

NO. A04-1445

State of Minnesota  
In Supreme Court

Geralyn S. Engler,

*Appellant,*

v.

Illinois Farmers Insurance Company,  
an Illinois corporation,

*Respondent.*

BRIEF AND APPENDIX OF AMICUS CURIAE  
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## ISSUE

“Fear for one’s own safety,” is appropriately used as a test for determining whether or not a claimant is within the “zone of danger” created by the defendant’s negligence. Should “fear for one’s own safety” also be used as a standard for assessing the damages of a person who can prove bodily harm caused by the defendant’s negligence?

This brief will argue that “fear for one’s own safety” is appropriate only as a means of determining if a claimant was within a “zone of danger” created by an accident.<sup>1</sup> However, once a claimant is within the class of persons permitted by Minnesota law to bring a tort claim, “fear for one’s own safety” should be rejected as a test for damages. Rather, damages should reasonably include all harm proximately caused by the negligence of the tortfeasor. Such a result is consistent with existing Minnesota precedents, implements well established tort principles, and effects sound public policy.

## Introduction

Minnesota law limits tort claims from accidents caused by negligence to two classes of people. (1) A cause of action exists for persons physically impacted in a collision who are injured as a result of the accident. (2) A cause of action also exists for persons within the “zone of danger” created by the defendant’s negligence, if they suffer bodily harm as a result of the accident. Stadler v. Cross,

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<sup>1</sup> This brief was authored by Hauer, Fargione, Love, Landy & McEllistrem, P.A. in its capacity as attorney for the Minnesota Trial Lawyers Association (MTLA). All costs related to the preparation of the brief have been paid by the law firm.

295 N.W.2d 552 (Minn.1980).<sup>2</sup> In Stadler v. Cross, this Court denied the right to sue to a third class of potential claimants: (3) bystanders who witness the accident and who have injuries caused by witnessing the accident. Bystanders, regardless of damages caused by the accident, simply have no right of recovery. They are not included within the two classes of people who may bring claims. Id.

How does the law determine whether or not a claimant is a bystander? A bystander is someone who is outside of the zone of danger of physical impact, someone who has no reasonable basis to fear for his or her own safety. Stadler, 295 N.W.2d at 554.

Amicus MTLA is not seeking any change in these existing standards. These standards both establish and limit the classes of persons who may seek damages for emotional distress and bodily injury.

Once bystanders as a class are excluded from those who may assert tort claims, a second question arises. For the two classes of people who are permitted to assert emotional distress claims (i.e., those physically impacted and those within the zone of danger), what damages for emotional distress may these people claim? Should damages include all of the harm proximately caused by the negligence of the defendant? Or, should the defendant be exempted from the payment of damages for emotional harm, even though that harm was proximately

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<sup>2</sup> This brief will be limited to claims for emotional distress related to bodily injury claims arising from an accident. Claims for emotional distress stemming from some other direct violation of personal rights, e.g. defamation or intentional torts, are not at issue.

caused by the defendant's negligence, unless the plaintiff also proves that the claimed emotional harm arose exclusively due to fear for his or her own safety?

This is the issue to be addressed. The issue focuses solely on the scope of damages which may be claimed. Existing law already defines and limits the cause of action involving bodily injury and emotional distress. Are the damages also to be limited?

The first section of this brief will argue that liability should extend to all damages proximately caused by the negligence of the tortfeasor.<sup>3</sup> Minnesota law already sets significant limits on emotional distress claims. People who come within these existing limits should not be denied damages for the harm actually caused by the negligence of the tortfeasor. This result is consistent with Minnesota Supreme Court precedents.

The second section will review the use of the proximate cause standard in many other jurisdictions which, like Minnesota, exclude bystander claims. The better rule of law is that all damages proximately caused by the defendant's negligence may be awarded.

The third portion of the brief will analyze the practical effect of the defense argument in the present case, which would make "fear for one's own safety" a limit on damages available to people injured in accidents. The Stadler court said that limits on liability "must be workable, reasonable, logical, and just as possible."

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<sup>3</sup> The damages at issue in these emotional distress claims will often include medical expenses and income loss. Such financial losses will not be uncommon when trauma from an accident causes a significant post traumatic stress disorder.

295 N.W.2d at 554. As a test to limit damages, “fear for one’s own safety” meets none of these objectives.

- I. **For those persons legally entitled to assert a claim for emotional distress, damages should include all harm proximately caused by the negligence of the tortfeasor.**
  - A. **Only those physically impacted or within a zone of danger for physical impact, who also suffer bodily injury, are now permitted to bring claims for emotional distress.**

A person within the “zone of danger” created by the tortfeasor’s negligence is included within the class of persons who may bring a tort claim. Stadler, 295 N.W.2d at 554. However, in order to state a cause of action for damages, a person who is within the “zone of danger” must also show, as a necessary element of the cause of action, that the tortfeasor directly caused emotional harm serious enough to cause significant physical symptoms. Leaon v. Washington County, 397 N.W.2d 867, 875 (Minn. 1986). A simple claim of emotional distress is not sufficient to state a cause of action. Id. This is an important point. The issue is not one of damages. A person within the “zone of danger” who has a small degree of emotional distress does not have claim for a small amount of damages. Rather, the person has no cause of action at all. Id. The plaintiff in the zone of danger must also present evidence of bodily harm, i.e., emotional distress of such severity that it results in physical symptoms, in order to have a cause of action.<sup>4</sup>

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<sup>4</sup> When interpreting the scope of a liability insurance contract, this court made the following observation concerning the meaning of the term “bodily injury”: “We

Applicable Minnesota law governing tort claims for bodily injury and emotional distress limits such claims by imposing two substantial safeguards. The existing law (1) limits the class of persons entitled to sue to those individuals who have been placed in physical danger by the tortfeasor's negligence, and (2) eliminates trivial emotional distress claims by requiring evidence of bodily harm proximately caused by the accident.<sup>5</sup>

These existing standards are sufficient to meet Minnesota's public policy goals. For people who meet these existing standards, it is neither necessary nor appropriate to impose an arbitrary restriction on the damages proximately caused by the accident.

**B. "Proximate cause" should be used as the standard for assessing damages once a plaintiff in the zone of danger has established a valid cause of action.**

Once a plaintiff comes within the category of those who may bring a negligence claim for bodily injury and emotional distress, the injured person should be permitted to claim all damages proximately caused by the defendant's

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do not think the term 'bodily injury,' as ordinarily understood, would draw a nice distinction between emotional distress and its harmful physical consequences, if any; rather, 'bodily injury' would be thought of as encompassing both because they are so closely interrelated." Garvis v. Employers Mut. Ins. Co., 497 N.W.2d 254, 257 (Minn. 1993). The court explicitly held that "emotional distress with appreciable physical manifestations does constitute a 'bodily injury.'" Id.

<sup>5</sup> In motor vehicle accident cases, the injured person must also meet statutory thresholds to prove the existence of a serious injury in order to receive any damages for non-economic losses. See Minn. Stat. § 65B.51 subd. 3.

negligence. This basic principle of tort law was stated over one hundred years ago in Christianson v. Chicago, St. P. M. & O. Ry. Co.:

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.

67 Minn. 94, 97, 69 N.W. 640, 641 (Minn. 1896).

This court has applied the proximate cause standard in “zone of danger” cases involving claims for bodily harm caused by emotional distress. See Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N.W. 1034 (Minn. 1892), and Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259 (Minn. 1969). In Purcell, the defendant’s negligence was the proximate cause of Mrs. Purcell’s miscarriage. The negligence created physical peril; the peril caused nervous shock; the emotional shock of the event caused bodily harm. Damages were permitted for the harm proximately caused by the defendant’s negligence. 48 Minn. at 138, 50 N.W. at 1035. In Okrina, a woman suffered emotional distress with resulting bodily harm when she was in the “zone of danger” created by a falling wall. The court, in permitting her claim, observed, “We have held that foreseeability is a test of negligence and not of damages. 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.” 262 Minn. 405, 165 N.W.2d at 263. Both Purcell and Okrina reject the argument that the chain of causation is broken merely because the bodily harm evolves, not from a direct physical impact, but from emotional distress.

These established principles should be applied by the court in the present case. If a person can state a cause of action in negligence which includes a bodily injury (whether caused by direct physical impact or by emotional distress related to the accident), the law should then permit recovery for all of the damages proximately caused.

**C. The “proximate cause” standard is consistent with existing Minnesota law relating to negligence claims for bodily injury and emotional distress.**

A claim for negligent infliction of emotional distress was first recognized in Purcell v. St. Paul City Ry Co. As noted above, a near collision caused such an emotional shock that Mrs. Purcell suffered convulsions and a miscarriage. The court in Purcell approached the case from the perspective of proximate cause. The complaint showed a duty. The complaint also showed negligence. There was a physical injury “as serious, certainly as the breaking of an arm or leg.” 48 Minn. at 137, 50 N.W. at 1034. What issue remained? “The question always is, was there an unbroken connection between the wrongful act and the injury – a continuous operation?” Id. The court resolved the causation issue by observing, “If the fright was the natural consequence of . . . peril and alarm in which the defendant’s negligence placed plaintiff, and the fright caused the nervous shock .

. . . , the negligence was the proximate cause of those injuries.” 48 Minn. at 138, 50 N.W. at 1035. In Purcell, there was no issue of whether Mrs. Purcell feared for herself or feared for the safety of her fetus. The accident caused nervous shock, and the nervous shock caused the physical injury. The chain of causation was established. Damages must be awarded for the harm caused.

Minnesota Supreme Court decisions since Purcell have not ruled on any damage claims brought by a person who was either physically impacted or in a zone of danger when that person was explicitly claiming bodily injury from emotional distress caused by injury to another. That issue remains open for decision by this Court.

In 1980, the Stadler court did review a claim by parents for emotional distress arising from a serious injury to their son. These parents had not been within any zone of danger when the boy was injured. When Stadler v. Cross was briefed and argued, the parties to the litigation agreed that, if the parents had in fact been within the “zone of danger” created by the defendant’s negligence, the parents would have had a claim for the emotional distress damages that they suffered. In Stadler, the respondents’ brief reached the following conclusion: “A witness to another’s injury cannot recover damages for personal injury **unless** the witness was within the zone of danger or feared for his own safety. . . . Since appellants were not in the zone of danger, did not fear for their own safety and were thus not owed a duty by the respondents, appellants have no cause of action. . . .” Respondents’ Brief p. 46, Stadler v. Cross, Appendix A-2 (emphasis

added). In Stadler, “fear for their own safety” was correctly cited as a test for determining whether or not the parents were placed in peril by the defendant’s negligence, for this determines whether or not a duty was owed. “Fear for their own safety” was not ever treated as a standard for assessing damages.

The analysis of Minnesota law being made in this Amicus brief is comparable to the one presented to the Minnesota Supreme Court by the tortfeasor in Stadler v. Cross. Emotional distress damages like those claimed by the Stadlers are appropriate under Minnesota law only if (1) the plaintiffs are physically impacted or in the zone of danger, and (2) the emotional distress results in some physical injury. Respondents’ Brief, Stadler v. Cross, page 13, Appendix A-3.

Since Stadler, a number of cases have considered various claims for emotional distress arising from different causes of action. Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26 (Minn. 1982) involved emotional distress caused by a bank foreclosure. Lickteig v. Alderson, Ondov, Leonard & Sween, 556 N.W.2d 557 (Minn. 1996) considered damages in a legal malpractice action. Such cases do not consider claims by a person involved in an accident or within the zone of physical danger created by an accident. Dornfeld v. Oberg, 503 N.W.2d 115 (Minn. 1993) did arise from a motor vehicle accident, but the only

issue addressed by this court involved standards applicable to claims for intentional infliction of emotional distress.<sup>6</sup>

The issue before the court in the present case does not involve any new cause of action. The plaintiff alleges a cause of action under long-accepted Minnesota legal principles (i.e. she was placed in physical peril by the negligence of the defendant and the resulting accident caused emotional shock leading to bodily harm). There is no existing decision that should bar plaintiff's claim for damages.

Professor Michael Steenson in his 1993 article *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MIT. LAW REV. 1, discusses the principles underlying "zone of danger" cases as they apply to claims where emotional harm is caused by fear for another's safety. He finds nothing in existing Minnesota Supreme Court precedents which precludes such a claim. "Application of existing Minnesota proximate cause principles could justify recovery in those cases without conflicting with the zone of danger cases such as Stadler and Purcell." *Id.* at 12.

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<sup>6</sup> The court of appeals decision in Carlson v. Illinois Farmers Ins. Co., 520 N.W.2d 534 (Minn. Ct. App. 1994), also involved an emotional distress claim arising from a motor vehicle accident. In Carlson, however, the plaintiff asked that the court abandon the requirement that an injured person have physical symptoms caused by emotional distress. The plaintiff asked the court to create a new cause of action allowing emotional distress claims whenever circumstances tended to guarantee the genuineness of the emotional distress claim. Brief of Appellant, Conclusion, p. 14. See Appendix A-4.

Professor Steenson notes that Section 436 of the Restatement (Second) of Torts also supports recovery “under a negligence theory by a claimant who is in the zone of danger and fears for the safety of either herself or a family member.” Id. at 15.

Once a plaintiff states a cause of action, based either upon being physically injured in an accident or upon being in the zone of danger and suffering bodily injury, there is no compelling reason to deny compensation for all harm proximately caused by the defendant. This result does not conflict with the holding in any prior decision of this Court.

**II. Other states, with tort standards comparable to Minnesota’s, use proximate cause as the test for damages.**

In Consolidated Rail Corporation v. Gottshall, 114 S.Ct. 2396 (1994), the United States Supreme Court reviewed the laws of various states before adopting a “zone of danger” standard for tort claims under the Federal Employers’ Liability Act. The decision identifies three different standards by which states identify the classes of people who may bring claims for emotional distress. It noted that at least five states still use a “physical impact” test to limit claims. It identified fourteen jurisdictions, including Minnesota, which use a “zone of danger” standard. And it found twenty-four states which permit claims by “bystanders.” See Consolidated Rail, 114 S.Ct. at 2406, n. 7, 9, and 10.

Obviously, "fear for one's own safety" is not a standard used to limit damages in the twenty-four states that allow claims by bystanders. By definition, the bystander was never put in personal peril by the defendant's negligence.

Is "fear for one's own safety" used as a standard for limiting damages in those states, like Minnesota, that deny claims of bystanders? These states, which limit emotional distress claims by employing a "physical impact" or a "zone of danger" standard, generally allow people placed in peril by the defendant's negligence to recover all damages proximately caused by the defendant. "Fear for one's own safety" is not considered a reasonable standard for assessing damages.

In Boysun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984), New York maintained its "zone of danger" rule. Under this zone of danger standard, it allowed recovery for all claims by Lydia Kugel, who was seated in a car with her one-year-old daughter on her lap when a collision occurred. Mrs. Kugel suffered a fractured clavicle, and the child died as a result of injuries caused by the tortfeasor. In allowing emotional distress claims for the mother's experience in the accident, the court held that "there is no recognition of a new cause of action or of a cause of action in favor of a party not previously recognized as entitled thereto. In conformity with traditional tort principles, the touchstone of liability in these cases is the breach of a duty of due care owed the plaintiff." 461 N.E.2d at 850. Although public policy does require that a tortfeasor's liability be limited in a reasonable manner, the use

of the “zone of danger” rule “mitigates the possibility of unlimited recovery.” 461 N.E.2d at 847.

The District of Columbia does not permit bystander claims, and in Williams v. Baker, 572 A.2d 1062 (D.C. 1990), it did adopt the “zone of danger” rule. The “zone of danger” rule was not inconsistent, however, with damage standards allowing claims for a person whose emotional distress was related either to her own safety or to the danger of a member of her immediate family. The court reasoned that the proximate cause standard was appropriate since there was no possibility of dividing damages when an emotion is instantly evoked by the common and simultaneous danger caused by the accident. 572 A.2d at 1069. On the facts in the Williams case, however, the court dismissed the mother’s claims because she had not been in any zone of danger when her child was injured.

Indiana is one of the few states which still limits tort claims to those suffering physical impact. In 1991, without abandoning the physical impact rule, the court held that a mother physically involved in a collision in which her child was killed could claim damages for the emotional distress directly related to this event. A jury would decide what “emotional trauma resulted from being involved in the accident, as opposed to being the normal reaction of a mother who has tragically lost her son (which would not be recoverable).” Shuamber v. Henderson, 579 N.E.2d 452, 456 (Ind. 1991).

A federal district court applying Indiana law had reached the same conclusion in an earlier case involving a woman who was a passenger in a crash which caused the death of her fiancé. Pieters v. B-Right Trucking, Inc., 669 F.Supp. 1463 (N.D. Ind. 1987). The woman had some physical injury herself (broken thumb), and she was found at the scene hysterical and covered in her fiancé's blood. The court concluded that "once a plaintiff has met the impact test, that plaintiff may recover damages for emotional distress stemming not only from her own injuries, but also from the injuries of another if those injuries occur in the same impact." 669 F.Supp. at 1471. In the court's view, once a plaintiff came within the limited scope of those who could state a claim, it made no sense to create an artificial wall protecting the defendant from paying damages actually caused by its negligence. Id.

Georgia likewise retained the impact rule while permitting an emotional distress recovery for a parent involved in a collision in which her daughter was killed. Lee v. State Farm Mut. Ins. Co., 533 S.E.2d 82 (Ga. 2000). This approach "appropriately restricts recovery to those directly affected by the defendant's negligent act or omission." 533 S.E.2d at 86.

Missouri is another zone of danger state. In Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595 (Mo. 1990), the Missouri Supreme Court stated: "We hold that a plaintiff may recover for emotional distress resulting from observing physical injury to a third person only if the plaintiff is within the zone of danger." 799 S.W.2d at 596. On the merits, the plaintiff had no claim because

she had not been within the zone of danger when her child was injured. 799 S.W.2d at 600.

In Delaware, the “zone of danger” rule was adopted in Robb v. The Pennsylvania RR Co., 58 Del. 454, 210 A.2d 709 (Del. 1965). In Robb, the court set aside for another day the question of “fear for one’s own safety” as a requirement for emotional distress damages. 58 Del. at 458, 210 A.2d at 711. Although Robb held out the possibility of damage claims not limited by “fear for one’s own safety,” there was no floodgate for litigation opened by the decision. Instead, it took almost thirty years for the Delaware appellate courts to review such an emotional distress damage claim. In Gill v. Nationwide Mut. Ins. Co., 1994 WL 150902 (Del. Super. Ct. 1994), claims were made by family members of a woman killed in an auto accident. Seven family members were in a different vehicle, not in the zone of danger, and they did not have claims. The claims of two grandchildren in the car with the decedent were dismissed because the children did not prove physical symptoms related to their emotional distress. Only the husband of the decedent, who was physically impacted in the crash and who had physical symptoms related to his emotional distress, did state a cause of action.

In a recent Wisconsin decision, Pierce v. Physicians Ins. Co. of Wisconsin, Inc., 692 N.W.2d 558 (Wis. 2005), the court considered the claims of a woman who, due to malpractice, delivered a child who had died in her womb. The lower courts characterized her direct claim for emotional distress relating to the stillbirth

as a “bystander claim” and limited the claim for damages to “emotional distress due to her own injuries.” 692 N.W.2d at 566. The Wisconsin Supreme Court reversed. The Court acknowledged that “it may be impossible to segregate injuries for emotional distress that stem from different sources.” 692 N.W.2d at 565. Because she was a “participant” in the event, not a mere bystander, she was entitled to claim damages for what she had actually experienced in giving birth to the stillborn child. There would be no attempt to compartmentalize the sources of her emotional injuries.

Not all of the cases on this topic are recent. A 1933 Maryland decision, Bowman v. Williams, 165 A.2d 182 (Md. Ct. App. 1933), involved a man at home with his two sons when a coal truck ran into the side of their house. All were within the zone of danger. Damages for all emotional distress actually experienced by the father could be claimed. “There was no basis to differentiate the fear caused 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 the three.” 165 A.2d at 184.

In Minnesota, as in these other states, there is an objective standard which limits and defines the number of people who may bring claims. The people who may bring claims are those to whom the tortfeasor owes a duty of care; the duty is owed because it is foreseeable that they will be put in physical peril by the tortfeasor’s negligence. Even for these people, Minnesota allows no cause of action for trivial emotional distress claims. To state an emotional distress claim,

the claimant must suffer emotional distress severe enough to cause physical symptoms. With these limits already in place, there is no need to depart from traditional tort standards that hold a tortfeasor responsible for all harm proximately caused.

**III. “Fear for one’s own safety” should be rejected as a measure of damages in a bodily injury claim because such a standard is not workable, reasonable, logical, or just.**

The issue before the court is whether or not a plaintiff who has suffered physical harm in an accident as a direct result of the defendant’s negligence will be limited to claiming only those emotional distress damages arising from “fear for his or her own safety.” In assessing standards for limiting liability, this court has said that such limits “must be workable, reasonable, logical, and just as possible.” Stadler, 295 N.W.2d at 554. Using the criteria from Stadler, this court should reject “fear for one’s own safety” as a test for emotional distress damages.

When imposing limits, it is important to keep in mind the goal which the limits are intended to achieve: What public policy is being implemented? In dealing with emotional distress claims, the primary concern has been to impose a reasonable limit on the number of people who may assert such claims. For more than a century, Minnesota’s rules requiring either direct physical contact or being in the “zone of danger” have provided workable standards for limiting claims. A second concern involves the subjective nature of emotional distress claims. For more than a century, Minnesota has required that emotional distress be so severe as to result in physical symptoms; this eliminates trivial claims and requires some

objective evidence of the emotional injury. The stated public policy goals have been met.

The relief being sought by the injured plaintiff in the present case does not alter these existing standards. Allowing actual damages does not add a single person to the class of those who may bring claims, and it does not subtract anything from the objective standards of physical symptoms currently being used by the courts.

What exactly is the new public policy objective that the insurance company is trying to achieve in having emotional distress damages measured, not by proximate cause, but by "fear for one's own safety"? Perhaps the public policy goals can be inferred from applying the "fear for one's own safety" test to a set of facts in which two people have similar injuries from the same accident. Assume that a fire in an apartment building has been caused by negligence and that two different people in the fire have suffered emotional distress. The first person, fearing for his safety, ran from the building. The second person, putting aside fear for his safety, aided others in escaping. Both suffered emotional trauma leading to significant physical symptoms. Is there some public policy which supports a legal standard allowing damages for the first person and not for the second? Concern for other people is generally considered to be a good thing, something

valued in society. Why would we then choose to elevate “fear for one’s own safety” to a standard which must be reached in order to state a damage claim?<sup>7</sup>

Even assuming that some new public policy goal could be articulated, “fear for one’s own safety” would not be an effective standard for measuring damages. When applied to actual human experience, “fear for one’s own safety” meets none of the criteria identified by this court in Stadler; it is not workable, not reasonable, not logical, and not just.

**A. “Fear for one’s own safety” is not a workable standard for damages.**

As a way of defining who is within a zone of danger, “fear for one’s own safety” provides an objective standard. The test identifies the people to whom a duty of care is owed: a duty is owed to those who would be put in physical peril by a negligent act.

“Fear for one’s own safety”, however, is hopelessly inadequate as a means of assessing the damage caused by a negligent act. The human experience of trauma simply does not fall into the two separate categories of “fear for one’s own safety” or “fear for the safety of another.”

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<sup>7</sup> An English case, cited in Professor Steenson’s article, gives an example of two mothers, each holding a child, who narrowly escape being struck by an oncoming lorry. One is terrified but courageous, and she thinks only of her child. The other is terrified but timid, and thinks only of the potential damage to herself. If they have the same physical symptoms from the frightful experience, “will the law recognize a cause of action in the case of the less deserving mother, and none in the case of the more deserving one?” Hambrook v. Stokes Brothers, 1 K.B. 141,156 (C.A. 1925). See Steenson, 13-14.

As observed in the 1933 Maryland decision, where a truck crashed into the home of a man and his two children, "there is no possibility of division of an emotion which was instantly evoked by the common and simultaneous danger of the three." Bowman, *supra*, 165 A.2d at 184. A similar observation was made in Eyrich for Eyrich v. Dam, 473 A.2d 539 (N.J. Super. Ct. App. Div. 1984), where a man brought a five year old neighbor child to a circus, and then fought to save the child when the child was attacked by a leopard. In response to an argument that the man's emotional injury had not been caused by fear for his own safety, the court stated that, "It defies the most elementary understanding of the way trauma affects the human mind to assert that Eyrich's physical contact with the leopard, his seizing of the wounded child from its mouth and the ultimate failure of this attempted rescue did not constitute an integral and significant part of the entire episode which caused his mental disturbance." 473 A.2d at 547. Since the man was within the zone of danger, all of his psychological damage was compensable. The jury was not asked to divine what portion of the trauma was related to "fear for his own safety."

"Fear for one's own safety" is not a useful tool for dissecting a complex human experience of trauma; using it is like trying to do surgery with a mallet. In most cases of horrific trauma, "fear for one's own safety" would simply be unworkable as a standard for damages. It could achieve no useful public policy goal.

**B. "Fear for one's own safety" is not a reasonable standard for damages.**

Physical symptoms related to emotional distress often arise as part of a post traumatic stress disorder (PTSD). In recent years, medical science has documented that the symptoms of PTSD are the result of altered brain chemistry. Due to the emotional trauma, ordinary events now become triggers which make a person experience once again the horrible feelings of the past event.<sup>8</sup> The experience is often debilitating.

In 1892, the court in Purcell was wise enough to observe that "The mind and body operate reciprocally on each other." 50 N.W. at 1035. New technologies are now making it possible to observe more precisely the manner in which this reciprocal relationship operates. Dr. J. Douglas Bremner of the Yale University School of Medicine published a review titled "Alterations in Brain Structure and Function Associated with Post-Traumatic Stress Disorder," *Seminars in Clinical Neuropsychiatry*, Vol. 4, pages 249 - 255, confirming alterations in brain structure and function which likely underlie the symptoms of PTSD. See Appendix, A-8 - A-13. As new knowledge is gained, the gap between physical injury and traumatic emotional disorders will narrow even further.

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<sup>8</sup> See Bessel van der Kolk, *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY* (1996). Pages 219 - 221 from chapter 10, "The Body Keeps Score: Approaches to the Psychobiology of Posttraumatic Stress Disorder," of this book are provided for reference at Appendix A-5 to A-7.

When a person suffers a broken leg in a car accident, it is not necessary for the person to prove the exact mechanism of the fracture. Whether the leg broke from hitting the dashboard or from hitting the car door is irrelevant. The legal issue is whether or not the crash was a proximate cause of the injury. What about a person who comes away from a crash with a significant post-traumatic stress disorder? If medical science confirms that the physical symptoms of PTSD stem from altered brain chemistry, why must we isolate one aspect of a single traumatic event as being responsible for this physical change? Is there some rational filter for human experience by which we can reasonably isolate the damage caused by “fear for one’s own safety” and distinguish this harm from that caused by other portions of a single horrible experience? It seems unlikely. It is much more reasonable to ask a jury to determine only if the crash was the proximate cause of the plaintiff’s injury.

**C. “Fear for one’s own safety” is not a logical standard for damages.**

“Fear for one’s own safety” appears to have emerged as a standard for damages in the following way. In Stadler, the court held that mere bystanders cannot state a cause of action under Minnesota law. A bystander, by definition, suffered no direct physical injury and had no reasonable basis for fearing for his or her own safety. Consequently, the only possible damage claim for a bystander would be a claim for damages caused by witnessing what happened to someone

else. The court refused to recognize the right of bystanders to recover such damages.

It must be kept in mind that the only issue in Stadler was whether or not the class of people permitted to bring tort claims should be expanded to include bystanders. Indeed, it was assumed by the parties to the litigation that emotional distress damages would have been appropriate in Stadler if the plaintiff parents had been in the zone of danger. Nevertheless, it is now argued that, by excluding bystanders from the class of persons entitled to sue for damages, Minnesota courts have also eliminated comparable damage claims for injured individuals who were not in fact bystanders. This is an argument that has no logical foundation.

Take the example of a wrongful death claim. Assume that a woman's business partner is killed in an accident and that she suffers a financial loss due to his death. She has suffered financial damages as a direct result of the tortfeasor's negligence. Does she have a wrongful death claim for those damages? No. Under Minn. Stat. §573.02, she is not within the class of people entitled to bring a claim. She cannot state a cause of action for her losses. Does it follow logically that no other person should be permitted to make a wrongful death claim for financial loss? It does not.

Policy considerations favoring objective limits to claims for emotional distress do eliminate bystanders from the class of persons who may bring a tort claim in Minnesota. It does not follow logically that a defendant should also be

absolved from paying damages for the harm actually inflicted on those persons who are permitted to assert claims. The use of "fear for one's own safety" as a standard for damages has to be considered on its own merits. There is no logical basis for using the standard simply because Minnesota does not acknowledge tort claims for bystanders.

**D. "Fear for one's own safety" is not a standard for damages that promotes justice.**

If justice is a concern, how do we balance the scales between (1) the rights of people whose negligence causes physical peril to others and (2) the rights of people harmed by that negligence?

There is no doubt that, as a society, we include as heroes those who put aside fear for themselves and who act out of concern for the safety of others. Having concern for others is a trait that we generally respect. If we are attempting to create limits on liability that, in the words of the Stadler court, are as "just as possible," why would we isolate concern for the safety of others as a test for denying damages? Why do we want a jury to ferret out from a plaintiff's experience those parts related to "fear for the safety of others" in order to make those experiences unworthy of compensation? It is unlikely that a desire to do justice would lead to such a standard.

The traditional balance in awarding damages has been struck through a standard of proximate cause: "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.”  
Okrina, 165 N.W.2d at 263. There is no just reason for abandoning this standard  
in the present case.

In these emotional distress cases, a just result certainly requires that clear  
limits be set on damages. An injured person can claim only those damages  
proximately caused by being a participant in the accident. In a case involving a  
death, there is no compensation for grief; the grief over the death would have  
occurred even if the plaintiff had not been in the accident. In a case involving an  
injury to a child, there is no compensation for sorrow over the child’s long term  
disability; this would have occurred even if the parent had not been involved in the  
accident. The compensation which may be sought must be caused by the  
traumatic event, by the experience of having been in the accident or in the zone of  
danger. It is the harm suffered by virtue of being a participant in the accident that  
is compensable.

In any given case, the task of a jury in assessing damages may not be  
easy. However, it is certainly both easier and more just to assess damages for  
what the plaintiff has actually experienced rather than to assess damages for  
some hypothetical experience that the plaintiff might have had if he or she had  
been alone when the accident occurred.

It is not necessary in the present case for the court to address the issue of  
whether or not the other person injured or killed in the accident must be a member  
of the plaintiff’s immediate family, as is required in some jurisdictions. In states

allowing claims by bystanders, this restriction of claims to the immediate family provides a limit to the number of bystanders who can bring claims. Such a limit is not needed in Minnesota, however, because the number of people who may bring claims has never been expanded to include any bystanders. And again, it is in the interest of justice not to exclude claims by someone like the man in the Eyrich case, *supra*, who had the hopelessness and despair of attempting and failing to save the life of a neighbor's five year old child.<sup>9</sup>

### CONCLUSION

The decision of the court of appeals should be reversed. The case should be remanded to the district court with instructions to allow a recovery of those emotional distress damages proximately caused by the defendant. "Fear for one's own safety" is not to be used as a standard for measuring damages.

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<sup>9</sup> If the court chooses to address this issue, comments on the topic in Stadler are pertinent. The court first noted an observation by Professor Prosser that, "The action might well be confined to members of the immediate family, or perhaps to husband, wife, parent or child, to the exclusion of bystanders, and remote relatives." 295 N.W.2d at 554. The court then responded by asking "But what if the third person was the plaintiff's beloved niece or nephew, grandparent, fiancée, or lifelong friend, as dear to the plaintiff as her more immediate family?" *Id.* The implication is that this type of distinction is not a reasonable or just way of limiting the number of claimants.

Respectfully submitted by,

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7/6/05

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STATE OF MINNESOTA

IN SUPREME COURT

A 04 - 1445

Geralyn S. Engler,

Appellant,

vs.

Illinois Farmers Insurance Company,

Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3. The brief was prepared using Microsoft Word 2002 and the typeface used was 13 point Arial. The brief contains 6,396 words in 524 lines.

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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).