

NO. A04-1445

State of Minnesota  
**In Supreme Court**

Geralyn S. Engler,

*Appellant,*

vs.

Illinois Farmers Insurance Company, an Illinois corporation,

*Respondent.*

**BRIEF OF AMICUS CURIAE  
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## ISSUE

Should Minnesota recognize an entirely new cause of action for negligent infliction of emotional distress for bystanders who experience emotional distress as a result of fear for the safety of another?

## INTRODUCTION

Minnesota courts have never imposed a duty upon persons to shield bystanders from their fear for the safety of a third party injured in close proximity to them. The MDLA respectfully submits that this Court should not depart from over 100 years of legal precedent and impose such a duty now. Under Minnesota law, there is no cause of action for negligent infliction of emotional distress, where the plaintiff has witnessed harm to a third party and fears for that person's safety, even if the plaintiff is in the zone of danger. *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980); *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 32 (Minn. 1982); accord *Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534 (Minn. Ct. App. 1994).<sup>1</sup>

Indeed, a person's fear for the safety of another is not an element of negligent infliction of emotional distress, and there are valid reasons why this is so. The current legal framework – to require the plaintiff to be in the zone of danger and to have physical manifestations of severe emotional distress, caused by the plaintiff's fear for her own safety - acts as a proper safeguard to ensure that the

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<sup>1</sup> This brief was authored by Larson • King, LLP in its capacity as attorneys for the Minnesota Defense Lawyers Association (“MDLA”). All costs related to the preparation of the brief have been paid by the law firm.

imposition of liability on a tortfeasor is not out of proportion to his or her actual culpability. The MDLA asserts that Minnesota's "zone of danger" rule is far more preferable to bystander rules adopted in other jurisdictions: "[A]lthough it may occasionally leave a seemingly deserving plaintiff without recovery, the zone of danger rule far surpasses other approaches by providing a practical and equitable means of determining liability in a potentially uncontrollable area of negligence law." Paul V. Calandrella, Note, *Safe Haven for a Troubled Tort: A Return to the Zone of Danger for the Negligent Infliction of Emotional Distress*, 26 *Suffolk U.L. Rev.* 79 (1992) ("*Safe Haven for a Troubled Tort*").

Appellant and the MTLA argue for an entirely new cause of action under the guise of seeking to expand the measure of damages. Under their theory, because Appellant GERALYN ENGLER met all the requirements of a negligent infliction of emotional distress claim, she should be able to recover damages for emotional distress unrelated to any fear for her own safety. Such an argument is wholly inconsistent with this Court's careful articulation of the factors that ensure the genuineness of such claims. In short, Appellant and the MTLA seek to create a new breed of emotional distress claims, embracing expansive damage theories that go far beyond the prudent boundaries that Minnesota courts have framed, for very good reason, over the years.

Section I of this brief canvasses Minnesota's long-standing negligent infliction of emotional distress doctrine, and points out that expanding tort damages to encompass emotional distress arising out of a fear for a third party's

safety is not warranted, and extremely unwise. Section II asserts that a tortfeasor does not owe a duty to protect a bystander from emotional distress and that a bystander's emotional distress arising out of fear for a third party's safety is not proximately caused by a person's negligent injury to that third party. Section III argues that this Court should decline the invitation to depart from over 100 years of legal precedent and impose a duty upon persons to shield bystanders from their fear for the safety of a third party.

The MDLA respectfully submits that the Court should reaffirm Minnesota's rule that a negligent infliction of emotional distress plaintiff is only allowed to recover damages for distress arising out of a reasonable fear for one's own safety.

## ARGUMENT

### **I. MINNESOTA'S CAREFULLY CONSTRUCTED NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS DOCTRINE SHOULD NOT BE EXPANDED.**

Mental distress claims are not favored in Minnesota. *See, e.g., Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 437 (Minn. 1983). Over the years, Minnesota courts have closely scrutinized negligent infliction of emotional distress claims. Minnesota courts have been mindful to develop the necessary elements of such claims with care. To date, courts have limited their application, due to a variety of concerns revolving around the inherent unreliability of this broad category of tort claims. This section analyzes, from a historical perspective,

the evolution of negligent infliction of emotional distress claims in Minnesota, and identifies the judicial concerns that have limited the expansion of such claims.

For over 100 years, Minnesota courts have recognized a cause of action for negligent infliction of emotional distress. *See K.A.C. v. Benson*, 527 N.W.2d 553, 558 (Minn. 1995). The tort, born out of common law negligence, requires a plaintiff to establish (1) a duty; (2) a breach; (3) that the breach of the duty proximately caused the plaintiff's injury; and (4) that the plaintiff has in fact suffered injury. *See Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N.W. 1034 (1892). Due to valid concerns about the reliability and potential volume of emotional distress claims, this Court created additional elements that a plaintiff must establish in order to pursue such claims: (1) that the plaintiff was within a zone of danger of physical impact; (2) that she reasonably feared for her own safety; and (3) that she suffered severe emotional distress with attendant physical manifestations as a result of her fear for her own safety. *Benson*, 527 N.W.2d at 557.

These additional proof elements accurately reflect the Minnesota judiciary's historical caution regarding emotional distress claims. *See Benson*, 527 N.W.2d at 559. As this Court stated in *Hubbard*: “[w]e have been careful to restrict the availability of such damage to those plaintiffs who prove that emotional injury occurred under circumstances tending to guarantee its genuineness.” 330 N.W.2d at 437. Minnesota courts have identified the fear of fraudulent lawsuits, the potential flood of unwarranted litigation, significant

problems of proof, unlimited liability for the actions of tortfeasors, and a lack of precedent in the common law as factors which support the level of restraint that Minnesota courts have adopted thus far. See *Stadler v. Cross*, 295 N.W.2d 552, 554-55 (Minn. 1980); *Okrina v. Midwestern Corp.*, 282 Minn. 400, 165 N.W.2d 259, 263 (1969); *Carlson v. Ill. Farmers Ins. Co.*, 520 N.W.2d 534, 537 (Minn. Ct. App. 1994); see also *Restatement (Second) of Torts* § 436A, cmt. b. (1965).

The express requirement that the plaintiff's emotional distress arise out of fear for her own safety is a legitimate tort concept that has properly kept negligent infliction of emotional distress claims in check. Accord *Restatement (Second) of Torts* § 313, cmt. d. (1965). In *Okrina*, this Court specifically found that the plaintiff – who witnessed, heard, and escaped the collapse of a nearby building wall – could recover damages for her mental distress because she “feared for her own safety, and her distress was not occasioned by concern for the safety of others.” 165 N.W.2d at 262 (emphasis added). The Court acknowledged that recovery for mental distress has been denied where such injuries “breed fraudulent actions; unleash a flood of litigation; cannot be proved except by subjective and remote causation; and have no precedent in the common law.” *Id.* at 263.

Since *Okrina*, this Court has also noted that 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 meaningfully applied by courts and juries, then the imposition of liability will become arbitrary and capricious.” *Stadler*, 295 N.W.2d at 554.

As noted by one legal commentator, "[w]hile intentional infliction of emotional distress hinges on a threshold question of extreme and outrageous behavior, bystander's claims for negligent infliction of emotional distress depends more on the amorphous notions of duty, foreseeability, and proximate cause." *Safe Haven for a Troubled Tort* at 83. In such bystander emotional distress claims, courts are necessarily forced to shift their attention away from plaintiff's physical safety in the zone of danger to a plaintiff's emotional stability, which can "strain" these traditional negligence concepts, due to the inherent difficulties in proving mental distress claims in general. *Id.*

Any attempt to identify and define the population of potential persons who might be classified as appropriate bystanders to recover damages for emotional distress claims as advocated by Appellant and the MTLA would ultimately result in a process fraught with uncertainty. As this Court observed in *Stadler*:

'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.' 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? . . . As Professor Prosser concedes, such limitations are quite arbitrary.

*Stadler*, 295 N.W.2d at 555 (referencing *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 312-13, 379 P.2d 513, 523-24 (1963)).

Professor Prosser's requisite tort boundaries – "the three limits of closeness in time, place, and relationship" – remain as important today as when they were

originally conceived and later recognized by this Court.<sup>2</sup> The complex nature of ever-changing family structures and diverse inter-personal relationships in modern America creates the burdensome and problematic task of forcing courts and juries to decide precisely which family member, friend, life-partner, or coworker has a legally adequate relationship with an injured person sufficient to pursue an emotional distress claim. While such decisions could be made on a case-by-case basis, the inevitable result would be arbitrary line drawing from one court or jury to the next. As noted by Respondent Illinois Farmers, California has labored, with some difficulty, in its attempts to evenly apply the bystander rule since its inception. See Respondent's Brief at 15-19.<sup>3</sup>

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<sup>2</sup> W. Prosser, Handbook of the Law of Torts s 54 (4<sup>th</sup> ed. 1971), as referenced in *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980).

<sup>3</sup> One legal observer has canvassed the terrain in this area, and points out that seven other states in addition to California have, at one time or another, adopted a cause of action for negligent infliction of emotional distress based solely on foreseeability. See Meredith A. Moore, Note, *South Dakota's Interpretation of Negligent Infliction of Emotional Distress and the Zone of Danger Rule in Nielson v. AT & T Corporation: A Dangerous Hybrid*, 45 S.D. L. Rev. 379 n. 259 (1999-2000). See generally *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 369 (Ala. 1981); *Montinieri v. Southern New England Tel. Co.*, 398 A.2d 1180 (Conn. 1978); *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970); *Gammon v. Osteopathic Hosp.*, 534 A.2d 1282 (Me. 1987); *Johnson v. Ruark Obstetrics & Gynecological Assocs.*, 395 S.E.2d 85 (N.C. 1990); *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983); *Hunsley v. Giard*, 553 P.2d 1096 (Wash. 1976).

As Moore notes, Hawaii illustrates one of the more compelling examples of the far reach of foreseeability, which permitted recovery for the plaintiff's emotional distress suffered as a result of the negligent death of the plaintiff's beloved dog. See *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1069 (Haw. 1981).

(continued next page)

Moreover, if the line were to be judicially drawn—for instance, that only parents could recover damages for emotional distress resulting from witnessing an injury to their children—the litigation floodgates would open with numerous claims from adoptive parents, grandparents, step-parents, or children who witnessed their parents injured, and other parties that had *in loco parentis* status. See *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422 (1969) (noting that once foreseeability is recognized for one type of bystander, it is not so easily limited to another).<sup>4</sup> The realistic hurdles in attempting to craft a workable bystander recovery rule in a non-arbitrary fashion are daunting. Indeed, the exceptions to a limitation on who may recover in these circumstances might eventually swallow the rule, which will place the justice system in a far more compromised position than before recognition of a bystander cause of action.<sup>5</sup>

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Significantly, due to similar decisions like *Campbell*, five of the eight states mentioned above ultimately reigned in their former decisions and reinstated more time-honored limitations on tort recovery for emotional distress. *Thing*, 771 P.2d at 814-830; *Maloney v. Conroy*, 545 A.2d 1059 (Conn. 1988); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990); *Gain v. Carroll Mill Co.*, 787 P.2d 553 (Wash. 1990) (rejecting bystander claim involving state trooper killed while family watched event on television).

<sup>4</sup> Accord Laura M. Raisty, *Bystander Distress and Loss of Consortium: An Examination of the Relationship Requirements in Light of Romer v. Evans*, 65 Fordham L. Rev. 2647, 2683 (1997) (concluding that those states which allow bystander claims only for those with a “significant relationship” but deny recovery for gays and lesbians violate equal protection principles).

<sup>5</sup> In those jurisdictions that have adopted a bystander emotional distress cause of action, courts have struggled to apply consistent rules to a plaintiff’s basis for recovery. See, e.g., *Pierce v. Casas Adobes Baptist Church*, 782 P.2d 1162, 1165 (Ariz. 1989) (stating that plaintiff must be “closely related” to victim within zone

Minnesota's negligent infliction of emotional distress law has been carefully constructed over the years to permit certain emotional distress claims without creating unlimited potential liability for a tortfeasor. Abandoning the requirement that the distress arise out of the "fear for one's own safety," to allow certain plaintiffs to recover damages arising out of fear for a close family member's safety, would create a doctrine that could not be consistently and meaningfully applied by both courts and juries. The imposition of liability from one case to the next would ultimately become arbitrary and capricious.

**II. CREATION OF A BYSTANDER EMOTIONAL DISTRESS CAUSE OF ACTION DOES NOT COMPORT WITH ESTABLISHED TORT PRINCIPLES.**

**A. MINNESOTA HAS NEVER USED A "BUT FOR" TEST OF FORESEEABILITY IN NEGLIGENCE CASES, AND SHOULD NOT ADOPT THAT TEST NOW.**

Appellant and MTLA essentially argue that a tortfeasor should be liable for every single foreseeable result of his or her negligent act. This is the classic "but for" foreseeability test, which considers that any injury, no matter how attenuated or remote in time, place, or relationship to the actual event, is foreseeable.

However, the "but for" causation rubric is not the accepted test for negligence in

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of danger); *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990) (limiting danger to "immediate" family members); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861, 866 (Tenn. 1978) (plaintiff must in zone of danger and witness injury to one "near and dear"); *Mobaldi v. Board of Regents of Univ. of Cal.*, 55 Cal. App. 3d 573, 576-77 (1976) (foster mother recovered for child's injuries although child neither natural or adopted); *Barnhill v. Davis*, 300 N.W.2d 104, 108 (Iowa 1981) (limiting recovery to family members "within the second degree of consanguinity or affinity").

Minnesota. *Harpster v. Hetherington*, 512 N.W.2d 585, 586 (Minn. 1994). Under Minnesota law, the negligent actions of the driver that injured Ms. Engler's son cannot be the proximate cause of her emotional distress, solely as it relates to the fear for her son's safety. *Id.*

As noted by this Court in *Harpster*, Appellant's reliance upon a "but for" causation test as the basis for recovery is flawed: "[t]his test has long been discredited in this state and was most recently rejected in *Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35 (Minn. 1982) [.]" *Id.* This Court further explained:

The problem with the 'but for' test, as this case illustrates, is that with a little ingenuity it converts events both near and far, which merely set the stage for an accident, into a convoluted series of 'causes' of the accident . . . not only does the 'but for' test obfuscate the legal doctrine of causation, but it distorts the basic tort concept of duty.

*Harpster*, 512 N.W.2d at 586.

In negligent infliction of emotional distress bystander cases, it is not the negligent driver that creates the bystander's mental distress, but rather the result, i.e., the injury to the third party that is considered to be the proximate cause of a plaintiff's alleged emotional distress. *See, e.g., Slaton v. Vansickle*, 872 P.2d 929, 931-932 (Okla. 1994).<sup>6</sup> To hold otherwise would mean that a bystander could hold a driver liable for distress caused by his mere *belief* that another is injured.

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<sup>6</sup> In *Slaton*, the bystander sought from a gun manufacturer damages for emotional and mental distress arising out of the death of young girl who had been shot by the manufacturer's gun when the bystander placed the gun in his truck. 872 P.2d at 930. The Oklahoma Supreme Court reaffirmed its rule that recovery for mental

Minnesota should continue to uphold the reasoning as applied in *Harpster* and *Kryzer*. While the negligent tortfeasor's driving conduct may have been the theoretical "but for" cause of the Appellant's alleged emotional injuries, they were not the *proximate* cause. Rather, it was the result of the negligent tortfeasor's driving conduct—the injuries to the child—that caused Appellant's emotional distress, just as any accident resulting in injuries to a loved one may cause emotional distress to a parent. However, "[b]ecause a single tragedy may unleash a wave of emotional distress extending to virtually anyone connected in some way with the victim, determining the extent of a defendant's liability strains the limits of the traditional negligence concepts of duty, foreseeability, and causation." *Safe Haven for a Troubled Tort* at 79.

**B. UNDER MINNESOTA LAW, THERE IS NO DUTY TO PROTECT A BYSTANDER FROM EMOTIONAL DISTRESS ARISING FROM THE FEAR FOR ANOTHER PERSON'S SAFETY.**

The Appellant's and MTLA's focus on foreseeability neglects a more important question – the pivotal issue of duty. *Accord Carlson v. Illinois Farmers*

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anguish is restricted to emotional trauma that "arises from an injury or wrong to the person rather than from another's suffering or wrongs committed against another person." *Id.* at 931. The Court refused to find the negligence in manufacture of the gun to be the proximate cause of the gunman's distress: "It is *not* the gun discharging that created [the bystander's] injury, but rather the result, i.e., the death of the plaintiff's daughter, that has caused [the bystander's] alleged mental and/or physical injury." *Id.* The Court concluded that recoverable damages must be personal: "[W]hat damages if any [the bystander] could have proven, he still cannot show his injury resulted from a wrong *to him* which was essential in order to recover his damages . . . . Rather, his injury resulted from the wrong done to another." *Id.* at 932 (emphasis supplied).

*Ins. Co.*, 520 N.W.2d 534, 537 (Minn. Ct. App. 1994); *Iacona v. Schrupp*, 521 N.W.2d 70, 73 (Minn. Ct. App. 1994); *see also Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952) (“The problem must be approached at the outset from the viewpoint of the duty of the defendant and the right of plaintiff, and not from the view point of proximate cause.”). Specifically, the proper focus depends on whether an actor should have a duty in the first instance to protect a bystander from distress arising from fear associated with another person’s safety.

Major factors that courts consider in deciding whether to impose a duty in a given case include: “[1] the judge’s sense of morality, [2] the foreseeability and extent of the likely harm from the defendant’s conduct, [3] the burden that the new duty will impose on the defendant, [4] alternative ways of protecting the plaintiff’s interest, [5] the increased safety likely to result from imposing the duty, [6] administrative problems for the courts in enforcing the duty, [7] problems of proof....” Joseph W. Glannon, *The Law of Torts* 197 (Aspen Pub. Inc. 2d ed. 2000) (hereinafter “*Glannon*”); *see generally Restatement (Second) of Torts* § 314 (1965). For instance, courts hesitate to create duties that impose excessive burdens on actors, even where injury may be foreseeable, such as a court’s refusal to impose a duty on school officials to supervise school children at bus stops. *Glannon* at 197. The rationale is that imposition of such an obligation would place an onerous burden on school operations. *Id.*

A rhetorical question perhaps, but nonetheless valid – where does a tortfeasor’s duty begin, but more importantly, where does it *end*, under Appellant’s

and MTLA's framework? A very realistic possibility appears to be that "[a] defendant's duty could further extend along the lines of proximate causation to include emotional trauma suffered by persons subsequently arriving at the scene of the accident, those later learning of the accident, or a family member who views the victim in a hospital emergency room." *Safe Haven for a Troubled Tort* at 84. Under Appellant's and MTLA's theory, foreseeability or proximate cause could arguably capture an unlimited class of plaintiffs and injuries. However, the traditional law of negligence, as adopted in Minnesota, properly limits an actor's duty to reasonably perceived risks. *Id.*

**1. Negligent Actors Should Not be Subject to Unlimited Liability Out of Proportion to Their Actual Culpability.**

To hold a tortfeasor has an absolute duty to protect all bystanders from emotional distress arising from fear for a third party's fate "would impose on a negligent tortfeasor liability out of proportion to his culpability." *Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534, 537 (Minn. Ct. App. 1994); *Iacona v. Schrupp*, 521 N.W.2d 70, 73 (Minn. Ct. App. 1994). A bystander's emotional distress arising from fear for another's safety might be theoretically foreseeable, but the practical foreseeability of such emotional distress claims, or the lack thereof, demands the use of judicial restraint. For each and every victim who suffers negligent physical injury, there may be any number of bystanders that may claim to have suffered emotional distress because of the alleged fear for that

person's safety. *Accord Glannon* at 220. Defendants should not be subject to such ill-defined and potentially staggering financial liability.

Indeed, injury arising from feelings for others who were directly injured by a defendant may be foreseeable, but such injury should nonetheless not be recoverable:

It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends.

*Glannon* at 220-21 (quoting Prosser and Keeton, *The Law of Torts* § 54, at 366 (2d ed. 1986)).

Minnesota courts have properly refused to create overly broad duties in order to expand the boundaries of prospective culpability. In *Carlson*, the Court of Appeals decided that the plaintiff was not entitled to damages for the emotional distress she suffered as a result of observing her friend's death. 520 N.W.2d at 538. There, the negligent driver/tortfeasor overturned a car containing Carlson, who was seriously injured, and her friend, who died instantly. *Id.* at 535. In rejecting Carlson's claims for emotional distress caused by her fear for her friend, Judge Short, writing for the Appellate Court, explained:

[T]o allow Carlson's [negligent infliction of emotional distress] claim to go forward, we would have to conclude that (1) the tortfeasor had a duty to treat Carlson's friend so as not to subject Carlson to emotional distress, and (2) Carlson has a legally protected right to be free from distress arising from harm to her friend.

520 N.W.2d at 537. The *Carlson* Court correctly stated that although the tortfeasor *did* have a duty to protect both Carlson and her friend from physical harm, the tortfeasor *did not* have a duty to protect Carlson from distress arising from the fate of her friend: “to hold otherwise would impose on a negligent tortfeasor liability out of proportion to his culpability.” *Id.* (referencing *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928));<sup>7</sup> *accord Iacona*, 521 N.W.2d 70.

The MDLA submits that the proper tort rule requires that an injury, whether emotional or physical, must be personal to the plaintiff. A negligent tortfeasor held liable for a bystander’s emotional trauma due to witnessing the fate of a third party becomes responsible for actions that are neither personal nor proximately

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<sup>7</sup> In *Cote v. Litawa*, the New Hampshire Supreme Court decided not to create a duty similar to that addressed in the present case:

[T]he plaintiff Lorraine must establish a legally protected right or interest to be free from shock or fright, with ensuing physical consequences, occasioned by the learning, immediately after its occurrence, of physical injury inflicted on her child by the negligent operation ... of defendant’s automobile; in other words, she must show a duty on the part of the defendant to so conduct himself with respect to the child, ... as not to subject the mother, ... to an unreasonable risk of shock or fright, with ensuing physical consequences, upon her learning immediately after its occurrence of injury inflicted by him on her child. In our opinion there is no such right in the plaintiff, and no such duty on the defendant. Such consequences are such an unusual and extraordinary result of the careless operation of an automobile that to recognize such a right and impose such a duty would, in our opinion, place an unreasonable burden upon users of highways.

96 N.H. 174, 177, 71 A.2d 792, 794-95 (1950).

related to the bystander's claimed injury. Such attenuated liability and damage theories are beyond the reasonable scope of an actor's duties under Minnesota law.

## **2. The Expansion of The Negligent Infliction of Emotional Distress Doctrine Will Compromise The Administration of Justice.**

Creation of a new cause of action for negligent infliction of emotional distress to fit the circumstances of the present case will create more confusion than clarity. As mentioned in section I, a decision to allow certain plaintiffs to recover emotional distress damages arising out of fear for another draws an arbitrary line in the sand. This section discusses additional complications to the administration of justice that negligent infliction of emotional distress bystander claims would create.

This Court has acknowledged "mistaken belief" concerns, where a negligent infliction of emotional distress plaintiff is honestly mistaken in believing the third person either is in danger or might be seriously injured. *See Stadler*, 295 N.W.2d at 555. In one context, it is theoretically foreseeable that parents might suffer emotional distress from the mistaken belief that he or she just witnessed their child injured by a car. In this instance, should the parents' mistaken belief be a superceding cause of the parents' injuries?

In the case at bar, the Appellant mistakenly believed that her son was dead. *See Respondent's Brief* at 5. However, under Minnesota law, a tortfeasor should not have a duty to protect a plaintiff from emotional trauma due to the plaintiff's *mistaken* belief that her son is injured or dead. Imagine, for the sake of argument,

that the “fear for one’s own safety” limitation is dropped and Minnesota courts refuse to allow recovery for mistaken beliefs. Under this new framework, courts will be unable to identify fraudulent damage claims, because the plaintiff’s now recoverable emotional distress from her fear for her child’s safety cannot be separated from her unrecoverable distress from her mistaken belief that her son was injured. Therefore, damages arising from distress beyond “fear for one’s own safety” should not be considered, because they will seriously compromise the administration of justice. *Accord Okrina*, 165 N.W.2d at 263 (recovery has been denied for emotional distress where such injuries breed fraudulent actions, unleash a flood of litigation, or cannot be proved except by subjective and remote causation).

The MDLA urges the Court to evaluate the wisdom of entertaining such claims, especially given a typical scenario where some or all of the plaintiff’s distress may originate from her own belief that she was contributorily negligent in allowing her child to enter the zone of danger. Courts will be unable to separate out the wheat from the chaff in these instances, and parse out claimed injuries that are actually caused by a plaintiff’s self-inflicted trauma or dismay arising from contributory negligence. *See Stadler*, 295 N.W.2d at 555 (acknowledging contributory negligence concerns).

This Court has also acknowledged that permitting bystander claims for emotional distress arising out of fear for a third person will eviscerate the current zone of danger requirements. *See Stadler*, 295 N.W.2d at 555. The Court,

quoting language from *Amaya*, rhetorically asked: “What is the magic in the plaintiff’s being ‘present’ [to witness the third party’s injury]?” *Id.* A plaintiff may suffer emotional trauma from fear for a third party’s safety by perceiving an accident from across the street, over the phone, or on television, just as he may suffer distress from perceiving an accident within the zone of danger. A rejection of the “fear for one’s own safety” requirement would destroy the zone of danger limitation, which prudently assures that a person’s negligence will not create an unlimited range of potential scenarios for broadly imposed liability.

### **III. A NEW CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS IS NOT WARRANTED.**

In a similar case, the New York Court of Appeals exercised the type of judicial restraint that the MDLA urges here. *See Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419 (1969). The broad issue in *Tobin* was “whether a mother may recover against a tort-feasor for her own mental and physical injuries caused by shock and fear for her two-year-old child who suffered serious injuries in an automobile accident.” *Id.* at 419. The narrow issue was “whether the concept of duty in tort should be extended to third persons, who do not sustain any physical impact in the accident or fear for their own safety.” *Id.* at 421.

The *Tobin* court correctly noted that the extension of duty proposed was more than a mere expansion of tort concepts; it was a proposed creation of an *entirely new cause of action*:

Its solution does not depend upon advances in medical science, namely, that mental traumatic causation can now be diagnosed

almost as well as physical traumatic causation. The question is profounder than that, *because there is now urged the creation of a new duty and therefore an entirely new cause of action.*

*Id.* (emphasis added). The *Tobin* court then noted that courts have created new causes of action in certain circumstances, but that such creation in this case would not be appropriate:

The impact on a mother of a serious injury to her child of tender years is poignantly evident. This has always been so. Unlike the factors which have brought about most expanding tort concepts, here there are no new technological, economic, or social developments which have changed social and economic relationships and therefore no impetus for a corresponding legal recognition of such changes. Hence, *a radical change in policy is required before one may recognize a cause of action in this case.*

*Id.* at 422 (emphasis added). The *Tobin* court also examined the many arbitrary lines that could be drawn in an effort to prevent unlimited liability. In the end, the court concluded that, “[a]ssuming that there are cogent reasons for extending liability in favor of victims of shock resulting from injury to others, *there appears to be no rational way to limit the scope of liability.*” *Id.* at 424 (emphasis added).

Analysis of case law in other jurisdictions illustrates that creation of bystander torts creates more confusion than it resolves. The California Supreme Court’s *Dillon v. Legg* decision was the first case that expanded bystander recovery for emotional distress to persons who neither suffered physical impact nor were in the zone of physical danger created by the defendant’s conduct. See Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg*, 68 Cal.2d 728, 69

*Cal. Rptr. 72, 441 P.2d 912 (1968), or Refinements Thereof, 96 A.L.R.5th 107, §2[a] (2004).* Since *Dillon*, the California Supreme Court has had to resolve “uncertainty over the parameters of the [negligent infliction of emotional distress] action, uncertainty that has troubled lower courts, litigants, and, of course, insurers.” *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989).

Minnesota’s current parameters for a negligent infliction of emotional distress claims do not create such uncertainties. California’s efforts to reconcile the inherent difficulties of controlling the mushroom effect of such lawsuits, post-*Dillon*, are a strong indication that a similar expansion of negligent infliction of emotional distress claims in Minnesota would create a virtual Sargasso Sea of potential liability scenarios, where courts and juries would become hopelessly lost, in the vain attempt to apply consistent and meaningful results, in a fair and well-reasoned fashion. *See, e.g., Stadler v. Cross*, 295 N.W.2d at 554. Currently, a tortfeasor’s liability has clear, well-defined boundaries, and any adoption of a bystander recovery rule for emotional distress damages caused by fear for the safety of another introduces an unknown amount of additional liability for such tortfeasor. *Accord Thing*, 771 P.2d at 821 (“Little consideration has been given in post-*Dillon* decisions to the importance of avoiding the limitless exposure to liability that the pure foreseeability test of ‘duty’ would create and towards which these decisions have moved.”).

The MDLA submits that this Court's power to adopt common law doctrines should not be exercised here. This Court has prudently observed that as society changes over time, the common law must also evolve:

It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, prosecution, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions.

*Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234 (Minn. 1998). There are no changed conditions in today's society which suggest a new cause of action for bystander negligent infliction of emotional distress claims arising out of fear for the safety of another is appropriate. *Accord id.* at 235-36 (refusing to adopt a new cause of action for the tort of false light publicity).

The MDLA acknowledges the emotional appeal of Appellant's and MTLA's argument that a parent who views an accident should be able to bring a claim for emotional distress arising out of the fear for her child. However, not all of life's unfortunate suffering either can, or should, be resolved by the courts of law. The MDLA respectfully submits that the same concerns which have limited negligent infliction of emotional distress claims in Minnesota—the fear of fraudulent lawsuits, the potential flood of unwarranted litigation, significant problems of proof, unlimited liability for the actions of tortfeasors—have not waned since the *Okrina* decision in 1969. There are no additional meaningful

societal, economic, or legal reasons to adopt a new bystander cause of action today than there were over 35 years ago. *Accord Stadler*, 295 N.W.2d 552, 554-55; *Okrina*, 282 Minn. 400, 165 N.W.2d 259, 263.

If this Court is nonetheless inclined to adopt some form of bystander claim for emotional distress, the *Restatement (Second) of Torts* § 46 (2) may provide this Court with the vehicle to do so. This Court previously adopted the formulation set forth in Section 46 (1) of the *Restatement (Second) of Torts* with respect to the elements necessary to prove *intentional* infliction of emotional distress, in *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428 (Minn. 1983). Section 46 (2) of the *Restatement (Second) of Torts* provides:

(2) where such conduct is directed at a third person, the actor is subject to liability if he *intentionally or recklessly* causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.

*Restatement (Second) of Torts* § 46 (2) (1965) (emphasis added). As this Court will recall, it took up the issue of whether to adopt the elements of Section 46 (2) of the *Restatement (Second) of Torts* in *Dornfeld v. Oberg*, 503 N.W.2d 115 (Minn. 1993).

In *Dornfeld*, the insured's wife brought a claim for intentional and reckless infliction of emotional distress arising from an accident in which her husband was killed at the side of a road while changing a tire by a drunk driver. *Id.* Decedent's wife was sitting in the car as a passenger at the time of the accident. *Id.* Although

this Court categorically rejected the wife's claim for intentional infliction of emotional distress, finding that defendant's conduct was not "directed at" the decedent husband within the meaning of Section 46 (2), this Court nonetheless reserved its overall judgment on this issue, stating "we decline to reach the issue of whether this [C]ourt would adopt section 46 (2) of the *Restatement (Second) of Torts* under a different set of facts." *Dornfeld*, 503 N.W.2d at 120.

If *Dornfeld* provides any guidance, it appears this Court may be willing to consider a bystander cause of action, in the context of intentional and reckless infliction of emotional distress claims. Recognition of such a claim in cases involving intentional or reckless conduct would not implicate the negligence principles of duty and foreseeability as discussed in this Amicus Brief. While not advocating that this Court should adopt any form of bystander claim, the MDLA respectfully submits that the Court should consider any new cause of action, if at all, only in cases involving intentional or reckless conduct.

### CONCLUSION

As aptly stated by our United States Supreme Court, "[e]very 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 a controllable degree." *Consolidated Rail Corp. v. Gottschall*, 512 U.S. 532, 552-53 (1994). For over 100 years, the Minnesota courts have carefully controlled legal consequences for negligence infliction of emotional distress claims. In the end, there is no rational

way to allow recovery for victims of shock resulting from injury to others and, at the same time, properly limit the scope of potential liability.

On one hand, to allow recovery for *all* plaintiffs who suffer emotional distress resulting from fear for a third party's safety would create unlimited culpability. Alternatively, a decision to limit recovery to *certain* plaintiffs—for instance, those with a particular familial relationship to the third party—would inevitably involve arbitrary decisions about which category of persons should be able to recover, to the exclusion of others. There is, however, a better solution: to simply stay the course as previously articulated by this Court. The MDLA respectfully submits that Minnesota's time tested "fear for one's own safety" limitation on negligent infliction of emotional distress claims should be upheld.

Respectfully submitted,

Dated: August 18, 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.

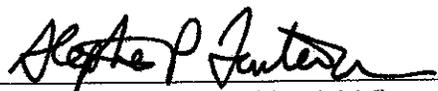
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**CERTIFICATION OF BRIEF LENGTH**

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

1. *Amicus Curiae* Minnesota Defense Lawyers Association's Brief contains 5,634 words;
2. The software used is Microsoft Office 2002; and
3. The Brief complies with the typeface requirements.

Dated: August 18, 2005

  
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