

IN THE SUPREME COURT OF THE STATE OF OREGON

STACIE PHILIBERT, in her capacity as guardian ad litem for CAMERON HOLLENBECK-HATCH and DOMANICK HOLLENBECK- HATCH,)	Supreme Court No. S063738
)	
)	Court of Appeals No. A156192
)	
Plaintiff-Appellant, Petitioner on Review)	Jefferson County Circuit Court No. 13CV1410
)	
vs.)	
)	
DENNIS KLUSER,)	
)	
)	
Defendant-Respondent, Respondent on Review)	

RESPONDENT'S BRIEF ON THE MERITS

On Review of the *Per Curiam* Opinion of the Court of Appeals on Sept. 30,
2015 by Lagesen, Presiding Judge and Nakamoto and Garrett, Judges, in an
Appeal from the Judgment of the Jefferson County Circuit Court, The
Honorable Gary L. Williams, Judge

Kathryn H. Clarke, OSB No. 791890
PO Box 11960
Portland, OR 97211
(503) 460-2870
kathrynhclarke@mac.com

Tim Williams, OSB No. 034940
Dwyer Williams Potter
1051 NW Bond Suite 310
Bend, OR 97701
(541) 617-0555
tim@rdwyer.com

Of Attorneys for Plaintiff-Petitioner

Flavio A. Ortiz, OSB No. 053400
Martin M. Rall, OSB No. 843298
Lachenmeier Enloe Rall & Ortiz
9600 SW Capitol Highway, Ste. 200
Portland, OR 97219
503-768-9600
alex@lerlaw.com; marty@lerlaw.com

Cody Hoesly, OSB No. 052860
Larkins Vacura LLP
121 SW Morrison Suite 700
Portland, OR 97204
503-222-4424
choesly@larkinsvacura.com

Of Attorneys for Defendant-Respondent

Of Attorneys for *Amicus Curiae*
Oregon Trial Lawyers Assn.

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INTRODUCTION

This is a sad factual situation which involves claims for psychic or emotional injuries to two young plaintiffs from witnessing the death of a family member due to an auto accident. There is no allegation of reckless or intentional conduct on the part of defendant, and this is a case of ordinary negligence. The plaintiffs were not physically impacted by the collision.

This exact situation has not been addressed by this Court, although the issue has previously been addressed by the Oregon Court of Appeals, which declined to extend negligence liability in similar circumstances by recognizing a new cause of action for bystanders. Consistent with long-standing principles of Oregon negligence liability, this Court should similarly decline to recognize a new cause of action. Furthermore, under these circumstances, the wrongful death act provides an appropriate remedy for plaintiffs' family.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant accepts plaintiffs' Statement of Facts and Procedural History.

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QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question

Should this Court extend liability and create a new cause of action in a case of ordinary negligence to allow plaintiffs to recover consequential emotional injuries from witnessing the death of a family member?

The Proposed Rule

A defendant who negligently causes the death of another is subject to liability under the wrongful death act. This Court should not extend negligence liability to create a new separate cause of action for bystanders who suffer emotional injuries as a result of witnessing the death of a family member.

SUMMARY OF ARGUMENT

This Court has not recognized negligence based claims for solely psychic or emotional injury not accompanying actual “physical harm” or an injury to another “legally protected interest.” Furthermore, this Court has held that ordinary negligence is not so grievous as to hold the negligent actor liable, beyond the immediate victim’s injuries, to others who suffer injury as a consequence of that injury. These limiting principles have been described and applied in several analogous cases, in which this Court has declined to recognize new causes of action for consequential emotional injuries to indirect victims. Norwest v.

Presbyterian Intercommunity Hosp., 293 Or 543, 652 P2d 318 (1982); Hammond v. Cent. Lane Communications Ctr., 312 Or 17, 816 P2d 593 (1991).

The plaintiffs in this negligence case did not suffer actual physical harm, have not identified an injury to a legally protected interest, and their injuries are indirect and consequential, arising from the direct injury to another. Consistent with these precedents, this Court should decline to extend liability and decline to recognize a new cause of action for the negligent infliction of emotional distress for witnessing the death of a family member. This is especially appropriate under the circumstances, as plaintiffs' family is entitled to statutory remedies under the wrongful death act.

ARGUMENT

Oregon Negligence Case Law Addressing Psychic or Emotional Injuries

Norwest v. Presbyterian Intercommunity Hosp.

As plaintiffs recognize in their brief, Norwest v. Presbyterian Intercommunity Hosp., 293 Or 543, 652 P2d 318 (1982) provides the relevant framework for analyzing claims for psychic or emotional injuries. That case involved a claim for loss of “parental consortium,” due to the plaintiff’s 25-year-old mother becoming incapacitated due to medical malpractice. Oregon courts had not recognized such a claim before.

In determining whether such a claim for psychic or emotional injuries should be recognized, the court reviewed and summarized Oregon's case law, which addressed the "source and scope of" liability for a defendant. The court explained that:

"This court has recognized common law liability for psychic injury alone when defendant's conduct was either intentional or equivalently reckless of another's feelings in a responsible relationship or when it infringed some legally protected interest apart from causing the claimed distress, even when only negligently....But we have not yet extended liability for ordinary negligence to solely psychic or emotional injury not accompanying any actual or threatened physical harm or any injury to another legally protected interest." Id. at 558-59 (quotations omitted) (emphasis added).

In addition to these limitations of negligence liability, the court further noted that plaintiff's claim was subject to objection because his injury arose "solely as a consequence of an injury to another person." Id. at 599. The court explained that this objection was supported by its case law. In fact, the court had only recently ruled that a person could not recover for "consequential" economic harms resulting from the negligent injury to another person. Id. at 560-61 (referring to Ore-Ida Foods v. Indian Head, 290 Or 909, 627 P2d 469 (1981)). The principle that was expressed from the case law was that:

"[N]egligence alone, as a reason to shift the burden of a resulting loss, has not been deemed so grievous as to hold the negligent actor liable beyond the immediate victim's injury to others who suffer a loss only in consequence of that injury." Id. at 560-61.

The court further expressed the objection as follows:

“The obstacle to plaintiff’s action is that ordinarily negligence as a legal source of liability gives rise only to an obligation to compensate the person immediately injured, not anyone who predictably suffers loss in consequence of that injury, unless liability for that person’s consequential loss has a legal source besides its foreseeability.” Id. at 569. (emphasis added).

The Norwest court declined to depart from this general rule of negligence and therefore it declined to recognize plaintiff’s cause of action. Id. It is significant to note that the Norwest court never had any doubt that the plaintiff suffered real and severe psychic injuries. Id. at 569. And the court also recognized that a jury could have determined that the harm to plaintiff was foreseeable, since medical providers could assume that if a 25-year-old woman was incapacitated, she may have children who would, as a result, suffer from both immediate and long range psychic harms. Id. at 560. However, despite the fact that plaintiff suffered a real and foreseeable injury, the court recognized that pursuant to the court’s precedents, it was proper to maintain recognized limits on the scope of liability in cases of ordinary negligence.

As plaintiffs correctly point out, when the Norwest court was considering plaintiff’s proposed claim for parental consortium the court searched for analogous situations for guidance, and the court noted that it had not yet examined a bystander’s claim for emotional injury for witnessing an injury to a close relative. Id. at 559 fn. 18. However, it is important to note that the Norwest court also

observed that a claim for loss of parental consortium for growing up with a permanently disabled and helpless mother (which is what the plaintiff was claiming), could easily be more traumatic, serious, and longstanding than witnessing an injury or death. *Id.* at 325. Yet, the court declined to depart from the general principles of Oregon negligence law to extend liability for the very serious injuries involved in a loss of parental consortium, which is an interference with the very closest of relationships.

Saechao v. Matsakoun

Four years after Norwest was decided, in Saechao v. Matsakoun, 78 Or App 340, 342, 717 P2d 165 (1986), *rev dismissed*, 302 Or 155, 727 P2d 126 (1986), the Oregon Court of Appeals addressed whether a bystander could assert a claim for negligent infliction of emotional distress from witnessing the injury or death of an immediate family member. In Saechao, a two-year old was riding his tricycle on a sidewalk at an apartment complex when the defendant accidentally put her car in reverse and struck and killed the child. One of the two-year old's brothers was also hit and injured by the car. The accident was also witnessed by two more siblings of the two-year old who were within 15 feet. *Id.* at 342-43.

The Saechao court acknowledged that there was no Oregon precedent expressly addressing whether or when a bystander who witnesses the negligently caused death or injury of a family member could recover for emotional distress,

noting that the issue was one of first impression. Id. at 342; id. at fn 2 (referencing that in Norwest, the court indicated that the precise issue had not yet been addressed). The court considered the issue in the context of applicable precedent and in accordance with the recent analytic framework provided by the Norwest decision. With that framework in mind, the Saechao court analyzed the different approaches taken by courts in determining whether one could recover damages for witnessing the injury or death of another. The court described (1) the impact rule, (2) the “zone of danger” rule (3) the Dillon rule, and (4) the foreseeability rule.

The Saechao court stated that the **impact rule** required that a person claiming emotional distress needed to plead and prove a direct accompanying physical impact. Id. at 346. It was well-understood that the impact rule represented a minority view amongst the states, as the dissent cited to a law review article indicating that as of 1982 only four states had retained the impact rule. Saechao, 348 Or App at 350. However, the court recognized that the rule was consistent with existing case law, particularly Fehely v. Senders, 170 Or 457, 135 P2d 283 (1943) (holding that plaintiff who was pregnant when she was physically injured in a car accident could recover for apprehension that her unborn child may have been harmed or killed). Id. at 344. Therefore, recognizing the impact rule did not require the Saechao court to extend liability or recognize a new cause of action. The Saechao court recognized that as a practical matter, the impact rule provided a

clear test, and it would almost always be a simple task to determine who a negligent actor may be liable to. But most importantly, the impact rule was consistent with the principal summarized in Norwest that a defendant is typically only liable to those who were “immediately injured” and not those who claimed damages only as a *consequence* of an injury to another.

The Saechao court went on to discuss the zone of danger and Dillon rules. The court explained that the **zone of danger rule** would permit the recovery of emotional distress damages due to witnessing a fatal injury to a third person, only if the plaintiff was in the “zone of danger of physical impact” from the defendant’s negligence. The court acknowledged this was the apparent majority rule amongst the states and was the position adopted in the RESTATEMENT (SECOND) OF TORTS § 436 (1965). Saechao, 78 Or App at 347. The **Dillon rule**, based on the decision in Dillon v. Legg, 68 Cal 2d 728, 69 Cal Rptr 72, 441 P2d 912 (1968) implemented a multi-factor approach based on foreseeability in which the court would determine liability depending on whether the plaintiff was near the accident, whether the emotional distress arose from observing the accident or learning about it from others, and whether the plaintiff and victim were closely related. Saechao, 78 Or App at 347.

The Saechao court noted that for the purposes of the case both the zone of danger rule and the Dillon rule did not significantly differ and that both would

have applied to the facts. Adopting either of these approaches, however, would have established a new cause of action (*i.e.* an action not previously recognized in Oregon) for an indirect injury resulting from a direct injury to another. Id. At 347-48. The court noted that this was inconsistent with Norwest, in which the court declined to recognize a new cause of action for indirect psychic or emotional injuries. Id. The court also noted that the zone of danger and Dillon rules were arbitrary in some respects and provided a less clear rule of law, which further made the adoption of such rules inappropriate.

The Saechao court noted that the **foreseeability rule**, which would allow plaintiff to recover if the factfinder determined that emotional distress was foreseeable, was plainly contrary to Norwest's statement that mere foreseeability was not sufficient to allow a plaintiff to recover for damages arising from injury to another. Saechao, 78 Or App at 347.

Considering the different approaches in light of the principles described in Norwest, the Saechao court declined to recognize a new cause of action for bystander claims, and decided that the impact rule (which was previously recognized in Oregon's case law) should apply. The Oregon Supreme Court accepted review of the Saechao decision, but the matter was settled before a decision was made. The decision was not vacated, which preserved the precedential effect of the opinion.

Hammond v. Cent. Lane Communications Ctr. And Subsequent Cases

As plaintiffs conceded to the trial court, Oregon has continued to follow the impact rule. ER-11.

Most notably, the Oregon Supreme Court expressly addressed the impact rule in Hammond v. Cent. Lane Communications Ctr., 312 Or 17, 816 P2d 593 (1991). In Hammond, the plaintiff called 9-1-1 after discovering her husband, who suffered from a congestive heart failure, lying on the kitchen floor. Based on the information relayed from plaintiff, the 9-1-1 operator concluded that plaintiff's husband was dead and no emergency services were immediately dispatched, even though the operator told plaintiff someone would be arriving in a couple of minutes. There was evidence that plaintiff's husband died during the 45 minutes it took for assistance to arrive, as he made rasping, breathing sounds. When a deputy sheriff eventually arrived, on a "deceased person" call, he found plaintiff's husband to be dead. Id. at 20-21. Plaintiff sought to recover for psychic and emotional injuries due to the negligence of the 9-1-1 service. Id. at 21.

The Hammond court stated the general rule that claims for psychic or emotional injuries alone are recognized in limited situations. The court, summarizing the case law, explained:

"This court has recognized common law liability for psychic injury alone in three situations.... First, where the defendant intended to inflict severe emotional distress.... Second, where the defendant intended to do the painful act with knowledge that it will cause grave

distress, when the defendant's position in relation to the plaintiff involves some responsibility aside from the tort itself. Third, where the defendant's conduct infringed on some legally protected interest apart from causing the claimed distress, even when that conduct was only negligent...." Id. at 22-23 (citations omitted).

The Hammond court then cited Norwest for the proposition that ordinarily negligence only obligates a defendant to compensate a person immediately injured, and not those who suffer from foreseeable consequential injuries, "unless liability for that person's consequential loss has a legal source besides its foreseeability." Id. at 23 *quoting* Norwest, 293 Or at 569. In support of this proposition, the Hammond court cited several cases (including Saechao) for the proposition that claims for consequential psychic or emotional damages arising from harm to another are generally not recognized:

"*See* Nearing v. Weaver, *supra*, 295 Or at 708 (no recovery for psychic loss caused by physical injury to another person); *see also* Heusser v. Jackson County Health Dept., 92 Or App 156, 757 P.2d 1363 (1988) (no recovery where plaintiff sustained no impact); Saechao v. Matsakoun, 78 Or App 340, 341 n 1, 348, 717 P2d 165, *rev dismissed* 302 Or 155 (1986) (same)." Id. at 23-24.

The Hammond court characterized plaintiff as a bystander, and commented that her emotional distress due to defendant's negligence was a foreseeable harm. Id. at 24-25. However, the court explained that "a bystander's emotional well-being is not a legally protected interest unless liability for the injury 'has a legal source besides its foreseeability.'" Id. at 25 (emphasis added). Plaintiff failed to identify the violation of a "legally protected interest" other than foreseeability, so

the court concluded that “plaintiff may not recover for defendant’s alleged negligence, because she sustained no physical injury.” *Id.* at 25 (emphasis added). The court cited generally to Norwest v. Presbyterian Intercommunity Hosp., 293 Or 543, 652 P2d 318 (1982) in support of that proposition.

The Hammond court, after referencing plaintiff’s lack of physical injury, then expressly declined plaintiff’s invitation to “abandon the impact rule” and to adopt the more expansive rule of liability in the RESTATEMENT (SECOND) OF TORTS § 436 (which includes at subsection (3) the “zone of danger” rule referenced in Saechao). Hammond, 312 Or at 25-26. The court explained that it would not lightly overturn precedent, and noted that changes in policy preferences should not support changing the law, *especially* when there was an existing common law rule on a subject. *Id.* at 26; fn. 8. Plaintiff was unable to convince the court to reconsider the impact rule, which the court could have done if it believed that the rule was wrongly decided or if the factual assumptions underlying the rule had changed. *Id.* at 26.

Following the Hammond decision, the impact rule has remained well-embedded in Oregon’s case law and has been continuously recognized and applied by Oregon’s courts. *See* Curtis v. MRI Imaging Servs. II, 148 Or App 607, 612, 941 P2d 602 (1997) *affirmed* 327 Or 9, 956 P2d 960 (1998) (“[f]or at least 60 years, Oregon courts have assumed, albeit implicitly, that emotional distress

damages can only be recovered in cases involving physical injury—and then have proceeded to carve out exceptions to that general rule.”); Phillips v. Lincoln County Sch. Dist., 161 Or App 429, 984 P2d 429 (1999) (plaintiff’s claim was correctly dismissed based on the impact rule since she did not otherwise prove defendant violated a “legally protected interest” of hers); Chouinard v. Health Ventures, 179 Or App 507, 513-14, 39 P3d 951 (2002) (noting that Hammond “reaffirm[ed] Oregon’s adherence to the impact rule” and that Hammond’s adherence to precedent suggested that earlier opinions requiring “some form of physical injury, remain good law.”); Lowe v. Philip Morris USA, Inc., 207 Or App 532, 551, 142 P3d 1079 (2005) *affirmed* 344 Or 403, 183 P.3d 181 (2008) (negligence requires actual, present harm or injury; stating that Oregon courts have recognized claims for emotional distress caused by ordinary negligence “but only if the distress is accompanied by physical impact”). Doyle v. City of Medford, 356 Or 336, 376, 337 P3d 797, 820 (2014) (“[P]laintiffs have failed to satisfy any exception to the general rule that tort damages for psychic injury in the absence of physical injury are not recoverable. In that circumstance, judicial creation of a right of action based on a tort claim permitting the recovery of such damages would constitute a significant departure from current law in this state.”)

Plaintiffs' Claims for Emotional Injuries are Contrary to Oregon Negligence

Law

Plaintiffs acknowledges that in Norwest the court outlined the well-defined limits to liability in cases of ordinary negligence. Particularly, Norwest indicated that in such cases, the court had not extended liability for solely psychic or emotional injury not accompanying any “actual or threatened physical harm” or injury to another “legally protected interest.” The Norwest court further explained that there is an additional roadblock to liability when the injury arises “solely out of an injury to another” which requires the consequential loss to have a “legal source besides its foreseeability.” Norwest, 293 Or at 559, 569.

Plaintiffs’ claims for emotional injuries are simply inconsistent with and contrary to these principles, for the reasons stated below.

Threatened Harm Is Not A Basis For Extending Liability

Plaintiffs contend that the reference to “threatened physical harm” in Norwest means that anyone who was in risk of physical harm (i.e. was in a “zone of danger”) due to defendant’s negligence should be able to recover any and all injuries that they suffer, including emotional injury. Norwest, 293 Or at 559. However, in Lowe v. Philip Morris USA, Inc., 344 Or 403, 412, 183 P3d 181 (2008), this court noted that the reference to “threatened physical harm” in Norwest was *dictum* that “at most” left open a “possibility” for future courts to

recognize liability to bystanders, and that it would be “fallacious” to assume that Oregon law would or should allow for recovery of damages when there is a threat of harm. The Lowe court further noted that for the purposes of that case, it did not need to address how that *dictum* may have been effected by the Hammond decision. Id. See Hammond v. Cent. Lane Communications Ctr., 312 Or 17, 816 P2d 593 (1991) (rejecting plaintiff’s claim because she did not sustain a physical injury and also rejecting plaintiff’s invitation to overrule the impact rule).

There is no authority in Oregon for the proposition that “threatened physical harm” caused by ordinary negligence would support a claim for emotional distress. Oregon does not recognize any sort of general right to be free from experiencing distress or emotional injury due to being placed in fear of one’s safety. While Oregon recognizes the common law tort of assault, for which fright and distress are recoverable as damages, this tort is limited to intentional conduct. Olsen v. Deschutes Cty., 204 Or App 7, 24, 127 P3d 655, 665 (2006). (“Assault is defined as ‘an intentional attempt to do violence to the person of another coupled with present ability to carry the intention into effect.’”) (citations omitted). Obviously, we live in a world which is sometimes dangerous and near-misses and close calls occur with regularity, but such close calls do not translate into legal causes of action. The reference to “threatened physical harm” in Norwest cannot be the basis of liability.

Plaintiffs Have Not Identified an Injury to a Legally Protected Interest

Plaintiffs also argue that there is a “legally protected interest” against nearly being hit by a vehicle and witnessing another injured or killed. Again, this proposition is not supported by Oregon precedent.

As noted above, there is no general right or legally protected interest to be free from “threatened physical harm” caused by negligence.

Further, there is no general right or legally protected interest to be free from witnessing disturbing or devastating events. In Hammond v. Cent. Lane Communications Ctr., 312 Or 17, 25, 816 P2d 593 (1991), where the court declined to extend liability to a plaintiff who experienced what seemed to be her husband’s dying breaths due to defendant’s negligence, the court stated that “the bystander’s emotional well-being is not a legally protected interest unless liability for the injury ‘has a legal source besides its foreseeability.’” (emphasis added).

Although plaintiffs allege that defendant violated a traffic rule by entering the crosswalk, this is not supportive of a claim that there was an injury to a “legally protected interest” with a legal source besides its foreseeability. This case is unlike Nearing v. Weaver, 295 Ore. 702, 670 P2d 137 (1983) in which liability was based on the legislature’s creation of a statutory right of action. Rather, this is a case of straightforward negligence. Though courts have recognized that the violation of a motor vehicle statute can create a *presumption* of fault (see Barnum v. Williams,

264 Or 71, 79, 504 P.2d 122, 126 (1972)), such statutes do not create a new legally protected interest. *See Deckard v. Bunch*, 358 Or 754, 761 n.6, 370 P3d 478, 483 (2016) (citing *Barnum* and noting that rules of negligence *per se* apply “[w]hen a negligence claim otherwise exists.”) Certainly, there is no evidence that the legislature had any sort of intent in expanding liability to include emotional injury claims of bystanders when it passed legislation relating to traffic safety. *See Doyle v. City of Medford*, 356 Or 336, 376, 337 P3d 797, 820 (2014) (declining to create a tort remedy based on a statute where doing so would expand negligence law as to psychic injuries and when creating a tort remedy was not necessary to effectuate the legislative purpose).

Plaintiffs Injuries Are Consequential / Indirect

Plaintiffs face another hurdle, in addition to ones described above. Namely, that pursuant to *Norwest*, in cases of “ordinary negligence” there is a duty to compensate only the person immediately injured, but not those who suffered loss in consequence of that injury (unless, again, liability for that person’s consequential loss has a legal source besides its foreseeability). *Norwest*, 293 Or at 569.

Plaintiffs argue that this case involves “direct” rather than “indirect” or “consequential” injuries. However, this does not make any common sense. The entire premise of this action is that defendant should be liable for what plaintiffs

“witnessed”, i.e. seeing their brother killed when they were nearly hit in the process. ER 2 (Plaintiff’s Complaint at Paragraph 5). Again, even though such emotional injuries to plaintiffs may have been foreseeable, that does not change the fact that the emotional injuries to the claimants arose from harm to another, which generally precludes a right of recovery under Oregon negligence law.

The rationale for limiting claims for indirect or consequential injuries is well-founded. Whenever a person is seriously injured or killed due to another’s negligence, there is a likelihood that the person will have close friends and family who may be seriously impacted and experience grief, anger, and serious emotional distress that may be life changing and life-long. There is no question as to the foreseeability or the genuineness of such harm, just as the court recognized in Norwest, Saechao, and Hammond. But, the courts have recognized that it is important to keep a focus on the nature of the conduct of the defendant, and to prevent open-ended liability to anyone who may experience such emotional distress in cases of ordinary negligence.

The Court Should Decline Extending Liability Under the Circumstances
Problems With Expanded Theories of Liability

There is no question that cases such as these involve very sad fact situations. Yet, expanding liability is not the correct response. When the Saechao court faced nearly identical facts, it considered the utility and importance of clear rules of law

and causation and recognized limitations of liability. Therefore, the court declined to recognize a new cause of action with more open ended liability. The court noted that the proposed expanded rules of liability were subject to criticism for creating limits that are unsatisfactory or arbitrary. Saechao, 78 Or App at 348. The Saechao court noted, for example, that witnessing one's child be struck by a vehicle from a window inside a house would be as equally distressing as witnessing the accident from outside the house near the collision—yet under the zone of danger rule, a parent would only recover damages under one of these circumstances. Id. Similarly, a person who does not fit the criteria for recovery under the Dillon rule may suffer at least as much if not more than someone who does. *See Colbert v. Moomba Sports, Inc.*, 163 Wn2d 43, 176 P3d 497 (Wash 2008) (applying modified Dillon rule and holding that a father seeing his daughter's drowned body pulled from a lake may not recover); Ko v. Seaview Chevrolet, 2010 Wash App LEXIS 1491 (Wash App 2010) (unpublished opinion) (death from the shock and stress of a spouse being seriously injured did not support recovery under the Dillon rule).

Expanding liability would also raise numerous practical issues related to the scope of liability. Implementing the zone of danger or Dillon rules would give rise to disputes about the legal significance of a multitude of issues which may need to be addressed by the appellate courts, including, but not limited to: the nature of the

relationship between the victim and bystander (including whether relation by blood or marriage is required, and if so, what degree of relation is required), the size of the zone of danger or the proximity of the bystander to the accident when it occurs, the amount of time that can elapse after the accident occurs before the bystander discovers that accident, whether the accident scene is modified before the bystander discovers the accident, etc.

Limits Applicable to Claims Based on Family Relationships

In Norwest, after the court examined the scope of negligence liability, it then considered existing Oregon case law and analogous situations relating to claims affecting family relationships, to consider whether a claim for loss of parental consortium should be recognized. Id. at 569. The court did not find sufficient reason to recognize a claim for loss of parental consortium, despite the fact that the court observed that having a debilitated parent would be extremely traumatic for a child, and that the effects may be more serious and long lasting than the harm one would have from observing the death of another. Id. at 556. Since Norwest did not recognize a claim for loss of parental consortium, the case is not supportive of recognizing emotional injury claims of bystanders who witness injury or death to their family members.

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The Wrongful Death Act Provides Appropriate Remedy to Plaintiffs' Family

When the Norwest court was searching for analogues in Oregon which may shed light on whether to recognize a new cause of action, the court spent a considerable amount of time considering the effect of the wrongful death act, even though Norwest did not actually involve a death. The wrongful death act was not addressed in either Saechao or Hammond, as the issue was not necessary to the outcome of those cases. However, the fact that the wrongful death act already provides a remedy in the present case should be considered when determining whether to extend negligence liability. The wrongful death statute may be viewed as either preclusive of plaintiffs' claims or, at a minimum, a limiting consideration.

In Horwell v. Oregon Episcopal School, 100 Or App 571, 787 P2d 502 (1990), plaintiff claimed emotional distress arising from her mother's death due to defendant's negligence. Plaintiff argued that her claim was not precluded by the wrongful death statute because she was bringing the lawsuit in her individual capacity and because she was seeking emotional distress damages—which are not recoverable under the wrongful death statute. The court held that plaintiff's action was substantively one for wrongful death since plaintiff “alleged the death of her mother, caused by the defendant's acts or omissions, under circumstances that would have enabled her mother to maintain an action against defendants had she lived.” Id. at 575; *see* ORS 30.020 (1) (“When the death of a person is caused by

the wrongful act or omission of another...the personal representative of the decedent...may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer....”) The court held that since the wrongful death statute did not provide for emotional distress damages, that did not mean that plaintiff’s claim was not governed by the wrongful death statute; it only meant that such damages were not recoverable by plaintiff. Id. Similarly, in the present case, plaintiffs have alleged the death of their brother, caused by defendant’s negligence, under circumstances that would have allowed their brother to maintain an action against defendant if he had lived. Accordingly, defendant contends that pursuant to Horwell, the wrongful death act provides the appropriate remedy.

The Horwell court explained that it was not addressing whether all common law claims were precluded by the wrongful death statute, and cited to Evans v. Salem Hospital, 83 Or App 23, 730 P2d 562 (1986) *rev den* 303 Or 331 (1987). The Evans case involved a claim for intentional infliction of emotional distress relating to defendant’s medical malpractice that resulted in death. However, the Evans court dismissed the claim based on the statute of limitations, so statements regarding the relationship between the wrongful death statute and common law tort claims were presumably *dicta*.

But, there is further authority for the proposition that the wrongful death act should preclude common law tort actions arising out of someone's death. *See Harp v. Montgomery Ward & Co.*, 223 F Supp 780 (D Or 1963) (when a spouse is killed immediately, Oregon's wrongful death statute applies and therefore there is no common law claim of loss of spousal consortium); ORS 30.020 (2)(d) (wrongful death action to include, for the decedent's spouse, pecuniary loss and for loss of the society, companionship and services of the decedent); *see also Simons v. Beard*, 188 Or App 370, 379, 72 P3d 96 (2003) (in medical malpractice case, plaintiff delivered a dead child, and brought a claim for her own emotional distress based on the impact rule and her husband filed a separate action for wrongful death of the unborn child; plaintiff acknowledged that she could not recover emotional distress damages arising from the death of the child, but only for trauma and apprehension about the child that antedated the child's death).

The legislature obviously has had the opportunity to consider what damages should be compensable under the wrongful death act, and has declined to extend liability to include a survivor's mental anguish. *See Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543, 543, 652 P2d 318 (1982) (noting that liability under the wrongful death act presents a special case in which liability is extended beyond providing restitution only to the immediately injured person); *Demars v. Erde*, 55 Or App 863, 866, 866 fn 2, 640 P2d 635, 637 (1982) *rev. den.* 293 Or 146

(1982) (purpose of wrongful death act is to provide remedy for wrongful death where none existed at common law) (“The 1973 amendments to ORS 30.020 originally contained a provision that a survivor's mental anguish be compensable under the wrongful death law. H.B. 2350 (1973). That provision was deleted from the amendments passed by the legislature. Or Laws 1973, ch 718.”).

Even if the wrongful death statute does not expressly preclude a recovery, it creates additional questions regarding whether the court should be recognizing new remedies arising out of the death of another when the legislature has described the available remedies and beneficiaries in the case of a wrongful death in considerable detail with the apparent goal of providing relief to the decedent’s immediate family.

Furthermore, when a negligent actor resolves a wrongful death claim, he or she may fully expect that all claims relating to that death have been resolved. However, if this court were to extend liability to bystanders who were not even impacted in an accident (or to some, based on Dillon, who were not even present at the time of the accident), this would obviously create potential uncertainty regarding a defendant’s liability to unknown or unidentified bystanders, especially when bystanders may be minors and their claims are subject to tolling provisions.

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Plaintiffs' Reliance on Out of State Authorities is Misplaced

A considerable portion of plaintiffs' argument for expanding liability is based on decisions and judicial trends throughout the country. However, this is not sufficient to justify a change in Oregon's already established law. As the court stated in Lowe v. Philip Morris USA, Inc., 344 Or 403, 415, 183 P3d 181, 187 (2008), "[o]ur precedents control this issue, and the differing decisions from the other jurisdictions do not provide a basis for overruling Oregon's well-established negligence requirements."

And, even though the trend in other states has been an expansion in liability, there are many unique considerations for why courts end up adopting certain positions, and there are countless nuances to their positions. *See e.g.* Conrail v. Gottshall, 512 US 532, 555, 114 S Ct 2396, 2410, 129 L Ed 2d 427, 447 (1994) (indicating the impact rule was not consistent with the broad remedial goals of the federal statute under consideration); Gates v. Richardson, 719 P2d 193 (Wyo. 1986) (limiting recovery to only those who could recover under wrongful death statute); Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 NC 283, 306-307, 395 SE2d 85, 99 (NC 1990) (rejecting physical impact requirement to allow recovery for medical malpractice related to delivery of dead child); Kraszewski v. Baptist Med. Ctr. of Okla., Inc., 1996 OK 141, P12, 916 P2d 241, 248 (Okla 1996) (stating that "direct victim" may recover for viewing injury to

another; case involved husband and wife who were both struck by drunk driver while walking and wife died as a result of injuries); *See also* Gray v. Inova Health Care Services, 257 Va 597, 598, 514 SE2d 355, 356 (Va. 1999) (applying impact rule where mother witnessed her daughter have an adverse reaction due to the negligent administration of a drug; court rejected mother’s argument that she stated claim for negligent infliction of emotional distress “independent of physical impact or injury.”)

CONCLUSION

Whenever someone is seriously injured or killed in an accident, the victim’s relatives and loved ones will learn about it and suffer in a variety of different ways. These are some of life’s most difficult moments. However, this does not mean that liability for ordinary negligence should be extended to make such emotional injuries compensable.

As stated above, this court has declined to extend liability for emotional injuries in ordinary negligence cases involving equally or even more traumatic situations. It is neither necessary or appropriate to expand liability beyond what has been recognized in Oregon’s precedents, particularly as the wrongful death act provides a remedy for plaintiffs’ family.

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The trial court's dismissal of plaintiffs' claims should be affirmed.

Respectfully submitted,

LACHENMEIER ENLOE RALL & ORTIZ

/s/ Flavio A. Ortiz

Flavio A. Ortiz, OSB No. 053400

Martin M. Rall, OSB No. 843298

9600 SW Capitol Highway, Ste. 200

Portland, OR 97219

503-768-9600; 503-768-9133 (fax)

alex@lerlaw.com; marty@lerlaw.com

Attorneys for Defendant/Respondent Kluser

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE
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Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6185.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

LACHENMEIER ENLOE RALL & ORTIZ

/s/ Flavio A. Ortiz

Martin M. Rall, OSB No. 843298

Flavio A. Ortiz, OSB No. 053400

9600 SW Capitol Highway, Ste. 200

Portland, OR 97219

503-768-9600

503-768-9133 (fax)

alex@lerlaw.com; marty@lerlaw.com

Attorneys for Defendant/Respondent Kluser

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on July 11, 2016, I e-filed the foregoing Respondent's Brief on the Merits with the State Court Administrator and by doing so, caused a true copy to be served electronically on:

Kathryn H. Clarke, Of Attorneys for Plaintiff-Petitioner

Cody Hoesly, Of Attorneys for *Amicus Curiae* Oregon Trial Lawyers Ass'n

Service was also made via email and first class mail on July 11, 2016 to:

Tim Williams
Dwyer Williams Potter
1051 NW Bond St. Ste. 310
Bend OR 97701
tim@rdwyer.com

Of Attorneys for Plaintiff-Appellant

LACHENMEIER ENLOE RALL & ORTIZ

/s/ Flavio A. Ortiz

Martin M. Rall, OSB No. 843298
Flavio A. Ortiz, OSB No. 053400
9600 SW Capitol Highway, Ste. 200
Portland, OR 97219
503-768-9600
503-768-9133 (fax)
alex@lerlaw.com; marty@lerlaw.com
Attorneys for Defendant/Respondent Kluser