S280322

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

JAYDE DOWNEY,
Plaintiff and Appellant,

v.

CITY OF RIVERSIDE, et al.,
Defendants and Respondents,

Court of Appeal, Fourth Appellate District, Division One,
Case Number D080377,
Riverside County Superior Court,
Case Number RIC1905830,
Hon. Harold W. Hopp, Judge Presiding

AMICI CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION

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QUESTION PRESENTED

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?

THE QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE

A plaintiff who alleges she witnessed an automobile accident that was caused by "dangerous conditions on nearby properties," and for which she seeks damages for negligent infliction of emotional distress ("NIED"), also must allege that she was contemporaneously aware of the causal connections between the dangerous conditions of the properties and the harm to her close relative. For example, in this case, Plaintiff Downey might allege that (a) she was familiar with the problems for drivers who try to negotiate the busy intersection, particularly given the surrounding landscaping that limits what drivers can see, (b) she knew the conditions were dangerous, and (c) she understood the dangerous conditions were causing the harm to her daughter she was witnessing.

THE ANSWER SHOULD BE AFFIRMATIVE BECAUSE PLAINTIFF DOWNEY DEFINED THE INJURY PRODUCING EVENT IN TERMS OF THE DANGEROUS CONDITIONS AT THE INTERSECTION

The applicable rule was announced by the Court in *Thing v. La Chusa* ("*Thing*") (1989) 48 Cal.3d 644, 668, as the second of three requirements for bystander NIED: the bystander "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." During the three decades that followed *Thing*, the Court has explained that bystander NIED recovery is permitted only if the bystander plaintiff is aware of *the defendant's conduct* and the resultant injury to the victim and that *the conduct* is causing the injury. For example, three years after deciding *Thing,* in a medical negligence case, the Court explained the distinction between "direct liability" for NIED and "bystander liability [for NIED which] 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* ("*Burgess*") (1992) 2 Cal.4th 1064, 1073. Emphasis added.) For another example, more than ten years after deciding *Thing,* in another medical negligence case, the Court explained that the "injury producing event" is *defined* by what it was that plaintiffs allege defendants did or did not do that caused the harm. (*Bird v. Saenz* ("*Bird*") (2002) 28 Cal.4th 910, 916-917.) "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." (28 Cal.4th at p. 917. Emphasis added.)

Like the plaintiffs in *Bird,* it was Plaintiff Downey herself who *defined* "the injury producing event" in her NIED claim. Specifically, she alleged her daughter's injuries were caused by the dangerous conditions that the City of Riverside and the Sevacherians had created. By definition, the "conditions of nearby properties" are the result of conduct by the owners of those properties, and conditions that are "dangerous" are potentially harmful. Their conduct is the injury producing event.

Because that was how Downey defined the "injury producing event," the Court of Appeal majority correctly applied the second *Thing* requirement, by defining the "injury producing event" in terms of the "dangerous conditions on nearby properties" that she alleged. As the majority put it, "There may be instances where a *dangerous condition* is obvious and observable to a bystander, who perceives the causal connection between *that condition* and the injury sustained by their loved one." (Slip Opn., p. 29. Emphasis by italics added.)

The third justice disagreed "that there is any need for Downey to further amend her complaint," reasoning "the immediate injury-producing event is the car crash." (Concurring

and Dissenting Opn. ("Diss. Opn."), p. 1.) He accused the majority of effectively adopting "a rule that bystander-plaintiffs must allege and prove that they were aware of *each defendant's* allegedly tortious conduct" (*id.* at p. 4, emphasis in original), which accusation the majority strongly denied. "We do not hold the plaintiff must know the precise nature of the defendant's negligence; we apply the *Bird* court's analysis in a similar unique context – a complaint alleging defendant's maintenance of a dangerous condition of property caused by a car accident – to hold that a plaintiff must be aware of the connection between *the defendant's conduct* and the injury." (Slip Opn., p. 26, fn. 7. Emphasis added.)

The Court of Appeal majority decision should be affirmed. The majority correctly analyzed the second *Thing* requirement and, in doing so, correctly answered the Question Presented. This Court should reject the analysis in the dissenting opinion of what constitutes "the injury producing event" – which analysis Plaintiff Downey repeats in her briefs on the merits – and the additional analysis that Plaintiff provides in those two briefs.

STATEMENT OF INTERESTS AND CONCERNS OF *AMICI*

The California Medical Association ("CMA") is a nonprofit, incorporated, professional association of more than 50,000

member-physicians practicing in the State of California, in all specialties. The California Dental Association ("CDA") represents over 27,000 California dentists, more than 70 percent of the dentists practicing in the State. CMA's and CDA's memberships include most of the physicians and dentists engaged in the private practices of medicine and dentistry in California. The California Hospital Association ("CHA") represents the interests of more than 400 hospitals and health systems in California, having approximately 94 percent of the patient hospital beds in California, including acute-care hospitals, county hospitals, nonprofit hospitals, investor-owned hospitals, and multi-hospital systems. Thus, *Amici* represent much of the healthcare industry in California.

CMA, CDA, and CHA have been active before the Courts in all aspects of litigation affecting California healthcare providers.[1]

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[1] Such cases have included *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, *Delaney v. Baker* (1999) 20 Cal.4th 23, *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, *Rashidi v. Moser* (2014) 60 Cal.4th 718, *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, *Matthews v. Becerra* (2019) 8 Cal.5th 756, *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, and *Quishenberry v. United Healthcare, Inc.* (2023) 14 Cal.5th 1057.

***Amici* are interested in reasoned decision-making in personal injury litigation pursued against California health care providers, such as claims for bystander NIED, where the primary purpose is recovery of noneconomic damages.**

CMA, CDA, and CHA have long been concerned about the potential for unpredictable and unreasonably large awards in professional negligence actions against healthcare providers. CMA, CDA, and CHA provided substantial input to the legislative process that led to enactment of the Medical Injury Compensation Reform Act ("MICRA"), and they continue to support MICRA's ongoing viability. As even Plaintiff acknowledges, there are "[s]ocietal interests that may be furthered by shielding medical professionals from liability[.]" (Opening Brief on the Merits ("OBM"), p. 31, citing *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital, supra.*)

CMA, CDA, and CHA have advocated rational and unbiased decision-making by judges and juries, primarily in personal injury litigation, where medical care is an important factual consideration. The MICRA statutes, for example, require damages to be assessed according to their various characteristics: economic damage versus noneconomic damage, past damage versus future damage, medical expense damage versus loss of earnings damage, and insurance-compensated damage versus

other compensation for damage. As such, MICRA requires lawyers, judges, jurors, arbitrators, and all others involved in the resolution of medical malpractice cases to think more precisely about the reasons and the methods for calculating damages. In other words, MICRA has resulted in improved decision-making and fairness, particularly in assessing damages during jury trials, which in turn has improved the administration of justice in tort litigation generally.

That is why *Amici* filed briefs in some of the most significant cases on NIED, for example, in *Burgess, supra,* 2 Cal.4th 1064, *Huggins v. Longs Drugs Stores* (1993) 6 Cal.4th 1243, and *Bird, supra,* 28 Cal.4th 910. Rational and unbiased decision-making also is the reason why *Amici* filed briefs in the most significant cases on the issue of causation, *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, and *Viner v. Sweet* (2003) 30 Cal.4th 1232. *Amici* have filed briefs on the issue of expert witness opinion testimony regarding causation, for example in *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, and *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747.

In summary, *Amici* are interested in this case because the Question Presented is about NIED and decision-making about NIED turns on causation. That is apparent from the phrases "*caused* by" and "the *connection between*" in the Question

Presented. That, in turn, is because causation is the limitation on recovery that is captured in the second *Thing* requirement: the bystander "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." (*Thing,* 48 Cal.3d at p. 668. Emphasis added.)

***Amici* have concerns about the position of the Court of Appeal dissent and Plaintiff Downey on the issue: that it is sufficient the bystander witnessed an accident.**

As it relates to bystander NIED, *Amici* submit this Court's decision in *Bird* was correct, and so too was the Court of Appeal majority's application of *Bird* to this case, whereas the dissent's analysis of *Bird* was incorrect. Plaintiff urges the Court to adopt the dissent's analysis. *Amici* are concerned that the position of the dissent and Plaintiff Downey – that the second factor in *Thing* merely requires a bystander to witness a harmful "accident" rather than be aware of the harmful "conduct" that caused the accident – essentially defeats the point of the second requirement, which operates as a limitation.

That the second *Thing* requirement operates as a limitation is not surprising. Causation is one of the requirements for analyzing tort duty that was announced by the Court in *Rowland v. Christian* (1968) 69 Cal.2d 108, and subsequently discussed by the Court in *J'Aire Corp. v. Gregory* (1979) 24 Cal.3 d 799, 808, in

terms of "harm *closely connected* with defendant's conduct" and "the *nexus between* defendant's conduct and the risk of injury." For the same reason, it is not surprising that the second *Thing* requirement was framed by the Court in terms of "defendant's conduct." To repeat the quote from *J'Aire Corp.* with different emphasis, it is "harm closely connected with *defendant's conduct*" and "the nexus between *defendant's conduct* and the risk of injury" (emphasis added) that is relevant to the analysis of tort duty.

The position of the Court of Appeal dissent and Plaintiff Downey essentially is that this Court should remove that limitation from the analysis of NIED. *Amici* are concerned about any such expansion of the law that results in increased frequency and severity of claims for noneconomic damages, not just claims against health care providers. One of the primary goals of those plaintiffs who pursue claims for bystander NIED is non-economic damages,[2] which is a problem because, as noted in *Thing,* they are "unpredictable." (48 Cal.3d at p. 664.) At the time *Thing* was decided, California health care providers knew from experience

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[2] The same can be said for claims by "direct victims" of NIED, such as in *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, *Ochoa v. Superior Court* ("*Ochoa"*) (1985) 39 Cal.3d 159, *Marlene F. v. Affiliated Psychiatric Medical Clinic* (1989) 48 Cal.3d 583, *Burgess, supra,* 2 Cal.4th 1064, and *Huggins v. Longs Drugs Stores, supra,* 6 Cal.4th 1243, many of which have been pursued against California health care providers.

that such damages lead to "limitless liability all out of proportion to the degree of defendant's negligence and against which it is impossible to insure."

***Amici* disclaim any authorship or financial contribution by a party to production of this brief.**

Amici reassure the Court that this brief was not authored, either in whole or in part, by any party to this litigation or by any counsel for a party to this litigation. No party to this litigation or counsel for a party to this litigation made a monetary contribution intended to fund the preparation or submission of this brief.

That said, some funding for this brief was provided by organizations and entities that share *Amici*'s interests and concerns, including physician-owned and other medical and dental professional liability organizations, nonprofit entities engaging physicians, dentists, and other healthcare providers for the provision of medical services, specifically The Cooperative of American Physicians, Inc., The Dentists Insurance Company, The Doctors Company, Kaiser Foundation Health Plan, Inc., Medical Insurance Exchange of California, and The Regents of the University of California.

THERE ARE MANY REASONS WHY THE QUESTION PRESENTED SHOULD BE ANSWERED IN THE AFFIRMATIVE

First, and most importantly, is the reason stated by the Court of Appeal majority in its response to the dissent: "we apply the *Bird* court's analysis in a similar context—where a plaintiff files a complaint alleging defendant's maintenance of a dangerous condition of property caused by a car accident—to hold that a plaintiff must be aware of the connection between the defendant's conduct and the injury." (Slip Opn., p. 26, fn. 7.) In other words, it is the allegation of defendant's conduct that caused harm to the close relative and emotional distress of the bystander that *defines* "the injury producing event." The specific conduct that Plaintiff Downey alleges in her NIED claim against the City of Riverside and the Sevacherians is their maintaining dangerous conditions on their properties.

Second, it is not enough for a close family member claiming bystander NIED simply to plead she witnessed an *accident* that caused harm to her close relative. In the second *Thing* requirement, the causal connection of which the bystander must be "contemporaneously aware" is the connection between *the defendants' conduct* and the victim's harm. That is the rule of law applicable to the Question Presented in this case.

Third, experience after *Dillon v. Legg* ("*Dillon*") (1968) 68 Cal.3d 728, showed that there will be uncertainty if there are no

such clear rules for when damages are recoverable by a bystander NIED plaintiff. As it relates to economic damages, rules are particularly important for the reason the Court stated in *Thing*: "the number of potential plaintiffs traumatized by reason of defendant's negligent conduct toward another[] would turn on fortuitous circumstances wholly unrelated to the culpability of the defendant." (*Thing,* 48 Cal.3d at 663.) In *Thing,* the Court repeated the concern it originally expressed in *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 Cal.2d 295, about "the social costs of imposing liability on a negligent tortfeasor for all foreseeable emotional distress suffered by relatives who witnessed the injury" (*Thing,* 48 Cal.3d at 664) and expressed again in *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, *Turpin v. Sortini* (1982) 31 Cal.3d 220, and *Ochoa,* 39 Cal.3d 159. (*Thing,* 48 Cal.3d at 664-666.)

Fourth, that concern is even greater for *non-economic* damages which are unpredictable and, often, arbitrary precisely because they are for *intangible* injury. Such damages can lead to "limitless liability all out of proportion to the degree of defendant's negligence and against which it is impossible to insure." (*Thing,* 48 Cal.3d at p. 664.) "When the right to recover is limited in this manner [referring to the class of plaintiffs], the liability bears a reasonable relationship to the culpability of the negligent defendant." (*Ibid.*) The best way to assure that "the

culpability of the negligent defendant" will be considered in the analysis of bystander NIED is to focus on defendant's conduct in analyzing the second *Thing* requirement: plaintiff must plead she understood the connection between the defendants' conduct and the victim's physical injuries. The Court of Appeal majority did precisely that when it applied this Court's analysis in *Bird*. (Slip Opn., pp. 11-17, 23-28.)

Fifth, because this Court has been so consistent – in *Ochoa,* in *Thing,* in *Bird* – there is neither "confusion" about the second *Thing* factor, as Plaintiff incorrectly claims, nor "uncertainty," as the CACI Advisory Committee incorrectly claims. (OBM, pp. 9, 16-18, citing the "Directions for Use" of CACI 1621.) The bystander must understand the causal connection between the defendant's conduct and the resulting injury to the victim. If there was any question, the Court clarified in *Bird* that the bystander must understand the defendant's conduct is "*harmful,*" as opposed to "*negligent*." (*Bird,* 28 Cal.4th at 920. Emphasis by italics in original.) Like the plaintiff in *Mobaldi v. Regents of the Univ. of Calif.* (1976) 55 Cal.App.3d 573, which this Court rejected in *Bird* (28 Cal.4th at 920-921), Plaintiff Downey has "confused negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird,* 28 Cal.4th at 920.) So too has the CACI Advisory

Committee, as will be explained below, under point heading III of the Legal Discussion that follows.

Sixth, this case is an illustration why the rule works even in the relatively unique context of a plaintiff who *virtually* witnesses injury to a close family member. Downey was talking on the telephone, explaining to her daughter how to drive to the office where Downey asked her daughter to go. Given Downey's own experience driving in the area where Downey alleges there were dangerous conditions on nearby properties, she was able to claim (not in her complaint, however, but during oral argument on appeal) that she was aware of those conditions. The Court of Appeal majority gave her the opportunity to plead that she was contemporaneously aware of the dangerous condition causing harm to her daughter.

There are other reasons, as well, why the Court of Appeal majority was correct and why the dissent was wrong. It is not enough for a bystander NIED plaintiff to simply plead she witnessed an *accident* causing harm to her close family relative. The second *Thing* requirement is that the bystander NIED plaintiff be contemporaneously aware of the harmful *conduct*.

The question in this case -- whether Plaintiff Downey understood the role of the dangerous conditions on nearby properties in causing her daughter to be harmed – is affirmative because she claimed to be familiar with the intersection.

LEGAL DISCUSSION

I. To Recover NIED Damages, A Bystander Plaintiff Must Plead And Later, At Trial, Must Prove That She Understood The Causal Connection Between Defendants' Conduct – That Is, The "Dangerous Conditions On Nearby Properties" – And The Harm To Her Daughter

Based on what the Court said in *Ochoa, Thing,* and *Bird,* Plaintiff Downey must plead in her complaint and, at trial, she must persuade the jury that she was contemporaneously aware of the connection between the conduct of Defendants City of Riverside and the Sevacherians – that is, the "dangerous conditions on nearby properties" that those defendants own and Plaintiff claims were responsible – and the harm to her daughter.

In *Ochoa,* the Court explained that the bystander NIED plaintiff must be "contemporaneously aware" of the causal connection between defendants' conduct and the victim's harm. "We are satisfied that when there is observation of *the defendant's conduct* and the child's injury and contemporaneous awareness of *the defendant's conduct or lack thereof* is causing harm to the child, recovery is permitted." (*Ochoa,* 39 Cal.3d 159, 170. Emphasis added.)

Four years later, in *Thing,* the Court considered *Ochoa* (*Thing,* 48 Cal.3d at pp. 660-661) and concluded, "as to 'bystander' NIED actions, *Ochoa* held only that recovery would be

permitted if the plaintiff observes both *the defendant's conduct* and the resultant injury, and is aware at that time that *the conduct* is causing the injury. The Court of Appeal erred in concluding that *Ochoa* [citation], held that these NIED plaintiffs need not witness the defendant's conduct." (*Thing,* 48 Cal.3d at p. 661. Footnote omitted. Emphasis added.) That became the second *Thing* requirement: "(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[.]" (*Thing,* 48 Cal.3d at p. 668.) In other words, the causal connection of which the bystander must be "contemporaneously aware" to plead bystander NIED is the connection between *the defendants' conduct* which is the injury producing event and the victim's harm.

Seventeen years after *Ochoa* and thirteen years after *Thing*, in *Bird,* the Court found it necessary to explain that requirement again: "Anticipating the formula we would later adopt in *Thing,* we explained 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* [citation], italics added.)" (*Bird,* 28 Cal.4th at p. 919.) Again, the connection of which the bystander must be "contemporaneously aware" to plead and prove bystander NIED

is between *the defendants' conduct* and the victim's harm. In *Bird,* to be clear, the Court explained that "a plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.*" (*Bird,* 28 Cal.4th at 920. Emphasis in original.) In other words, the plaintiff must be aware of defendant's *harmful conduct,* although plaintiff need not understand that it qualifies as actionable negligence.

Now, more than twenty years after *Bird* and almost forty years after *Ochoa,* it apparently is necessary for this Court to explain that requirement yet again. That is surprising because the Court of Appeal majority saved Plaintiff's case by following *Bird* and correctly applying the second *Thing* requirement to what it felt was a "similarly unique context." (Slip Opn., p. 26, fn. 7.) Nevertheless, Plaintiff petitioned for review.

Essentially, Plaintiff disagrees with the reasoning by which the Court of Appeal majority saved her case. Plaintiff argues she should not 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." (OBM, pp. 6-7.) Apparently based on what the dissent said in its opinion, Plaintiff proposes a new rule: it is enough for a close family member claiming bystander NIED to simply plead she witnessed an *accident* that caused harm to her close relative. "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." (*Id.* at p. 16-17. Emphasis deleted.)

Failing that argument, Plaintiff proposes that the second *Thing* factor be restated as two, alternative factors – one for "the traditional fire, explosion, and auto collision cases" (*id.* at p. 9) and another for "certain medical malpractice cases." (*Id.* at p. 10.)

In both respects, Plaintiff is wrong. So too was the dissent wrong.

II. The Court Of Appeal Majority Correctly Understood The Second Requirement In *Thing* To Be That The Bystander Plaintiff Was Then Aware And Understood The Defendant's Role In The Event That Was Causing Injury To The Victim

The Court of Appeal majority relied primarily on *Bird* (Slip Opn. at pp. 10-17, 24-29), but it also cited *Golstein v. Superior Court* (*Golstein*) (1990) 223 Cal.App.3d 1415 (Slip Opn., pp. 14-15, 25), which predicted *Bird*. The Court of Appeal in *Golstein* explained,

> we repeatedly asked petitioners' counsel at oral argument to present some analytical distinction between this case and the standard medical malpractice case, where the injury is typically witnessed by the plaintiff but the plaintiff does not see, or meaningfully comprehend, the actual injury-causing event. Counsel was unable to do so.

> We are reasonably certain the Supreme Court would not accept a conclusion which could apply *Dillon* recovery almost automatically to a medical malpractice plaintiff who observes only the suffering of the victim and not the actual event that causes that suffering.

(223 Cal.App.3d at pp. 1427, fn. 3.) This footnote by the *Golstein* court was quoted by this Court in *Bird.* (*Bird*, 28 Cal.4th at 918.) So too was the *Golstein* court's explanation of the second *Thing* requirement: "a contemporaneous sensory awareness of the causal connection between *the negligent conduct* and the resulting injury." (*Bird*, 28 Cal.4th at 918, quoting *Golstein,* 223 Cal.App.3d at 1427-1428. Emphasis added.)

Bird, like *Golstein,* was a medical malpractice case. Even though *Downey v. City of Riverside* is not a medical malpractice case, the Court of Appeal majority correctly applied *Bird* to Plaintiff Downey's factual allegations, explaining that "plaintiff must then be aware of the connection between *the defendant's conduct* and the injury." (Slip Opn,, p. 26, fn. 7. Emphasis added.) "In other words, the court permits recovery where the plaintiff connected the injury with *the defendant's conduct*." (*Ibid.* Emphasis added.)

The *defendant's conduct* is the "injury producing event" in the second *Thing* requirement. Alternatively stated, it is the *conduct* that is *harmful* to the victim. Most simply stated, it is *harmful conduct*.

Thus, the second *Thing* requirement that the bystander be "present at the scene of the injury producing event" means that the bystander must have been present when the *conduct* was *producing injury*. Again, most simply stated, the bystander must have been aware of the *harmful conduct*.

The Court of Appeal majority explained, in responding to the dissent's incorrect characterization of the majority ruling, "We do not hold the plaintiff must know the precise nature of the defendant's negligence; we apply the *Bird* court's analysis in a similar unique context—a complaint alleging defendant's maintenance of a dangerous condition of property caused a car accident—to hold that a plaintiff must be aware of the connection between *the defendant's conduct* and the injury." (*Ibid.* Emphasis added.)

The majority also explained why the dissent's rule should be rejected. The majority gave an example of how, under the dissent's analysis, there would be "ever widening circles of liability" against health care providers: "if the driver hit Downey's daughter's vehicle because he was under the influence of medication prescribed by a physician or as a result of an undiagnosed medical condition, Downey could maintain a cause of action against that physician merely because she perceived the car accident, having no knowledge or awareness whatsoever of the physician's role in it." (*Ibid.*)

In summarizing its response to the dissent, the majority alternatively explained, the bystander plaintiff must be aware of *the defendant's "role" in the "event"* that "is causing injury to the victim." (*Ibid.* Emphasis added.) That was consistent with this Court's prior rulings in *Ochoa, Thing,* and *Bird,* as well as the prior Court of Appeal ruling in *Golstein.*

The Court of Appeal majority's analysis of the second *Thing* requirement was correct, and its decision should be affirmed. The dissent's analysis was wrong, and it should be rejected.

III. In The Trial Of Plaintiff Downey's NIED Claim, There Will Be No Confusion When The Jury Is Instructed That, To Recover NIED Damages, She Must Have Been Contemporaneously Aware Of The "Dangerous Conditions" On Defendants' "Nearby Properties"

The dissent and Plaintiff argue there is confusion in the law. (Diss. Opn., pp. 2-3, Petition for Review, pp. 6-8.) Plaintiff quotes the "Directions for Use" of the relevant jury instruction, CACI 1621, "[t]here is some uncertainty as to how the 'event' should be defined in element 2 [of the jury instruction] and then exactly what the plaintiff must perceive in element 3." (OBM, p. 16.) Plaintiff argues that the analysis of the issue and the approach proposed by the Court of Appeal majority confuses matters further. (See, *e.g.,* OBM, p. 9.)

To the contrary. The Court of Appeal majority's analysis of the "injury producing event" in this case, as defined by Plaintiff herself, was "defendant's maintenance of a dangerous condition of property." (Slip Opn., p. 26, fn. 7.) That phrase is readily inserted into CACI 1621, in place of the phrase "*traffic accident*":

> 1. That [*name of defendant*] negligently caused [injury to/the death of] [*name of victim*];
>
> 2. That when the [*describe event, e.g.,* ***defendant's maintenance of a dangerous condition of property***] that caused [injury to/the death of] [*name of victim*] occurred, [*name of plaintiff*] was [virtually] present at the scene [through [*specify technological means*]];
>
> 3. That [*name of plaintiff*] was then aware that the *[e.g.,* ***defendant's maintenance of a dangerous condition of property***] was causing [injury to/the death of] [*name of victim*];
>
> 4. That [*name of plaintiff*] suffered serious emotional distress; and
>
> 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s serious emotional distress."

(Emphasis by italics in original; emphasis by bold added.)

Amici submit that, if there is confusion, it is the result of the next sentence in CACI 1621:

> [*Name of plaintiff*] need not have been then aware that the conduct of [*name of defendant*] had caused the [*e.g., traffic accident*].

(Emphasis by italics in original.) Although this Court in *Ochoa, Thing,* and *Bird* used the phrase "the defendant's conduct" to describe the causal connection to the victim's harm of which the bystander must be aware, this language in CACI instructs the jury to the contrary.

Both the "Directions for Use" of CACI 1621 and Plaintiff acknowledge that, in *Bird,* the Court used the phrase "defendant's conduct": " '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.' " (OBM, p. 17, quoting CACI 1621 "Directions for Use," quoting *Bird,* 28 Cal.4th at p. 920.)[3]

That sentence in CACI should be rewritten, so that the jury is told that the plaintiff need not be contemporaneously aware that defendant was being negligent but, rather, that the plaintiff must have been contemporaneously aware that defendant's conduct was a cause of the harm. For example, CACI 1621 could instruct the jury:

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[3] It is revealing that, while the words "*negligent*" and "*harmful*" were italicized in the *Bird* opinion and in the CACI "Directions for Use," they are not italicized in Plaintiff's quotation of *Bird* in her Opening Brief on the Merits.

> [*Name of plaintiff*] need not have been then aware that [*name of defendant*] was negligent, only that the conduct of [*name of defendant*] had caused the [*e.g., dangerous condition of property*].

That way, if Plaintiff pleads her case as the Court of Appeal majority proposes, the jury will be instructed consistent with *Ochoa, Thing,* and *Bird.*

In the trial of this case, the jury might well agree with Plaintiff Downey that she was then aware of Defendants' role in the harm to her daughter, that is to say, the harmful condition of Defendants' properties. After all, at the time Downey claims to have vicariously witnessed the collision by telephone, she was familiar with the place where her daughter's car was located. Indeed, Downey was giving her daughter directions, based on what Downey knew about the intersection. As such, Downey was in a position to understand the role of the dangerous conditions in what was happening to her daughter, and that was true even though the cause of the harm to her daughter was not then *directly* observable to Downey. Although she was not in the car with her daughter, she was talking to her daughter on the telephone, telling her daughter where to go, based on her own prior experience driving to the same location. To use the words of the Court of Appeal majority, Downey was aware of the defendants' conduct from her prior "familiarity with, and

knowledge and awareness of, the intersection and the dangerous conditions[.]" (Slip Opn., p. 29.)

Of course, that might lead the jury to question what role Downey herself had in the injury producing event.[4] Perhaps that is why, even though the Court of Appeal majority gave Downey an opportunity to replead her case, she does not want to do it the way the majority outlined. (See Slip Opn., pp. 3, 23-24, and 26, fn. 7.) She would have to testify that she was then aware of the dangerous conditions but directed her daughter to proceed nevertheless.

IV. Plaintiff Downey Incorrectly Mischaracterizes, Criticizes, Or Distinguishes The Decisions On Which The Court Of Appeal Majority Relied In Analyzing The Second Requirement In *Thing*

The common feature of this Court's decision in *Bird* and the Court of Appeal decisions that were analyzed by the Court of Appeal majority is that all of those decisions can be explained in terms of the bystanders' awareness or lack of awareness of a "connection" between defendants' conduct and the victim's injuries. Plaintiff argues *Bird* and the Court of Appeal decisions

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[4] For example, since "Downey was on the phone with Vance giving her directions to get to a realtor's office close to the intersection" (Slip Opn., p. 4), why did Downey direct Vance to turn left – into oncoming traffic – at the blind intersection with which Downey was familiar and Vance was not?

on which the majority relied should be distinguished, if not limited, because they are for medical malpractice. Plaintiff criticizes the Court of Appeal decisions which apply the second *Thing* requirement consistently with *Bird*. Plaintiff mischaracterizes and/or misstates what this Court and those Courts of Appeal said, for example, when Plaintiff confuses the distinction between the words *negligence* and *harmful* while discussing *the defendant's conduct*.

A. Plaintiff not only argues for revival of one or more decisions that pre-date *Ochoa, Thing,* and *Bird,* but she also makes a thinly veiled attack on *Ochoa, Thing,* and *Bird*

Plaintiff urges the Court to overrule *Fortman v. Förvaltnings-bolaget Insulan AB* ("*Fortman*") (2013) 212 Cal.App.4th 830 (ABM, pp. 25-27), to distinguish *Golstein v. Superior Court, supra,* 223 Cal. App. 3d 1415 (ABM, pp. 20-21), and to revive *Mobaldi v. Regents of University of California* (1976) 55 Cal.App.3d 573. (OBM, pp. 20, 26.)

Plaintiff is wrong. *Fortman* closely followed *Bird,* as the Court of Appeal majority noted (Slip Opn., pp. 17-18, 23-24, 27) and as discussed under sub-heading IV C that follows. As noted above, *Golstein* was cited approvingly in *Bird*. (*Bird,* 28 Cal.4th at pp. 918, 921.) *Mobaldi* was rejected by this Court in *Bird* because *Mobaldi* "cannot be reconciled with *Thing*. (*Id.* at pp. 920-921.)

Plaintiff's reliance on *Mobaldi* is particularly significant because Plaintiff confuses the legal conclusion that defendant's conduct is "negligent" with the observable fact that defendant's conduct is "harmful" to the victim. As this Court explained in *Bird,*

> The court in *Mobaldi, supra,* 55 Cal.App.3d 573, 127 Cal.Rptr. 720, may well have been correct in saying that a plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim. To borrow the *Mobaldi* court's own example, the bystander to the fatal traffic accident knows the driver's conduct has killed the child, even though she may not know the driver was drunk. One takes a giant leap beyond that point, however, by imposing liability for NIED based on nothing more than a bystander's "observation of *the results* of the defendant's infliction of harm," however "direct and contemporaneous." (*Id.* at p. 583, 127 Cal.Rptr. 720, italics added.) Such a rule would eviscerate the requirement of *Thing, supra,* 48 Cal.3d 644, 668, 257 Cal.Rptr. 865, 771 P.2d 814, that the plaintiff must be contemporaneously aware of the connection between the injury-producing event and the victim's injuries. The Court of Appeal in *Golstein, supra,* 223 Cal.App.3d 1415, 273 Cal.Rptr. 270, which saw this point clearly, correctly determined that *Mobaldi* did not survive *Thing.* "The actual negligent act [in *Mobaldi*]," the court in *Golstein* explained, "was not simply the injection itself, but the use of the wrong solution, an act which plaintiff, as a medical layperson, could not meaningfully perceive: what appeared to her as an innocent-seeming injection was actually the conduit of medical negligence and the cause of her child's

> injuries. Unlike an explosion, traffic accident, or electrocution, the injury-causing event in *Mobaldi* was essentially invisible to the plaintiff and not a component of her emotional trauma." (*Golstein, supra,* at p. 1423, 273 Cal.Rptr. 270.)

(*Bird,* 28 Cal.4th at 920-921.)

Plaintiff also is wrong to rely on *Delta Farms Reclamation District v. Superior Court* (1983) 33 Cal.3d 699. (RBM, p. 12.) As the Court of Appeal majority explained, *Delta Farms* predated *Ochoa, Thing,* and *Bird* (Slip Opn., pp. 19-22) and "*Thing* made clear that foreseeability was not an adequate test to determine the right to recover for the negligent causing of an intangible injury." (*Id.* at p. 21.)

It is unclear whether Plaintiff Downey relies on *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, which she cites as "an observable distress case." (OBM, p. 17, quoting the "Directions for Use" of CACI 1621.) According to Plaintiff, "It might be argued observable distress is the event and that the bystanders need not perceive anything about the distress," but Plaintiff admits that "is not the standard." (*Ibid.*)

The reason it is not the standard is that the possible argument to which Plaintiff refers completely misses the point of the second *Thing* requirement, "the *connection* between the injury-producing event and the harm." (Emphasis added.) Worse, perhaps, the argument lumps together "the injury-

producing event," "the harm," and "the *connection* between" them into "distress." Worst of all, the argument results in a tautology, since the test is for "negligent infliction of emotional *distress*" on the bystander.

B. The federal cases on which the Court of Appeal dissent and Plaintiff Downey rely are wrong, although there is language in one of them that actually supports the Court of Appeal majority's analysis

The Court of Appeal majority and Plaintiff rely heavily on an unpublished federal court decision, *Walsh v. Tehachapi Unified School District,* 2013 WL 4517887 (Diss. Opn., pp. 7-8, OBM, pp. 17-18, 21-24) to argue that the result should be the same as in *Walsh*. The *Downey* court majority correctly rejected the argument, explaining,

> We decline to follow *Walsh v. Tehachapi Unified School District, supra*, 2013 WL 4517887 to the extent it is inconsistent with our conclusions. Downey points out *Walsh* states that *Bird* and *Fortman* "do 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." She would have us follow *Walsh* and limit *Bird* and *Fortman* to the scenario where the negligent act and the injury-producing event are the same. We cannot ignore *Bird* and *Fortman's* focus on the defendant's negligent conduct or the actual negligent act. In our view, *Bird* plainly interprets the second *Thing* prong to require contemporaneous perception of a causal connection between the defendant's negligent

> act and the injury suffered to impose negligent infliction of emotional distress liability.

(Slip Opn, p. 27, fn. 8.) The Court of Appeal majority also was correct not to follow *Walsh* because, as the majority explained, "We are not bound by lower federal decisions, including those of the Ninth Circuit." (Slip Opn., p. 27.)

To be sure, the analysis in *Walsh* was wrong. The plaintiff was not aware suicide was the reason her son was hanging from a tree and not moving. It was only later that she found a suicide note. The harmful conduct in the *Walsh* case was bullying; the causal connection between the bullying and the death was suicide.

The dissent and Plaintiff rely on another federal decision for authority that a bystander NIED plaintiff need not show the defendant's role in the injury-producing event, *In re Air Crash Disaster Near Cerritos, California* (9th Cir. 1992) 967 F2 d 1421. (Diss. Opn., p. 7, OBM, p. 21, 22, 24-25.) The Court of Appeal majority was correct not to follow it, as well. The plaintiff there was not even aware the "injury-producing event" was an air crash, let alone the cause of the air crash. All she knew was that there was an explosion. Like the plaintiff in *Walsh,* the plaintiffs *In re Air Crash Disaster Near Cerritos* were not aware of, let alone understood, the harmful conduct until later.

Because they are wrong, the analysis in both federal decisions on which Plaintiff Downey relies should not be followed.

That said, it should be noted that the discussion of *Bird* and *Fortman* in the *Walsh* decision was under the heading, "Aware of a Causal Connection to *Defendants' Conduct*." (2013 WL 4517887 *7-10. Emphasis by italics added.) Even though the District Court in *Walsh* got it wrong, the court understood the second *Thing* factor was the connection between *defendant's conduct* and the harm.

C. *Fortman v. Förvaltningsbolaget Insulan AB* was correctly decided, and the Court of Appeal majority's analysis of it was correct

Plaintiff's strongest criticism is of *Fortman* (OBM, *passim*; RBM, *passim*), to the point of asking this Court to disapprove it. (OBM, pp. 31-32; RBM, p. 22.)

In *Fortman,* the court applied the second *Thing* requirement to not allow recovery because plaintiff did not then understand defendant's role in the injury-producing event in order for a bystander to the physical harm a close relative sustained while using defendant's product. "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." (212 Cal.App.4th at p. 845. Emphasis added.)

The *Fortman* court's "Survey of Pertinent Cases" began, "In medical malpractice cases, an NIED plaintiff cannot recover under the bystander theory for emotional distress damages arising from unperceived medical errors in the course of treatment. In the cases discussed below, the plaintiffs' emotional trauma did not arise from witnessing the injury-producing event, usually referred to as the "negligent *conduct*," and therefore the plaintiffs could not satisfy the second *Thing* requirement." (*Id.* at p. 836. Emphasis added.) The first case the *Fortman* court discussed was *Bird*. (*Id.* at p. 836-838.)

The *Downey* court majority correctly applied the analysis of the *Fortman* court, concluding,

> As *Fortman* did, we acknowledge that we must follow the California Supreme Court's mandates in creating a policy-based "clear rule under which liability may be determined" (*Thing*, *supra*, 48 Cal.3d at p. 664) in negligent infliction of emotional distress cases. (See also *id*. at p. 666 [drawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts]; *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 410 [characterizing *Thing* as imposing "a hard-and-fast rule"].) Doing so here, we conclude Downey must allege facts showing she had " 'contemporaneous sensory awareness of the causal connection between the [defendant's] negligent conduct and the resulting injury.' " (*Bird*, *supra*, 28 Cal.4th at p. 918.)

(Slip Opn., p. 28.)

Finally, it must be noted, Plaintiff Downey acknowledges that the test in *Fortman* is defendant's "conduct," although she characterizes it as a "wrongful conduct test" (OBM, p. 6.) Another, better characterization, based on what this Court said in *Bird,* would be a "harmful conduct test."

D. The analysis in *Ortiz v HPM* is consistent with the analysis of the Court of Appeal majority

The Court of Appeal dissent and Plaintiff Downey cite *Ortiz v. HPM* ("*Ortiz*") (1991) 234 Cal.App.3d 178 (Diss. Opn, pp. 6-7, OBM, pp. 21, 32), where the *Ortiz* court applied the second *Thing* requirement and allowed recovery, the implication being the Court of Appeal majority analysis is contrary to that in *Ortiz.*

The dissent and Plaintiff are wrong. In order for a third party bystander to the physical harm a close relative sustained while using defendant's product, "the injury-producing event was still occurring at the time Mrs. Ortiz discovered Mr. Ortiz trapped in the machine, and that she was then aware that it was causing injury to him, so as to meet the contemporaneous observation requirement for a claim of negligent infliction of emotional distress." (234 Cal.App.3rd at p. 186.) Plaintiff was aware and understood defendant's role in the injury-producing

event. That is consistent with the analysis of the Court of Appeal majority in this case.

V. Ultimately, Plaintiff Downey Proposes That The Second *Thing* Requirement Be Rewritten For "Collision, Fire, And Explosion Cases" So That Bystanders No Longer Are Required To Be Contemporaneously Aware Of The Causal Connection Between Defendant's Conduct And The Harm

Plaintiff argues that this Court's decision in *Bird* should be limited. (OBM, p. 10 ["Save for certain medical malpractice cases where an injurious event is not contemporaneously perceived (or perceivable) by the bystander"].) Plaintiff argues that this Court should restate the second *Thing* requirement as two separate requirements, one for situations where the causal connection is "observable" and one for situations where the causal connection that is not "observable." (*Id.* at p.p. 17-20.) As Plaintiff explains the idea, "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." (OBM, p. 17.) In other words, Plaintiff proposes that there be two categories of bystander NIED cases, depending on the nature of the injury producing event and without reference to the defendant's harmful conduct.

For bystander NIED cases that fall into Plaintiff's category of "observable" injury producing events, Plaintiff proposes nothing less than a rejection of the requirement that bystanders be aware of the connections between the defendants' conduct and the harms. Only as to medical malpractice cases, under Plaintiff's proposal, will the second *Thing* requirement be retained in the formulation announced by the Court in *Ochoa, Thing,* and *Bird* – that the bystander be aware of a connection between defendant's conduct and the harm continue to apply.

In support of the proposal, Plaintiff cites *Wilks v. Hom* (*Wilks*) (1992) 2 Cal.App.4th 1264, and *Zuniga v. Housing Authority of City of Los Angeles* (*Zuniga*) (1995) 41 Cal.App.4th 82 (OBM, pp. 22-23; RBM, pp. 16-17, 21-22), which she characterizes as " 'collision, fire and explosion' cases[.]" (OBM, p. 21; RBM, pp. 21-22.) She also cites the federal decisions (OBM, pp. 21-24), discussed *supra.* Plaintiff argues that "[i]n '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." (OBM, p. 21.)

Misleadingly, Plaintiff Downey's proposal uses different words and phrases than those used by this Court in *Ochoa, Thing,* and *Bird.* For example, Downey uses the word "observe" to describe what connection between the conduct and the harm

the bystander is required to understand, whereas the Court uses the phrase "contemporaneously aware". For another example, Downey uses the word "distress" to describe what is happening to the victim that the bystander is required to understand, whereas the Court uses such words as "injury," "death," or "harm".

These and other examples of Plaintiff's replacement of the Court's terminology with her own are significant because a causal connection cannot be "observed." It only can be *understood*. That is particularly relevant to this case, where Plaintiff could not "observe" anything about the collision for the simple reason that she was not there, at the scene. For example, she did not see the oncoming automobile; she only could hear the noise of the collision. From that, she *understood* the likely reason (*i.e.*, the cause) for her daughter no longer speaking to her on the telephone was that her daughter was injured. She also *understood,* based on her familiarity with the intersection through which she was guiding her daughter, that it was a so-called "blind intersection".

Ultimately, Plaintiff Downey's justification for a distinction between injury producing events that are "observable" and those that are not "observable" is that causation is not "observable." That is not the second *Thing* requirement, however. The second *Thing* requirement is, following Plaintiff's format (OBM, p. 17), when the victim is observed being harmed, but the cause that

harm is not "observable" by the bystander, the bystander still may *understand* there is harmful conduct. Plaintiff Downey's case is an example, which is why the Court of Appeal majority correctly analyzed the second *Thing* requirement and saved Downey's case for bystander NIED.

In other words, there is no need for the alternative version of the second *Thing* requirement that Plaintiff Downey proposes. If the Question Presented in this case is answered by this Court in the affirmative, Plaintiff Downey and other bystander NIED plaintiffs can plead and then, at trial, can tell the jury that they *understood* at the time what was happening and why.

CONCLUSION

In this case, Plaintiff Downey claims to have witnessed the collision *virtually*, by what she heard on the telephone, at the time she was *virtually* guiding her daughter through the intersection. As such, she now can allege in her complaint for bystander NIED and later, at trial, she can testify that she *understood* there was a causal connection between the defendants' "dangerous conditions" and the collision in which her daughter was harmed. She was familiar with that intersection, having driven there herself.

The Court of Appeal majority correctly analyzed and applied the second *Thing* requirement, that the causal connection

of which the bystander must be contemporaneously aware is between defendants' conduct and the victim's harm. In other words, the bystander must understand the defendant's role as one of the causes of the harm.

The majority decision should be affirmed.

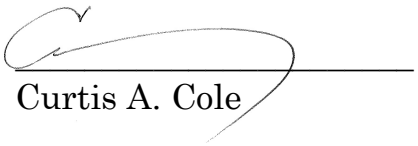
Dated: January 26, 2024 COLE PEDROZA LLP

By: _____
Curtis A. Cole
Cassidy C. Davenport
Attorneys for *Amici Curiae*
CALIFORNIA MEDICAL ASSOCIATION,
CALIFORNIA DENTAL ASSOCIATION, and
CALIFORNIA HOSPITAL ASSOCIATION

CERTIFICATION

Appellate counsel certifies that this document contains 8,214 words. Counsel relies on the word count of the computer program used to prepare the document.

Dated: January 26, 2024

By: 
Curtis A. Cole

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Freddi Lindsey

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