IN THE SUPREME COURT OF THE STATE OF OREGON

STACIE PHILIBERT, in her capacity as guardian *ad litem* for and , Plaintiff-Appellant, Petitioner on Review, v. DENNIS DIXON KLUSER, Defendant-Respondent, Respondent on Review.	)	Supreme Court No. S063738 Court of Appeals No. A156192 Jefferson County Circuit Court No. 13CV01410

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

On Petition for Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the
Jefferson County Circuit Court
The Honorable Gary Lee Williams, Judge

Opinion filed: September 30, 2015
Author of Opinion: Per Curiam

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I. This court should reject the "impact rule" of *Saechao*.

Plaintiffs, young boys, were crossing the street with their even younger brother when, out of nowhere, defendant's truck came and ran their brother over, killing him. Plaintiffs, who narrowly escaped getting killed themselves, helplessly watched as their brother died. They now suffer severe emotional distress, wrestling with depression, aggression, and anxiety attacks.

Plaintiffs brought suit against defendant for his negligent driving, but the trial court dismissed the case because plaintiffs had been lucky enough not to get hit by the truck. The trial court was bound to rule as it did, given the "impact rule" adopted in *Saechao v. Matsakoun*, 78 Or App 340, *rev dismissed*, 302 Or 155 (1986).

This court is not so bound. The Oregon Trial Lawyers Association (OTLA) urges this court to overrule *Saechao*. The rule of that case is anachronistic, arbitrary, harsh, and inconsistent with this court's precedents. This court has long approved of recovery for emotional distress whenever a "legally protected interest" is invaded, even if only negligently. In defining what is a "legally protected interest," this court has primarily looked for statuses, relationships, and standards of conduct that provide a limiting principle so that liability for emotional distress is not indefinite. And this court has repeatedly reserved the question presented here.

This court should hold that plaintiffs had legally protected interests in

avoiding the threat of imminent physical harm, and in avoiding having to witness their brother's violent death. Those interests limit recovery to persons who are in the "zone of danger" or who witness wrongful injuries to loved ones (or who, like these plaintiffs, suffer in both regards).

II. This court has a long history of allowing recovery of emotional distress damages absent physical impact.

A. Emotional distress damages are recoverable in numerous claims.

It has been said that, for generations, "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 proposition." *Curtis v. MRI Imaging Svcs. II*, 148 Or App 607, 612 (1997), *aff'd*, 327 Or 9 (1998). The situation is actually more nuanced.

This court has recognized the recoverability of emotional distress damages for the following common law intentional torts, none of which involve a physical impact on the plaintiff:

- Defamation. *Spain v. Or.-Wash. R. & N. Co.*, 78 Or 355, 363 (1915) (*dictum*); *Lane v. Schilling*, 130 Or 119, 131-32 (1929); *Hinish v. Meier & Frank Co.*, 166 Or 482, 506 (1941) (*dictum*); *Wheeler v. Green*, 286 Or 99, 123-24 (1979).
- Breach of promise of marriage. *Spain*, 78 Or at 363 (*dictum*); *Hinish*, 166 Or at 506 (*dictum*). This is a tort, not a contract, claim, *Osmun v. Winters*, 30 Or 177, 182 (1896).
- Alienation of affection. *Coates v. Slusher*, 109 Or 612, 630-31 (1924); *Hinish*, 166 Or at 506 (*dictum*). This claim has since been abolished. ORS 31.980.
- Trespass to real property. *Quillen v. Schimpf*, 133 Or 581, 590-97 (1930); *Douglas v. Humble Oil & Refining Co.*, 251 Or 310, 317 (1968).
- Trespass to chattels. *Quillen*, 133 Or at 590-97.

- Assault. *Hinish*, 166 Or at 506 (*dictum*).
- Wrongful use of civil proceeding (malicious prosecution). *Id.* (*dictum*).
- Invasion of privacy. *Id.*; *Tollefson v. Price*, 247 Or 398 (1967).
- Conversion. *Douglas v. Humble Oil & Refining Co.*, 251 Or 310 (1968); *Fredeen v. Stride*, 269 Or 369 (1974).
- Intentional infliction of emotional distress. *Pakos v. Clark*, 253 Or 113 (1969), and many subsequent decisions.
- Breach of fiduciary duty. *Farris v. U.S. Fid. & Guar. Co.*, 284 Or 453, 456 (1978) (*dictum*).
- Intentional interference with economic relations. *Mooney v. Johnson Cattle Co.*, 291 Or 709 (1981).
- Breach of confidentiality. *Humphers v. First Interstate Bank*, 298 Or 706 (1985).

In addition, this court has recognized the recoverability of emotional distress damages for the following common law negligence claims, none of which involve a physical impact on the plaintiff:

- Negligent handling of a family member's remains. *Hovis v. Burns*, 243 Or 607 (1966).
- Negligent interference with use and enjoyment of real property (nuisance). *Macca v. Gen. Tel. Co. of N.W.*, 262 Or 414 (1972); *Edwards v. Talen Irrig. Dist.*, 280 Or 307 (1977).
- Negligent violation of court order. *McEvoy v. Helikson*, 277 Or 781 (1977).
- Negligent violation of a duty to protect against emotional distress. *Curtis v. MRI Imaging Svcs.*, 327 Or 9 (1998).

This court also has, in appropriate circumstances, recognized statutory claims for emotional distress absent physical impact. *Nearing v. Weaver*, 295 Or 702 (1983) (recognizing claim for failure to arrest person who violates domestic protective order).

Indeed, although this court's case law conditions recoverability of emotional distress damages on the violation of a "legally protected interest,"

Norwest v. Presby. Intercomm. Hosp., 293 Or 543, 558-59 (1982), that case law "suggests that [physical harm] is merely one species (albeit one that occurs most frequently) of an injury to a legally protected interest." *Chouinard v. Health Ventures*, 179 Or App 507, 515 n4 (2002).

The requirement – and sufficiency – of such an interest is longstanding. *See Adams v. Brosius*, 69 Or 513, 517 (1914) ("Where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act.") (quoting *Larson v. Chase*, 50 NW 238, 239 (Minn 1891)); *Macca v. Gen. Tel. Co. of N.W.*, 262 Or 414, 420 n1 (1972) ("Where an independent basis of liability exists, irrespective of whether there existed physical injuries, recovery has been uniformly allowed for mental suffering and anguish."); *Nearing*, 295 Or at 707 ("The question, therefore, is whether plaintiffs pleaded an infringement by defendants of a legal right arising independently of the ordinary tort elements of a negligence action.").

B. Emotional distress damages are recoverable whenever a legally protected interest is violated.

Adams v. Brosius, 69 Or 513 (1914), embodies the nuances present in this court's cases. There, this court rejected a claim for emotional distress where a doctor breached a contract to care for the plaintiff's wife and the plaintiff consequently had to watch her die. *Id.* at 514-16. Although the claim was labeled as one for breach of contract, it actually sounded in tort. *Coffey v.*

N.W. Hosp. Ass'n, 96 Or 100, 116-17 (1920). The court in *Adams* agreed with "the correctness of the doctrine" that "[w]here the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act." 69 Or at 517 (quoting *Larson v. Chase*, 50 NW 238, 239 (Minn 1891)). But the court held that "[t]he direct and proximate result of the [defendant's] breach…was the suffering and mental anguish of the wife"; the husband's suffering was "too remote and consequential," being "but a sympathetic reflection of his wife's anguish and distress." *Id.* at 517-18.

Adams' rejection of emotional distress damages on proximate cause grounds was unremarkable, given the court's reliance on *Maynard v. Or. Co.*, 46 Or 15 (1904), and similar cases. *Id*. *Maynard* held that, although a person physically injured by another's negligence may recover for emotional distress naturally "resulting from the same cause," *i.e.*, physical pain, that person cannot recover for "anguish of the mind, wholly sentimental, arising from the contemplation of a disfigurement of the person" or "of any extraneous suffering or inconvenience that such condition might entail, whether it respects the person himself, or others dependent upon him." 46 Or at 18. In other words, *Adams* was decided under a "restrictive concept of mental anguish as an element of [consequential] damage." *Fehely v. Senders*, 170 Or 457, 476 (1943). *Fehely* abrogated that concept in favor of a "broader doctrine" of

proximate cause which permits recovery not only for physical pain but also "the numerous forms and phases which mental suffering may take." *Id.* at 464, 469, 472, 476 (quoting *Merrill v. L.A. Gas & Elec. Co.*, 111 P 534, 540 (Cal 1910)). This court subsequently abrogated the concept of proximate cause altogether in favor of a foreseeability analysis. *See Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 11-14 (1987) (so noting); *Deckard v. Bunch*, 358 Or 754, 761 (2016) (same). This calls into question the vitality of *Adams*' holding, premised as it was on a lack of proximate cause.

But *Adams*' agreement with *Larson* that emotional distress damages are recoverable for an infringement of a legal right remains the law to this day, as noted above. True, there were times when this court cited *Adams* for the proposition that "recovery for mental suffering unaccompanied by physical injury will not be permitted." *Spain v. Or.-Wash. R. & N. Co.*, 78 Or 355, 363 (1915). *See also Coffey*, 96 Or at 115-16 (same); *Rostad v. Portland R. L. & P. Co.*, 101 Or 569, 581 (1921) (same); *Hinish v. Meier & Frank Co.*, 166 Or 482, 506 (1941) (same); *Kinney v. State Indust. Acc. Comm'n*, 245 Or 543, 553 (1967) (citing *Rostad* for same proposition). Yet in each of those cases, the mischaracterization of *Adams* was *dictum* because all of the cases allowed recovery of emotional distress damages, except *Kinney*, where none were sought.

Moreover, contemporary decisions affirmed the recoverability of

emotional distress damages, absent physical injury, for a variety of claims. *Spain*, for example, recognized as "except[ions]" to the "rule" of *Adams* "cases of slander, breach of promise [of marriage] and the like." 78 Or at 363 (*dictum*). Likewise, *Hinish* followed its statement of the "rule" of *Adams* with the following: "But it is well settled that where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the direct, proximate and natural result of the wrongful act." 166 Or at 506 (citing *Larson* but, curiously, not *Adams*). *Hinish* held that "[v]iolation of the right of privacy is a wrong of that character" and in *dictum* listed several other claims for which emotional distress damages are recoverable absent physical harm. *Id.* This court subsequently affirmed awards of emotional distress damages in several other cases. *See Coates v. Slusher*, 109 Or 612, 630-31 (1924) (alienation of affections); *Lane v. Schilling*, 130 Or 119, 131-32 (1929) (defamation); *Quillen v. Schimpf*, 133 Or 581, 590-97 (1930) (trespass to real and personal property; the court also approvingly cited cases allowing recovery for emotional distress in claims of child abduction and breach of a contract to lend money). As this court later put it: "[T]his court has departed from the rigid rule of no redress for damages for mental disturbance without accompanying physical injury or physical consequences, as stated in *Adams* and *Rostad*." *Melton v. Allen*, 282 Or 731, 736 (1978) (citations omitted).

Although the above cases all involved intentional wrongdoing, this court

has also approved emotional distress damages absent physical injury in several negligence cases. *See Hovis v. Burns*, 243 Or 607 (1966) (mishandling of a family member's remains); *Macca v. Gen. Tel. Co. of N.W.*, 262 Or 414 (1972) (violation of the right to use and enjoy real property); *Edwards v. Talen Irrig. Dist.*, 280 Or 307 (1977) (same); *McEvoy v. Helikson*, 277 Or 781 (1977) (violation of a right granted under court order); *Curtis v. MRI Imaging Svcs.*, 327 Or 9 (1998) (violation of professional duty to protect against emotional distress).

In short, despite some stray *dicta*, this court's cases have been quite consistent with the century-old rule that emotional distress damages are recoverable absent physical harm so long as the defendant "infringe[s] on a legal right" of the plaintiff. *Adams*, 69 Or at 517 (quoting *Larson*, 50 NW at 239). As this court put it in *Norwest v. Presby. Intercomm. Hosp.*, 293 Or 543, 558-59 (1982):

> 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.

(footnotes omitted).[1] *See also id.* at 560 (stating that the defendant must have

[1] This court has repeated the *Norwest* formulation. *See Nearing v. Weaver*, 295 Or 702, 706 (1983); *Hammond v. Ctrl. Lane Comm'ns Ctr.*, 312 Or 17, 22-23 (1991); *Paul v. Providence Health Sys.-Or.*, 351 Or 587, 597-98 (2012); *Doyle v. City of Medford*, 356 Or 336, 375-76 (2014). However, this court in

violated a duty other than "the duty to avoid negligent injury to another," *i.e.*, to avoid "the foreseeable risk of harm"); *id.* at 569 (requiring "a legal source" for recovery of emotional distress "besides its foreseeability"); *Nearing v. Weaver*, 295 Or 702, 707 (1983) ("The question, therefore, is whether plaintiffs pleaded an infringement by defendants of a legal right arising independently of the ordinary tort elements of a negligence action").

C. This court has rejected most of the rationales that other courts have relied upon to deny recovery.

Consistent with this court's numerous cases allowing recovery for emotional distress, this court has rejected most of the rationales adopted by other courts to deny it. *Norwest v. Presby. Intercomm. Hosp.*, 293 Or 543 (1982), was a signal decision in that regard. In *Norwest*, a child sued for loss of consortium after the defendant committed medical malpractice on the child's mother. *Id.* at 545. In deciding the viability of that claim, this court espoused the "legally protected interest" test (which had its roots in *Adams*). This court also deemed it important to set forth "[t]he basis for [its] decision," to separate "the reasons that do not as well as those that do enter into our assessment of the present state of Oregon law on this issue." *Id.* That analytical paradigm remains appropriate today.

McGanty v. Staudenraus, 321 Or 532 (1995), erased the divide between intentional and reckless conduct in this regard. *See Babick v. Or. Arena Corp.*, 333 Or 401, 411-12 (2002) (so noting). What remains are cases of "intentional torts" and infringements (even if only negligent) of other "legally protected interest[s]." *Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 412 (2008).

Among the reasons that this court rejected for denying a claim for emotional distress is its asserted novelty. *Id.* at 548 ("That a novel issue is open to judicial resolution says little about how to resolve it."); *id.* at 547 ("[W]hen a claim is new to this court, either a decision for or one against liability may be harder to square with established law."). Likewise, this court rejected the view that it should simply demur in favor of the legislature. *Id.* (refusing to "place[] on the plaintiff the burden to show why the law should be changed by judges rather than by legislators"); *id.* at 547-48 (viability of novel claim is "rightly considered…to be open for judicial resolution"). And this court refused to base its decision on "the court's views of desirable social policy." *Id.* at 553.

Further, this court refused to deny recovery on the basis that allowing it would lead to increased litigation or insurance rates. *Id.* at 552 ("Courts exist to serve whatever rights people have," so if "the social costs of litigation" "are to be the reason for denying an otherwise meritorious cause of action, that is one judgment to be made by legislatures rather than by courts."); *id.* ("A person's liability in our law still remains the same whether or not he has liability insurance; properly, the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance.").

This court also rejected several rationales steeped in duty and causation:

> These include such propositions as that the defendant's negligence, though the cause of plaintiff's loss, was not the 'proximate cause,' a concept no longer employed in our cases; or that the consequence is 'too remote,' which generally means the same thing; or that it is

> not foreseeable, which is a question of fact and will often be untrue; …or that the negligent defendant's duty to avoid unreasonable risk of harm to the person initially injured does not extend to [consequentially injured] plaintiffs, which merely states the result.

Id. at 560.

In addition, this court explained that, "[i]f there are few causes of action for psychic or emotional harm as such, the reason is not found in objections to monetary damages for harm of that nature." *Id.* at 558. *See also id.* at 569 (plaintiff's injury "is not ineligible for the recovery of compensatory pecuniary damages merely because the injury itself is to psychic and emotional rather than to physical or economic interests, for injury to such interests of personality and emotional well-being is compensable in various other contexts"). In making that recognition, this court abjured the prejudice against emotional distress damages that some courts have espoused on the view that they are indicative of female fragility. *See Twyman v. Twyman*, 855 SW2d 619, 642-44 (Tex 1993) (Spector, J., dissenting) (discussing how emotional distress has historically been devalued in the law because it is associated with women); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich L Rev 814 (1990) (same); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U Pa L Rev 463 (1998) (same); *Dillon v. Legg*, 441 P2d 912, 923-24 (Cal 1968) (similar). Society's commitment to alleviating emotional distress has grown since *Norwest* was decided in 1982, as evidenced

by the advancement of gender equality, enactment of mental health parity laws,[2] and judicial consensus that has developed against the "physical impact" rule of *Saechao v. Matsakoun*, 78 Or App 340 (1986). That said, injuries to person and property are still privileged over emotional and economic injuries. For example, foreseeability-based negligence is sufficient to sustain a claim for injury to person or property but not to emotion or economy; the latter injuries require an additional "legally protected interest."

This court has also allowed recovery for emotional distress despite arguments that it leads to "spurious claims." *Edwards v. Talen Irrig. Dist.*, 280 Or 307, 309 n1 (1977). *See also Fehely v. Senders*, 170 Or 457, 471-72 (1943) (doing same despite "the supposed…danger that unscrupulous persons may impose on juries with fictitious claims"); *Libbee v. Permanente Clinic*, 268 Or 258, 264 (1974) (same); *Dillon*, 441 P2d at 917-19 (similar). As this court has repeatedly recognized, the task of discerning genuine from fake claims is one that Oregon courts entrust to the jury, just as the jury generally is entrusted to discern truth from fiction, even when a witness gives self-serving testimony. *See Harwell v. Argonaut Ins. Co.*, 296 Or 505, 510 (1984) ("A claimant is a competent witness to testify as to the pain he suffers…."); *Eisele v. Rood*, 275 Or 461, 467 (1980) ("In cases in which plaintiff's evidence of injury is merely

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[2] *See, e.g.*, Mental Health Parity Act, Pub L No 104-204 (1996); Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, 29 USC § 1185a; Patient Protection and Affordable Care Act, Pub L No 111-148 (2010); Oregon Mental Health Parity Act, ORS 743A.168 (SB 1 (2005)).

subjective in nature, the jury may choose to disbelieve plaintiff's testimony…."); *Equitable Life Assur. Soc. v. McKay*, 306 Or 493, 498 (1988) ("Ferreting out and discounting biased testimony is treated as a question of believability for the jury, not admissibility for the court."); *Davidson v. Rogers*, 281 Or 219, 234 (1978) (Lent, J., dissenting) ("It is no answer to say that juries can not be trusted, nor that rascals might profit from the jury system….") (quoting *Holden v. Pioneer Broadc. Co.*, 228 Or 405, 434 (1961) (Goodwin, J., dissenting)).

Relatedly, some authorities require physical manifestation of emotional distress as verification of its genuineness. *See Saechao*, 78 Or App at 350 (so noting). Oregon has never required that. *See Carranza v. United States*, 2013 US Dist LEXIS 92265, *22 (D Or July 1, 2013) ("Under Oregon law, objective evidence of severe emotional distress, such as medical, economic, or social problems, is not required to prove a plaintiff suffered emotional distress."); *Fredeen v. Stride*, 269 Or 369, 374 (1974) (affirming recovery based on "nightmares"); *Mooney v. Johnson Cattle Co.*, 291 Or 709, 719 (1981) (same for "stress"); *Edwards*, 280 Or at 310 (same for generalized "concern" and "anguish"). *Cf. Rockhill v. Pollard*, 259 Or 54, 63 (1971) ("[I]t is the distress which must be severe, not the physical manifestations."); *Bodewig v. K-Mart, Inc.*, 54 Or App 480, 488 (1981) (same); *Norwest*, 293 Or at 556-57 (noting that California abandoned the physical manifestation requirement); *Doe Parents No.*

1 v. Dep't of Educ., 58 P3d 545, 580 (Hawaii 2002) (same for Hawaii); *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 SE2d 85, 92-93 (NC 1990) (same for North Carolina).

Likewise, this court has rejected the argument that emotional distress is too trivial to be recognized. *See Norwest*, 293 Or at 552 (rejecting rationale that some "wrongs…do not merit the social costs of litigation"); *Fehely*, 170 Or at 471 ("To brand such mental distress as 'wholly sentimental' is to invite the criticism implied in Circuit Judge Frank's aphorism: 'Give a bad dogma a good name, and its bite may become as bad as its bark.'") (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F2d 978, 984 (2nd Cir 1942)). *See also Heino v. Harper*, 306 Or 347, 358-59 (1988) (abrogating doctrine of spousal immunity despite claims that it would "lead to a great number of cases being brought, far too many of which would involve circumstances so trivial that they should not permit recovery although they technically do involve negligent torts").

And this court has rejected the argument that emotional distress damages are too difficult to measure. *See Hinish v. Meier & Frank Co.*, 166 Or 482, 506 (1941) ("The damages may be difficult of ascertainment, but not more so than in [other] actions [where they are allowed]…. The law has never denied recovery to one entitled to damages simply because of uncertainty as to the extent of his injury and the amount which would properly compensate him.");

Fehely, 170 Or at 471-72 (similar).

By contrast, this court has recognized three valid reasons for denying recovery for emotional distress: the lack of a legally protected interest, *Rathgeber v. James Hemenway, Inc.*, 335 Or 404 (2003); a harm that is only theoretical, *Paul v. Providence Health Sys.-Or.*, 351 Or 587 (2012); and a need to avoid limitless recoveries, *Norwest*, 293 Or at 559-61.

Rathgeber held that emotional distress damages are not recoverable in a professional malpractice claim "unless a standard of care that includes the duty to protect a client from emotional harm governs the professional's conduct." 335 Or at 418. That is because malpractice claims are negligence claims, negligence claims are grounded in foreseeability, and, per *Norwest*, emotional distress is not recoverable unless there is a legal interest beyond foreseeability.[3] *Cf. Curtis v. MRI Imaging Svcs. II*, 327 Or 9 (1998) (involving such an interest); *McEvoy v. Helikson*, 277 Or 781 (1977) (same). The need for an additional legal interest results from the above-mentioned privilege that Oregon law still affords physical and property interests over economic and emotional ones.

This court has also rejected "emotional distress damages when those damages are based only on the risk of some future harm." *Paul*, 351 Or at 602

[3] In this respect, the rule governing purely emotional loss is the same as that for purely economic loss. *See Harris v. Suniga*, 344 Or 301, 307-08 (2008) (illustrating proposition).

(increased risk of identity theft and economic harm resulting from negligent failure to protect plaintiffs' data). The rationale is that threatened harm (even physical harm) caused by negligence, standing alone, is too theoretical to be a cognizable injury, so neither is associated emotional harm. *Id.* at 594-95.[4] That rationale holds when the threatened harm may never arrive or will arrive only "at some indefinite point in the future." *Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 411-12 (2008). But this court has never denied recovery where the threat is "certain" or "imminent." *See id.* (so noting).

Finally, this court has barred claims by indirect victims of negligence "unless liability for [their] consequential [emotional] loss has a legal source besides its foreseeability." *Norwest*, 293 Or at 569.[5] The rationale is to avoid "limitless recoveries," *i.e.* "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 290 Or 909, 917, 919 (1981) (quoting *Ultramares Corp. v. Touche*, 174 NE 441, 444 (NY 1931)). *See also Norwest*, 293 Or at 559-61 (implicitly adopting that rationale). Thus, this court has barred recovery to a child whose mother was disabled by a negligent doctor, *id.* at 545, to a wife whose husband died following a negligent 9-1-1 response, *Hammond v. Ctrl. Lane Comm'ns Ctr.*, 312 Or 17 (1991), and to a husband whose wife died

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[4] This rule extends to economic damages as well. *Paul*, 351 Or at 597.
[5] This principle also extends to economic loss. *Norwest*, 293 Or at 559-60. And, as explained below, it actually applies to both direct and indirect victims.

following a doctor's breach of his duty to care for her, *Adams v. Brosius*, 69 Or 513 (1914).[6]

This case presents none of the problems identified in *Rathgeber*, *Paul*, or *Norwest*. Courts around the nation have recognized that people have legally protected interests against the threat of imminent physical harm and against witnessing the needless deaths of their loved ones. Further, an imminent threat of physical injury is, by definition, not theoretical, per *Lowe*, and plaintiffs did, in fact, watch their brother die. Moreover, the class of persons who are threatened with imminent physical harm by a defendant's negligence is easily enough ascertained. *See Engler v. Ill. Farmers Ins. Co.*, 706 NW2d 764, 771 (Minn 2005) ("The primary advantage of the zone of danger test is that it provides a bright line to limit recovery."). So is the class of persons who are forced to witness negligently-caused injuries to their loved ones. *See Thing v. La Chusa*, 771 P2d 814, 829-30 (Cal 1989) (stating that a modified *Dillon* test "provides a socially and judicially acceptable limit on recovery").

D. Some older decisions denying recovery are no longer good law.

Some of this court's cases have denied recovery for emotional distress on grounds that other cases from this court have rejected. The former cases appear

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[6] In *Burnette v. Wahl*, 284 Or 705, 716 (1978), the court held that claims for reckless infliction of emotional distress are "inapplicable as between parents and children" because, otherwise, "children of divorced parents would almost always have an action for emotional distress against their parents." That rationale appears to reflect a type of intrafamily tort immunity, but it might also be an attempt to avoid limitless recoveries, given the ubiquity of divorce.

to be no longer good law in this regard, as explained below. For that reason, defendant cannot rely on them to deny plaintiffs recovery here.

For example, this court has denied recovery in claims for breach of contract. *See Hammond v. Ctrl. Lane Comm'ns Ctr.*, 312 Or 17 (1991); *Keltner v. Washington County*, 310 Or 499 (1990); *Farris v. U.S. Fid. & Guar. Co.*, 284 Or 453 (1978); *Farris v. U.S. Fid. & Guar. Co.*, 273 Or 628 (1975); *Adams v. Brosius*, 69 Or 513 (1914). *Hammond* followed *Keltner* and *Adams*; *Keltner* followed *Farris* and *Adams*. *Adams*, as discussed above, was actually a tort case, and one based on proximate cause, not the cognizability of emotional distress damages as a categorical matter. In *Farris*, the court based its decision entirely on secondary sources, which posit that emotional distress generally is not a foreseeable result of a breach of contract, that negligence should not give rise to emotional distress damages, and that emotional distress over economic loss should not be compensable. 273 Or at 638; 284 Or at 456.

In addition, this court has issued mixed rulings in cases involving trespass to real and personal property. On the one hand, *Quillen v. Schimpf*, 133 Or 581 (1930), and *Douglas v. Humble Oil & Refining Co.*, 251 Or 310 (1968), allowed emotional distress damages where personal effects were removed from a home. *Quillen* reasoned that such damages are recoverable where they are "the direct result of willful wrong as distinguished from mere negligence." 133 Or at 593. *Douglas* reasoned that, while they are not

recoverable in "ordinary" trespass cases, there is an "exception" if they are "the direct and natural result of a specific trespass or other tort." 251 Or at 317. On the other hand, this court denied recovery in *Brown v. Dorfman*, 251 Or 522, 526 (1968) (construction of a sewer next to a home), *Stoll v. Curl*, 275 Or 487, 490 (1976) (removal of a fence), and *Melton v. Allen*, 282 Or 731 (1978) (towing of a car), on the view that those were "ordinary trespass action[s]," *Stoll*, 275 Or at 490, lacking any "special circumstances," *Brown*, 251 Or at 526; *Melton*, 282 Or at 736.

It is not clear what differentiates an "ordinary" trespass case from a "special" one. The requirement that emotional distress be a "direct and natural" result of the defendant's conduct appears to mean that it is compensable only if it is "foreseeable."[7] But "[f]oreseeability ordinarily presents a question of fact." *Lasley v. Combined Transp., Inc.*, 234 Or App 11, 16, *on recons*, 236 Or App 1 (2010), *aff'd*, 351 Or 1 (2011). Only "where no reasonable juror could find that the kind of harm that befell the plaintiff was the foreseeable result of the defendant's negligent act" will "the harm [be] unforeseeable as a matter of

[7] In *Mooney v. Johnson Cattle Co.*, 291 Or 709, 718 n10 (1981), this court replaced the phrase "direct and natural" with the phrase "common and predicable," which this court believed "more accurately describes" the concept. But even that phrase means "foreseeable." *See Fazzolari*, 303 Or at 7 (equating the words "natural," "predictable," and "foreseeable"); *Knepper v. Brown*, 345 Or 320, 329-30 (2008) (equating "proximate cause" with "the concept of 'reasonable foreseeability,' as we have used that phrase in cases like *Fazzolari*").

law." *Id.* *See also Chapman v. Mayfield*, 358 Or 196, 206 (2015) (same).[8]

It is difficult to sustain *Farris*, *Brown*, *Stoll*, and *Melton* on the basis that emotional distress was unforeseeable as a matter of law in those cases. Towing a person's car or installing a sewer at their home, can be as "personal" as entering their home. *Cf. Douglas*, 251 Or at 317 ("An invasion of a home by strangers is not so impersonal in its effect upon the householders that we can say as a matter of law that mental distress is never compensable."); *Macca v. Gen. Tel. Co. of N.W.*, 262 Or 414 (1972) (affirming emotional distress damages for phone calls received at home in case of negligent interference with use and enjoyment of real property). Likewise, in *Farris*, business partners were foreseeably upset when their liability insurer denied coverage, putting them personally at risk for losses they had contracted to avoid. 284 Or at 455. Indeed, the general foreseeability of emotional distress is what gives rise to the need for limitations to prevent "limitless recoveries." *See Norwest v. Presby. Intercomm. Hosp.*, 293 Or 543, 560 (1982) (non-foreseeability "is a question of fact and will often be untrue"). It is, therefore, why this court requires something more, *i.e.*, "injury to another legally protected interest," before recovery can be had. *Id.* at 559.

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[8] The foreseeability limitation also applies to the recovery of economic damages in cases of fraud. *Knepper*, 345 Or at 329-30 (so holding). *But cf. State v. Turnidge*, 359 Or 364, 484 (2016) ("[F]oreseeability has no place in assessing…responsibility for the *intended* consequences of a defendant's act."; such harms are cognizable even if unforeseeable) (emphasis in original).

Farris and *Melton* both indicated that there can be no recovery for emotional distress caused by negligence, as opposed to intentional or reckless conduct. They also indicated that recovery requires "flagrant" or "aggravated circumstances." And *Melton* expressed concern about "feigned" claims. *Farris*, 273 Or at 638; *Melton*, 282 Or at 736. It is possible that *Stoll* and *Brown* relied on similar views. Those views are contrary to other decisions from this court, as indicated above, and those views did not survive *Mooney v. Johnson Cattle Co.*, 291 Or 709 (1981), and *Norwest* in any event. This court has never cited *Stoll* or *Brown* in this context, and it has denigrated *Melton* when it has mentioned it, as explained below. Moreover, *Stoll* and *Melton* were decided by a four-judge court, and *Brown* by a five-judge court, at a time – before *Mooney* and *Norwest* – when this court was still refining the foreseeability concept and felt that "[t]he law involving recovery for emotional distress generally is confused and perhaps in need of rethinking." *Edwards v. Talen Irrig. Dist.*, 280 Or 307, 310 n4 (1977).

In *Brewer v. Erwin*, 287 Or 435, 458 (1979), this court noted the tension between *Douglas* and *Mooney* but did not "need to consider it in th[at] case." That consideration came in *Mooney*, and the court explained that its prior cases

> may have left some question about the significance of various factors to liability for mental distress, for instance whether this liability results from defendant's intent, as distinguished from recklessness or negligence, *compare Melton with McEvoy v. Helikson*, 277 Or 781 (1977), or from the "direct and natural" causation, that is to say predictability, of the mental distress, *see*

> *Fredeen v. Stride*, [269 Or 369 (1974)], and *Douglas*, and whether "aggravated circumstances" are relevant to liability for such distress because of defendant's greater culpability for acts of "a flagrant character," *Melton*, or because defendant's "aggravated conduct" contributes "evidence of genuine emotional damage," *Fredeen*.

291 Or at 715-16 (citations omitted).

This court then explained that, despite some imprecise language in *Fredeen* and *Douglas*, "the formula actually employed in [those cases] rested the inclusion or exclusion of damages for mental distress not on the defendant's motives but on whether such distress was a common and predictable result under the circumstances of the kind of conversion involved." *Id.* at 716 (citation omitted). That is the test that *Mooney* also applied. *Id.* at 718. It is a test of foreseeability, as noted above.

Mooney also rejected the defendant's argument that "there was insufficient evidence of 'aggravated conduct,'" stating: "Under the test we have set forth in this opinion, recovery for mental distress in this tort hinges on factors other than the degree of defendant's culpability." *Id.* at 720.[9] That rationale likewise doomed the argument, also rejected by this court's other cases, as noted above, that aggravated conduct is necessary to prove the

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[9] *Farris* stated that "emotional distress caused by pecuniary loss resulting from breach of contract is not recoverable." 284 Or at 456. Yet *Farris* recognized that the same distress is recoverable if the same facts constitute a tort. *Id.* And *Mooney* held that emotional distress caused by pecuniary loss resulting from interference with a contract is recoverable. 291 Or at 720. It is not clear what principle distinguishes the former rule from the latter two.

genuineness of a plaintiff's claimed distress. Indeed, *Mooney* referred to the reasoning in *Melton* as merely a "description of prior cases," not a legal test. *Id.* at 715 n7. *See also Hovis v. Burns*, 243 Or 607, 613 (1966) (rejecting contention "that circumstances of aggravation must appear and that mere negligence is not sufficient").

Mooney also quoted with approval this court's statement in *Macca* that "[w]here an independent basis of liability exists, irrespective of whether there existed physical injuries, recovery has been uniformly allowed for mental suffering and anguish." 291 Or at 715 n7 (quoting 262 Or at 420 n1). The following year, this court reiterated that test, explaining that emotional distress is recoverable when the defendant "infringed some legally protected interest apart from causing the claimed distress, even when only negligently." *Norwest v. Presby. Intercomm. Hosp.*, 293 Or 543, 559 (1982). In so doing, this court noted that *Melton* is an outlier incompatible with that test. *Id.* at 559 n17.[10] One year later, this court repeated the test from *Norwest*, and *Melton* was mentioned only in Justice Peterson's dissent, where he urged adherence to it, a call not heeded by the majority. *Nearing v. Weaver*, 295 Or 702 (1983). This court has not cited *Melton* since, but it continues to repeat the *Norwest* test.

For its part, the Court of Appeals has long held that a plaintiff seeking recovery for negligent emotional injury must not only identify a legally

[10] Even Justice Peterson's dissent in *Mooney*, which urged adherence to *Melton*, recognized that *Macca* was "at variance with my conclusion." 209 Or at 726.

protected interest, but also show that the interest is "of sufficient importance." *Shin v. Sunriver Prep. Sch., Inc.*, 199 Or App 352, 370-71 (2005). The Court of Appeals has held that economic- and property-related interests are not sufficiently important, because an award of economic damages will "adequately compensate" the plaintiff "for the injury to the [emotional] interests" as well. *Id.* Thus, for example, the Court of Appeals has denied recovery for emotional distress where a contractor's negligence burned the plaintiffs' home. *Meyer v. 4-D Insulation Co.*, 60 Or App 70 (1982).

The Court of Appeals' "sufficient importance" test originated in *Meyer*, a 2-1 decision that came down a few weeks after *Norwest* and that dismissed this court's cases, including *Norwest*, as "ad hoc" and advancing "no general rule." *Id.* at 79 n5. *Meyer* described *Mooney*'s foreseeability test as "not add[ing] anything" to the analysis and *Macca*'s recitation of the "independent basis of liability" test as *dictum*. *Id.* at 77-78 & n4. In the *Meyer* court's view, "[e]xtension of the right to recover damages for mental distress in a given case is basically a policy decision." *Id.* at 79. Drawing on Justice Peterson's dissent in *Mooney*, the Court of Appeals in *Meyer* expressed its policy preference by inveighing against what it perceived to be a looming "eggshell society." *Id.*

Meyer and its progeny are inconsistent with this court's cases, particularly *Mooney* and *Norwest*, which established the governing test and rationale, but also *Quillen*, *Douglas*, *Macca*, *Fredeen*, *Edwards*, *Farris*,

Mooney, and *Hinish v. Meier & Frank Co.*, 166 Or 482 (1941), all of which recognize the recoverability of emotional distress damages in tort cases, including negligence cases, involving economic and property interests but no physical injury.

In short, *Farris*, *Brown*, *Stoll*, *Melton*, and *Meyer* are inconsistent with decisions from this court that preceded them; they are also inconsistent with *Mooney* and *Norwest*, which came after *Farris*, *Brown*, *Stoll*, and *Melton*, and which *Meyer* treated dismissively. It therefore appears that *Farris*, *Brown*, *Stoll*, *Melton*, and *Meyer* are not good law (if they ever were). Accordingly, defendant cannot rely on them to deny plaintiffs recovery here.

In any event, this case does not involve a claim for breach of contract or trespass, or economic or property interests. The circumstances of this case were flagrant and aggravated. The physical threat to plaintiffs was imminent, and their emotional distress was a foreseeable result of narrowly missing getting run over and of having to witness their brother's violent death.

III. Plaintiffs have stated valid claims for emotional distress.

Having established the proper basis for this court's decision, the task remains to make that decision. This court has repeatedly reserved the question that this case presents. Before *Saechao v. Matsakoun*, 78 Or App 340, *rev dismissed*, 302 Or 155 (1986), was decided, this court stated:

> 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*.

Norwest v. Presby. Intercomm. Hosp., 293 Or 543, 558-59 (1982) (footnotes and citations omitted; emphasis added). A footnote following the italicized sentence states: "We have not had occasion to examine the bystander's claim for psychic injury from witnessing a negligent physical injury to a close relative which was variously decided in [*Dillon v. Legg*, 441 P2d 912 (Cal 1968), *Tobin v. Grossman*, 249 NE2d 419 (NY 1969), and *Culbert v. Sampson's Supermarkets, Inc.*, 444 A2d 433 (Me 1982)], and we therefore exclude it from the pertinent analogues in Oregon." *Id.* at 559 n18. *See also id.* at 562 (noting that it is an "open issue in this state" whether recovery can be had "for emotional trauma from observing a physical injury to a member of the family").[11] *Norwest* involved a claim for emotional distress arising from medical malpractice committed on the plaintiff's mother.

More recently, in *Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 412 (2008), this court stated:

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[11] *Saechao* therefore erred in stating that *Dillon* and the zone of danger test both conflict with *Norwest*. 78 Or App at 347-48.

> The negative implication of the sentence [from *Norwest* italicized above] at most held open the possibility that a threat of imminent physical harm – a negligently driven car, for instance, that swerves off the road and narrowly misses a bystander – might give a bystander who suffers only psychic injury as a result an actionable claim for negligence.

This court declined to "decide how the statement in *Norwest* relates to this court's later decision in *Hammond*[*v. Ctrl. Lane Comm'ns Ctr.*, 312 Or 17 (1991)]," because *Lowe*, like *Norwest*, did "not involve a threat of an imminent physical harm" to the plaintiff (who instead feared only a potential future harm from smoking cigarettes). *Id.*[12]

Hammond also did not involve such a threat. The plaintiff in that case, whose husband died after emergency responders failed to timely respond to a 9-1-1 call, suffered no actual or threatened physical harm, and identified no "'legally protected interest' of hers that defendants violated." 312 Or at 24. She therefore could not recover as a direct victim of the defendants' negligence. Her claim likewise failed when viewed as one of indirect harm:

> *Norwest*…teaches that, although emotional injury to a bystander may be foreseeable, the bystander's emotional well-being is not a legally protected interest unless liability for the injury "has a legal source besides its foreseeability." Here, plaintiff points to no legal source of liability for her emotional injury other than its foreseeability.

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[12] In *Lowe*, the situation was such that the "defendant's negligence may or may not give rise to physical harm at some indefinite point in the future." 344 Or at 412. The same was true in *Paul v. Providence Health Sys.-Or.*, 351 Or 587 (2012), although the threatened harm was economic, not physical. This case, by contrast, involves a threat of *imminent* physical harm.

Id. at 25 (quoting *Norwest*, 293 Or at 569).

Consistent with this court's reservation of the issue in *Norwest* and *Lowe*, this court should hold that plaintiffs had legally protected interests in avoiding the threat of imminent physical harm, and in avoiding having to witness their brother's death.

A. Plaintiffs should recover because they were in the zone of danger.

Plaintiffs experienced a threat of imminent physical harm when defendant's truck narrowly missed running over them. As plaintiffs' briefing notes, nearly every jurisdiction in this country has approved the recovery of emotional distress damages for plaintiffs who similarly find themselves in the "zone of danger." This court should do the same.

This court has already recognized a legally protected interest in avoiding the threat of imminent physical harm. For example, *Hinish v. Meier & Frank Co.*, 166 Or 482, 506 (1941), noted that assault claims give rise to emotional distress damages. The essence of a civil assault claim is "intentionally placing another in apprehension of an immediate battery." *State v. Garcias*, 296 Or 688, 692 (1984). *See also Mooney v. Johnson Cattle Co.*, 291 Or 709, 724 (1981) ("[I]n the case of an assault, no one could deny the social and individual interests in the security of a person.") (Peterson, J., dissenting). Similarly, *Babick v. Or. Arena Corp.*, 333 Or 401, 413 (2002), approved of emotional distress damages in the context of a claim for intentional infliction of emotional

distress where the "defendant exposed plaintiffs to a threat of imminent physical harm." (quotation marks omitted). And *Nearing v. Weaver*, 295 Or 702 (1983), permitted recovery of emotional distress damages after police officers violated a statute by failing to arrest a man who had threatened to kill the plaintiffs.

Although *Hinish* and *Babick* involved intentional conduct, and *Nearing* involved violation of a statute, factors not present here, those cases recognize and vindicate the value society places on security from physical harm – a value so dear it also protects against the threat of imminent physical harm.

That value should extend also to threats of imminent physical harm caused by simple negligence. This court's cases have "rested the inclusion or exclusion of damages for mental distress not on the defendant's motives but on whether such distress was a common and predictable result under the circumstances." *Mooney*, 291 Or at 716. That test is easily met here. Human experience shows that, when threatened with imminent physical harm, people commonly and predictably (*i.e.*, foreseeably) experience emotional distress. *See Dillon v. Legg*, 441 P2d 912, 917 (Cal 1968) ("It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid.") (quoting *Sloane v. So. Cal. Ry. Co.*, 44 P 320, 322 (Cal 1896)).

The "near-miss" circumstances of this case are exactly what this court has described as exemplifying this type of liability. *See Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 412 (2008) (illustrating proposition). This court used the word "yet" advisedly in *Norwest* when it explained that it had "not *yet* extended liability for ordinary negligence to solely psychic or emotional injury not accompanying…threatened physical harm." *Norwest v. Presby. Intercomm. Hosp.*, 293 Or 543, 559 (1982) (emphasis added).

Hammond v. Ctrl. Lane Comm'ns Ctr., 312 Or 17 (1991), is no barrier to liability here. To be sure, *Hammond* declined to adopt the "zone of danger" test embodied in Restatement (Second) of Torts § 436 (1965). *Id.* at 25. But that was *dictum*, because the plaintiff in *Hammond* was not in the zone of danger. And the court's analysis was as conclusory as the plaintiff's brief was cursory; the brief barely mentioned this issue and offered no argument to support it. Or Briefs 4313 (1990); Or Briefs 4767 (1991).

It may also seem significant that *Hammond* refused to "abandon the impact rule" and cited *Saechao* favorably for the proposition that there can be "no recovery where plaintiff sustained no impact." *Id.* at 24-25. *See also id.* (also favorably citing *Heusser v. Jackson County Health Dep't*, 92 Or App 156 (1988), *rev den*, 307 Or 326 (1989), which applied *Saechao* to a claim of negligent inoculation of plaintiff's children). But *Hammond* did not hold that emotional distress damages cannot be recovered where the plaintiff sustains no

physical impact. On the contrary, *Hammond* noted that "[t]his court has recognized common law liability for psychic injury alone" in cases of intentional and reckless infliction of emotional distress, as well as "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 (citing *Nearing* and *McEvoy v. Helikson*, 277 Or 781 (1977), as illustrative of the latter type of claim).

It is unclear what "physical impact" rule *Hammond* was referring to. The traditional rule is described in *Dillon*, which noted that, originally, courts "insisted that there be no recovery for emotional trauma at all," but then, "[r]etreating from this position, they gave relief for such trauma only if physical impact occurred," and then they "abandoned the requirement for physical impact" in favor of other limiting principles (such as the "zone of danger" test). 441 P2d at 924-25. As noted above, this court for a time described *Adams v. Brosius*, 69 Or 513 (1914), as having adopted a true "physical impact" rule. But that description was inaccurate, and this court has never actually adopted the rule or applied it to deny recovery. This court has instead allowed recovery in numerous cases without physical impact, as *Hammond* noted, and, when this court has denied recovery, it has done so on the basis of other limiting principles, as explained above. It seems likely that *Hammond* meant merely to reference the "general proposition" described in *Curtis v. MRI Imaging Svcs. II*,

148 Or App 607, 612 (1997), *aff'd*, 327 Or 9 (1998), that "emotional distress damages can only be recovered in cases involving physical injury," subject to "exceptions." That assumption, however, is not quite accurate, as explained above. *See also Chouinard v. Health Ventures*, 179 Or App 507, 515 n4 (2002) (noting that physical harm "is merely one species (albeit one that occurs most frequently) of an injury to a legally protected interest").

In any event, the arbitrariness, harshness, and diminished acceptance of the anachronistic "physical impact" rule has been repeatedly demonstrated. *See*, *e.g.*, *Hammond*, 312 Or at 30-31 (Unis, J., dissenting); *Saechao*, 78 Or App at 348 (majority opinion); *Saechao*, 78 Or App at 348-55 (Warren, J., dissenting); Restatement (Second) of Torts § 436, reporter's notes (1965). *See also Conrail v. Gottshall*, 512 US 532, 548 (1994) (recognizing that "a near miss may be as frightening as a direct hit") (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U Fla L Rev 477, 488 (1982)). The circumstances of this case are no less aggravated, and plaintiffs' pain is no less real and understandable, than in many cases that involve impacts that Oregon courts have deemed sufficient to satisfy the rule. *See Doe v. Am. Red Cross*, 322 Or 502 (1996) (introduction of HIV into bloodstream); *Spain v. Or.-Wash. R. & N. Co.*, 78 Or 355 (1915) (ejection from train car); *Chouinard*, 179 Or App at 515 (offensive sexual touching); *id.* (any other "perceptible physical

effect").

The circumstances of this case are also far more compelling than in many cases where this court has allowed recovery for emotional distress absent physical impact. *See, e.g., Macca v. Gen. Tel. Co. of N.W.*, 262 Or 414 (1972) (annoying telephone calls); *Edwards v. Talen Irrig. Dist.*, 280 Or 307 (1977) (entry of water onto land); *Mooney*, 291 Or at 720 (loss of contract to buy cattle). There is little principle or justice in denying plaintiffs recovery here but allowing them to recover if the morgue negligently mishandles their brother's remains. *Hovis v. Burns*, 243 Or 607 (1966).

A final point bears mention: a plaintiff in the zone of danger can recover even if she is alone there; she need not witness injury to another person. *See, e.g., Vance v. Consolidated Rail Corp.*, 652 NE2d 776, 783 (Ohio 1995) (affirming verdict for plaintiff who was alone in the zone of danger). That is because the relevant legal interest is the plaintiff's interest in avoiding the threat of imminent physical harm, and the plaintiff recovers primarily for her fear for her own physical safety. Indeed, some cases hold that, if a mother and her children are in the zone of danger, she can recover *only* for her "fear for her own safety." *Dillon*, 441 P2d at 924. Other cases hold that she can only "recover for fear of her children's safety if she simultaneously entertained a personal fear for herself." *Id. See also Engler v. Ill. Farmers Ins. Co.*, 706 NW2d 764, 770-71 (Minn 2005) (same).

B. Plaintiffs should recover as witnesses to their brother's death.

For the plaintiffs in this case, it is sufficient if this court adopts the zone of danger test and recognizes that they have a legally protected interest in being free from the threat of imminent physical harm. OTLA, however, urges this court to go further and adopt the *Dillon* test, or a version of it, which recognizes a legally protected interest in avoiding having to witness injury to a loved one. *Dillon v. Legg*, 441 P2d 912 (Cal 1968). OTLA recognizes that there are variations on the *Dillon* test, and that it may be easier to choose the proper variation for Oregon when the court is presented with concrete facts involving a plaintiff who is not in the zone of danger. But the plaintiffs in this case would recover under the most stringent variation of the *Dillon* test, so OTLA urges this court to adopt it here. Plaintiffs witnessed their brother's death, and they should recover for their resulting severe emotional distress, apart from the fear that they felt for their own safety and that of their brother before he was hit.

This court in *Norwest v. Presby. Intercomm. Hosp.*, 293 Or 543, 559 n18, 561 (1982), left open the question whether there is a "legally protected interest" against "witnessing a negligent physical injury to a close relative" or other person with whom the plaintiff has a "close emotional relationship." This court should resolve that question in the affirmative here.

The following cases recognized the importance of close emotional relationships when they permitted recovery of emotional distress damages:

- Alienation of affection. *Coates v. Slusher*, 109 Or 612 (1924); *Hinish v. Meier & Frank Co.*, 166 Or 482, 506 (1941) (*dictum*).
- Breach of promise of marriage. *Hinish*, 166 Or at 506 (*dictum*); *Spain v. Or.-Wash. R. & N. Co.*, 78 Or 355, 363 (1915) (*dictum*).
- Negligent mishandling of a family member's remains. *Hovis v. Burns*, 243 Or 607 (1966).
- Negligent violation of court order. *McEvoy v. Helikson*, 277 Or 781 (1977) (defendant negligently violated a court order by giving a passport to plaintiff's wife, who absconded with plaintiff's child).
- Negligent violation of statute. *Nearing v. Weaver*, 295 Or 702 (1983) (police officers failed to arrest man who threatened to kill plaintiffs).
- Breach of confidentiality. *Humphers v. First Interstate Bank*, 298 Or 706 (1985) (doctor gave adopted child the identity of plaintiff birth mother).
- Conversion of personal property. *Fredeen v. Stride*, 269 Or 369 (1974) (veterinarian gave plaintiff's dog to plaintiff's neighbor instead of putting it down).

In *Norwest*, a child sued for loss of consortium after the defendant committed medical malpractice on the child's mother. 293 Or at 545. This court denied the claim, not because the child lacked a "legally protected interest," but because the child was an indirect victim of the negligence. Regarding the child's interest, this court stated that

> a child might well have a cause of action for solely emotional distress if someone, in order to cause that distress, injured not the child's parents but a favorite family pet. Arguably, also, the child has rights in the parental relationship sufficiently like those asserted in *Hovis* and *McEvoy* to support a similar recovery for a psychic injury inflicted even by negligence. The nature of the harm asserted here therefore does not alone defeat plaintiff's claim.

Id. at 559 (citing *Fredeen* after the first sentence).

Regarding the fact that the child was an indirect victim, this court stated:

> 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.

293 Or at 569. *Norwest* indicated that such a "legal source" can be found in analogous common law and statutory claims. *Id.* at 562-67. It can also be found in "a status, a relationship, or a particular standard of conduct that creates, [or] defines…the defendant's duty" differently from foreseeability. *Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17 (1987) (so noting). *Norwest* ultimately held that there is no "general liability toward dependent children for negligent injury to their parents." 293 Or at 569.

The point of the distinction that *Norwest* drew between direct and indirect victims is not entirely clear. Neither can recover for emotional distress alone based on foreseeability alone. *See Nearing v. Weaver*, 295 Or 702, 707 (1983) (so holding as to direct victims); *Rathgeber v. James Hemenway, Inc.*, 335 Or 404, 418 (2003) (same). Although *Norwest* drew the direct/indirect distinction from a case involving purely economic loss, 295 Or at 559-61 (citing *Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 290 Or 909, 917 (1981)), the distinction does not pertain even in that field. Both direct and indirect victims of economic loss must prove something more than foreseeability. *See Harris v. Suniga*, 344 Or 301, 307-09 (2008) (purely economic loss is recoverable for breach of any "source of duty outside the common law of negligence," *i.e.*, beyond foreseeability, which includes injuries to person or property, and

intentional torts) (quoting *Hale v. Groce*, 304 Or 281, 284 (1987)). It may be harder for an indirect victim to prove that "something more" (*e.g.*, a "special relationship" with the defendant), but the need to prove it is the same. And the reason for requiring it is the same: to avoid limitless liability. *Id.* at 307-08.

Regardless of the point of the direct/indirect distinction, these plaintiffs should prevail. They are either direct victims of defendant's negligence because they had a "legally protected interest" in not having to witness their brother's death, or they are indirect victims with a cognizable claim because their status as witnesses constitutes a "legal source" for their distress "besides its foreseeability." The same rationale underlies both conclusions, which is consistent with *Norwest*'s reservation of this issue for both direct and indirect victims. *See* 293 Or at 559 n18 (direct); *id.* at 562 (indirect).

What differentiates *Norwest* from this case is the fact that here, unlike in *Norwest*, plaintiffs witnessed the automobile accident and their brother's death. Plaintiffs are not merely sad because their brother died. They are traumatized because they had to watch it happen. In other words, there may be no general liability toward people for negligent injury to their loved ones, as *Norwest* indicates, but there can (and ought to) be general liability for making people watch their loved ones get injured, even if only negligently.

Norwest's reference to *Dillon* is telling. In that case, the California Supreme Court permitted recovery of emotional distress damages by a mother

who, although not in the zone of danger, nonetheless witnessed the negligently caused death of her child. The court explained that reasonable foreseeability was the touchstone of liability but that three factors guided the foreseeability analysis: (1) the plaintiff's proximity to the scene of the accident; (2) when the plaintiff learned of the accident; and (3) the plaintiff's relationship to the person physically impacted by the accident. If the plaintiff is near the accident (rather than far), learns of it contemporaneously (rather than later), and is emotionally close to the person physically impacted (rather than a stranger), then the plaintiff's emotional distress is more reasonably foreseeable and, therefore, recoverable. 441 P2d at 920-21. *See also Thing v. La Chusa*, 771 P2d 814, 829-30 (Cal 1989) (altering the *Dillon* test by making the three factors requirements instead of guidelines). A parent who looks through a window as her child is struck by a car could, under *Dillon*, recover emotional distress damages, even though the same parent could not recover under the zone of danger test. *See Saechao v. Matsakoun*, 78 Or App 340, 348 (1986) (so noting). *See also Culbert v. Sampson's Supermarkets, Inc.*, 444 A2d 433, 437 (Me 1982) (allowing recovery to mother who saw her child choke on baby food). *Cf. Tobin v. Grossman*, 249 NE2d 419 (NY 1969) (denying recovery to mother who did not see the accident but heard the screeching breaks and ran outside to see her child's body).

Dillon's focus on proximity to and contemporaneous awareness of the

accident mirrors *Norwest*'s discussion of "witnessing" or "observing" the accident. 289 Or at 559 n18, 562. Similarly, *Dillon*'s distinction between "closely related" parties and those who have "only a distant relationship" or none at all mirrors *Norwest*'s discussion of "close relatives" and others in a "close emotional relationship to the injured person." *Id.* at 559 n18, 569. Notably, *Norwest* did not limit the scope of the "legally protected interest" it described to family relationships alone. Instead, this court anticipated that "any person who is in a close emotional relationship to the injured person" might recover emotional distress damages. *Id.* at 561. *See also id.* at 569 (same); *id.* at 563 (rejecting the "negligence claim for psychic injury from loss of a parent's society and companionship based specifically on the family relationship, as distinct from other relationships of close emotional dependence"). Indeed, this court's entire analysis in *Norwest* hews so closely to *Dillon* that it seems likely this court would have reversed in *Saechao* had that case not settled first.

As noted above, there are many versions of the *Dillon* test that have been adopted. Most courts require the physically-injured person to be seriously injured or killed. *Gates v. Richardson*, 719 P2d 193, 199 (Wyo 1986). Some courts limit recovery to immediate family members of the physically-injured person; other courts permit distant relatives and close friends to recover as long as they are emotionally close as a matter of fact. *See* Colin E. Flora, *Special Relationship Bystander Test: A Rational Alternative to the Closely Related*

Requirement of Negligent Infliction of Emotional Distress for Bystanders, 39 Rutgers L Rev 28, 31-35 (2011-12) (surveying cases). Some courts require contemporaneous observance of the accident and injury, *Thing*, 771 P2d at 829, while others permit recovery to persons removed from the scene, *Kelley v. Kokua Sales & Supply*, 532 P2d 673 (Hawaii 1975); *Gates*, 719 P2d at 199. Finally, some courts require that the plaintiff suffer "serious" or severe emotional distress, *Thing*, 771 P2d at 830, while others do not, *Gates*, 719 P2d at 200.

This court need not resolve those questions in this case, because the plaintiffs in this case would recover under the most stringent of these variations. Plaintiffs watched their brother die in the same crosswalk they all were in, which has caused plaintiffs severe emotional distress. Thus, although future cases may call for refinement of Oregon's version of the *Dillon* test, the existence of variations is no barrier to adoption of that test in this case.

Neither do *Adams v. Brosius*, 69 Or 513 (1914), or *Hammond v. Ctrl. Lane Comm'ns Ctr.*, 312 Or 17 (1991), pose such a barrier. Admittedly, *Adams* rejected emotional distress damages even though the defendant doctor breached a duty to care for the plaintiff's wife, and the plaintiff had to watch her die. 69 Or at 514-16. And *Hammond* reached the same result when the defendant emergency responders negligently responded to the plaintiff's 9-1-1 call regarding her husband, whom she had to watch die. 312 Or at 20-21. But each

of those cases is distinguishable, because in neither of them did the defendant cause any injury to the spouse who died. Rather, the defendants merely gave the plaintiffs false hope that their spouses might live. This court placed great weight on this distinction in *Adams*, stating:

> It is noticeable that the complaint is not based upon the claim that defendant's breach of contract was responsible for, or in any wise contributed to, the physical injury of plaintiff's wife; nor that the observance of the contract of employment on the part of defendant would have ameliorated the sufferings of the wife, nor have prolonged her life. Likewise there is no charge made that defendant's presence at the bedside of plaintiff's wife would have prevented or even delayed her death.

69 Or at 516. Similarly, the plaintiff in *Hammond* alleged that "because of a defect in the original design of the 9-1-1 system, [emergency medical] services would never have been sent to the unincorporated area where she lived." 312 Or at 21. Because, unlike this defendant, the defendants in *Adams* and *Hammond* did not kill the plaintiff's family member, neither *Adams* nor *Hammond* was a true bystander case in the vein of *Dillon*.

Even if *Adams* and *Hammond* were on point, their application to this case suffers from additional flaws. As explained above, *Adams* rested on notions of proximate cause that this court subsequently abrogated, and *Adams* predated a significant expansion of the circumstances under which emotional distress damages are recoverable in Oregon. This court rejected the claim in *Hammond* because "plaintiff points to no legal source of liability for her emotional injury other than its foreseeability." 312 Or at 25. That phrasing is important, because

a review of the briefs in *Hammond* shows that the plaintiff relied entirely on a breach of contract theory that this court rejected, *id.* at 24, and a reading of the 9-1-1 statutes that this court viewed as applying only to the plaintiff's claim for intentional infliction of emotional distress, *id.* at 27. Or Briefs 4313 (1990); Or Briefs 4767 (1991). The plaintiff never cited *Dillon* or any similar case or theory of recovery, barely mentioned *Norwest*, and did not mention at all *Norwest*'s reservation of the question whether the zone of danger or *Dillon* test should apply in Oregon. That explains why this court's opinion does not mention *Dillon* or any other bystander case. And, as noted above, although *Hammond* rejected the zone of danger test in Restatement (Second) of Torts § 436 (1965), the plaintiff's argument on that point was totally conclusory. In short, neither *Adams* nor *Hammond* forecloses plaintiffs' recovery here.

IV. The wrongful death act is no bar to plaintiffs' claims.

The wrongful death act also is no bar to plaintiffs' claims. True, the act initially permitted no recovery for emotional distress suffered by those who grieve over the loss of the decedent. *See Carlson v. Or. Short Line Ry. Co.*, 21 Or 450 (1892) ("[T]he proper measure of damages under our statute is the pecuniary loss suffered by the estate without any *solatium* for the grief and anguish of surviving relatives * * *."). But in 1973 the act was amended to permit family members to recover for the "loss of the society, [and] companionship…of the decedent." ORS 30.020(2)(d). This court has since

recognized that the effect of the 1973 amendment was to permit recovery for "mental suffering," *Woosley v. Dunning*, 286 Or 233, 253 (1974), and "psychic" and "emotional distress." *Norwest v. Presby. Intercomm. Hosp.*, 293 Or 543, 558, 562 (1982). *See also id.* at 565 (describing "the emotional injury of lost companionship"); *id.* at 566 (similar).

The Court of Appeals has reached a contrary conclusion. In *Demars v. Erde*, 55 Or App 863, 866-67 (1982), the court held that the terms "society" and "companionship" "do not contemplate a claim for a survivor's pain and suffering" but rather "refer to the prospective advantages to the surviving beneficiaries which are lost as a result of the decedent's death." Similarly, in *Green v. Denney*, 87 Or App 298, 303 (1987), the court stated that "evidence concerning 'psychological effects' of plaintiff's wife's death on plaintiff and his children" was inadmissible to "prove the mental suffering of the survivors," because "such damages are not recoverable in a wrongful death action." But the court then stated that "evidence of grief and emotional reactions was relevant to the existence and extent of the claimed loss of society and companionship, for which damages are recoverable." *Id.* at 304. It appears that the Court of Appeals has adopted a metaphysical distinction between grief over the fact that someone is dead and grief over the fact that the dead person is no longer around to be with. To the degree that that distinction makes sense, it is contrary to *Woosley* and *Norwest*. *See also Fredeen v. Stride*, 269 Or 369, 372

(1974) (equating "mental anguish" with "pain and suffering"); *Wallender v. Michas*, 256 Or 587, 591 (1970); *Quillen v. Schimpf*, 133 Or 581, 593, 595 (1930) (same).

But even if the wrongful death act bars recovery for grief over the loss of a loved one, that is no bar to recovery for emotional distress caused by having witnessed the decedent's death or having been in the zone of danger oneself. Courts have repeatedly recognized the distinction. In *R.D. v. W.H.*, 875 P2d 26 (Wyo 1994), the defendant, as here, argued that the plaintiff could not recover on claims for negligent and intentional infliction of emotional distress because "mental suffering of the survivors caused by the death was not an element of damages for wrongful death." *Id.* at 31. The court rejected that argument, because "damages claimed for negligent or intentional infliction of emotional distress are personal to the plaintiffs and do not result from the decedent's death alone." *Id.* Rather, "[t]he two mental distress torts provide for recovery in special circumstances where plaintiffs suffer from extreme shocks. They do not provide for recovery from the typical type of grief suffered by all who lose a loved one." *Id.* at 32. Further, the event for which they provide recovery, "witness[ing] the infliction of a relative's injury," "generally occurs… regardless of whether the injury results in death." *Id.* Thus, the distress governed by those claims "is not derivative of" "the loss of care, comfort, and society of the decedent" for which the Wyoming wrongful death act, like the

Oregon act, provides recovery. *Id.* In other words, the distress claims "clearly were not parasitic to the wrongful death claims even though they arose out of the same circumstances." *Id. See also Cimino v. Milford Keg, Inc.*, 431 NE2d 920, 927 (Mass 1982) (similarly holding that negligent infliction of emotional distress "is not a duplicative remedy and is not 'preempted' by the wrongful death statute").

In *Stump v. Ashland, Inc.*, 499 SE2d 41 (W Va 1997), the court held that claims for wrongful death and negligent infliction of emotional distress are not duplicative even when the state's wrongful death act permits recovery for emotional distress damages. The court explained that both claims "may arise from the same event" because they each "provide recovery for separate and distinct injuries." *Id.* at 51-52. "In a wrongful death action, damages result from the decedent's death alone, and are designed to provide for recovery 'from the typical type of grief suffered by all who lose a loved one.'" *Id.* at 51 (quoting *R.D.*, 875 P2d at 32). By contrast,

> The essence of the tort of negligent infliction of emotional distress is the shock caused by the perception of an especially horrendous event. It is more than the shock one suffers when he learns of the death or injury of a child, sibling or parent over the phone, from a witness, or at the hospital. It is more than bad news.

Id. (quoting *Gates v. Richardson*, 719 P2d 193, 199 (Wyo 1986)). *See also Dawson v. Hill & Hill Truck Lines*, 671 P2d 589, 593 (Mont 1983) (similarly holding that "[t]he two actions are distinct and separate" and "not to be

confused"); *Tommy's Elbow Room v. Kavorkian*, 727 P2d 1038, 1048 n13 (Alaska 1986) (same).

Likewise, in *Thayer v. Herdt*, 586 A2d 1122, 1127 (Vt 1990), the court held that an intentional infliction of emotional distress claim "is not precluded by the wrongful death statute," because it "seeks to recover for a tort committed directly against" the plaintiff, whereas "[t]he wrongful death statute provides a remedy for loss by a spouse and next of kin resulting from a wrongful act, neglect, or default *against the decedent*," and is therefore of a "derivative nature." (emphasis added). *See also De Cicco v. Trinidad Area Health Assn.*, 573 P2d 559, 561-62 (Colo Ct App 1977) (same); *Behurst v. Crown Cork & Seal USA, Inc.*, 346 Or 29, 40 (2009) (under Oregon wrongful death act, "the personal representative's right to bring a wrongful death action is derivative of the decedent's own right to do so").

In addition to the foregoing decisions, the court in *Stump* cited numerous cases from around the country "in which wrongful death claims and emotional distress claims arising from the same event were allowed without comment." 499 SE2d at 51 n7. Indeed, *Adams v. Brosius*, 69 Or 513 (1914), and *Hammond v. Ctrl. Lane Comm'ns Ctr.*, 312 Or 17 (1991), both involved death-related claims for emotional distress, and yet this court did not mention the wrongful death act in either of those decisions, even though the defendants in *Hammond* urged the court to hold that the act barred the plaintiff's claims based

on *Horwell v. Or. Episcopal Sch.*, 100 Or App 571 (1990),[13] and even though the Court of Appeals decision in *Hammond* cited *Horwell* as one reason for rejecting the plaintiff's claim. *Horwell* held that the act preempted a claim for negligent infliction of emotional distress arising from a loved one's death. If the act were such a clear bar to claims for infliction of emotional distress, it seems likely this court would have said so in *Adams* and *Hammond*.

In any event, *Horwell* is inapposite. Unlike this case, the plaintiff in *Horwell* was never in a zone of danger, she did not witness the decedent's death, and the distress for which she sought compensation was that which she sustained purely "as a consequence of her mother's death." *Id.* at 573-74. Under those circumstances, the Court of Appeals was correct to hold that "this action falls squarely within the statute." *Id.* at 575.

Moreover, *Horwell* recognized that the act might not "preclude[] all common law claims arising out of the death of a beneficiary's deceased." *Id.* at 575 (citing *Evans v. Salem Hosp.*, 83 Or App 23 (1986)). In *Evans*, the court recognized a distinction between derivative claims for wrongful death and direct claims for intentional infliction of emotional distress based on witnessing the decedent's suffering. *Id.* at 32-33. That distinction is the same one relied on by courts around the country in allowing such claims to proceed simultaneously. *See also Norwest v. Presby. Intercomm. Hosp.*, 52 Or App 853,

[13] Or Briefs 4767 (1991) (City of Eugene Brief at 3-5; Oregon State Police Brief at 3).

860, *aff'd*, 293 Or 543 (1982) (wrongful death claim "is derivative, not independent. That is not the case in an action for loss of consortium: it is an independent, separate injury to the spouse of the victim giving rise to a separate and independent action for damages resulting from that injury.").

V. Conclusion

For the reasons stated above, OTLA urges this court to reject the impact rule of *Saechao* and recognize plaintiffs' claim for negligent infliction of emotional distress on the ground that plaintiffs have legally protected interests in avoiding the threat of imminent physical harm and having to witness the death of their beloved brother. Although adoption of the zone of danger test would suffice to permit plaintiffs' recovery here, OTLA urges this court to adopt the broader *Dillon* test for the reasons stated above, or at least to reserve consideration of that test for a future case.

DATED: May 19, 2016.

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I certify that (1) 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); (2) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (3) the word-count of this brief as described in ORAP 5.05(2)(a) is 12,519 words.

I further certify that on May 19, 2016, I filed the foregoing document with the Appellate Court Administrator through the court's eFiling system and that, on the same date, I served the same document on the party or parties listed below in the following manner(s):

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