S280322

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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.

ANSWER BRIEF ON THE MERITS

Michael A. Verska, Sr. Deputy City Attorney,
Bar No. 207213
OFFICE OF THE CITY ATTORNEY – CITY OF RIVERSIDE
3750 University Avenue, Suite 250
Riverside, California 92501
Telephone (951) 826-5567
Facsimile (951) 826-5540
mverska@riversideca.gov
Attorneys for Defendant and Respondent

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 4,593 words in 13-point Times New Roman type as counted by the word processing program used to generate the text.

Requirements for *form*, such as typeface, margins, pagination, and so forth, are the same as for a brief in the Court of Appeal, as described in California Rules of Court, rules 8.520 and 8.204. The allowable length—14,000 words or 50 pages—is set forth in rule 8.520(c). The covers of the opening brief on the merits must be white (or blue, for an answer brief on the merits), as provided in rule 8.40. The *contents* of the brief, as set forth in California Rules of Court, rule 8.520(b), must begin by quoting the court's order specifying the issues to be briefed, if any, or the statement of issues in the petition for review.

DATED: November 17, 2023 OFFICE OF THE CITY ATTORNEY

By: /s/Michael A. Verska
MICHAEL A. VERSKA
Attorneys for Respondent

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STATEMENT OF THE ISSUE

Whether "[i]n order to recover damages for negligent infliction of emotional distress as a bystander to an automobile accident allegedly caused by dangerous conditions on nearby properties, must the plaintiff allege that she was contemporaneously aware of the connection between the conditions of the properties and the victim's injuries?"

INTRODUCTION

This case asks whether California courts should require a Plaintiff to allege a causal connection between the alleged negligent conduct involving dangerous condition of property and the injury to a loved one? Yes. Both the trial court and appellate court opinions applied the *Thing v. La Chusa* (1989) 48 Cal.3d 644 "three mandatory requirements" for NIED claims including the second requirement that Jayde Downey must plead and prove contemporaneous awareness of the injury-producing event. The injury producing event is not just knowledge of injury, but rather contemporaneous knowledge of the allegedly malfeasant act or omission by each specific defendant. As to City of Riverside, the injury-producing event is alleged defective engineering design of the intersection. Jayde Downey cannot meaningfully perceive defective engineering design as such awareness is "beyond the awareness of lay bystanders" as a matter of law. *Bird v. Saenz* (2002) 28 Cal.4th 910, 917. Further, the injury-producing event as to City of Riverside and/or Sevacherian Defendants is just not subject to auditory perception.

As to Sevacherians, the injury-producing event is alleged overgrown vegetation blocking line of sight on oncoming traffic heading down Canyon Crest. Jayde Downey could not have had contemporaneous awareness of this alleged injury-producing event either as she could not auditorily perceive an alleged line-of-sight obstruction as to on-coming traffic. The factual allegations of the third-amended complaint foreclose reasonable amendment for Jayde Downey to state a cause of action.

The Doctrine of Truthful Pleadings precludes Jayde Downey's ability to allege requisite contemporaneous knowledge. The operative Third-Amended Complaint contains key factual allegations that foreclose Jayde Downey's ability to allege contemporary knowledge of *either* alleged injury-producing event. Paragraph 10 alleges that Jayde Downey guided her daughter specifically toward this intersection rather than other intersection routes of egress in a cell phone conversation. Obviously, this fact is completely inconsistent with any potential pleading allegation of contemporaneous awareness of intersection "dangerous engineering design"—much less contemporaneous awareness of said design being the injury-producing event causing injury.

Paragraph 10 of the operative complaint further alleges: "Plaintiff DOWNEY heard plaintiff VANCE, in a self-talk voice said, something like "I'm gonna go left, OK…OK…OK"—in a manner and tone of voice that plaintiff DOWNEY understood was consistent with plaintiff VANCE waiting to turn left and mentally 'checking off' traffic on Canyon Crest as it approached and cleared the intersection before she could turn left." The alleged facts are that DOWNEY contemporaneously understood her daughter stopped and specifically saw approaching traffic and waited for each car to clear before proceeding into the intersection. There are no facts alleging that DOWNEY understood her daughter had any difficulty seeing approaching traffic. Rather, the pleading allegations suggest that she stopped and specifically saw approaching traffic and waited for that oncoming traffic to clear the intersection before proceeding.

The facts alleged in the operative Complaint are inconsistent with contemporaneous knowledge of injury producing event as a matter of law. Knowledge of injury *after* the injury-producing event is insufficient to confer liability for negligent infliction of emotional distress as a matter of law. *Bird v. Saenz* (2002) 28 Cal.4th 910, 915-916; and footnote 2. *Thing v. La Chusa* (1989) 48n Cal.3d 644, 668 [Disapproving inter alia *Nazaroff v. Superior Court* (1978) 80 Cal.App.3d 553

premises liability NIED decision that erroneously held perception of the immediate harm was sufficient].

A majority of the Court of Appeal, like the trial court, answered that question in the affirmative while giving the Plaintiff an opportunity to allege additional potential facts establishing that she had familiarity with, and knowledge and awareness of, the intersection and the dangerous conditions created by the City and Sevacherian as this would be the "contemporary sensory awareness of the causal connection between the [defendants'] negligent conduct and the resulting injury.' (citing *Bird* 28 Cal.4th at p. 918). (Opinion). And yet, the Plaintiff could not and did not subsequently amend. Instead, Plaintiff seeks the Supreme Court's reversal of *Bird v. Saenz* (2002), 28 Cal. 4th 910, after 34 years of guidance since this court's landmark decision in *Thing v. La Chusa* setting forth the three "mandatory requirements" for liability in this context. Jayde Downey proposes a return to the standards previously set forth in the *Dillon v. Legg* (1968) 68 Cal.2d 728, the era of case- by-case basis determination of foreseeability. This Court already discerned that *Dillon* produced arbitrary and conflicting results and "ever widening circles of liability" *Bird supra* at 915. Requiring Plaintiff to allege the three prongs as prescribed by *Thing v. La Chusa* (1989) 3d 644 against *each* Defendant is proper, especially where a plaintiff's liability arguments are so attenuated. Counsel for Jayde Downey did not present sufficient facts to state a claim at the trial court level, the appellate court, or to this court because facts needed to meet the second mandatory requirement for NIED would necessarily be pure fiction.

The Doctrine of Truthful Pleadings precludes Jayde Downey from alleging qualifying facts as those qualifying facts would necessarily conflict with known existing facts and Plaintiff's admissions against interest in deposition. Engineering design did not cause the collision with Evan Martin proceeding down Canyon Crest—Malyah Vance running the stop sign without even looking for oncoming traffic caused the collision. The operative pleading artfully but erroneously suggests that

daughter Malyah Vance stopped to look for oncoming traffic because Jayde Downey interpreted and erroneously assigned meaning to ambiguous vocalizations. Both Malyah Vance and Jayde Downey have testified in deposition that they have no evidence that she stopped or even looked before running the stop sign and causing the accident, but rather admitted that she caused the accident by running the stop sign.

The case at bench should not be the "pebbles cast into the pond" that creates further ripples of liability. The general rule is one of non-liability for emotional injury without physical impact in California and surrounding jurisdictions. See discussion in *Amaya v. Home Ice, Fuel & Supply Co*. (1963) 59 Cal.2d 295, 302-304. Liability for pure emotional distress has and should always be a very *limited* exception to the general rule of non-liability. Jayde Downey erroneously urges this court to expand the limited exception to now swallow the general rule of non-liability. And this avenue for expanding NIED recovery is built upon a fiction of suggestion, smoke, and mirrors rather than actual provable fact.

First, Accordingly, this Court should affirm the Court of Appeal's judgment as to the correctness of sustaining the demurrer and hold that: (1) California Courts should require Plaintiffs to allege the second prong of *Thing*, contemporary awareness of the causal connection between the negligent conduct and the injury producing event, against *each* Defendant involved in a bystander NIED case involving dangerous conditions of property.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 4, 2018, Plaintiff MALYAH JANE VANCE ("VANCE") and Defendant EVAN THEODORE MARTIN ("MARTIN") were involved in a vehicle accident. CT 295-297.

The accident occurred while VANCE was driving eastbound on Via Zapata and entered the intersection of Via Zapata and Canyon Crest Drive. CT 295-297. Plaintiff DOWNEY was on the phone with VANCE assisting VANCE with directions to get her to her destination as Plaintiff DOWNEY alleges, she was familiar with the area.

CT 295-297. Thereafter, VANCE's vehicle was allegedly struck by MARTIN's vehicle while MARTIN was traveling southbound on Canyon Crest Drive. CT 295-297. As a result of said collision, VANCE alleges she suffered personal injuries. CT 295-297. Plaintiff DOWNEY was on the phone with VANCE and heard the collision over the phone. CT 295-297. She now seeks recovery for emotional distress under a theory of bystander recovery. CT 298-300.

Plaintiff DOWNEY alleges only the First Cause of Action for Dangerous Condition of Public Property against the CITY. CT 298-300. The core of Plaintiff DOWNEY's complaint against the City is that cars parked on Canyon Crest Drive obstructed VANCE's view and the speed limit on Canyon Crest was too high. CT 298-300. Plaintiff DOWNEY was on the phone with VANCE and only auditorily perceived the collision. CT 295-297.

On November 23, 2020, Plaintiffs filed a Second Amended Complaint ("SAC"). CT 124-162. Defendants Ara and Vahram SEVACHERIAN filed a demurrer to Plaintiff DOWNEY's SAC arguing that DOWNEY could not recover for emotional distress because she was not at the scene of the incident and therefore could not satisfy all of the elements under a "bystander" theory of liability. CT 192-202. The Court ultimately sustained the demurrer with leave to amend, explaining that the SAC did not demonstrate awareness of the causal connection between Defendants' conduct (the condition of the premises) and the injury to the close relative. CT 290-291. Judge Lucky explained: "The essence of bystander recovery is that the plaintiff experiences a contemporary sensory awareness of the causal connection between the defendant's infliction of harm and a close relative's injury. (*Fortman v. Forvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 836; see also *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159 (Ko).)" CT 290-291. The ruling also stated: "Plaintiff cites no decision that holds that an auditory perception alone, without further awareness of an injury-causing event, is sufficient." CT 290-291.

Plaintiffs filed a Third Amended Complaint ("TAC"). CT 294-308. The only substitutive change Plaintiffs made to their allegations against the CITY was adding subsections A, B, and C to paragraph 10. CT 296-297. The City responded by filing a demurrer to the TAC arguing that Plaintiff DOWNEY could not perceive any dangerous condition of public property caused by alleged obstruction of view or a posted speed limit at the time of the collision because she was on the phone with VANCE and therefore, as a matter of law, cannot auditorily perceive the alleged dangerous conditions. CT 320-333. The Court's ruling made reference to *Thing v. La Chusa*, (1989) 48 Cal.3d 644, where the focus was on the same issue present here, whether the bystander observed or experienced the negligent causing event. The ruling found DOWNEY had no contemporaneous awareness of the injury-causing event, or, in other words, PLAINTIFF DOWNEY had no awareness of the alleged dangerous condition of public property caused by the City as expressly defined by Plaintiff DOWNEY in the operative complaint. The Court sustained the City's Demurrer as to the First Cause of Action without leave to amend. CT 407.

Thereafter, the case was fully briefed and argued before the Court of Appeal, Fourth Appellate District, Division One. On April 26, 2023, the Court of Appeal issued its opinion, affirming the granting of the demurrer but reversing the "orders sustaining City's and Sevacherian's demurrers without leave to amend and direct the trial court to overrule the demurrers with leave to amend" (Opinion, at 29).

The Opinion was 2-1, with Justices O'Rourke and McConnell in the majority and Justice Dato dissenting. Plaintiff filed a timely Petition for review which was granted. The issue identified for briefing is the following: "Petition for review after the Court of appeal reversed the judgment in civil action. This case presents the following issue: In order to recover damages for negligent infliction of emotional distress as a bystander to an automobile accident allegedly caused by dangerous conditions on nearby properties, must the plaintiff allege that she was contemporaneously aware of the connection between the conditions of the properties

and the victim's injuries?"

A. WHEN THE PLAINTIFF CANNOT MEANINGFULLY COMPREHEND WHAT DANGEROUS DESIGN OR MAINTENANCE OF A PUBLIC ROAD OR PRIVATE PROPERTY IS CAUSING THE INJURY, THEN PLAINTIFF CANNOT SATISFY THE SECOND REQUIREMENT OF *THING*

Thing establishes the requirements for a bystander negligent infliction of emotional distress ("NIED") cause of action. The California Supreme Court in *Thing* re-defined the scope of bystander recovery by creating a more stringent definition of the requirement of contemporaneous observance of the event and injury. *Thing* stressed the requirement of observation of the injury-causing event, the injury, and the causal connection between them. *Id.* at 675-677. The Court's rational was that certainty in the law dictates limitation of bystander recovery of damages for emotional distress. Unless and until the Supreme Court revisits *Thing*, it is binding on this Court. *Fortman*, *supra* at 844 (citing *Auto Equity Sales, Inc. v. Superior Court*, (1962) 57 Cal.2d 450, 455.).[1]

In *Bird v. Saenz*, (2002) 28 Cal. 4th 910, the California Supreme Court revisited the second *Thing* requirement of contemporaneous presence. In that case, the California Supreme Court held an NIED claim could not be maintained by the adult daughters of a woman who suffered the negligent transection of an artery during a medical procedure because they were not present in the operating room and only learned of the accident when they were later told by another surgeon of the accident, even though they suffered emotional distress from learning their mother had suffered

[1] Courts have routinely applied *Thing*'s strict standard when deciding other bystander cases. For example, in *Golstein v. Superior Court*, (1990) 223 Cal. App. 3d 1415, parents brought an action against a hospital after their son was negligently given a fatal overdose of radiation during treatment for a curable cancer. The trial court sustained a demurrer without leave to amend filed by the hospital. On appeal, the parents challenged the ruling on the demurrer arguing that since radiation is invisible its fatal dosage cannot be seen, it would be unjust to deny them recovery. However, the Court of Appeal denied the parents' writ of mandate finding that negligent infliction of emotional distress was not allowed in applying *Thing* because the parents could not experience a contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury.

a possible stroke, seeing her rushed to surgery, and ***hearing an urgent call over the hospital loudspeaker*** for a thoracic surgeon. *Id.* at 915-916. The California Supreme Court held that the plaintiffs in *Bird* could not recover emotional distress damages because, at the time of the injury, they were unaware that defendants' conduct was to blame- they had no sensory perception whatsoever of the transection at the time it occurred. *Id.*

Similarly, the Court of Appeal in *Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 144–145, concluded the plaintiff could not recover on her NIED claim arising from her emotional distress upon ***hearing a loud crash*** in a clothing store from the area where her husband was shopping, then learning a sign had fallen on his head. The Court of Appeal concluded the plaintiff's "…fear for her husband's safety at the time she heard the loud bang emanating from the part of the store where she knew he was shopping and her belief the possibility of his injury was more likely than not are insufficient as a matter of law to establish contemporaneous awareness of her husband's injuries at the time of the injury-producing accident within the meaning of *Thing* [citation omitted] and *Bird* [citation omitted]." *Id.* at 152-153.

"From these pertinent bystander cases, it is clear that 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 v. Forvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 836. In *Fortman,* Plaintiff who witnessed her brother's death while scuba diving could not state a claim for negligent infliction of emotional distress under the bystander theory of recovery because she did not have a contemporaneous, understanding awareness that a defective product was causing her brother's injury but rather thought he was suffering a heart attack.

The recent case of *Ko v. Maxim Heathcare Services, Inc.* (2020) 58 Cal.App.5th 1144 in which the ***parents saw and heard*** their child being abused by his babysitter on a nanny cam, reiterated the *Fortman* requirement that to maintain a

bystander NIED cause of action the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm (defendant's conduct) and the injuries suffered by the close relative. *Id.* at 1158-1159. Distinguishing *Ko* from our present case, the Court of Appeal considered the parent's "virtual presence" and determined the parents in *Ko* satisfied the elements to recover under a bystander theory of liability because they were aware of how the defendant's conduct caused injury to their child since they ***watched through a nanny cam*** as a babysitter hit, slapped, pinched, and shook their two-year-old disabled child. *Id.*

In this case, because DOWNEY was on the phone with her daughter at the time of the collision, DOWNEY was only able to use her sense of hearing to perceive the moments leading up to the collision and first responders' attempts to revive her daughter. (CT 295-296, ¶ 8). Plaintiff DOWNEY did not visually observe how or where the collision occurred or the acts leading up to it. As explained in more detail below, Plaintiff DOWNEY's allegations in the TAC indicate she was only aware that her daughter was involved in a vehicle accident. However, these allegations are insufficient to establish any contemporary sensory awareness of any alleged dangerous condition of public property that Plaintiffs contend caused the collision. Although DOWNEY alleges, she had a brief conversation with VANCE and heard the collision over the phone, there are no allegations that Plaintiff DOWNEY visually observed or was contemporaneously aware of any dangerous condition of public property that caused the collision. Indeed, the operative pleading cannot reasonably be amended to state a viable cause of action as against CITY or SEVACHERIANS.

The Doctrine of Truthful Pleadings would preclude Jayde Downey from alleging qualifying knowledge or awareness.

> "A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded false." *Cantu v. Resolution*

Trust Corp. (1992) 4 Cal.App.4th 857, 877. [citing *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151]. Likewise, the plaintiff may not plead facts that contradict the facts or positions that plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false. [citing *Morton v. Loveman* (1968) 267 Cal.App.2d 712, 717-719.] "The principle is that of truthful pleading." [Citing *Watson v. Los Altos School Dist.* (1957) 149 Cal.App.2d 768, 771.] …Under such circumstances, the court will disregard the falsely pleaded facts and affirm the demurrer."

(*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 877-878.)

Jayde Downey's perception was limited to auditory awareness. She could not contemporaneously know that her daughter failed to stop for the stop sign at the intersection of Canyon Crest and Via Zapata. Plaintiff Downey could not know whether there were any visual obstructions blocking view of oncoming traffic because Plaintiff Downey could not know that her daughter did not even look for oncoming traffic before barreling through the stop sign into traffic. What Jayde Downey knew through her auditory perception was that her young daughter was lost, distracted, on her cellphone, immersed in a conversation with her mother, driving, when she got involved in a traffic accident—nothing more. Jayde Downey was asked in deposition on December 21, 2021, the following:

Q. Did she at any point between that time when she said I'm coming up to a stop sign and ultimately when you heard the crash, did she verbalize to you that she was looking at any particular direction?

A. No, she did not verbalize that to me.

Q. Okay. Do you have any way of knowing that?

A. I would have no way of knowing that.

(Request for Judicial Notice, Exhibit A, Jayde Downey 12/21/21 Depo., page 60, lines 16-22).

Jayde Downey's auditory perception necessarily limited her understanding and awareness of events. Obviously, Jayde Downey did not know her daughter ran the stop sign causing the collision. Malyah Vance was deposed on December 8, 2021 whereby she made an admission against interest that the collision was caused by her failure to stop for the stop sign. She further testified that she did not remember anything from the day of the accident, so she could not rebut eyewitness accounts that she did not even look for traffic before running the stop sign. Further, she could not rebut the traffic collision report, which found her at fault for causing this accident. Her own counsel of record, Eric Ryanen, attempted to rehabilitate his client after the glaring admission against interest and elicited the following from his client at deposition:

> Q. All right. If I understand your earlier testimony, you knew that the traffic collision occurred because you didn't stop for a stop sign?
>
> A. That's what I was told, yeah.
>
> Q. Do you have an independent recollection of stopping or not stopping for a stop sign at the scene of this accident?
>
> A. No, not that I remember.

(Request for Judicial Notice, Exhibit A, Malyah Vance 12/8/21 Depo, page 155, lines 9-16)

However, Plaintiff's theory of the case is not that view of the stop sign was obstructed in any way. Rather, Plaintiff alleges that *if* Malyah Vance had stopped, and <u>if</u> she had looked, that her view of oncoming traffic <u>may</u> have been obstructed by vegetation and/or parked cars along the roadway. Of course, that is pure fiction in this case where Malyah Vance, in fact, ran the stop sign without so much as even looking for oncoming traffic before barreling past the stop sign into the intersection. The Doctrine of Truthful Pleadings precludes Plaintiff from amending the complaint to assert requisite contemporaneous awareness because Malyah Vance did not stop at the stop sign or even look.

Therefore, the facts as alleged preclude a cause of action for negligent infliction of emotional distress cause of action against Defendant CITY as a matter of law.

> Here, the allegations against Defendant City of Riverside and property owner Sevecharian require more allegations because they were not the drivers of the automobile that collided with Plaintiff's daughter and their harmful conduct is not so obvious. There cannot be audio sensory perception of an engineering design defect for a public road. The appellate court generously reversed so that Plaintiff could have an opportunity to allege what *knowledge* and *awareness* she possessed that would be coupled with the auditory perception at the time of the collision. As such, this Court should affirm the appellate court's decision.

B. MEDICAL MALPRACTICE CASES DO NOT HAVE A SEPARATE TEST

Appellants are incorrect in asserting that the law applies differently to medical malpractice and products liability cases as opposed to 'fire/crash/explosion class of cases'. The same test applies to medical malpractice cases as products liability cases as traffic accident cases, however, the concurrent awareness of the injury producing event is more attenuated depending on the obviousness of the negligent conduct. To the naked eye, it is not so obvious that an intravenous substance is the wrong substance much like it was not so obvious in *Fortman* that the scuba diving equipment was malfunctioning. An auditory perception of an auto collision cannot possibly yield concurrent awareness of a defective design or maintenance of a public road or poor maintenance of a private property because the injury-producing event is necessarily not subject to auditory perception. The more attenuated and complex the alleged injury-producing event, the less likely there will be requisite contemporaneous awareness to support a NIED claim.

C. PUBLIC POLICY SUPPORTS LIMITING NIED EXPANSION TO ENGINEERING DESIGNS

Legal culture built upon a foundation of zealous advocacy will always construct compelling claims of compensable emotional injury. Enterprising attorneys continuously strive to fit a proverbial square peg into a legally round hole. Plaintiff Janice Bird zealously claimed to have contemporaneous awareness of the injury-producing event [transected artery] because Plaintiffs visually observed decedent blue-faced in medical distress, heard calls for a thoracic surgeon, and medical staff rushing with pints of blood and just *knew* her mother was "bleeding to death". *Bird* Supra at p. 917. "In their own words, "[w]hile Plaintiffs do not dispute that Janice Bird and Dayle Edgmon were not in the operating room at the time Nita Bird's artery was transected, Plaintiffs do contend that Janice Bird and Dayle Edgmon were aware that Nita Bird's artery and/or vein had been injured as a result of Defendants' conduct, that Defendants failed to diagnose that injury and that Defendants failed to treat that injury while it was occurring." *Bird* Supra at p. 917. Hard cases cannot be allowed to make bad law. Claimed knowledge of injury is just not enough to meet the second "mandatory requirement" of *Thing v. La Chusa*. This court properly denied Janice Bird NIED recourse. Public policy similarly must deny Jayde Downey NIED recourse. Jayde Downey knew her daughter was lost, distracted, and talking on her cell phone at the time of the accident, but she did not know that her daughter caused the accident by running the stop sign without even looking for oncoming traffic. In this case, auditory perception limited her sensory awareness of causal events and thus necessarily limited NIED recourse.

Should this court wipe out the last 50 years of lessons learned to thereon return to a *Dillon v. Legg* case-by-case "foreseeability" test as counsel for Jayde Downey urges this court with its associated "ever-widening circles of liability"? *Bird* Supra at p. 915. The real public policy concerns expanding NIED liability based upon a "foreseeability" test can be highlighted by analogy to the bar of general damages

recovery from property damage loss. General damages are not recoverable in property damage suits no matter how artfully or materially those claims are asserted in pleadings. A line must be drawn in the sand to protect society. *Erlich v. Menezes* (1999) 21 Cal.4th 543 is a case where Plaintiff alleged that stress caused by negligent construction of a home made him "absolutely sick", resulted in him having to be "carted away in an ambulance" and allegedly developed a permanent heart condition as a result of the stress of damage to his home. The California Supreme Court decision reversed a trial court award of $150,000 of emotional distress damages and specifically rejected Plaintiffs' argument that the damages were "foreseeable":

> "Because the consequences of a negligent act must be limited to avoid an intolerable burden on society [citation], the determination of duty "recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk." "[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." [citation] In short, foreseeability is not synonymous with duty; nor is it a substitute."

(Erlich v. Menezes (1999) 21 Cal.4th 543, 552)

Emotional distress claims are just not recoverable no matter how artfully a Plaintiff or complaint may present the issue. As noted, the Plaintiff in *Bird v. Saenz* artfully but outrageously asserted that they were contemporaneously aware of decedent's artery being transected because they saw staff rushing with the patient to the operating table in some obvious medical distress. Jayde Downey's claim of contemporaneous awareness of deficient intersection design is just as artful and outrageous in zealous attempt to squeeze a factual square peg into a legally round hole. Public policy limits are in place to preclude just this type of legal claim. The return to a case-by-case Foreseeability test is neither socially, nor judicially

acceptable.

CONCLUSION

Liability for pure emotional distress has and should always be a very *limited* exception to the general rule of non-liability. Jayde Downey erroneously urges this court to expand the limited exception to now swallow the general rule of non-liability by returning to a case-by-case "foreseeability" test. This Court already discerned that *Dillon* produced arbitrary and conflicting results and "ever widening circles of liability" *Bird supra* at 915. Requiring Plaintiff to allege the three prongs as prescribed by *Thing v. La Chusa* (1989) 3d 644 against *each* Defendant is proper, especially where a plaintiff's liability arguments are so attenuated as in this case. Jayde Downey did not have requisite contemporaneous awareness of engineering design or that her daughter caused the accident by running the stop sign without even looking for traffic because her auditory perception necessarily limited her understanding of events.

DATED: November 17, 2023

OFFICE OF THE CITY ATTORNEY

By: /s/ Michael A. Verska
MICHAEL A. VERSKA
Attorneys for Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am employed in the County of Riverside; I am over the age of 18 years and not a party to the within above-entitled action; my business address is 3750 University Avenue, Suite 250, Riverside, California 92501.

On November 17, 2023, I served the foregoing document described as:

CITY OF RIVERSIDE'S ANSWER BRIEF ON THE MERITS

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Executed on November 17, 2023, at Riverside, California.

(X) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dorothy C. Zolman

SERVICE LIST

Counsel for Jayde Downey — **Service via First Class Mail**
Gregory G. Rizio, Esq.
Eric Ryanen, Esq.
Rizio Lipinsky Law Firm, PC
2677 N. Main Street, Suite 225
Santa Ana, CA 92705
Tel: 714-547-1234
Fax: 714-547-1245
eryanen@riziolawfirm.com
mmarkus@riziolawfirm.com

Counsel for Severacherian Respondents — **Service Via First Class Mail**
Shelby Kennick, Esq.
CP Law Group
655 North Central Avenue, Suite 1125
Glendale, CA 91203
Tel: 818-853-5131
Fax: 818-638-8549
skennick@cplawgrp.com
achikuami@cplawgrp.com

Evan Theodore Martin — **Service Via First Class Mail**
1009 NE Elm Street
Grants Pass, Oregon 97526

California Court of Appeals — **Service Via First Class Mail**
4th Appellate District Division One
750 B Street, Suite 300
San Diego, California 92101

Superior Court of the County of Riverside — **Service Via First Class Mail**
Honorable Harold W. Hopp, Judge
Department 10
4050 Main Street
Riverside, CA 92501

STATE OF CALIFORNIA
Supreme Court of California

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Case Name: **DOWNEY v. CITY OF RIVERSIDE**
Case Number: **S280322**
Lower Court Case Number: **D080377**

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Eric Ryanen Rizio Law Firm 146559	eryanen@riziolawfirm.com	e-Serve	11/20/2023 11:19:09 AM
Pro Per Attorney Nationwide Legal, LLC 266298	sfcourt@nationwideasap.com	e-Serve	11/20/2023 11:19:09 AM
Erin Summers Riverside City Attorney	esummers@riversideca.gov	e-Serve	11/20/2023 11:19:09 AM
Michael Verska Riverside City Attorney 207213	mverska@riversideca.gov	e-Serve	11/20/2023 11:19:09 AM
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/20/2023
Date

/s/Erin Summers
Signature

Summers, Erin (Other)

Last Name, First Name (PNum)

Riverside City Attorney

Law Firm