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Supreme Court of California
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S280322

IN THE SUPREME COURT OF CALIFORNIA

Jayde Downey,
Plaintiff and Appellant,

v.

City of Riverside, Ara and Vahram Sevacherian,
Defendants and Respondents.

After a Decision by the Court of Appeal Fourth Appellate District,
Div 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 Hon. Harold W. Hopp, Judge.

ANSWERING BRIEF

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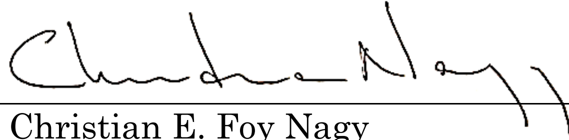
CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208(e)(3), the undersigned certifies that the following entities have a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

Ara Sevacherian

Vahram Sevacherian

Dated: December 18, 2023 **FREEMAN MATHIS & GARY, LLP**



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I. INTRODUCTION

This Court has been concerned about the enveloping potential of a cause of action for negligent infliction of emotional distress from the first enunciation of the tort. Even at inception in *Dillon*, the limitations placed on recovery flowed from traditional tort principles of "foreseeability": "In order to limit the otherwise potential infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable." *Dillon v. Legg* (1968) 68 Cal.2d 728, 739.

Although it purported to create guidelines that might circumscribe the conditions of recovery, subsequent courts noted that the *Dillon* opened the field to increasing numbers of tort claimants, until twenty years later, the Court further tamped down the conditions of recovery to avoid the creeping expansion of the tort: "like the pebble cast into the pond, *Dillon's* progeny have created ever widening circles of liability." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 654.) *Thing* jettisoned "foreseeability" as the sole determinant of the defendant's duty. (*Thing v. La Chusa, supra*, 48 Cal.3d 644, 652; *Dillon v. Legg, supra*, 68 Cal.2d 728, 733–735; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 884–885 .

In 1989, the year that *Thing v. La Chusa* was published, the Court may not have appreciated the technology on the horizon that would make

contemporaneous remote "viewing" a global reality. In 2023, the ubiquity of cellphones, Facetime, Zoom, and Teams, and "live streaming" challenge what it means to be "present" and "observe" a tort. This creates conditions of liability far removed from the antiquated pre-*Dillon* concerns about being in the "zone of danger." Because of the potential for "virtual presence," as the Petitioner put it, the potential for recovery is now endless without a prudential limitation establishing what the observing family member knew of the "injury producing event."

Here, the circumstances alleged by Downey to undergird a claim of NIED against the Respondents Ara and Vahram Sevecherian—who are alleged to own or maintain land on the road where Downey's daughter was injured in a collision—are even more remote, because their alleged tort—the maintenance of plants that may have obstructed roadway visibility—is not the kind of wrong that can be perceived contemporaneously through a mere cellphone connection. Nor was the role of the plant life along the road known to Downey at the time of the accident.

A parent on the phone with their adult child, hearing the screeching of tires and an impact, does not know whether the child was in a single car accident caused by her own negligence or a multiple car accident. The child may have had the sun in their eyes or was distractedly and blithely making an unsafe left turn. Litigants whose experts canvass the location thereafter

may find many additional parties to sue on various technical theories of liability—here, the City of Riverside for dangerous condition of public property and the Sevacherians for vegetation on their property. None of this was known to Downey, who only heard the screeching of tires and the sounds of an automobile impact. Both the specific circumstances of the collision and the cause of the collision were unknown to her at the time.

Cellphone or other virtual technologies can create a class of distant tort claimants who are far from the scene but who will nonetheless feel stress, worry and concern or worse if—while virtually or remotely connected to a family member—they perceive that harm has befallen their loved one. Technology opens the floodgates of "presence" at tortious injury-producing events. Petitioner Downey is seeking to bridge this wide chasm by arguing that she should be relieved of the obligation to plead her then-awareness of the Respondents role in the "injury producing event."

Having accepted review, this Court should create reasonable guardrails to preserve the abiding and longstanding concerns of the court about infinite liability owed to remote persons—out of proportion with fault.

II. ISSUE UNDER REVIEW

Downey asked this Court to review whether, 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, the plaintiff must allege that she was contemporaneously aware of the connection between the conditions of the properties and the victim's injuries. Respondent interprets that issue as encompassing various parts: the issue of pleading, the issue of contemporaneous awareness, and whether Downey needed to be aware of the alleged causal connection between the conditions of the property and the accident that harmed her daughter.

The Court of Appeal found that for purposes of pleading, Downey had adequately plead that she had auditorily perceived the accident but she had not established that she was aware of the causal relationship between the conditions of public and private property and the collision giving rise to her daughter's injury. This Court reviews the ruling, and not the Court's rationale. (*Ko v. Maxim Healthcare Services, Inc*. (2020) 58 Cal.App.5th 1144, 1150.)

A. A Plaintiff Must Allege the Factual Basis for Each of the Three *Thing v. La Chusa* Requirements

The first facet of the issue under review is well-established in California: whether the factual basis giving rise to a claim for NIED must be

alleged in the complaint. Here, to survive demurrer on the cause of action for negligent infliction of emotional distress, Downey must allege that she (1) is closely related to the injury victim; (2) was present at the scene of the injury producing event at the time it occurred and was then aware that it caused injury to the victim; and (3) as a result suffers serious emotional distress. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 667–668.) The second *Thing* requirement is comprised of two parts: the plaintiff needed to be present at the scene of the injury producing event at the time it occurred and have a contemporaneous awareness that it was causing injury. (*Id*.)

Each of the necessary elements set forth in *Thing v. La Chusa* must be alleged, even if in general terms. "[W]hile most causes of action have specific elements which must be pleaded, the amorphous emotional distress cause of action has no particular elements. [...] While the pleading and proof stages of a case are obviously distinct, sufficient circumstances must be alleged for the emotional distress claim to survive demurrer." (*Accounts Adjustment Bureau v. Cooperman* (1984) 158 Cal.App.3d 844, 848.) To those ends, the general pleading requirements in California would control. A sufficient factual basis must be alleged, without mere conclusory statements of liability.

Downey, however, asks to be relieved of both the burden of pleading and proof. She asks the Court not only to relieve her of the obligation to plead her contemporaneous awareness of the alleged "deficient landscaping," and

its role in causing the accident, she asks to be relieved of the burden of proving her contemporaneous awareness of that role as well. Meaning, she would like to recover for negligent infliction of emotional distress from a defendant about whose role she has no knowledge whatsoever, and whose liability to her will be determined on the basis not of what she knew or perceived, but on the basis of whatever her accident reconstructionist says at trial. This theory is utterly at odds with the history of NIED.

B. "Presence at the Scene of the Injury Producing Event" and "Awareness That it Was Causing Injury" Are Relational

The second aspect of the issue under review pertains to the plaintiff's "contemporaneous awareness." The second requirement articulated by this Court in *Thing* is itself comprised of two aspects ("present at the scene of the injury producing event at the time it occurred" ***and*** "then aware that it caused injury"), and both need to be established. The two aspects of this prong are related because alone neither would be sufficient to maintain an action for emotional distress. Where a plaintiff is present at the injury producing event but has no awareness of the harm it caused the loved one, there is no recovery. (See *Golstein v. Superior Court* (1990) 223 Cal.App.3d 1415 [parents had observed the radiation procedure that was later determined to have been the injury-producing event, but they were not aware that the radiation caused their son's death, hence no recovery for NIED].)

Similarly, if the plaintiff perceived the incident without awareness that it caused an injury, there would also be no recovery. (See *Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 144-145 [no recovery on an NIED claim for a plaintiff who heard a loud crash in a clothing store without knowing that it caused her husband injury]; accord, *Fife v. Astenius* (1991) 232 Cal.App.3d 1090 [plaintiffs heard an automobile collision and saw debris without realizing their sister had been injured for several minutes; this was insufficient to satisfy the second *Thing* requirement].)

Downey takes it as a given that her mere "virtual presence" via her cellphone connection during which she heard a collision and spoke to a bystander is sufficient to meet the second *Thing* requirement. Downey rhetorically stretches the concept of presence and observation by alleging that she was "virtually present and perceived events that were "dramatic and visible," and the cause of that distress - a traffic accident - was 'observable.'" (AOB at 18.)

While auditory or other virtual perception has sufficed to establish the first requirement of "presence at the scene," remote technology potentially creates a class of plaintiffs anywhere in the world. Common sense (if not prudence) dictates that if the concept of "presence" and "observation" can be widened by technology, the plaintiff alleging NIED must have a correspondingly greater awareness of the harm caused by the bad acts to be

distressed by them. At a minimum, the plaintiff must be aware of the alleged tortfeasors' participation in or contribution to the injury producing event. Downey cannot be distressed by causal factors she had no awareness of, even if the Court deems her "present" because she had auditory perception of the collision.

Clearly, "presence" and "observation" are not limited to visual observation and that other forms of perception may satisfy this element. (*See Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1273 [mother heard child's voices at the explosion; she felt and heard the force of the explosion, and she knew the flash emanated from child's room; ergo she personally and contemporaneously perceived the injury-producing event and was aware that it caused injury to her children.)

Downey's perception is limited to what she heard. She could not have known whether the screeching tires and sound of metal on metal was caused by a single car accident or a multi-vehicle accident. She could not have known whether her daughter was the sole cause of the injury producing event. She certainly could not have known of the technical aspects of roadway metrics and visibility that she now claims are the source of her emotional distress.

Respondents maintain that if "presence" is determined by remote connection alone, the plaintiff should have a greater understanding of how the defendant's conduct contributed to the harm as a reasonable limitation to

endless liability. And the second facet of the second *Thing* requirement provides just that nuance: the plaintiff must be "then aware" of the "injury producing event."

The term "injury producing event" has been used by this Court as a means to identify how a defendant is alleged to have contributed to the harm—ie., their role in the event that caused the injury. (See *Bird v. Saenz, supra*, 28 Cal.4th at p. 917 ["Even if plaintiffs believed, as they stated in their declarations, that their mother was bleeding to death, they had no reason to know that the care she was receiving to diagnose and correct the cause of the problem was inadequate. While they eventually became aware that one injury-producing event—the transected artery—had occurred, they had no basis for believing that another, subtler event was occurring in its wake."]) Other courts, including the court below, have used the term as a cognate for "cause." See *Fortman v. Forvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 843, as modified (Feb. 7, 2013) ["The cause of Myers's injury, or the "injury-producing event," was the company's defective product that restricted Myers's ability to breathe underwater through his regulator."]) *Bird v. Saenz* made clear that the nature of the "injury causing event" needs to be known to the person asserting NIED. Not quite identical to knowing the "cause" of the accident, it is more akin to perceiving the "role" of the defendant.

Thus, as decided by the Court of Appeal, in order to state a claim for NIED against Respondents for the ways in which public and private property caused the accident, Downey would have to allege her contemporaneous awareness of the role that the condition of the roadway and the maintenance of neighboring properties played with respect to visibility on the roadway and the ultimate collision that injured her daughter.

Requiring that awareness would be the only fair means by which to adhere to a reasonable limitation of the tort at a time when most things can be simultaneously viewed or broadcast or heard around the globe. Less "presence" should require more "awareness" as to what or who is causing the injury. The courts are skilled at these kinds of sliding scale analyses, where a lesser showing in one area would necessitate a greater showing in another.

Existing cases already establish that the Courts are making such calculations. In *Ko v. Maxim Healthcare Services, Inc*. (2020) 58 Cal.App.5th 1144, 1151–1152 [272 Cal.Rptr.3d 906, 912], as modified (Jan. 14, 2021), the court agreed that the parent's "virtual presence" during the child's abuse by a caretaker through a real-time audiovisual connection satisfied the requirement in *Thing* of contemporaneous presence. *Ko v. Maxim Healthcare Services, Inc*. (2020) 58 Cal.App.5th 1144, 1146, as modified (Jan. 14, 2021). Certainly, the plaintiffs could see that the source of their child's injury was his mistreatment at the hands of the nanny. That lends an immediacy and

certainty to the cause of their shock and distress—they are viewing the mistreatment of their son by a healthcare provider and they know that the mistreatment is causing injury.

In *Bird v. Saenz, supra,* 28 Cal.4th at 916, by contrast, plaintiffs did not perceive the procedure harming their mother's artery, were not present at the scene of the injury-producing event at the time it occurred and were not then aware that it was causing injury. The Court barred recovery for NIED for their failure to establish the second *Thing* requirement.

> "The problem with defining the injury-producing event as defendants' failure to diagnose and treat the damaged artery is that plaintiffs could not meaningfully have perceived any such failure. Except in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders.... Even if plaintiffs believed, as they stated in their declarations, that their mother was bleeding to death, they had no reason to know that the care she was receiving to diagnose and correct the cause of the problem was inadequate. While they eventually became aware that one injury-producing event—the transected artery—had occurred, they had no basis for believing that another, subtler event was occurring in its wake."

(*Bird v. Saenz, supra*, 28 Cal.4th at p. 917.)

In *Bird*, this Court acknowledged the “slight degree of flexibility” in the second *Thing* requirement that plaintiffs must be “present.” Still the Court denied NIED recovery because the plaintiffs had “no sensory perception whatsoever of the transection at the time it occurred. Thus, defining the injury-producing event as the transection, plaintiffs’ claim falls squarely within the category of cases the second *Thing* requirement was intended to bar.” (*Bird v. Saenz*, 28 Cal.4th at 916–17.)

This Court should fashion a test that examines the proximity of observation as against the knowledge of what precisely gave rise to the injury. Here, while an accident caused Downey’s daughter’s harm, and while she was able to hear the accident occurring, she had no knowledge of the mechanism of injury with respect to the Sevacharians because she did not perceive any aspect of their contribution to the injury. As a “lay bystander,” she could not have contemporaneous awareness (and be caused extreme emotional distress) by circumstances beyond her perception, and those requiring expert explanation.

C. Fortman is Rooted In This Court’s Jurisprudence

As this Court has repeatedly held, negligently causing emotional distress is not an independent tort; it is an expression of the tort of negligence, bounded by traditional elements of duty, breach of duty, causation, and damages. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064,

1072; *Thing, supra*, 48 Cal.3d at p. 647; *Dillon v. Legg*, *supra*, 68 Cal.2d at 733–734.) Whether the plaintiff may recover emotional distress damages depends upon whether the defendant owes a duty to the plaintiff. (*Dillon*, at pp. 739–741; *Thing*, at p. 647.) "[B]ystander liability is premised upon a defendant's violation of a duty not to negligently cause emotional distress to people who observe conduct which causes harm to another." (*Burgess v. Superior Court*, at pp. 1072–1073.)

These principles were expressed in *Fortman v. Forvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 834–835, as modified (Feb. 7, 2013), a case that Petitioner asks the Court to disapprove. In *Fortman*, the Second District concluded the plaintiff could not recover NIED damages from the manufacturer of allegedly defective scuba diving equipment although she witnessed the death of her brother during a dive. While she was present to contemporaneously observe him falling unconscious, she believed he had died from a heart attack, not the result of defective scuba equipment.

On the basis of this Court's prior decisions, the Second District determined 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*, at p. 836; accord, *Golstein v. Superior Court* (1990) 223 Cal.App.3d 1415, 1427 [parents who watched son undergo radiation

therapy but only later discovered he had been given a fatal dose of radiation could not recover for NIED].)

It was not enough for the Fortman plaintiff to see her brother unconscious; she needed to know that the defendant's scuba equipment had malfunctioned in order to recover against them. This result flowed from a line of cases acknowledging "the difference between observable medical negligence" giving rise to NIED liability, such as the failure to give immediate medical attention while the family looks on, and unobservable misdiagnosis and malpractice cases which typically do not. Those outcomes turn upon what the lay plaintiff could observe and appreciate about the cause of the injury to their loved one—where the malpractice was seen and perceived and understood, NIED would stand. If the plaintiff was then-unaware of the ways in which the family member was harmed by a botched procedure or defective product, there was no recovery.

Downey asks the Court to differentiate medical malpractice cases and product liability cases from other types of torts. There is no basis to do so.

The basic premise of the "unobservable misdiagnoses" limitation on NIED is what the lay bystander understood of the circumstances giving rise to the "injury producing event." Downey has not articulated a reason to hold some types of case apart. Medical malpractice cases are no less or not more

expert driven, and have no greater or lesser importance in the overall policy goals expressed in the law of tort.

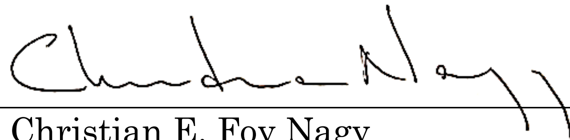
Respondents do not suggest that all forms of "causation" need to be known to the Plaintiff to recover, and neither did the court below. Even where the lay plaintiff has a general understanding of the cause of the accident, proving actual causation may be more challenging and require expert testimony. But if the plaintiff has no perception or understanding whatever of the role or existence or conduct of a potential defendant, that plaintiff fails to establish eligibility for NIED under *Thing v. La Chusa.* A given plaintiff should at least be able to plead and prove that she perceived an injury producing event and was then aware that it was harming a loved one. Here, Downey had no perception of the alleged role of Respondent's landscaping along the road's edge. Certainly, she could not hear that on the course of the call, nor could see perceive the role it played in the collision, if any.

III. CONCLUSION

The Sevecharian Respondents maintain that in light of the potentially global nature of "remote viewing" or "virtual presence," and the endless liability flowing therefrom, the Court should require an NIED plaintiff to plead his or her contemporaneous awareness of the defendant's role in the injury producing event causing harm to a loved one.

Respondents request that the Court affirm the ruling of the Court below on the grounds that Downey was not present at the injury causing event such that she had a contemporaneous awareness of the harm that visibility and roadway metrics caused her daughter. Her alleged "virtual presence" was not sufficient to permit her to understand that her daughter's injury resulted from an alleged obstruction by vegetation. Because there is no reasonable probability that amendment will cure the defect in pleading, Sevacharian Respondents ask the court to reverse or vacate that portion of the Court of Appeal's order permitting Downey leave to amend.

Dated: December 18, 2023 **FREEMAN MATHIS & GARY, LLP**



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CERTIFICATE 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 4,370 words in 13-point Century Schoolbook type as counted by the word processing program used to generate the text.

Dated: December 18, 2023

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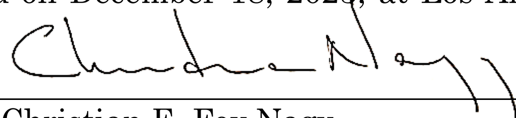
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 18, 2023, at Los Angeles, California.



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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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Date

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