. . . . Witnessing either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs is an extraordinary experience, distinct from the experience of learning of a family member's death or severe injury through indirect means.

Id., at p. 443-444.

All three factors cited by the Wisconsin Supreme Court assure the authenticity and genuineness of the NIED claim clearly exist in this case. First, Jeffrey Engler did sustain serious injuries (over 100 stitches to repair his face), so serious his mother initially believed he was dead. Second, the plaintiff is the victim's mother - the most close and intimate a

⁶ At this point in the opinion Justice Abrahamson, in footnote 28, reveals her personal opinion that she would also "allow recovery when the plaintiff can prove the victim is a loved one, that is, when the plaintiff and the victim have a relationship analogous to one of the relationships specified." This is an insightful observation.

relationship there is. Not only were both Geri Engler and the plaintiff in Bowen both parents seeking emotional distress damages after observing their children get injured, but Geri Engler and the mother in Bowen were both "participant(s), and victim(s) of the actionable conduct..." Pierce at 563. Third there is no disputing that Geri Engler witnessed "an extraordinary event," capable of causing emotional injury.

Other courts offer thoughtful analysis on this issue. See, Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984); Williams v. Baker, 572 A.2d 1062, 1069 (D.C. 1990) (the court acknowledged the impossible nature of dividing emotional damages between fear for one own's safety and fear for the safety of an immediate family member); Pieters v. B. Right Trucking, Inc., 669 F.Supp. 1463, 1471 (N.D.Ind. 1987) (once a plaintiff falls within the limited scope of those who can state a NIED claim, it made no sense to create an artificial wall to protect the defendant from paying all damages caused by its negligence); Bowman v. Williams, 165 A.2d 182 (M.D. Ct. App. 1933). Bowman involved a man and his two sons. All were at home when a coal truck collided into their home. All were within the zone of danger. The father was allowed to recover for all emotional distress damages he actually experienced.

"There was no basis to differentiate the fear caused to the plaintiff for himself and for his children because there is no possibility of division of an emotion which was instantly evoked by the common and simultaneous danger of all three." Id., p. 184.

The preceding analysis and holdings from the highest courts of other states, along with §436 of the Restatement (Second) of Torts, offers insight and strong support as to why **Geri Engler should be allowed to recover emotional distress damages that reflect the full extent of the intensely emotional situation she experienced.** There are many reasons why no other state nor any other reputable authority requires an NIED claimant to (1) separate out

their emotional distress from a traumatic event; (2) isolate what emotions arose out of the fear for their own safety; and then (3) limit their recovery to that specific component of their emotional distress.

CONCLUSION

It is important to understand the facts in this case. They make this a case one of first impression on the issue of the scope of recoverable damages in a NIED claim. In light of the facts presented, the decisions of the lower courts provides the wrong answer to the legal issue presented. When applied to this case, and others like it, the lower court's decisions provides an artificial, unworkable, illogical result that runs contrary to established Minn. Tort Law principles on damages and with other jurisdictions that have addressed the issue. This Court should reverse the holding of the Court of Appeals. Appellant respectfully requests the Minnesota Supreme Court to conclude that a person who is in the zone of danger and suffers physical manifestations of emotional distress can recover all elements forming the basis of their emotional distress, **including emotional distress caused by witnessing and experiencing the serious injury and/or death of an immediate family member** as long as those elements of emotional distress were proximately caused by defendant's negligence.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).