

NO. A04-1445

State of Minnesota
In Supreme Court

GERALYN S. ENGLER,

Appellant,

vs.

ILLINOIS FARMERS INSURANCE COMPANY,
an Illinois corporation,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Whether the trial court erred in concluding that Appellant was not entitled to bring a claim for emotional distress sustained as a result of witnessing her son's accident?

The trial court ruled that Appellant was not entitled to bring a claim for emotional distress sustained as a result of witnessing her son's accident.

Authorities:

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

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

STATEMENT OF THE CASE

This underinsured motorist case arises out of a motor vehicle accident that occurred on April 17, 1997, and follows the underlying third-party liability case entitled Engler v. Wehmas, 633 N.W.2d 868 (Minn. App. 2001).

In Engler v. Wehmas, Geralyn Engler asserted a claim for negligent infliction of emotional distress against Beverly Wehmas. Ms. Engler sought damages for the emotional distress she sustained as a result of being in the zone of danger, and separately, as the result of emotional distress she sustained as being in the zone of danger and watching as her son, Jeffrey Engler was struck by the Wehmas vehicle.

Ms. Engler filed a motion seeking admission of photographs, and Ms. Wehmas responded with a memorandum which opposed admission of those photographs, and contained a basis for a motion for summary judgment to dismiss Engler's negligent infliction of emotional distress claim. In the alternative, Ms. Wehmas asked the trial court to certify the question of whether Ms. Engler could recover from emotional damages beyond those caused by a fear for her own safety. While the trial court denied Ms. Wehmas' motion for summary judgment, the motion for certification was granted.

Following briefing and oral arguments, the Minnesota Court of Appeals certified the question in the negative. Specifically, the Court held that Ms. Engler, while in a zone of danger could not recover damages for emotional distress caused by fear for the safety of her son and from witnessing her son's injuries. Engler, 633 N.W.2d 868.

Following the Court of Appeals' decision, a Petition for Review was granted by the Minnesota Supreme Court on December 19, 2001. Before oral arguments, the case was settled.

Ms. Engler then commenced this underinsured motorist lawsuit. On or about January 15, 2004, Appellant filed a motion seeking clarification of the scope of her recoverable damages. On or about, January 23, 2004, Respondent, Illinois Farmers Insurance Company submitted a motion in opposition.

On April 9, 2004, the trial court found that Ms. Engler was not entitled to emotional distress as a result of fearing for her son's safety or witnessing her son's safety. The court further held that Ms. Engler's damages were limited to the emotional distress she sustained as a result of fear for her own safety. The parties entered into a Stipulation dated July 13, 2004, in which the parties agreed that the trial court's order of April 29, 2004 effectively resolved Ms. Engler's claim for damages because she would be unable to prevail in the UIM case, as damages in excess of \$50,000 would be required. As such, if this Court reverses the decision of the trial court and the Court of Appeals, this case would be remanded for a determination as to whether Ms. Engler can present a prima facie case of NIED based on witnessing her son's injury. Respondent has never conceded that Ms. Engler has in fact sustained a "psychic injury" with attendant physical manifestations.

Judgment was entered after the trial court filed an amended Order dated June 29, 2004. On March 29, 2005, the Minnesota Court of Appeals affirmed the decision of the trial court. This Court granted Appellant's Petition for Review on June 14, 2005.

STATEMENT OF THE FACTS

On April 17, 1997, Appellant, Ms. Engler, and her family had eaten at McDonalds on Highway 10 in Anoka and on their way to the Appellant's home in Isanti, Minnesota. [Respondent's Appendix at page 34, hereinafter "A-___"] Appellant was a front seat passenger in a vehicle driven by her then boyfriend, Brent Renner. Appellant's sons, Jeffrey and Jacob, were in the back seat. [A-34] The Englers were traveling eastbound on 221st Avenue Northwest in Oak Grove, Minnesota when Appellant's son Jeremy, indicated that he needed to go to the bathroom, and could not wait. [Id.] Appellant believed it was safe to pull off on the dirt road so that Jeffrey could go to the bathroom in the woods. [A-34] As such, Mr. Renner pulled off the roadway onto the shoulder. [A-34] Appellant indicated that the driver's side tires were on the shoulder of the road and the passenger side was off on the edge of the ditch. [A-34] Appellant opened the back door for Jeffrey and directed him to the ditch and into the woods. [A-34] Appellant estimated that Jeffrey was approximately 30 feet from the vehicle and close enough that the Appellant could still see him, just near the line where the woods began. [A-35] After Appellant directed Jeremy to the spot where he was going to the bathroom, she heard something, looked up and saw a car which was approximately three quarters of a mile away. [A-34] Appellant indicated she heard the car which was loud because it was a gravel road and she believed the car was traveling fast. [A-35] Upon hearing the vehicle approaching, Appellant looked at Jeffrey and said, "You better hurry. There is a car coming." [A-35]

Next, Appellant heard the car driven by Ms. Wehmas go out of control, and observed the vehicle traveling towards Jeffrey. At that time, Appellant testified that she “couldn’t move ... and that she was frozen in fear.” The Appellant also testified that originally she believed the Wehmas vehicle was going to hit her, her son Jacob and Mr. Renner, but then the Wehmas vehicle kept turning diagonally, sideways. [A-35] Upon the realization that the Wehmas vehicle was going to hit her son Jeffrey, Appellant screamed, and turned away. [A-35] The Wehmas vehicle hit Jeffrey Engler and he flew into the woods. [A-35]

Appellant testified that while at first she thought that the Wehmas vehicle was going to hit her, Jacob and Brent Renner, she also testified that it happened so quickly she really didn’t have an estimation as to how long she herself was in fear. [A-36]

Appellant testified that it was a couple of months after the accident that she sought medical treatment for her own symptoms, i.e., post-traumatic stress. [A-37] Appellant testified that she sought medical treatment because she would cry all the time for no reason, couldn’t get out of bed and was irritable. Appellant testified she didn’t feel like herself, she couldn’t function normally and didn’t have any ambition. [A-37]

LEGAL ARGUMENT

Standard of Review

This appeal presents the Court with a purely legal issue. There are no facts in dispute for purposes of this appeal. A reviewing court is not bound by a district court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n., 358 N.W.2d 639, 642 (Minn. 1984).

The court uses a de novo standard of review to determine whether the trial court erred in its application of the law. Durfee v. Red Baxter Imports, Inc., 262 N.W.2d 349, 354 (Minn. 1977).

I. APPELLANT IS NOT ENTITLED TO EMOTIONAL DISTRESS DAMAGES AS A RESULT OF WITNESSING HER SON'S ACCIDENT.

a. Existing Minnesota case law precludes Appellant's claim for emotional distress.

Appellant would like to recover damages for her own emotional distress as a result of her fear for her son's safety and as a result of witnessing her son's injuries. However, this same issue has already been decided by the Minnesota Court of Appeals in Engler v. Wehmas, 633 N.W.2d 868 (Minn. App. 2001). In Engler v. Wehmas, the Court of Appeals answered that question unequivocally no, Appellant could not bring such an action even though she herself had been in a zone of danger.

In Engler, the Court of Appeals articulated the elements necessary to maintain a claim for negligence which are: 1) duty; 2) breach of that duty; 3) that the breach of duty be the proximate cause of the plaintiff's injuries; and 4) that the plaintiff did in fact suffer injury. Engler, 633 N.W.2d at 872, *citing*, Johnson v. State, 533 N.W.2d 40, 49 (Minn.

1996). There are three additional requirements for the tort of negligent infliction of emotional distress. The plaintiff must also show that she: 1) was within a zone of danger of physical impact; 2) reasonably feared for her own safety; and 3) suffered severe emotional distress with physical manifestations. Engler, 633 N.W.2d at 872, *citing*, K.A.C. v. Benson, 527 N.W.2d 533, 557 (Minn. 1995).

In Engler v. Wehmas, the Court of Appeals found that the parties stipulated that Appellant met the required elements for negligent infliction of emotional distress and that it was not disputed that she could go forward for her own claim for damages she suffered based upon her fear of her own safety. However, the Court found that Appellant was not entitled to damages for the emotional distress she suffered as a result of either fearing for her son's safety or witnessing her son's injury. Engler, 633 N.W.2d at 873.

Existing Minnesota case law does not allow a plaintiff to assert a claim for emotional distress as a result of witnessing harm to another. As noted in K.A.C. v. Benson and Stadler v. Cross, fear for the safety of another is not an element of negligent infliction of emotional distress. Some of the earliest Minnesota case law in emotional distress claims suggests that fear for another's safety must be separated from fear for plaintiff's own safety.¹ *See*, Okrina v. Midwestern Corp., 282 Minn. 400, 404, 165

¹ Appellant and MTLA assert that Minnesota should allow recovery in the instant case because it is an unfair burden to require Appellant to separate the emotional distress she sustained as a result of fear for her own safety from that of fear for her son's safety. However, such a requirement in Minnesota is far from novel. For example, plaintiffs are required to separate out their injuries and damages in aggravation cases. In addition, if a plaintiff sues two separate defendants as a result of two separate accidents, plaintiffs can most assuredly find an expert who can separate out the plaintiff's injuries. As such, requiring Appellant to separate out her emotional distress in the instant case is based on long-standing principles in Minnesota. While this may be a difficult task, it is certainly not impossible.

N.W.2d 259, 262 (Minn. 1969) (because plaintiff feared for her own safety and her distress was not caused by concern for the safety of others, plaintiff had a cause of action.)

In Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980), the plaintiffs witnessed their child being struck by a truck as the child crossed the road. The parents were not in the zone of danger at the time of the accident. Plaintiffs sued the driver of the truck for negligent infliction of emotional distress. The Minnesota Supreme Court affirmed the district court's order granting summary judgment in favor of the defendant and held that because the parents were not within the zone of danger and did not fear for their own safety, they cannot recover damages for emotional distress. Id., 295 N.W.2d at 555. Accordingly, one who is not in the zone of danger and witnessed the injury of another, regardless of the relationship of the person, cannot recover for negligent infliction of emotional distress.

Moreover, Minnesota precedent establishes that no cause of action exists for negligent infliction of emotional distress where plaintiff has witnessed harm to another, even when the plaintiff is in the zone of danger. In Carlson v. Illinois Farmers Ins. Co., 520 N.W.2d 534 (Minn. App. 1994), a passenger in the vehicle was killed and the surviving passenger who sustained injuries brought an action seeking damages for negligent infliction of emotional distress. The insurer moved for partial summary judgment on the negligent infliction of emotional distress claim which was granted and the plaintiff appealed. The court held that the plaintiff could not recover for negligent

infliction of emotional distress arising from witnessing the death of her friend. Carlson, 520 N.W.2d at 538.

The court reasoned that to allow the plaintiff's claim to go forward, it would have to conclude that 1) the tortfeasor had a duty to the plaintiff's friend so as not to subject the plaintiff to emotional distress; and 2) the plaintiff had a legally protected right to be free from distress arising from harm to a friend. Id., citing Cote v. Litawa, 71 A.2d 792, 794, (N.H. 1950) (holding that mother could not recover for distress caused by harm to a child); *See also* Resavage v. Davies, 86 A.2d 879, 881-83 (M.D. 1952). The court explained the driver had a duty to protect both the plaintiff and her friend from physical harm because they were passengers in his car but he had no duty to protect the plaintiff from distress arising from the fate of plaintiff's friend. Carlson, 520 N.W.2d at 537. To hold otherwise, the court explained "would impose on a negligent tortfeasor liability out of proportion to his culpability." Id.

In Engler v. Wehmas, the Court of Appeals looked to Stadler v. Cross as instructive, even though in Stadler, the plaintiff was not in the zone of danger. In Stadler, the court discussed why Minnesota applied the zone of danger test:

A person's liability for the consequences of her or his actions cannot be unlimited. The limits imposed must be as workable, reasonable, logical and just as possible. If the limits cannot be consistently and meaningful applied by Courts and juries, then the imposition of liability will become arbitrary and capricious.

Stadler v. Cross, 295 N.W.2d at 554.

The Stadler court raised policy concerns about a rule that would allow recovery of damages for negligent infliction of emotional distress for a plaintiff who witnesses injury to an immediate family member. The court in Stadler also questions where the line would be drawn in terms of immediate family member:

What if the third person was the Plaintiff's beloved niece or nephew, grandparent, fiancé, or life long friend, is dear to the Plaintiff as her more immediate family?

Id., at 555.

Accordingly, based on the holdings in Stadler and Carlson, the Court in Engler v. Wehmas held that "Minnesota Appellate Courts have been reluctant to extend liability to third persons in negligent infliction of emotional distress cases. In addition, Minnesota has never held that a tortfeasor has the duty to protect the person within the zone of danger from witnessing harm to a family member." Engler 633 N.W.2d at 873.

Appellant relies on the Restatement (Second) of Torts and a law review article by Professor Steenson to support their argument that Minnesota law will support recovery where emotional distress by a claimant who was in the zone of danger and fears for the safety of a family member. Michael K. Steenson, "The Anatomy of Emotional Distress Claims in Minnesota, 319 William Mitchell Law Review 1, 11 (Winter 1993). However, the Minnesota Supreme Court in Stadler v. Cross declined to adopt the foreseeability as a liability limitation as noted in the Restatement of Torts. Stadler, 295 N.W.2d at 554. In fact, William J. Prosser, author of the Handbook of the Law of Torts, Section 54, at 33-35 (4th Ed. 1971) conceded that such limitations are "quite arbitrary." Stadler, 295 N.W.2d at 554.

Instead, the Supreme Court in Stadler, cited an earlier California decision which criticized the foreseeability limitations that allowed the recovery depending on the relationship between the plaintiffs and the victim. The Court stated that the action might well be confined to members of the immediate family, or perhaps the husband, wife, parents or child, to the exclusion of bystanders, and remote relatives. Stadler, 295 N.W.2d at 555 *quoting* Amaya v. Home Ice Fuel & Supply Co., 379 P.2d 513, 523-24 (Cal. 1963), *overruled on other grounds*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968). Moreover, the United States Supreme Court has also criticized foreseeability as a meaningful limitation on liability for emotional distress. In Consolidated Rail Corp. v. Gottschall, 512 U.S. 532, 552-53 (1994), the Court said “conditioning liability and foreseeability therefore, is hardly condition at all. Every injury has ramifying consequences, like the ripples of the waters without end. The problem for the law is to limit the legal consequences of wrongs to controllable degree.” *Id.*, *quoting* Tobine v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969). The Supreme Court also cited a California decision stating “there are clear judicial days on which a court can foresee forever and this determines liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery.” *Id.*, *quoting* Thing v. La Chusa, 48 Cal.3d 644, 771 P.2d 814, 257 Cal.Rptr. 865 (Cal. 1989). As the court explained, common law restricts recovery for negligent infliction of emotional distress because of the “potential flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect and the specter of a limited and unpredictable liability.” Consolidated Rail, 512 U.S. at 552.

As more fully discussed below, the Stadler Court was correct in their concerns about the direction of the California courts. While originally, California adopted the zone of danger requirement in allowing plaintiffs to assert claims for emotional distress based on injury to third persons, the zone of danger rule was short-lived and ultimately replaced with a bystander recovery rule. California has subsequently rejected the physical injury requirement and plaintiffs can now assert claims for emotional distress with no physical manifestations.

One should not create a new duty in emotional distress cases even when the mother is in the zone of danger. The Court in Carlson noted that Carlson's presence in the zone of danger when her friend was killed did not support a negligent infliction of emotional distress claim. The Court noted that Carlson's "physical injury is unrelated to her claim for emotional distress arising from the death of her friend." Carlson v. Illinois Farmers Insurance Company, 520 N.W.2d 534, 538 (Minn. App. 1994).

A mother in the zone of danger has a claim for emotional distress from fear for her own safety just as the plaintiff in Carlson had a claim for emotional distress caused by a physical injury. Carlson, 520 N.W.2d at 537-38. Because a mother's presence in the zone of danger establishes her own claim, these facts do not give rise to any public policy justification to create a new duty of care for the tortfeasor to protect her from witnessing harm for her child. This analysis applies directly to Appellant's claim, because the trial court had already determined that she has a valid claim for emotional distress based on

fear for her own safety.² Accordingly, based upon existing Minnesota case law, this Court should affirm the decision of the trial court and the Court of Appeals.

b. Other jurisdictions support Minnesota's limited recovery for negligent infliction of emotional distress claims.

According to the American Law Reports, four states, including Minnesota, do not allow recovery for emotional distress caused by witnessing negligent injury to another. 89 A.L.R. 5th 255, § 2a. Those other jurisdictions include Colorado, Oklahoma and Virginia.

A number of other jurisdictions followed the impact rule. Under the impact rule, one cannot recover for negligent infliction of emotional distress as a result of witnessing injury to another unless the plaintiff has suffered a physical impact or injury in the same event. Jurisdictions that follow this rule include Arkansas, Georgia, Kansas, Kentucky and Oregon. *Id.*

As noted by Appellant, there are other jurisdictions that allow bystander recovery under a negligent infliction of emotional distress claim. However, there have been problems articulating a standard based upon foreseeability. The foreseeability requirement itself is somewhat unclear with the primary problem being that it seems possible to foresee almost everything. As discussed more fully below, the least restrictive standard for allowing recovery under negligent infliction of emotional distress is that which was introduced by the California Supreme Court in Dillon v. Legg, 68

² Although the trial court found that Appellant had a viable claim for emotional distress based on fear for her own safety, the parties have subsequently stipulated that because she did not meet the underinsured motorist threshold, Appellant's claim was essentially dismissed.

Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (Cal. 1968). The California Supreme Court ultimately revisited Dillon in Elden v. Sheldon, 46 Cal.3d 267, 758 P.2d 582, 250 Cal.Rptr. 254 (Cal. 1988); and Thing v. La Chusa 48 Cal.3d 644, 771 P.2d 814, 257 Cal.Rptr. 865 (Cal. 1989) due to some recurrent problems with the administration of the Dillon rule.

Accordingly, there are other jurisdictions that support Minnesota's rule that bystanders cannot recover for emotional distress caused by witnessing injury to another. In addition, while there are jurisdictions that do support bystander recovery, adopting a foreseeability test has been difficult to administer.

c. Public policy considerations do not support Appellant's claim for emotional distress.

Appellant and MTLA are urging that this Court allow Appellant to recover for emotional distress she sustained as a result of witnessing injury to her son. Appellant and MTLA further assert that Ms. Engler's claim for emotional distress is warranted and credible given that she herself was in the zone of danger. However, adopting such a standard in Minnesota is not only contrary to Minnesota precedent, but it is also an unworkable and illogical standard. The zone of danger bears no causal relationship or connection to damages for distress sustained from witnessing the injury to another. The current zone of danger requirement only makes sense in relation to allowing a plaintiff to assert a claim for emotional distress when they fear for their own safety and sustain emotional distress with physical manifestations.

In Minnesota, courts have traditionally been suspect of psychic injuries. Courts have held that plaintiffs are only allowed to recover for “psychic injuries” if they are in the zone of danger, fear for their own safety, and suffer attendant physical manifestations. These requirements alleviated the courts’ concerns that psychic injuries were unreliable and illegitimate. However, requiring a plaintiff to be in the zone of danger bears no connection to recovering for fear for someone else’s safety. The zone of danger requirement makes sense only in relation to claims based on fear for one’s own safety. In such a case, a parent who is just outside the zone of danger and witnesses a traumatic injury to their child would not be allowed to assert a claim for emotional distress. Yet, the resulting emotional distress sustained by a parent who is in the zone of danger versus outside the zone of danger is no different upon viewing injury to a family member. This is the exact scenario which led California to forego the zone-of danger rule for general bystander recovery. California courts have since continued down a slippery slope of expanding tort recovery beyond all rational limits.

Originally, California allowed emotional distress damages as a result of witnessing injury to another, but only if the plaintiff was in the zone of danger. Specifically, in Amaya, the California Supreme Court denied recovery to a pregnant mother who was not within the zone of danger, but was nearby her infant son watching over him, when her son was run over by the defendant’s truck. Amaya v. Home Ice, Fuel and Supply Co., 59 Cal.2^d 295, 379 P.2d 513, 29 Cal.Rptr. 33 (Cal. 1963). This is the similar zone-of-danger test for emotional distress urged by Appellant in the present case. This decision was subsequently overruled.

In Dillon, a mother and sister each sought damages for emotional distress as a result of witnessing the defendant's vehicle collide with and roll over an infant as she crossed the street. The court found that this case illustrated the fallacy of the zone of danger requirement. The court noted: "We can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of the happenstance that the sister was some few yards closer to the accident." Dillon v. Legg, 68 Cal.2d 728, 733, 441 P.2d 912, 916, 69 Cal.Rptr. 72, 76 (Cal. 1968). Further, the Court indicated the present case illustrated the "hopeless artificiality" of the zone of danger requirement. Id. After concluding that the zone of danger rule made no sense, the court then addressed the foreseeability of "psychic injuries". The court found that recovery should be had if the defendant could foresee fright sufficient enough to cause a "psychic injury". In that instance while the plaintiff would not be in the zone of danger for physical impact, they would be in the zone of danger for psychic injury and should therefore be entitled to recover. Dillon, 68 Cal.2d at 740, 441 P.2d at 920, 69 Cal.Rptr. at 80.

The Dillon Court adopted the bystander recovery rule in which bystanders could recover for negligent infliction of emotional distress when it was reasonably foreseeable that the negligent conduct would cause emotional distress to the bystander. Generally, the elements of the reasonably foreseeable rule included the following requirements: 1) a close family relationship between the family and the victims; 2) the plaintiffs proximity to the scene of the accident to which the victim was injured or killed; 3) the plaintiffs

sensory and contemporaneous observations of the accident. Dillon, 68 Cal.2^d at 741, 441 P.2^d at 921, 69 Cal.Rptr. at 81.

Criticism of the Dillon framework has existed since its conception. First, the requirement that the plaintiff be in a close relationship with the victim and the plaintiff's sensory and contemporaneous observation of the accident have proven difficult for the courts to apply. For example, California courts have had difficulty in interpreting the family relationship rule. For example, under the current definition of "close family relationship", only closely-related relatives living together can assert a claim. Thing v. La Chusa, 48 Cal.3d 644, 668, 771 P.2d 814, 829, 257 Cal.Rptr. 865, 880 (Cal. 1989). As such, a mother can assert a claim, but grandparents cannot. Questions arise as to judicially-created family relationships such as stepmother, stepfather, half brother or half sister or adopted parent/child relationships. In addition, the close family relationship test raises questions regarding those who are engaged, or more recently, regarding same sex relationships.

Courts have had difficulty in applying the sensory and contemporaneous observations of the accident. This requirement is predicated on the theory that a person would suffer more emotional distress as a result of seeing the accident versus being at home and hearing of the accident via telephone. However, courts have had difficulty applying this rule in situations where a plaintiff didn't actually see the accident but happened upon it later. Given the expanding nature of this requirement, California recently tried to hold firm in denying recovery to parents who happened upon their infant after he was electrocuted, but still dying. The court denied recovery holding that since

the child was not still being electrocuted, the parents did not meet the sensory and contemporaneous observation of the accident requirement. Hathaway v. Superior Court, 112 Cal.App.3d 728, 169 Cal.Rptr. 435 (Cal. App. 1980).

In Elden, while not specifically overruling Dillon, the court rejected the foreseeability argument as a rationale for recovery. In Elden the court rejected the claims of plaintiff and his live-in lover for emotional distress. Elden v. Sheldon, 46 Cal.3d 267, 758 P.2d 582, 250 Cal.Rptr. 254 (Cal. 1988) Mr. Elden sustained injuries and his lover was thrown from the car and died, in a motor vehicle accident caused by the defendant. The court rejected Mr. Elden's claims for NIED because of the unmarried relationship. The court also cited the burden on courts and the need to limit the number of persons to whom the defendant owes a duty of care. The court also rejected the foreseeability rationale by noting, "policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk." Elden, 46 Cal.3d at 274, 758 P.2d at 586, 250 Cal.Rptr. at 258.

In Thing v. La Chusa, the California Supreme Court tried to stem the tide of NIED recovery. The court criticized its prior decisions for "giving little consideration to the importance of avoiding the limitless exposure to liability." Thing, 48 Cal.3d at 656, 771 P.2d at 821, 257 Cal.Rptr. at 872. The court further noted that:

In the ensuing 20 years, like the pebble cast into the pond, Dillon's progeny have created ever widening circles of liability. Post-Dillon decisions have now permitted plaintiffs who suffer emotional distress, but no resultant physical injury, and who were not at the scene of and thus did not witness the event that injured another, to recover damages on grounds that a duty was owed to them solely because it was

foreseeable that they would suffer that distress on learning of injury to a close relative.

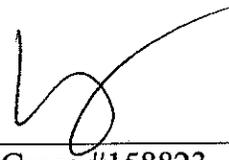
Thing, 48 Cal.3d at 653, 771 P.2d at 819, 257 Cal.Rptr. at 870.

As such, California law is particularly instructive as their NIED law starts where Appellant urges Minnesota should follow. California has since rejected the artificiality of the zone of danger rule for NIED claims based on witnessing injury to a third person, and turned to the next logical choice, the bystander recovery rule. This rule allows bystanders to assert a claim for negligent infliction of emotional distress as a result of witnessing injury to a third person without being in the zone of danger. Not only does the bystander recovery rule lead to a host of new difficulties and incongruities in interpretation as delineated in California, but this Court in Stadler v. Cross, has specifically rejected the expansion of tort law in such a scenario. Nothing has changed since Stadler was decided in 1980. This Court has already declined to expand tort law and allow bystander recovery and should not now start on the slippery slope of ever-expanding tort law as so aptly demonstrated in California.

CONCLUSION

Based on the foregoing, Respondent Illinois Farmers Insurance Company respectfully requests that this Court affirm the decision of the trial court and the Court of Appeals.

Respectfully submitted,



Dated: August 11, 2005.

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**STATE OF MINNESOTA
IN SUPREME COURT**

GERALYN S. ENGLER,

Appellant,

vs.

Case No. A04-1445

ILLINOIS FARMERS INSURANCE COMPANY,
an Illinois Corporation

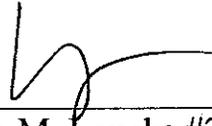
Respondent.

CERTIFICATION OF BRIEF LENGTH

Pursuant to Rule 132.01, subs. 1 and 3 of the Minnesota Rules of Civil Appellate Procedure, the undersigned hereby certifies that:

1. Respondent's Brief contains 5,272 words;
2. The software used is Microsoft Office Word 2003; and
3. The Brief complies with the typeface requirements.

Dated: August 11, 2005



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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).