IN THE SUPREME COURT OF THE STATE OF OREGON

STACIE PHILIBERT, in her capacity as guardian *ad litem* for - and -	)	Supreme Court No. S063738
Plaintiffs-Appellants, Petitioners on Review,	)	Court of Appeals No. A156192
v.	)	Jefferson County Circuit Court No. 13CV1410
DENNIS KLUSER, Defendant-Respondent, Respondent on Review.	)	

PLAINTIFFS' OPENING 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

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INTRODUCTION

Plaintiffs are two young children who were crossing the street next to their 7-year-old brother when a pickup truck drove into the crosswalk, narrowly missing them and killing their younger brother. Their claims for compensation for their emotional and mental trauma have been dismissed by the courts below, because 30 years ago, on substantially the same facts, the Oregon Court of Appeals ruled that the absence of a physical impact rendered their claims non-cognizable. *Saechao v. Matsakoun*, 78 Or App 340, *rev dism* 302 Or 155 (1986); *Philibert v. Kluser*, 274 Or App 195 (2015)(*per curiam*, citing *Saechao v. Matsakoun*).

This "impact rule" was archaic when the Court of Appeals adopted it, and it is even more of an anachronism 30 years later. Plaintiffs ask this court to correct the course that Oregon law has taken on this issue, and recognize the viability of these claims.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs' case was dismissed on a Rule 21 motion, and the following statement is therefore based on the allegations in the complaint. ER 2-4 (¶¶ 5, 7-10). On an August morning in 2011, , then almost 9, and , then 12, were walking in the town of Madras with their 7-year-old brother At an intersection,

they waited for the light to turn green and began crossing in a crosswalk. Defendant Kluser was in his truck at the same intersection, and proceeded to turn across the crosswalk, narrowly missing and but running over The truck stopped with its front tire resting on chest. Defendant Kluser left the truck and walked around to see what he hit; he then backed the truck off who struggled to breathe and then died at the scene. and were intimately involved with this event, and both suffered the foreseeable consequences of witnessing their brother's brutal death – severe emotional distress, depression, post-traumatic stress disorder, aggression and severe anxiety resulting in panic attacks. Both seek economic damages of $51,500 for past and future counseling, and noneconomic damages of $500,000.

Defendant moved to dismiss the complaint for failure to state claims for relief because plaintiffs did not and could not allege that they had suffered a physical impact in the accident, as required by *Saechao v. Matsakoun*, *supra.* ER 6-8. The trial court granted the motion and entered a judgment dismissing plaintiffs' complaint. ER 31, 33. As stated previously, the Court of Appeals affirmed in a *per curiam* opinion, citing *Saechao. Philibert v. Kluser*, *supra.*

QUESTION PRESENTED AND PROPOSED RULE OF LAW

The Question

Does an individual who is within the zone of danger created by a defendant's negligent conduct, who is standing next to a family member that is killed or seriously injured by that conduct, but who does not experience a direct physical impact, have a claim for the resulting severe emotional injury?

The Proposed Rule

An individual who is within the zone of danger created by a defendant's negligent conduct is a "direct victim" of that conduct, and may recover for the emotional and psychological trauma of witnessing the death or injury of another person.

Plaintiffs framed the question and the proposed rule in terms appropriate to the facts in this case. In moving away from the requirement of a physical impact, courts in other jurisdictions have articulated several approaches, only one of which requires that the plaintiff be in the "zone of danger." Phrased more generally, the question would be: Under what circumstances, if any, can a person who suffers emotional trauma from

witnessing negligently-caused harm to another person recover for that injury?[1]

SUMMARY OF ARGUMENT

Plaintiffs were in the "zone of danger" created by defendant's negligence; they were placed in peril of their own safety and had to watch the brother next to them die of the blow that barely missed them. These children were direct rather than indirect victims, and the defendant's conduct invaded a legally protected interest. The emotional trauma suffered under these circumstances is a foreseeable consequence of defendant's negligence. Whether analyzed under the "zone of danger" rule or under foreseeability principles, recognition of this claim is consistent with Oregon legal principles. The court should undo *Saechao,* and remove Oregon from the small list of jurisdictions that apply an archaic rule to foreclose recovery in a case such as this one.

ARGUMENT

Plaintiffs were aware from the start of this litigation that the Court of Appeals opinion in *Saechao v. Matsakoun* would dictate dismissal of their

[1] The court's media release of March 24, 2016, used this broader phrasing of the question presented. Nonetheless, plaintiffs continue to frame the question presented in the terms of the most restrictive or least inclusive rule articulated by jurisdictions that have eliminated the impact rule (at least in "bystander cases"), and that would permit recovery in the circumstances presented in their case.

claims, unless that case were overruled by the Court of Appeals, or unless that holding was finally reversed by this court. For that reason, plaintiffs find themselves in the relatively unusual posture of having fully stated their arguments in the briefs previously submitted to the Court of Appeals, supplemented by their petition for this court's review. This brief will therefore be deserving of its name, and plaintiff will attempt to reiterate a few points while not duplicating (at least entirely) the previous submissions.

Two words about terminology.

Plaintiffs' claims fall under the general label of "negligent infliction of emotional distress" (NIED). More specifically, because plaintiffs claim distress from witnessing their brother's traumatic death, the claims are often categorized as "bystander" claims, or the issue referred to as "bystander liability."

As plaintiffs have previously pointed out (Opening Brief at 4-5, Pet Rvw at 4), this "bystander" label isn't very accurate. It is sometimes used as including plaintiffs who suffered a physical impact, but whose primary claim is for the distress caused by harm to another; it may include claims by plaintiffs who are within the "zone of danger" but who suffer no physical impact; and it may include true "bystanders" who are "onlookers," and are not themselves placed in jeopardy. The "bystander" label has become the

legal shorthand for injuries suffered (at least in part) as a result of witnessing the harm to another, and inevitably surfaces when discussing them. But it is important to remember that these boys who saw and felt the truck mow down the brother next to them cannot be characterized as mere onlookers just because the truck did not hit them too. Plaintiffs contend that they were in fact "direct victims" because they were in the zone of physical danger created by defendant's negligence, and were threatened with physical harm that did not materialize.

In addition, the word "distress" may not be the best term to describe the harm for which plaintiffs are seeking compensation. Despite a dictionary definition that equates "distress" with "suffering," and lists synonyms that include "misery" and "agony,"[2] the word is too often used to describe a transient worry ("I was *distressed* when my daughter didn't return my call promptly") or relatively mild irritation (a piano teacher is "distressed" by a student's failure to practice**)**. The word "distress" can be heard as minimizing the seriousness of the injury, or implying a state that is fleeting and avoidable.

This case involves claims for emotional injuries. As a society, we have come to realize that an invasion of and injury to a person's mental and

[2] http://www.merriam-webster.com/dictionary/distress

emotional processes can be just as damaging, just as much an impairment, as an invasion of their physical integrity. We know about post-traumatic stress disorders, and we know that they require treatment that our veterans seem to have difficulty finding. Despite common usage, often reduced even further to an acronym (NIED), "distress" is not a particularly apt term for plaintiffs' injuries.

The Court of Appeals ruling in *Saechao v. Matkasoun*

In *Saechao*, the majority opinion begins with an acknowledgment that recovery of emotional distress has been permitted even where that distress "was not the result of a physical injury." 78 Or App at 344, citing *inter alia* *McEvoy v. Helikson*, 277 Or 781 (1977)(negligence in returning passports to a litigant in violation of a court order); *Macca v. Gen. Telephone Co. of NW*, 262 Or 414 (1972)(negligent listing in telephone directory, regarded as a nuisance); *Hinish v. Meier & Frank C.*, 166 Or 482 (1941)(invasion of privacy). But then the court states:

> In each of those cases, **however**, the plaintiff was the *direct* victim of the tortious conduct, although no *physical* injury was involved. *Id.* (italics in text, bold added).

The "however" indicates that the *Saechao* majority did not see the three children who were within the zone of danger, even the one who suffered a physical impact, as "direct victims" of the tortious conduct. The court never

gave any consideration to the possibility that the plaintiffs were in fact "direct victims" of the actor that unreasonably created the zone of danger, or that there might be a legally protected interest – in not having their sidewalk transformed to a zone of danger – that had been invaded.

The majority then turned to the "four different rules" that have evolved for "bystander" liability, choosing the "impact test" to recognize the claim of the child who suffered a physical impact (even though the impact did not cause the emotional injury resulting from watching his sibling die), but to foreclose the claims of the two children who were within the "zone of danger" but were not physically struck. 78 Or App at 348.

This court's opinions.

The Oregon Trial Lawyers Association, as *Amicus Curiae,* has presented in its brief a thorough summary of a century of this court's case law regarding recovery of emotional distress damages. Merits Brief of *Amicus Curiae* OTLA at 9-17. Plaintiffs believe that *Norwest v. Presbyterian Intercommunity Hosp.* 293 Or 543 (1982), as well as three subsequent cases, offer guidance for the analysis of the claims in this case.

In *Norwest*, a child brought a claim for loss of a living parent's society and companionship as a result of a negligently-inflicted injury. In discussing the circumstances in which Oregon law had recognized claims for

emotional distress in the absence of a physical impact, the *Norwest* opinion states:

> [W]e 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. 293 Or at 558-59 (emphases added).

In a footnote to that sentence, Justice Linde also stated this *caveat:*

> 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 [such cases as *Dillon v. Legg,* 68 Cal2d 728, 441 P2d 912 (1968)] and we therefore exclude it from the pertinent analogues in Oregon. 293 at 559 n 18 (emphasis added).

Although the *Saechao* opinion cited *Norwest* multiple times, it mentioned neither the reference to "threatened physical harm" nor the footnote making clear that "bystander" claims were set apart from the general analysis of NIED claims.

One year after *Norwest,* Justice Linde again addressed the viability of a claim for NIED in *Nearing v. Weaver,* 295 Or 702, 670 P2d 137 (1983). Once again, this was not a bystander claim; it was a claim for emotional distress damages resulting from the failure of police officers to enforce a judicial order under the "Abuse Prevention Act." 295 Or at 704. The opinion focuses on whether the plaintiff alleged an infringement of a legal

right, or a legally protected interest, that existed independent of the "ordinary tort elements of a negligence action," and held that she did. Plaintiff's legal right, or legally protected interest, existed by virtue of the statute. In the *Nearing* opinion there was no mention nor need for mention of the other basis for recovering emotional distress damages – the existence of "actual or threatened physical harm."

In *Hammond v. Central Lane Communications Center,* 312 Or 17, 816 P2d 593 (1991), the plaintiff sought damages for a 45-minute delay in response to a 9-1-1 call, during which time her husband died of congestive heart failure. The plaintiff was not a "direct victim," and was not herself in jeopardy of physical harm; there was no "immediate" injury to her. Furthermore, *Hammond,* like *Norwest* and *Nearing,* was not really a bystander case: there was no evidence that a more prompt response would have made any difference to the fate of the husband or prevented her from having to watch him die of heart failure. The court concluded that plaintiff had shown no basis for "reconsideration of the impact rule in this case." 312 Or at 27.

In *Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 412 (2008), this court rejected the plaintiff's argument that *Norwest's* reference to "threatened physical harm" could support recognition of a viable claim where the injury

was a threat that there might be physical harm in the future. This court stated that the *Norwest* opinion had

> 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. 344 Or at 412.

Lowe, like *Norwest*, did "not involve a threat of an imminent physical harm" to the plaintiff, but only a possibility "that defendants' negligence may or may not give rise to physical harm at some indefinite point in the future." *Id.*

Plaintiffs were direct victims, and allege infringement of a legal right.

This is not a case where plaintiffs seek recovery only "for harm resulting from an injury to another person;" this is not equivalent to the child's "loss of parental consortium" claim in *Norwest.* It isn't just death that afflicts these children; it's the devastating image of their brother's destruction before their very eyes, by a force that almost took them as well, and left them with the need to learn how to live with that image seared into their brains. This is their own harm they live with, not just their brother's death.

In addition, it seems almost axiomatic that citizens have an interest in being able to walk in crosswalks without being terrified by a vehicle that

almost hits them, and without being forced to witness another person's actual or potential destruction. Citizens no doubt believe that such an interest is (and should be) "legally protected." If violation of a court order infringes on a legally protected interest, violation of the rules applicable to crosswalks and traffic control certainly does as well.

The threat of imminent physical harm, the terror that accompanied it, and the horror of watching that threat materialize and destroy their brother – all of this harm flowed directly from the defendant's failure to exercise reasonable care. These children were direct victims of defendant's conduct.

The alternative: Foreseeability qualified.

The *Saechao* majority took the position that there was no conceivable relationship "between being in the zone of physical danger and being subject to emotional traumatization." 78 Or App at 348. Judge Warren, in his dissent, pointed to the equal lack of relationship between the impact that the majority required and the emotional trauma that was claimed as injury. *Id.* at 349. The two viewpoints inevitably suggest that both tests lack coherence, and the remedy might in fact be a less restrictive approach that places the focus on the injury that is the basis for the claim. Judge Warren did not go so far, but plaintiffs suggest that the similar deficiencies in both

the impact and the zone of danger rules should lead the court to consider an alternative answer.

In *Norwest,* the court commented on the explanations advanced (in *Ore-Ida Foods v. Indian Head*, 290 Or 909 (1981)) to recognize a claim for a solely economic injury as a result of negligent injury to another person: "These include such propositions as that * * * the consequence is not foreseeable, which is a question of fact and will often be untrue[.]" 293 Or at 560. That is certainly true here. Even if these children had still been standing on the sidewalk instead of the crosswalk, and were not within the "zone of danger," watching their brother destroyed would nonetheless have been traumatic, and that trauma was eminently foreseeable.

In *Dillon v. Legg,* 68 Cal2d 728 (1968), the California Supreme Court determined that the zone of danger rule, which it had adopted in 1939, was insufficient. In that case, a vehicle ran over and killed defendant's infant daughter in an intersection. The mother saw the event but was not within the zone of danger; another daughter was in the zone of danger, but suffered no impact. The court said:

> [T]he complaint here presents the claim of the emotionally traumatized mother, who admittedly was *not* within the zone of danger, as contrasted with that of the sister, who *may have been* within it. The case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other. In the first place, we can hardly justify

> relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule. In the second place, to rest upon the zone-of-danger rule when we have rejected the impact rule becomes even less defensible. We have, indeed, held that impact is not necessary for recovery [*Cook* v. *Maier*, 33 Cal App 2d 581 (1939)]. The zone-of-danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of *impact*.
>
> 68 Cal 2d at 733 (emphasis in text).

The court rejected the argument that recovery should be denied (even though the claim was undeniably legitimate) because other fraudulent claims might be urged; "we cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong." *Id.* at 739. The court then set "guidelines" to indicate the "extent of liability" in future cases, guidelines that it saw as indicating "the *degree* of the defendant's foreseeability:"

> In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, * * * the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted

> with an absence of any relationship or the presence of only a distant relationship.
>
> *Id.* at 740.

Although the *Saechao* majority found the *Dillon* guidelines describing a different territory than "foreseeability," that appears to be a distinction without a difference. On the one hand, as summarized above, the *Dillon* court articulated its guidelines as indicia of foreseeability. 68 Cal 2d at 740. On the other hand, an Ohio case, which the *Saechao* court summarily rejected as relying solely on foreseeability, in fact adopted the *Dillon* guidelines. *Paugh v. Hanks,* 451 NE2d 759 (Ohio 1983), discussed in *Saechao,* 78 Or App at 347. There appear to have been three, rather than four, approaches taken by the courts to the question presented here: the impact rule, the zone of danger rule, and a foreseeability analysis combined with stated limitations or requirements.

The California Supreme Court revisited *Dillon* in *Thing v. La Chusa*, 48 Cal 3d 644 (1989), and after discussing at some length the difficulty inherent in defining the limits of "bystander" liability, restated the rule as follows:

> We conclude, therefore, that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2)

> is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.
>
> 48 Cal 3d at 667-8.

Under this formulation, the *Dillon* "guidelines" became "requirements," that were seen as necessary to limit the number of claims that might otherwise qualify as "foreseeable."[3]

In *Barnhill v. Davis*, 300 NW2d 104, 106 (Iowa 1981), the court recognized "bystander liability" if the claim satisfied these elements:

> 1. The bystander was located near the scene of the accident.
> 2. The emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
> 3. The bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity.
> 4. A reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed.
> 5. The emotional distress to the bystander must be serious.

In *Groves v. Taylor*, 729 NE2d 569, 573 (Ind 2000), the Indiana court held that a bystander could establish "direct involvement" by proving that he

[3] The majority in *Thing* found difficulties with *Dillon* that two dissenting justices, in separate opinions, took issue with. *See* 48 Cal 3d at 677 (Mosk, J., dissenting) and 682 (Broussard, J., dissenting).

or she "actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling."

In *Clohessy v. Bachelor*, 675 A2d 852 (Conn 1996), the court repudiated the "impact rule" (at 857) and concluded (at 861) that the zone of danger rule was unnecessarily restrictive and arbitrary. The court stated that "bystander emotional distress is reasonably foreseeable" (at 860), but "agree[d] that specific limitations must be imposed upon the reasonable foreseeability rule." 675 A2d at 862-63. The court adopted the three requirements stated in *Thing, supra*, adding that the witnessed injury to the direct victim must be "substantial, resulting in either death or serious physical injury." *Id.* at 864.

In 2012, the Kentucky Supreme Court repudiated the impact rule, holding that plaintiffs claiming emotional distress must "satisfy the elements of a general negligence claim, and must also show "by expert and scientific proof" that the claimed injury is severe or serious. *Osborne v. Keeney*, 399 SW3d 1, 5-6 (Ky 2012). The Kentucky court seemed satisfied with a simpler version of the *Dillon* "guidelines" or the *Thing* "requirements."

These are not the only examples. *See* Open Br at 12-16 and Appendix A. A majority of jurisdictions have found no barrier in the principles of their

negligence law to recognition of a claim for the emotional damage suffered by being forced by a defendant's negligence to witness the death or serious injury of a loved one – the true "bystander" scenario.

Conclusion

The Court of Appeals felt that its decision in *Saechao* "must be made as a matter of policy," and "[t]he impact rule seem[ed] * * * to reflect the best policy option." 78 Or App at 348. This court has expressed hesitation to make decisions based on its "views of desirable social policy" (*Norwest,* 293 Or at 55) and there is no call to do so in this case. Recognition that these children were direct victims of the defendant's negligence, and a protected legal interest was invaded under these circumstances, is consistent with this court's precedents; it's what should have occurred in 1986 when this court took review of *Saechao,* had settlement not mooted the case.

Plaintiffs urge the court to correct this aberration in Oregon law, and allow these young boys to seek compensation for the injuries they suffered when they were placed in peril of their own life to watch the end of their brother's.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Brief length:

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 4064 words.

Type size:

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

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **Plaintiffs' Opening Brief on the Merits** with the State Court Administrator and by so doing electronically served the following individuals

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DATED this 20th day of May, 2016.

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