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In the Supreme Court of California

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Jayde Downey,
Plaintiff and Appellant
v.
City of Riverside, et. al.,
Defendants and Respondents.

After a Decision by the Court of Appeal Fourth Appellate District, Division One, Case No. D080377 Appealing from a Judgment Entered in Favor of Defendants Riverside, Ara Sevacherian and Vahram Sevacherian, County Superior Court Case No. RIC 1905830 Honorable Harold W. Hopp, Judge.

JAYDE DOWNEY'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

In *Thing v. LaChusa* ("*Thing*") (1989) 48 Cal. 3d 644, 667-668 this Court held that a claimant may recover damages for negligent infliction of emotional distress (NIED) caused by observing the negligently inflicted injury of a third person if, but only if, the claimant: (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.

As to the second prong of the *Thing* test, this court held, in *Bird v. Saenz* ("*Bird*") (2002) 28 Cal. 4th 910, that bystander NIED claimants in certain medical malpractice cases are also required to plead and prove their presence at the scene, along with their contemporaneous awareness of the causal connection between the defendant's negligent conduct and the resulting injury to the claimant's loved one.

Some lower courts, as in *Fortman v. Förvaltningsbolaget Insulan ("Fortman")* (2013) 212 Cal.App.4th 830, acknowledge the language of the second prong of the *Thing* test, but attach the additional *Bird* 'contemporaneous awareness of the causal connection" between the injury and defendant's wrongful conduct test in contexts other than medical malpractice cases. This is what the courts below did in the case now at bench.

Here, the issue presented to this court is whether a bystander NIED claimant -- in a traffic accident case – should be required to plead and prove

her contemporaneous awareness of the causal connection between the harmful conduct of each defendant's acts and the injuries to her loved one. Downey submits the answer to that question is "no".

SUMMARY OF FACTS AND ARGUMENT

Jayde Downey filed a Third Amended Complaint against the municipality that owned and maintained a dangerous intersection (City of Riverside), the owner of the hazardously maintained private property adjacent to that intersection (Sevacherian), and the driver of a car (Martin), all of whom were alleged to be responsible for causing an automobile vs. automobile collision that caused severe injuries to her daughter, Malyah Vance (Vance [1]). Downey's operative complaint pleads only a bystander NIED claim.

Downey's operative complaint established she was virtually present at the scene of the collision as she contemporaneously perceived it causing horrendous injuries to Vance. The courts below, invoking *Bird v. Saenz* ("*Bird"*) (2002) 28 Cal.4th 910 and *Fortman v. Förvaltningsbolaget Insulan ("Fortman")* (2013) 212 Cal.App.4th 830 found Downey's complaint legally insufficient because she did not also allege her contemporaneous

[1] Neither Vance nor Martin are appellants, but they are parties to the Vance personal injury case still pending in the trial court.

awareness of the causal connection between Vance's injuries and the hazardous condition City's intersection or Sevacherian's deficient landscaping obscuring the drivers' view of oncoming traffic.

Thing v. LaChusa (1989) 48 Cal. 3d 644 makes clear that, as in this case, it is enough that the bystander-NIED claimant contemporaneously perceives the injurious accident as it is causing injuries to her loved one. She need not also be contemporaneously aware of the specific acts of wrongful conduct of the City or Sevacherian that caused the injury-producing event.

However, in the context of some medical malpractice cases, this Court has held a bystander NIED claimant is required to establish a contemporaneous awareness of the causal connection between the defendant's negligent conduct and the resulting injury, *Bird,* Id., 28 Cal. 4th at 918, citing *Golstein v. Superior Court* (1990) 223 Cal. App. 3d 1415, 1427-1428. Some lower courts, notably *Fortman,* impose this as an additional pleading requirement in (at least) defective product claims. The case at bench expands this rule to dangerous roads and negligently maintained land that are (at least) contributing causes of a traffic accident.

Paraphrasing liberally from the concurring and dissenting opinion of Justice Dato, the argument adopted by the trial court and endorsed by the court below was considered and rejected by the court in *Walsh v. Tehachapi Unified School Dist.* (*"Walsh"*) E.D. Cal., Aug. 26, 2013, No. 1:11-cv-01489 LJO JLT) 2013 WL 4517887. The *Walsh* court explained that *Bird* simply

applies what *Thing* already requires: the bystander's awareness at the time of the injury-producing event of a causal connection between the victim's injuries and the injury-producing event, thereby making the two interchangeable. However, the two do not always occur in tandem and are not always synonymous with one another. When the two diverge, it is the injury-producing event that matters. Here, the injury-producing event is the auto collision and there is no dispute Downey perceived it causing injury to her loved one, see *Walsh*, supra, WL 4517898 at page *8 and Slip Opinion/Dissent at pg. 7-8.

In the traditional fire, explosion, and auto collision cases, a requirement that such claimants also be contemporaneously aware of the causal connection between the defendant's tortious conduct and a loved one's injuries imposes an additional pleading-and-proof burden that is not required by *Thing*. As in the case at bench, the additional pleading and proof requirement is unnecessary (under *Thing*) and almost insurmountable.

Fortman thus injects confusion into this body of law. This confusion is explicitly noted and left unresolved by the Judicial Council Advisory Committee on Civil Jury Instructions at CACI 1621 (Essential Elements for Recovery of Damages/Bystander NIED Claimant).

Although the court below unanimously reversed and granted leave to amend, petitioner respectfully submits the 2-1 majority was incorrect as to imposing an inappropriate burden on Downey. The operative complaint

states a proper bystander NIED claim under the formulation laid down in *Thing*. Save for certain medical malpractice cases where an injurious event is not contemporaneously perceived (or perceivable) by the bystander, the second prong of the *Thing* test is satisfied upon the NIED claimant's presence at the scene coupled with her contemporaneous perception that an injurious event is causing injury to her loved one.

STATEMENT OF THE CASE

The present matter arises from an automobile accident that occurred on December 4, 2018. The Factual and Procedural Background from the opinion of the appellate court below lays out a clear statement of what occurred that day (Pages 4-5 of the Slip Opinion/Majority):

"In December 2018, Vance was driving eastbound on Via Zapata and entering the intersection of Via Zapata and Canyon Crest Drive when her vehicle was struck by a vehicle owned and operated by Evan Martin, who was traveling southbound on Canyon Crest Drive. Vance suffered serious personal injuries as a result of the collision. Canyon Crest Drive and Via Zapata are public streets in Riverside. City owned, managed, supervised, controlled, and/or maintained Canyon Crest Drive at or near the intersection at Via Zapata. Sevacherian owned, managed, supervised, controlled, and/or maintained the real property adjacent to the intersection.

"At the time of the collision, Downey was on the phone with Vance giving her directions to get to a realtor's office close to the intersection.

Downey knew Vance was close to the Via Zapata/Canyon Crest Drive intersection and would have to stop there. Downey heard Vance in a self-talk voice say something like 'I'm gonna go left, I'm gonna go left, OK. . . OK. . .OK'—in a manner and tone that Downey understood was consistent with Vance waiting to turn left and mentally 'checking off' traffic on Canyon Crest Drive as the traffic approached and cleared the intersection before she could turn. Then, in rapid succession, Downey heard Vance take an audibly sharp, gasping breath; her frightened or shocked exclamation: 'Oh!' and the simultaneous, or near-simultaneous sounds of an explosive metal-on-metal vehicular crash; shattering glass; and rubber tires skidding or dragging across asphalt. Downey had not heard the sounds of skidding tires or squealing brakes in the seconds immediately preceding the impact. Then and there, Downey knew from the combination of the sounds she heard, and from having directed Vance where to drive, that Vance had been injured in a high-velocity motor vehicle collision at or near Via Zapata at Canyon Crest Drive.

"As the sound of tires skidding or dragging across asphalt diminished, and having heard no sounds or vocalizations from Vance, Downey understood Vance was injured so seriously she could not speak. Downey immediately left her office, telling people there something like, 'I have to go, my daughter has been in a car accident, I have to go.' As Downey ran to her car and started driving toward the scene of the incident, she called out to Vance. For a time, Downey heard nothing, but then heard the sound of

rustling in Vance's car. Downey started screaming into her phone, 'Can you hear me? Can you hear me? I can hear you, can you hear me?' She then heard a male voice say something like, 'Would you stop? I'm trying to find a pulse.' Downey waited, then asked, 'Is she alive?' Moments later, the man said, "She breathed. I got a breath." He then said something like: 'What I am going to tell you to do is going to be the hardest thing you will ever do in your life. I want you to hang up your phone and call 911 and have them respond to Via Zapata and Canyon Crest Drive in Riverside.'"

Additionally, the third amended complaint pleads, rather generally, City's liability for maintaining a dangerous condition of the intersection, and Sevacherian for maintaining the landscaping near the intersection in such a condition that it obstructed the view of vehicular traffic turning left, eastbound to northbound so as that Martin and Vance could not see each other's cars, C.T., Vol 2, 294-304.

In ruling on the demurrers of Sevacherian and the City, the trial court held that the complaint did not establish that Downey had a contemporaneous awareness the causal connection between the Respondents' tortious conduct and the injuries sustained by Vance. Therefore, Downey's NIED claim could not withstand the demurrers, C.T. 407.

The trial court entered orders dismissing the City and Sevacherian with prejudice on October 29, 2021, and November 9, 2021, respectively. Although Downey's notice of appeal referred to a judgment entered

following the sustaining of the demurrer, the court below construed the notice of appeal as referring to the October and November 2021 orders dismissing the City and Sevacherian, C.T. 413-416. The opinion of the Court of Appeals was filed on April 26, 2023. This Court granted Appellant's Petition for Review on July 19, 2023.

STANDARD ON REVIEW

In determining whether plaintiff properly stated a claim for relief, reviewing courts will treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. The Court will give the complaint a reasonable interpretation, reading it as a whole and its parts in their context, *Zelig v. County of Los Angele*s (2002) 27 Cal.4th 1112, 1126.

Although the standard is effectively de novo review, the positions staked out by the majority and minority positions in the court below are quite developed, well-considered and, we expect, raise some of the same questions or concerns this Court will have. So, we address them at length.

ARGUMENT

I Appellant Demonstrated Contemporaneous Awareness of the Traffic Collision Causing Injuries to her Daughter, So She Should Not be Required to Plead or Prove her Awareness of Each Defendant's Wrongful Conduct

It has long been held that a claimant may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, the claimant: (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, *Thing,* supra, 48 Cal. 3d at 667-668. As was the case in *Thing*, it is the second prong of the *Thing* test that is at issue here.

In this matter, the court of appeal was unanimous in its conclusions that Downey was virtually present via cell phone technology at the scene of the injury-producing traffic collision, and that she was contemporaneously aware the collision was causing injuries to her daughter. Of course, Downey has no quarrel with these findings.

However, the court below was divided on whether Downey was also required to plead and prove a contemporaneous awareness of the connection between the harmful or wrongful conduct of each defendant with her daughter's injuries:

The majority answered that question in the affirmative, holding the operative complaint did not establish that Downey was contemporaneously aware of the causal connection between the defendant's harmful conduct—the dangerous condition of the roadway and/or negligent maintenance of vegetation abutting the roadway---and the injuries to her daughter.

The majority opinion adopted this holding from the body of bystander NIED claims arising from medical malpractice cases, and *Fortman* which extends these holding to (at least) defective product cases. In *Fortman*, a bystander NIED claim was denied to the sister of a deceased scuba diver against the manufacturer of the defective regulator that killed her brother. Sister and Brother were scuba diving together. During that dive, "…it is undisputed that Fortman (the sister) was present and aware that her brother was suffering an injury," *Fortman,* supra, 212 Cal. App. 4th at 836. The sister had witnessed her brother falling unconscious but believed it was due to a heart attack, not the defective equipment which was, in fact, the case. The court of appeal stated in that case: "to satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative." (*Fortman*, *supra,* 212 Cal. App. 4th a830, 836.) But to demonstrate that awareness, Fortman had to prove she was then aware of the causal connection between the company's defective product and the resulting injury, *Fortman*, supra, at 212 Cal. App. 4th at 846. 332.

The dissenting opinion by Justice Dato answered the question in the negative. As the complaint established that Downey was contemporaneously aware of the injury-producing collision as it was causing injuries to her daughter, he would have reversed the trial court. He noted there is a long line of cases dating back to *Dillon v. Legg* (1968) 68 Cal.2d 728 (*Dillon*), in

which this Court has made clear emotional distress is compensable where a plaintiff closely related to the victim contemporaneously perceives the "injury-producing event" and understands that it is causing injury to their loved one.

At a minimum, apart from the cases arising in the context of medical malpractice cases where perception of an injury-producing event can sometimes not be perceived, *Fortman* injects some unnecessary confusion as to what "injury producing event" must be perceived by an otherwise qualified NIED claimant. The Judicial Council Advisory Committee on Civil Jury Instructions breaks the second prong of the *Thing* into two components at CACI 1621 (Essential Elements for Recovery of Damages/Bystander NIED Claimant) and states:

2. That when the [traffic collision] that caused injury to [Vance] occurred, plaintiff [Downey] was virtually present at the scene [through cell phone technology];

3. That [Downey] was then aware that the [auto collision] was causing injury to [Vance].

However, the CACI 1621 Instructions for Use provides, in pertinent part:

"There is some uncertainty as to how the 'event' should be defined in element 2 and then exactly what the plaintiff must perceive in element 3. **When the event is something dramatic and visible, such as a traffic**

accident or fire, it would seem that the plaintiff need not know anything about why the event occurred. (See *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1267 [3 Cal.Rptr.2d 803]) […] And the California Supreme Court has stated that the bystander plaintiff need not contemporaneously understand the defendant's conduct as negligent, as opposed to harmful. (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324].) [...] But what constitutes perception of the event is less clear when the victim is clearly in observable distress, but the cause of that distress may not be observable. It has been held that the manufacture of a defective product is the event, which is not observable, despite the fact that the result was observable distress resulting in death. (See *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 843−844 [151 Cal.Rptr.3d 320].) In another observable distress case, medical negligence that led to distress resulting in death was found to be perceivable because the relatives who were present observed the decedent's acute respiratory distress and were aware that defendant's inadequate response caused her death. (See *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489−490. [185 Cal.Rptr.3d 313]. It might be argued that observable distress is the event and that the bystanders need not perceive anything about the cause of the distress. However, these cases indicate that is not the standard. But if it is not necessary to comprehend that negligence is causing the distress, it is not clear what it is that the bystander must perceive in element 3. Because of this

uncertainty, the Advisory Committee has elected not to try to express element 3 any more specifically," (CACI 1621 Vol. 1, Page 1054 (2023), emphasis added).

In the case at bench, Downey was virtually present and perceived events that were "dramatic and visible," and the cause of that distress – a traffic accident – was 'observable.' Thus, it would seem that Downey need not know anything about why the event occurred under the rule established by *Thing*. However, under the rule established in the case at bench, for potentially every bystander NIED claimant, in any kind of case, there is a further requirement of contemporaneous awareness of the specific wrongful acts committed by each responsible defendant as they are causing injury to a loved one.

On this point, the voice of dissenting Justice Dato is informative. He observed that the California Supreme Court understood that its discussion in *Bird* was necessarily contextual:

"Justice Werdegar made a point of characterizing the action as a medical negligence case in the first sentence of, and repeatedly throughout, her opinion." (28 Cal.4th at pp. 912, 917–922.)

Further expounding on this Court's opinions in this area, Justice Dato wrote: "[T]he (Supreme) court noted in *Thing* that what justifies the award of emotional distress damages is 'the traumatic emotional effect on the plaintiff who contemporaneously observes both the event ***or*** conduct that

causes serious injury to a close relative and the injury itself.' (*Thing*, supra, 48 Cal.3d at p. 667, emphasis added.) Phrased in the disjunctive, *Thing* makes clear it is enough that the bystander-plaintiff contemporaneously perceives the accident; she need not also be aware of the underlying negligent cause."

Downey respectfully submits Justice Dato is correct. There is a distinction to be made between many medical malpractice cases, as in *Bird* and "collision/fire/explosion" cases. Justice Dato, citing the case of *Walsh* proposes that the additional element being imposed on bystander NIED claimants that they be contemporaneously aware of the underlying negligent cause of an injury-producing traumatic accident, results from a misreading of *Bird*:

"[T]he *Walsh* court explained that *Bird* "simply appl[ies] what *Thing* already requires: a plaintiff must be aware at the time of the injury-producing event of a causal connection between the victim's injuries and the injury-producing event." (*Walsh*, at p. *8.) It added that to the extent *Bird*'s analysis "focused on a defendant's negligent conduct, it was only because the court first identified the negligent conduct as the injury producing event, thereby making the two interchangeable. The two, however, do not always occur in tandem and are not always synonymous with one another. And when the two do diverge, it is the injury-producing event that matters." (*Walsh*, at p. *8.)

The injury-producing event in this case is an automobile collision, which the majority concedes Downey perceived."

Interestingly, the court in *Fortman* also draws a distinction between the *Bird* medical malpractice cases and at least traffic cases. "The injury-producing event was injecting the wrong solution, which could not be observed by the plaintiffs (in) *Golstein v. Superior Court* (1990) 223 Cal. App. 3d 1415, 1423 'Even accepting the injection as the 'accident,' its role in triggering the emotional trauma is meaningless because—unlike a car bearing down on one's child—the event was bereft of obvious danger.'" *Fortman*[2] supra, 212 Cal. App. 4th at 838, fn. 3

The requirement that an NIED claimant be contemporaneously aware of the defendant's negligent conduct in some medical malpractice cases is necessary because it is frequently not possible to discern injurious from non-injurious medical care as the time it is being provided to the patient and

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[2] As discussed below, and elsewhere in *Fortman*, the injury in *Golstein* was a radiation overdose. In *Fortman*, at footnote 3, where reference is made to *Golstein* at its page 1423, the court discusses *Mobaldi v. Regents of University of California* (1976) 55 Cal.App.3d 573. In *Mobaldi,* the injury was caused by a physician injecting the wrong solution to the toddler being held by the bystander NIED claimant…but the point is the same.)

perceived by the family member, see *Golstein v. Superior Court* (1990) 223 Cal. App. 3d 1415 (plaintiffs were not aware their child was being exposed to an overdose of radiation during radiation therapy); and *Wright v. City of Los Angeles* (2001) 93 Cal. App. 4th 683 (relative of victim was not contemporaneously aware the victims was being injured by a paramedic's failure to diagnose sickle cell shock).

"Unlike the plaintiffs in the fire and explosion cases, that is, *Wilks v. Hom* Cal.App.4th 1264, 3 Cal.Rptr.2d 803, *Zuniga v. Housing Authority*, 41 Cal.App.4th 822 …and *In re Air Crash Disaster Near Cerritos*, 967 F.2d 1421, and the plaintiff who observed her husband being crushed by a faulty machine, that is, *Ortiz v. HPM Corp*., 234 Cal.App.3d 178…this case falls into the *Golstein* category of cases in which the plaintiff has no meaningful comprehension of the injury-producing event. Fortman witnessed her brother's injury, but like the parents in *Golstein* who were unaware of the radiation overdose, Fortman had no contemporaneous awareness of the causal connection between the company's defective product and her brother's injuries. Months after the accident, Fortman learned that she had witnessed a product-related injury, not a heart attack", *Fortman,* supra, 212 Cal.App.4th at 845.

In 'collision, fire, and explosion' cases, even those relied upon by the court in *Fortman*, bystander NIED claimants are not required to demonstrate a contemporaneous awareness of the acts of all the responsible wrongdoers.

In re Air Crash Disaster Near Cerritos, California., (1986) 967 F. 2d 1421 (9th Cir. 1992), decided under California law, a mother was allowed to recover for emotional distress suffered when she arrived at her home to see it engulfed in flames, although she did not witness and could not know the most temporally proximate cause of the fire (the crash of an airliner into the house), nor could she know at that time the tortious nature of any of the defendants' conduct that caused the crash. She had witnessed only the injury-producing event—the fire—and knew her husband and children were inside the house. That was enough to satisfy *Thing.*

In *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, a mother sued her landlord, among others, after one of her daughters died, and another was severely injured following an explosion in their home caused by an improperly installed propane stove. The mother was also in the home at the time of the explosion, but in a different room. As it turned out, the explosion was triggered by a spark from an electrical socket as a vacuum cleaner plug was removed. The appellate court concluded that, despite being in a different part of the apartment, "she personally and contemporaneously perceived the injury-producing event and its traumatic consequences," *Wilks,* Id., 2 Cal. App. 4th at 1273. The opinion of the court contains no discussion of the nature of the landlord's "negligent acts" and how (or whether) the plaintiff was contemporaneously aware of them. In affirming the judgment in favor of the mother, the court simply stated it was sufficient that "the plaintiff was at the

scene of *the accident* and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child," *Wilks,* Id. 2 Cal. App. 4th at 1271, italics added.)

In *Zuniga v. Housing Authority of City of Los Angeles* (1995) 41 Cal. App. 4th 82, 102-103 (disapproved on other grounds by *Zelig v. County of Los Angeles* (2002) 27 Cal. 4th 1112, 1146), the widower/father of arson victims was allowed to pursue a bystander NIED claim against the Housing Authority for its negligent failure to control crime in its housing projects. Even though he witnessed the fire and the injuries inflicted on his family, he did not otherwise know of the nature of defendant's alleged tortious conduct.

The issue of whether a claimant must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by a close relative was rigorously examined by the Federal District Court in *Walsh* (a post-*Fortman* case), at 2013 WL 4517887. There, a 13-year-old boy died eight days after he attempted suicide by hanging himself by the neck. Plaintiff on the bystander NIED claim came upon her son while he was still hanging by an extension cord that was tied to a tree in the back yard of their home. She climbed the ladder her decedent had used to tie the extension cord to the tree and held his body while the cord was cut from his neck. After the cord was cut, she lost her grip and the boy fell to the ground. At that moment, plaintiff thought her son was already dead. She had known for a long time that her decedent had

been sexually harassed at school. After the hanging, she came across her decedent's suicide notes, where he blamed the school for his death. Defendant school district brought a summary judgment motion, based on *Fortman,* on plaintiff's NIED claim.

The court in *Walsh*, held that the defendant's reliance on *Fortman* was misplaced. The court read *Fortman* to require only that the plaintiff "be aware at the time of the injury-producing event of a causal connection between the victim's injuries and *the injury-producing event*." (2013 WL 4517887, at *8; emphasis in original): "[T]he plaintiff must have an understanding perception of the 'event as causing harm to the victim.'" The Court went on to hold that *Fortman* does not stand "for the much broader proposition that a plaintiff must be aware of the causal connection between the victim's injuries and the defendant's negligent conduct." (Id., citing this language from *Fortman*: "*Thing* does not require the plaintiff to have awareness of what caused the injury-producing event[.]").

The court in *Walsh* pointed out how *In re Air Crash Disaster Near Cerritos, California* ("*Air Crash*"), 967 F.2d 1421 (9th Cir.1992) "demonstrates this point":

"In that case, the plaintiff returned from the grocery store and found her house engulfed in flames. *Id*. at 1422–23. Although she saw and felt a large explosion minutes earlier, she did not know at that time that a passenger airliner had just collided with a private plane and had crashed into her house.

Id. at 1423. As the fire continued to consume her house, the plaintiff was aware that her husband and two children were still inside and were being seriously injured. *Id.* Indeed, all three perished in the fire. Id. at 1422."

[...]

"The defendant's negligent conduct in *Air Crash* was distinct from the injury-producing event. (Footnote omitted.) The defendant's negligent conduct was the failure to detect the private plane's intrusion into restricted airspace and the failure to give a traffic advisory to the passenger airline. See *Id.* at 1423. The injury-producing event, meanwhile, was the fire that engulfed the house, which killed the plaintiff's husband and children. See *Id*. at 1425. In concluding that the plaintiff could recover for negligent infliction of emotional distress to a bystander, the Ninth Circuit focused only on the fire (i.e., the injury-producing event). The Ninth Circuit reasoned that the plaintiff satisfied the second *Thing* requirement because she (1) arrived at the scene of the fire while it was still consuming her house; and (2) was at that time aware of the causal connection between the fire and her husband's and children's injuries. See *Id.* at 1424–25. Notably, whether the plaintiff was aware of the actual cause of the fire (i.e., the defendant's negligent conduct) and its ultimate connection with the deaths of her family members was immaterial to the Ninth Circuit's analysis." (*Walsh*, supra, 2013 WL 4517887, at *9.)

In another pre-*Thing* case, *Ochoa v. Superior Court* (1985) 39 Cal.3d 160, this Court held that the claimant parents could state a bystander NIED claim based on witnessing their son's prolonged suffering and ultimate death in a juvenile hall as a result of medical neglect. They were present when the child's medical needs were disregarded and were immediately aware of the child's consequent suffering. "It was immaterial that they were 'voluntarily' present at the scene and were not aware of the 'tortious nature' of the staff's conduct toward the child," citing *Ochoa*, supra, 39 Cal. 3d at 170-172. (Emphasis added)

With specific regard to whether a claimant must be aware of the tortious conduct of a defendant, this Court in *Ochoa* also stated, "we by no means suggest—as did the court in *Hair v. County of Monterey*, supra, 45 Cal.App.3d 538, 543–544, 119 Cal.Rptr. 639—that plaintiff must be aware of the tortious nature of defendant's actions. As the court in *Mobaldi* [*v. Regents of the University of California* (1976) 55 Cal. App. 3d 573] observed, such a requirement would lead to the anomalous result that a mother who viewed her child being struck by a car could not recover because she did not realize that the driver was intoxicated, *Mobaldi*, supra, 55 Cal.App.3d at 583[...] "We are satisfied that when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted." (*Ochoa*, supra, 39 Cal. 3d at 170.)

Downey alleged a contemporaneous awareness of the traffic collision, the fact that Vance had suffered serious injuries, and the responsibility therefor of the City and Sevacherian. At least outside the context of that subset of medical malpractice cases where it is not reasonably possible to conclude an injurious event is occurring as it is being perceived, it is simply not required that the bystander NIED claimant contemporaneously know the exact nature of the conduct giving rise to the injurious collision. To satisfy the second prong of *Thing,* she need only be aware of the injury-producing and she is then aware that it is causing injury to her loved one, *Thing,* supra, 48 Cal.3d at 667-668.

Justice Dato presaged additional difficulties for Downey and similarly situated bystander NIED claimants in this state:

"Downey's allegations against Martin, the driver of the vehicle that collided with her daughter, are not directly before us. Still, the majority opinion seems to assume that she has adequately pled such a claim. But even this assumption is problematic in light of the majority's requirement that plaintiff be aware of the defendant's 'negligent act.' How can someone listening on a phone know what Martin did or did not do? And what if Martin were to claim that a passenger in the car, with whom he was arguing, grabbed the steering wheel, causing the vehicle to veer off course? Is Downey precluded from stating a claim against the passenger because she couldn't possibly know about the passenger's involvement? Or if Martin says he

couldn't stop because of faulty brakes repaired by a negligent mechanic? Is the mechanic insulated from a claim by Downey? None of these questions are relevant if the focus is, as it should be, on whether the bystander-plaintiff contemporaneously perceived the injury-producing event, defined as the automobile accident." (Slip Opinion/Dissent, pages 4-5).

If Justice Dato is correct, then Downey's claim against Martin fails. And, going forward, consider the case of a sighted Father and a blind Mother standing at a curb as their Daughter enters her car and drives away from the curb. Seconds later, Daughter's car is destroyed when a car coming from the opposite direction veers into oncoming traffic lanes and collides, head-on, with Daughter's car. Mother and Father know their daughter was just horribly injured in a traffic accident. Father also knows how and why the collision occurred. Mother does not. Both suffered grievous emotional distress knowing their Daughter was, at best, horribly injured in a traffic accident. Under *Fortman* and the rule proposed by the majority opinion, Father has a bystander NIED claim to make. Mother does not. Under such circumstances one might well argue that Article 1, Section 7 (Due Process and Equal Protection) of the *California Constitution* comes into play, because blind people will never be treated equally in cases such as this one.

Thing and its progeny seek to limit bystander NIED claims to those in which an injury to a loved one can be meaningfully perceived at the time the event is occurring. *Bird* and its progeny recognize, in the context of some –

perhaps most – medical malpractice cases it is not possible to perceive an injurious event or differentiate it from necessary medical care as the care is being provided. With a bystander NIED claimant in the medical malpractice context, this Court has deemed it proper to require them to establish a contemporaneous knowledge of negligent, or at least harmful conduct at the time it is occurring to a loved one: this is how and when *Bird* and *Thing* harmonize. Requiring bystander NIED claimants, in such medical malpractice cases, to plead and prove their contemporaneous awareness of the causal connection between the defendant's negligent conduct and the resulting injury does not modify standard established in the second prong of the *Thing* test.

But in the 'fire/crash/explosion' class of cases, the harmful conduct of the defendant is interchangeable with the injury-producing event itself and requiring the NIED claimant to plead and prove contemporaneous knowledge of how each wrongdoer caused the injurious event poses imposes a burden not intended by *Bird* or *Thing*. *Fortman* borrows the *Bird* pleading and proof limitation relating to the NIED claimant's contemporaneous knowledge of tortious conduct while the injurious event is occurring, and imposes that standard where it does not belong: in a defective product claim. Here, City and Sevacherian seek to expand *Fortman's* reach traffic collision cases.

In our view, justice would be served by permitting Downey, and those similarly situated, to bring bystander NIED claims under the facts as currently pleaded. Doing so is permissible under *Thing* and *Bird.*

Returning the state of bystander NIED jurisprudence to its condition before the appearance of *Fortman* could have some impact on the number of such cases filed. With an increased number of such cases, so too does the number of such cases as may present with indicia of fraud or other mischief brought by those with ulterior motives. Downey submits this is no reason, in and of itself, to deny a day in court to Downey and those who are similarly situated. And Downey is in good company on this point:

Since its first appearance in our jurisprudence, the courts of this state have been vigilant guardians against the risks associated 'ever widening circles of liability' to plaintiffs who suffer emotional distress but no resultant physical injury. At the same time, otherwise meritorious claims should not be barred out of a fear that there would be an increase in suits as well as fraudulent claims. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust in the courts' own capacity to get at the truth in this class of claim, (paraphrasing *Dillon,* supra, 68 Cal.2d at 744, quoting *Hambrook v. Stokes Bros*. (1925) 1 K.B. 141, quoting *Dulieu v. White and Sons* (1901) 2 K.B. 669, 681, opn. by Kennedy, J.)

II The Case of *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal. App. 4th 830 Should be Disapproved, or its Principal Holdings Should be Limited to the Facts

Fortman appears to be the first time the *Bird* "causal connection between each defendant's harmful conduct and victim's injury" standard was imposed on a bystander NIED claimant outside the medical malpractice context.

While one could argue that *Fortman* is distinguishable from the present matter due to the context of a product liability occurrence and the fact the plaintiff erroneously believed her brother was having a heart attack, Downey submits that is a distinction without a difference. Downey and Fortman were both present at the scene of the injury-producing event at the times they occurred, and they were both then aware that the events they observed were causing injury to their loved ones. That *Fortman* misapprehended the cause of the obvious injurious event does not mean she did not perceive her loved one was not "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," as required by *Thing.*

Societal interests that may be furthered by shielding medical professionals from liability (see *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal. 4th 100, 112) are not advanced by extending that shield to those who place defective products into

the stream of commerce and, in fact, would run counter to this Court's numerous opinions on the subject, including *Escola v. Coca Cola Bottling Co.*, (1944) 24 Cal. 2d 453, 461-462 [concurring opinion of Justice Traynor]; *Greenman v. Yuba Power Prods., Inc.*, (1963) 59 Cal. 2d 57, 63-64; *Vandermark v. Ford Motor Co*., (1964) 61 Cal.2d 256, 262-263; *Jiminez v. Superior Court*, (2002) 29 Cal.4th 473; , *Ortiz v. HPM Corp*., (1991) 234 Cal.App.3d 178, 184-1986 [permitting bystander NIED recovery in a strict liability/defective product claim].

Thus, *Fortman* thus runs directly afoul of this Court's plain pronouncements in *Thing v. La Chusa* (1989) 48 Cal.3d 644 and *Bird v. Saenz*, (2002), 28 Cal. 4th 910, as previously discussed.

CONCLUSION

For the reasons cited above, Appellant Jayde Downey respectfully requests this Court to rule that the law of this state on bystander NIED claims is as set forth in *Thing*, such that, such bystanders are not obligated to plead and prove contemporaneous awareness of the defendant's wrongful conduct causing injuries to their loved ones, outside the medical malpractice situations identified by this Court in *Bird.* The rule in *Fortman* should be disapproved, or its application should be limited accordingly.

DATED: 9/18/2023 RIZIO LIPINSKY LAW FIRM PC

By: //S/ Eric Ryanen
ERIC RYANEN

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CERTIFICATION OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this petition, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks and this certificate, consists of 7,381 words in 13-point Times New Roman type as counted by the word processing program used to generate the text.

DATED: 9/18/2023 RIZIO LIPINSKY LAW FIRM PC

By: /s/ Eric Ryanen
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/s/ Michele A. Markus
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Supreme Court of California

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