

IN THE
MISSOURI SUPREME COURT

Appeal No. SC88700

TOMMY R. JARRETT and BEVERLY JARRETT,

Plaintiffs/Appellants,

vs.

MICHAEL B. JONES

Defendant/Respondent.

Appeal from the Circuit Court of Laclede County, Missouri
Hon. Theodore B. Scott, Senior Judge

Transfer from the Missouri Court of Appeals for the Southern District

RESPONDENT'S BRIEF

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Respondent objects to the argumentative nature of Appellant's Jurisdictional Statement in that it makes argument as to Defendant's fault in the underlying action and asserts and makes legal conclusions regarding the causation of the collision in this case. Respondent objects to Appellants' statements that this appeal involves "a head-on collision caused by Defendant Michael Jones," and that "Plaintiffs presented overwhelming evidence linking Plaintiff Tommy Jarrett's severe emotional distress to Defendant's negligent conduct."

This is an appeal involving the following questions:

- (1) whether the trial court properly granted Respondent's Motion for Summary Judgment on Appellants' claims for negligent infliction of emotional distress;
- (2) whether Appellants admitted that the cause of Tommy Jarrett's alleged emotional distress was his viewing of the Respondent's deceased daughter after an automobile collision, and not the collision itself;
- (3) whether the trial court properly granted summary judgment to Respondent Michael Jones on the basis that Appellant Tommy Jarrett was not in the zone of danger because he did not reasonably fear for personal injury to himself at the time emotional distress was allegedly caused; and

- (4) whether the trial court properly judged that Michael Jones owed no duty to safeguard Tommy Jarrett from viewing the body of Mr. Jones' deceased daughter after the collision.

This action does not involve the construction of the Constitution of the United States or the State of Missouri, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the Revenue Laws of this State, title to any office under this State of a criminal offense involving a sentence of death or life imprisonment. Thus, this appeal is within the general appellate jurisdiction of the Missouri Court of Appeals, Southern District, V.A.M.S. Const.Art. V, Sec.3.

STATEMENT OF FACTS

Respondent objects to, and refuses to accept Appellants' Statement of Facts for the reasons that the same is improperly argumentative, omits relevant facts for this Court's consideration, and recites many facts which have no bearing on the issues on appeal. Appellants fail to recite the facts of this case crucial to the determination of whether the trial court's Judgment granting Defendant's Motion for Summary Judgment was proper.

A. Motion to Strike and Dismiss

Respondent moves the Court to strike Appellants Brief and dismiss their appeal because Appellants' Statement of Facts does not substantially comply with Missouri Rule of Civil Procedure 84.04(c). Rule 84.04 (c) requires that "the statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Missouri Rule of Civil Procedure 84.04(c). The purpose of the statement of facts is not to grant Appellants an opportunity to argue or introduce irrelevant and potentially prejudicial facts, but "to afford an immediate, accurate, complete and unbiased understanding of the facts of the case." *State ex rel. Missouri Highway and Transportation Commission v. Pipkin*, 818 S.W.2d 688, 690 (Mo.App.S.D.1991). Appellants' Statement of Facts is rife with inaccuracies, incomplete recitations, biased statements of fact, and argument.

Appellants may not exclude facts essential to the position of respondent and substantially comply with Rule 84.04(c). "Aside from violating Rule 84.04(c), failure to acknowledge adverse evidence is simply not good appellate advocacy. Indeed it is often viewed as an admission that if the Court was familiar with all of the facts, the appellant

would surely lose.” *Evans v. Groves Iron Works*, 982 S.W.2d 760, 762 (Mo.App.1998). “Appellate advocacy is not legerdemain. The function of the appellants brief is to explain to the Court why, despite the evidence seemingly favorable to the respondent, the law requires that appellant must prevail.” *Id.*

Appellants’ Statement of Facts discusses in large part the alleged damages suffered by Appellant Tommy Jarrett (Appellants’ Statement of Facts, pages 6-10). This information is not only irrelevant, but belies Appellants’ intent to shift this Court’s focus from the underlying Judgment. The Judgment underlying this appeal has nothing to do with Appellants’ alleged damages. Rather, the Judgment is predicated upon admissions made by the Appellants during summary judgment proceedings and a lack of duty on behalf of Respondent.

Appellants make no effort to inform the Court of the underlying summary judgment proceedings which are central to this case. Virtually no mention of Defendant’s Statement of Uncontroverted Material Facts or Plaintiffs’ responses thereto is made. Yet, this constitutes the foundation of the trial court ruling. When Appellants do mention Defendant’s Statement of Uncontroverted Material Facts and Plaintiffs’ responses thereto, the record is blatantly misstated as follows:

“Defendant filed a Motion for Summary Judgment on April 18, 2006, alleging that Plaintiff’s emotional struggle after the accident stemmed from viewing the defendant’s deceased daughter.” (Appellants’ Brief, Statement of Facts, Section E, page 13)

Defendant’s Statement of Uncontroverted Material Facts actually read as follows:

“7. Plaintiff’s emotional struggles, grief and feelings of guilt after the collision stemmed from his viewing of defendant’s deceased daughter, not from the collision itself.” (Defendant’s Motion for Summary Judgment, Statement of Uncontroverted Material Facts, paragraph 7.)

Appellants’ omission of the terms in “not from the collision itself” is inexcusable. Further, Appellants omit the fact that they did not deny any portion of paragraph 7 of Defendant’s Statement of Uncontroverted Material Facts. Appellants clearly know their admission regarding emotional harm not being caused by the collision is evidence favorable to Respondents. Yet, they chose to exclude this critical fact.

Appellants’ Statement of Facts also excludes all of Defendant’s responses to the Statement of Uncontroverted Material Facts in Plaintiff’s Motion for Summary Judgment. Appellants make no mention of Defendant’s Responses which included denials of Plaintiffs’ Statement of Uncontroverted Material Facts and introduction of Additional Material Facts Remaining in Dispute which alleged Tommy Jarrett had an opportunity to avoid the collision in this case. Plaintiffs’ denied these Additional Material Facts, but their exclusion of any mention of them here reveals that Appellants know the facts are unfavorable to their position, and thus, they excluded them.

Appellants also exclude the fact that Defendant raised the affirmative defense failure to mitigate and Plaintiff’s Motion for Summary Judgment did not address this affirmative defense. Yet, Appellants spend numerous pages in their Statement of Facts detailing their alleged damages.

Appellants "Statement of Facts" is predominately argument, as well. Legal conclusions are forwarded at to the causation of the collision and Appellants' injuries. "Defendant Michael Jones ... caused a head-on collision with Plaintiff's truck." (Appellants Brief, Statement of Facts, Section B, page 4.) "Defendant's negligence was, without question, the cause of this accident. (Id. at page 5) "Plaintiff Tommy Jarrett presented overwhelming evidence to support the fact that he suffered severe emotional distress as a result of Defendant's negligence." (Id. at page 6) "He [Respondent] oversteered his vehicle across a median and into the pat of an innocent motorist." (Id. at page 11). The repeated arguments of Respondent's alleged negligence and the "innocence" of Appellant Tommy Jarrett are truly only a sampling of the repeated argument and attempted insertion of bias toward Appellants presented in their Statement of Facts.

Further, Appellants delve into legal analysis of the underlying case law of negligent infliction of emotional distress. The Statement of Facts is framed by the Standard of Review. "One cannot prepare a statement of facts that complies with the rule without first determining what standard of review will apply to the points raised on appeal ... the standard of review essentially defines what facts are relevant to the questions presented for determination by the Court." *Evans v. Groves Iron Works*, 982 S.W.2d 760, 762 (Mo.App.1998). Appellants' Standard of Review cites the standard of review as that for summary judgment. However, their Statement of Facts spends virtually no, if any, time discussing facts pertinent to this end.

In sum, Appellants' Statement of Facts is bloated with argument, bias, prejudicial incomplete statements of fact, misrepresentations of pleadings, and legal analysis to be reserved for Argument. It fails to substantially comply with Rule 84.04(c) of the Missouri Rules of Civil Procedure. Failure to substantially comply with Rule 84.04(c) leaves nothing for appellate review. *Riley v. Hartman*, 981 S.W.2d 159, 160 (Mo.App.S.D.1998). Failure to provide a fair and concise statement of facts warrants dismissal. *Amparan v. Martinez*, 862 S.W.2d 497 (Mo.App.E.D.1993). Appellants' Statement of Facts should be stricken and their appeal dismissed for failure to substantially comply with Rule 84.04(c) in that it fails to provide the relevant facts, misrepresents or omits essential facts favorable to Respondent, and is predominately argument rather than fact.

B. Respondent's Statement of Facts

1. The Collision at Issue

On June 8, 2004, Appellant Tommy Jarrett was operating his tractor-trailer unit westbound on Interstate 44 in Laclede County, Missouri. (Defendant's Statement of Uncontroverted Material Facts, paragraph 1.) At the same time, Respondent Michael Jones was operating his 1999 Pontiac Grand Prix westbound on Interstate 44 in Laclede County, Missouri. (Id. at paragraph 2.) Respondent's two-year old daughter was a passenger in his vehicle. (Id. at paragraph 6.) Respondent's vehicle crossed the median of the interstate and collided with the tractor-trailer operated by Appellant. (Id. at paragraph 3.)

Immediately after the collision, Appellant spoke with a witness at the scene. (Id. at paragraph 5.) He then exited his vehicle. (Id.) Appellant next approached the vehicle operated by Respondent and for the first time saw the body of Respondent's deceased two-year-old daughter, Mikayla Jones. (Id. at paragraph 6.) Respondent was rendered unconscious by the collision and was folded under the dashboard of his vehicle. (Deposition Testimony of Michael Jones, page 36, lines 2-17, Deposition Testimony of Amanda Jones, page 8 line 10 – page 9 line 1.) He lapsed into a coma for eight days due to massive trauma to his head. (Id.)

Appellants allege Tommy Jarrett suffered and continues to suffer from post-traumatic stress disorder after the collision. (Plaintiffs' Statement of Uncontroverted Material Facts, paragraphs 4, 6-26.) Counsel for Appellants conceded during oral argument in the Court of Appeals that the "emotional struggles, grief and feelings of guilt" alleged by Tommy Jarrett constitute the "universe" of Appellants' claim. (Court of Appeals for the Southern District, Majority Opinion, *Tommy R. Jarrett and Beverly Jarrett v. Michael B. Jones, Case No. SD28259*, page 2, footnote 3.) Appellants filed their Petition for Damages in Laclede County Circuit Court on or about August 5, 2005 alleging a claim of negligent infliction of emotional distress. (Plaintiffs' Petition for Damages.)

2. Defendant's Motion for Summary Judgment

On April 19, 2006, Respondent filed Defendant's Motion for Summary Judgment. Defendant's Motion for Summary Judgment contained the following paragraph in its Statement of Uncontroverted Material Facts:

“7. Plaintiff’s emotional struggles, grief and feelings of guilt after the collision stemmed from his viewing of defendant’s deceased daughter, not from the collision itself.”¹ (Defendant’s Motion for Summary Judgment, Statement of Uncontroverted Material Facts, paragraph 7.)

On May 19, 2006, Appellants filed a document titled Plaintiffs’ Memorandum Contra Defendant’s Motion for Summary Judgment/Plaintiffs’ Motion for Summary Judgment. (Trial Court Docket, page 2.) In Section B of Plaintiffs’ Memorandum Contra Defendant’s Motion for Summary Judgment/Plaintiffs’ Motion for Summary Judgment, Appellants provided their response to Defendant’s Statement of Uncontroverted Material Facts. (Plaintiffs’ Memorandum Contra Defendant’s Motion for Summary Judgment/Plaintiffs’ Motion for Summary Judgment, Section B.) The response did not specifically deny any paragraph of Defendant’s Statement of Uncontroverted Material Facts. (Id.) With respect to paragraph 7 of Defendant’s Statement of Uncontroverted Materials Facts (cited above), Appellants responded as follows:

“Paragraph 7: Plaintiffs admit that Tommy Jarrett was emotionally scarred after having witnessed a child die. Plaintiffs admit further that the excerpts from Counselor Deborah Jessie’s notes are restated accurately.” (Id.)

¹ Paragraph 7 included four subparagraphs citing various portions of Tommy Jarrett’s social worker’s notes which detailed the emotional trauma alleged to have occurred from viewing the body of Mikayla Jones. (Defendant’s Motion for Summary Judgment, Statement of Uncontroverted Material Facts, paragraph 7.)

Appellants response did not deny any portion of paragraph 7 of Defendant's Statement of Uncontroverted Material Facts. (Id.)

On June 5, 2006, Respondent filed Defendant's Reply Memorandum in Support of Defendant's Motion for Summary Judgment which contained the argument that Appellants had admitted each and every paragraph contained in Defendant's Statement of Uncontroverted Material Facts. (Trial Court Docket, page 2, Defendant's Reply Memorandum in Support of Defendant's Motion for Summary Judgment, Sections I, II, and III.) On June 16, without leave from the trial court, Appellants filed Plaintiffs' Memorandum Clarifying Plaintiffs' Earlier Response to Defendant's Motion for Summary Judgment. (Trial Court Docket, page 3.) This document failed to specifically deny a single paragraph or assertion contained in Defendant's Statement of Uncontroverted Material Facts. (Plaintiffs' Memorandum Clarifying Plaintiffs' Earlier Response to Defendant's Motion for Summary Judgment, page 3.) It contained the following response to paragraph 7 of Defendant's Statement of Uncontroverted Material Facts:

““Paragraph 7: Plaintiffs admit that Tommy Jarrett was emotionally scarred after having witnessed a child die. As to sub-parts a, b, and c, Plaintiffs admit that the excerpts from Counselor Deborah Jessie's notes are restated accurately.” (Id.)

Appellants again did not deny any portion of paragraph 7 of Defendant's Statement of Uncontroverted Material Facts. (Id.)

On December 7, 2006, the trial court entered its Judgment granting Defendant's Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. (Trial Court Docket, page 4.) The trial court judged therein that Appellants had admitted each and every allegation contained in Defendant's Statement of Uncontroverted Materials Facts. (Judgment, paragraphs 1, 2.) The trial court specifically found:

- (1) Plaintiffs admitted the cause of Tommy Jarrett's emotional distress was the viewing of Defendant's deceased daughter and not the collision itself (Id., paragraphs 3, 4);
- (2) Tommy Jarrett was not in the zone of danger at the time the alleged emotional distress occurred (Id., paragraph 5); and
- (3) Defendant Michael Jones was physically unable to, and owed no duty to, safeguard Tommy Jarrett from viewing Michael Jones' deceased daughter after the collision. (Id., paragraph 6.)

POINTS RELIED ON

I.

**MISSOURI HAS TWO STANDARDS FOR RECOVERY IN NEGLIGENT
INFLECTION OF EMOTIONAL DISTRESS CASES**

POINTS RELIED ON

II.

PLAINTIFF CAN RECOVER AS A DIRECT VICTIM, BUT ALSO AS A BYSTANDER WHO WAS IN THE ZONE OF DANGER WHEN THE ACCIDENT OCCURRED. PLAINTIFF TOMMY JARRETT MEETS THE STANDARD FOR BYSTANDER RECOVERY.

POINTS RELIED ON

III.

PLAINTIFF TOMMY JARRETT'S SEVERE EMOTIONAL DISTRESS AROSE BOTH FROM HIS FEAR FOR HIS OWN LIFE AND SAFETY AND HIS DISTRESS OVER THE DEATH OF A CHILD; HE WAS THEREFORE DIRECTLY IN THE ZONE OF DANGER.

POINTS RELIED ON

IV.

PLAINTIFF TOMMY JARRETT DID NOT ADMIT THAT THE SOLE SOURCE OF HIS EMOTIONAL DISTRESS WAS THE VIEWING OF THE DECEASED BODY OF DEFENDANT'S CHILD, NOR DID HE ADMIT THAT HE DID NOT SUFFER EMOTIONAL TRAUMA STEMMING FROM THE ACCIDENT ITSELF.

POINTS RELIED ON

V.

**PLAINTIFF TOMMY JARRETT'S RESPONSE TO DEFENDANT'S
STATEMENT OF FACTS IN NO WAY NEGATES HIS CLAIM FOR
NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS.**

ARGUMENT

STANDARDS OF REVIEW

A party is entitled to summary judgment when “there is no genuine issue as to any material fact” and the moving party is “entitled to judgment as a matter of law”. Missouri Rule of Civil Procedure 74.04(c)(6). “The standard of review on appeal regarding summary judgment is essentially *de novo*.” *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707 (Mo.banc 2006).

A. Defendant’s Motion for Summary Judgment

A defending party may establish a right to judgment by showing facts that negate any one of the claimant’s elements facts. *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp*, 854 S.W.2d 371, 381 (Mo.banc 1993).

B. Plaintiffs’ Motion for Summary Judgment

A trial court’s denial of a motion for summary judgment does not present and appealable issue. *Shelter Mut. Ins. Co. v. DeShazo*, 955 S.W.2d 234, 238 (Mo.App.S.D. 1997).

ARGUMENT

POINTS RELIED ON

I.

MISSOURI HAS TWO STANDARDS FOR RECOVERY IN NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS CASES

A. Defendant's Motion for Summary Judgment

An understanding of the underlying summary judgment proceedings is crucial to this appeal. Appellants expend considerable effort to disguise this critical issue because in the summary judgment proceedings they admitted that Tommy Jarrett did not suffer emotional harm due to the collision in this case. Their admissions at the trial court level dispose of their claims against Michael Jones. Appellants would like to omit the dispositive fact that their responses to Defendant's Motion for Summary Judgment preclude their recovery, but must not be allowed to do so.

Appellants' brief is conspicuously bereft of discussion of the summary judgment procedure underlying this appeal. This is done in an attempt to improperly shift this Court's focus away from the fact that Appellants admitted:

- (1) that Tommy Jarrett's alleged emotional distress was not caused by the collision in this case, but by the viewing the body of Mikayla Jones after the collision; and
- (2) that Tommy Jarrett was not in the zone of danger when the emotional distress was allegedly caused.

Defendant's Motion for Summary Judgment contained the following paragraph in its Statement of Uncontroverted Material Facts:

“7. Plaintiff's emotional struggles, grief and feelings of guilt after the collision stemmed from his viewing of defendant's deceased daughter, not from the collision itself.”

In a memorandum filed in response to Defendant's Motion for Summary Judgment, Appellants included the following response to paragraph 7 of Defendant's Statement of Uncontroverted Material Facts:

“Paragraph 7: Plaintiffs admit that Tommy Jarrett was emotionally scarred after having witnessed a child die. Plaintiffs admit further that the excerpts from Counselor Deborah Jessie's notes are restated accurately.”

“The requirements of Rule 74.04(c) are mandatory.” *Ford v. Cedar County*, 216 S.W.3d 167, 171 (Mo.App.S.D.2006). A “response shall admit or deny each of movant's factual statements in numbered paragraphs that correspond to movant's numbered paragraphs.” *Id.* “A response that does not comply with this Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph.” *Id.*

Appellants' response to Defendant's Statement of Uncontroverted Material Facts failed to deny any portion of paragraph 7. Moreover, Appellants “response” to Defendant's Statement of Uncontroverted Material Facts is contained in their legal memorandum, requiring the Court to search for the admissions or denials of alleged facts. However, this form of response has been rejected by Missouri Courts – “We [the court] are not required to ‘compare each averment in [P]laintiff's suggestions to each averment in [Defendant's] motion for summary judgment in

order to ascertain which factual statements were admitted or denied by plaintiff.” *Wehmeyer v. Fag Bearings Corp.*, 190 S.W.3d 643, 649 (Mo.App.S.D.2006).

Pursuant to Rule 74.04(c)(2), each paragraph in Defendant’s Statement of Uncontroverted Material Facts, including paragraph 7, is admitted. Therefore, Appellants admitted that the cause of Tommy Jarrett’s emotional struggles, grief and feelings of guilt after the collision stemmed from his viewing of defendant’s deceased daughter, “**not from the collision itself.**”

Respondent filed a Reply brief in support of Defendant’s Motion for Summary Judgment which put Appellants on notice of their admissions. Thereafter, absent leave required by Rule 74.04(c)(5), Appellants filed Plaintiffs’ Memorandum Clarifying Plaintiffs’ Earlier Response to Defendant’s Motion for Summary Judgment.² This memorandum ostensibly was offered to repair Appellants defective response to Defendant’s Motion for Summary Judgment. Even if this were allowed under the civil rules, which it is not, the responses contained in the memorandum still admitted each and every factual allegation contained in Defendant’s Statement of Uncontroverted Material Facts. Appellants again did not deny a single allegation. Appellants response to paragraph 7 in the memorandum stated: “Paragraph 7: Plaintiffs admit that Tommy Jarrett was emotionally scarred after having witnessed a child die. As to sub-parts a, b, and c, Plaintiffs admit that the excerpts from Counselor Deborah Jessie’s notes are restated accurately.” In sum, no dispute remains that Appellants admitted Tommy Jarrett’s alleged emotional distress was not caused by the collision.

² “(5) *Additional Papers*. No additional papers with respect to the motion for summary judgment shall be filed without leave of court.” Missouri Rule of Civil Procedure 74.04(c)(5).

B. Missouri Law – One Standard for Negligent Infliction of Emotional Distress

Appellants have tried, and indeed continue to try, to avoid the admission that the collision did not cause Tommy Jarrett any emotional harm. They reference affidavits executed in conjunction with Plaintiff's Motion for Summary Judgment (filed after the admissions were made by defective response) and other materials. They repeatedly assert that Tommy Jarrett feared for his life at the point of the collision. All of this is ineffectual. Appellants' admissions bind them. Paragraph 7 of Defendant's Uncontroverted Material Facts plainly establishes that Mr. Jarrett's emotional struggles, grief and feelings of guilt after the collision stemmed from his viewing of defendant's deceased daughter, **not from the collision itself**.

Semantic attempts to avoid this admission must fail. Plaintiffs, and indeed the dissenting opinion from the Court of Appeals, focus on whether the collision was the "sole" cause of Tommy Jarrett's alleged emotional distress. Centering on this term ignores the plain language of Paragraph 7 of Defendant's Statement of Uncontroverted Material Facts and distorts the admission made by Plaintiffs. Plaintiffs admit that the distress was caused by viewing the defendant's deceased daughter, "not from the collision itself." That the alleged distress was not caused by the collision vitiates any liability of Michael Jones.

Appellants' admission cannot be understated when the law is applied. "In Missouri a plaintiff states a cause of action for negligent infliction of emotional distress upon injury to a third person only upon a showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was present at the scene of an injury producing sudden event, (3) and that plaintiff was in the zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person."

Asaro v. Cardinal Glennon Memorial Hospital, 799 S.W.2d 595, 599-600 (Mo.banc 1990).

First, if Tommy Jarrett's alleged emotional harm stemmed from viewing Respondent's deceased daughter, not from the collision, then this occurred when Respondent was in a coma, crushed beneath the dash of his vehicle. It is impossible that at this point Michael Jones "should have realized that his conduct involved an unreasonable risk to the plaintiff." There was no conduct by Michael Jones at that point which involved unreasonable risk to Tommy Jarrett.

Second, Tommy Jarrett's viewing of the body of Mikayla Jones is not an "injury producing sudden event." The only "injury producing sudden event" is the collision, from which Appellants admit Tommy Jarrett suffered no emotional harm.

Third, Tommy Jarrett was not in the zone of danger when he viewed the body of Mikayla Jones. He did not reasonably fear for personal injury to his own person after the collision, after the spoke with a witness, after the exited his vehicle and walked over to the Jones' destroyed car. Simply put, Appellants fail to demonstrate any of the three elements from *Asaro* at the time they admit the alleged emotional distress occurred.

Appellants also argue that Tommy Jarrett was a "direct victim" who should recover under a separate standard as stated in *Bass v. Nooney*, 646 S.W.2d 765 (Mo.banc 1983). This point is discussed at length in Respondent's Response to Appellants' Point Relied on II, however, Appellants admit that Tommy Jarrett was not a "direct victim." The admission that the alleged emotional distress did not result from the collision necessitates that Tommy Jarrett was not the "direct victim" of an allegedly negligent act.

By their admissions and their own analysis, Appellants must comply with the requirements of *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 599-600 (Mo.banc 1990) and meet the zone of danger test.

Appellants admit their alleged emotional harm does not meet the necessary elements of negligent infliction of emotional distress because they admit it does not stem from the collision. Rather, they admit that Tommy Jarrett's alleged emotional harm results solely from the viewing of the body of Mikayla Jones after the accident. They cannot escape this fact by arguing against their own admission.

ARGUMENT

POINTS RELIED ON

II.

PLAINTIFF CAN RECOVER AS A DIRECT VICTIM, BUT ALSO AS A BYSTANDER WHO WAS IN THE ZONE OF DANGER WHEN THE ACCIDENT OCCURRED. PLAINTIFF TOMMY JARRETT MEETS THE STANDARD FOR BYSTANDER RECOVERY.

A. To Recover for Negligent Infliction of Emotional Distress, a Plaintiff Must Be in the Zone of Danger

Appellants attempt to create two torts from one in their analysis of Missouri law regarding negligent infliction of emotional distress. They do so in hopes of avoiding the requirement that a plaintiff be in the zone of danger to recover. Contrary to Appellants' assertions, two separate causes of action for negligent infliction of emotional distress have not been adopted by Missouri Courts. There are not separate "direct victim" and "bystander" tests for negligent infliction of emotional distress. Rather, Missouri Courts require a plaintiff to be in the zone of danger for any claim of negligent infliction of emotional distress.

Appellants rely heavily on *Bass v. Nooney Company*, 646 S.W.2d 765 (Mo.banc 1983) for the erroneous assertion that a "direct victim" need not show he was in the zone of danger to recover for negligent infliction of emotional distress.

The Missouri Supreme Court abrogated the “impact rule” in *Bass*. *Id.* at 772-773. The Court stated it would not digress into an analysis of “bystander” cases, implying that a separate rule *may* apply. *Id.* at 770, fn 3. However, *Bass* did not create separate tests for “direct victim” and “bystander” negligent infliction of emotional distress.

In 1990, the Missouri Supreme Court again addressed negligent infliction of emotional distress in *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595 (Mo.banc 1990). The holding of *Asaro* follows:

“In Missouri a plaintiff states a cause of action for negligent infliction of emotional distress upon injury to a third person only upon a showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was at the scene of an injury producing sudden event, (3) and that plaintiff was in the zone of danger, i.e. placed in a reasonable fear of physical injury to his or her own person. *Id.* at 599-600.

The *Asaro* holding recognized the zone of danger requirement. Appellants leap to the conclusion that because *Asaro* held that a third person (a “bystander”) could recover if in the zone of danger, the two-part test enunciated in *Bass* must apply to so-called “direct victim” cases. This ignores the language of *Asaro* wherein the Court never made such a distinction. Rather, the rationale of *Asaro* and subsequent holdings by Missouri Courts dictate that there is only one test for negligent infliction of emotional distress, and a plaintiff must in the zone of danger to recover.

Asaro analyzed common law rules which limit the class of plaintiffs who can sue for negligent infliction of emotional distress. Traditionally in Missouri, this rule was the impact rule (abrogated in *Bass*). However, “with the abrogation of the impact rule, the potential for extended liability and new causes of action arose. **Two alternative rules of liability arose to fill the vacuum left by the abandonment of the impact rule.**” *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 598 (Mo.banc 1990) [emphasis added]. The two alternative rules were the zone of danger rule based on *Tobin v. Grossman*, 24 N.Y.2d 609 (1969), and a reasonable foreseeability rule based on *Dillon v. Legg*, 68 Cal.2d 728 (1968). The *Asaro* Court went on to specifically adopt the rationale of *Tobin* and specifically reject the rationale of *Dillon*, thereby adopting the zone of danger test. *Id.* at 598-600. By its rationale, the *Asaro* Court adopted a position that with the abrogation of the impact rule, another test for limiting the class of plaintiffs for negligent infliction of emotional distress was necessary. *Id.* at 598. The Court preferred the zone of danger test. *Id.* at 599. Even though the *Asaro* Court held as it did in a so-called “bystander” cases, the Court’s rationale and concern for expanding circles of liability indicate that the zone of danger requirement applies to all claims of negligent infliction of emotional distress.

The adoption of the zone of danger test in *Asaro* creates no conflict with the ruling of *Bass*. The plaintiff in *Bass* became trapped in an elevator and reasonably feared for personal injury to herself. *Bass v. Nooney Co.*, 646 S.W.2d 765, 766-767 (Mo.banc 1983). Therefore, she was in the zone of danger as defined in *Asaro* (“the zone of

danger, i.e. placed in a reasonable fear of physical injury to his or her own person.”

Asaro at 599-600.).

Further, any question of whether the zone of danger requirement applies to all claims of negligent infliction of emotional distress is resolved by looking to case law subsequent to *Asaro*. In *Consolidated Rail Corporation v. Gottshall*, 114 S.Ct. 532 (1994), the United States Supreme Court emphasized that the impact rule, the zone of danger test, and the reasonable foreseeability test were **alternative** tests for negligent infliction of emotional distress. *Id.* at 546-549 [emphasis added]. In analyzing these “three major limiting tests for evaluating claims alleging negligent infliction of emotional distress,” the United States Supreme Court listed Missouri as a jurisdiction where the zone of danger test is followed. *Id.* at 546, 548 fn 9.³

Missouri Courts do not delineate between “bystander” and “direct victim” negligent infliction of emotional distress. In *Wyatt v. Hinton Enterprises, Inc.*, 899 S.W.2d 547, 1995 WL 256232, 4 (Mo.App.E.D. 1995), which Appellants insist is a “bystander” case, the Court stated that in order to make a “submissible case for **negligent infliction of emotional distress** a plaintiff must prove ... (3) that plaintiff was in the zone of danger, i.e. placed in reasonable fear of physical injury to his or her own person.” (Emphasis added.) Further, in *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462,

³ Further note that the U.S. Supreme Court made no distinction between bystander and direct victim cases when discussing common law negligent infliction of emotional distress.

465 (Mo.banc 2001), the Missouri Supreme Court reasserted that a plaintiff must be in the zone of danger to state a claim for negligent infliction of emotional distress. Neither of these cases states that the zone of danger test applies is only for “bystander” cases. The Courts’ language in these cases is specific, intentional, and indicates that Missouri Courts adopt the zone of danger test for all claims of negligent infliction of emotional distress. Appellants distort the opinions by reading in limitations and distinctions which the Courts did not make.

The zone of danger test is required as an alternative to the impact rule because to allow recovery without it too broadly defines the class of plaintiffs who can recover. “Courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants. Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on injuries that may be compensable.” *Consolidated Rail Corporation v. Gottshall*, 114 S.Ct. 532, 546 (1994).

Though Appellants assert that Missouri has a “liberalized” view of recovery for negligent infliction of emotional distress, this is clearly not the case. In *Asaro*, the Missouri Supreme Court voiced concern about ever-widening circles of liability in support of its adoption of the zone of danger test. *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 597-600 (Mo.banc 1990). Further, Appellants’ extra-jurisdictional citations offered in support of their contention that no zone of danger rule applies have no weight. They include: *Hamilton v. Nestor*, 265 Neb. 757 (2003), *Sinn v. Burd*, 486 Pa. 146 (1979), *Portee v. Jaffee*, 84 N.J. 88 (1980), *Barnhill v. Davis*, 300

N.W.2d 104 (Iowa 1981), and *Payton v. Abbot Labs*, 386 Mass. 540 (1982). Each of these jurisdictions have adopted the reasonable foreseeability test of *Dillon v. Legg*, 68 Cal.2d 728 (1968).⁴ The Missouri Supreme Court specifically declined to follow *Dillon* and citations to jurisdictions which have adopted such a test are completely bereft of authority in this case.

The case law cited in the Appellate Court’s dissent opinion would suggest the “direct victim” standard may apply in Missouri as a “relaxation” of the impact rule. However, the dissent’s citations, *Pieters v. B-Right Trucking, Inc.*, 699 F.Supp. 1463 (N.D.Ind 1987) and *Montoya v. Pearson*, 142 P.3d 11 (N.M.App. 2006), for this proposition fly in the face of Missouri precedent.

Missouri abrogated the impact rule in *Bass v. Nooney Co.*, 646 S.W.2d 765, 766-767 (Mo.banc 1983). A “relaxed” version of the rule likewise finds no application in Missouri. Therefore, the *Montoya* Court’s recitation that some states allow this direct

⁴ The exception to this are cases cited by plaintiffs from Tennessee. However, Tennessee law regarding negligent infliction of emotional distress requires a claimant to establish the elements of negligence, including duty and proximate causation, in addition to the elements of negligent infliction of emotional distress. *Lourcey v. Estate of Charles Scarlett*, 146 S.W.3d 46, 52 (Tenn. 2004). Missouri law requires the same (*Thornburg v. Federal Express Corporation*, 62 S.W.3d 421, 427 (Mo.App.2002)), and Appellants fail to meet the elements of negligence as set forth in Section B of Respondent’s Argument as to Point Relied on III, below.

victim theory is inapposite. Of further note, the *Montoya* Court went on to reject the direct victim theory in New Mexico, which limits the class of plaintiffs who can recover for negligent infliction of emotional distress to those who contemporaneously observe an accident involving a close family member.” *Montoya v. Pearson*, 142 P.3d 11, 13-14 (N.M.App. 2006). The Appellate Court majority opinion correctly observes that Missouri implicitly recognized a limitation of plaintiff class to close relatives in *Asaro*. *Montoya* then persuades a refusal to extend the direct victim theory in Missouri as well, given Missouri Courts’ recognition that the class of plaintiffs who can recover for negligent infliction of emotional distress must be limited. See *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 598-600 (Mo.banc 1990).

Next cited by the dissent is *Pieters v. B-Right Trucking, Inc.*, 669 F.Supp. 1463 (N.D.Ind 1987). *Pieters* originates in Indiana, a state which adopts the impact rule which is not the law of Missouri. It is therefore of dubious value to this analysis.

Lastly, the dissent offers a California case, *Long v. PKS, Inc.*, 12 Cal.App.4th 1293 (Cal.App.I.D. 1993). The dissent claims *Long* stands for the premise that very minor physical injuries may be sufficient to connect a collision caused by negligence to the subsequent viewing of injury or death and thereby vest one with a cause of action for negligent infliction of emotional distress. However, *Long* dealt with a plaintiff with relatively significant (not minor) injuries including bruised ribs, breasts, and cervical sprain. *Id.* at 1296. Tommy Jarrett, according to statements of his counsel and the weight of the evidence, did not suffer injury from the collision aside from emotional struggles, grief and feelings of guilt. This comprises the “universe” of Appellants’ claims.

Appellants cannot escape the zone of danger test. Tommy Jarrett's emotional distress must have been caused when he was in the zone of danger, i.e. placed in a reasonable fear of physical injury to his or her own person. *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 599 (Mo.banc 1990) Plaintiffs have admitted that Tommy Jarrett's emotional distress occurred due to viewing Defendant's deceased daughter, **not from the collision**. Therefore, Tommy Jarrett was not in the zone of danger when his alleged emotional distress was caused and therefore Appellants cannot recover under a theory of negligent infliction of emotional distress.

ARGUMENT

POINTS RELIED ON

III.

PLAINTIFF TOMMY JARRETT'S SEVERE EMOTIONAL DISTRESS AROSE BOTH FROM HIS FEAR FOR HIS OWN LIFE AND SAFETY AND HIS DISTRESS OVER THE DEATH OF A CHILD; HE WAS THEREFORE DIRECTLY IN THE ZONE OF DANGER.

A. Appellants Admitted Tommy Jarrett Was Not a Direct Victim and Not in the Zone of Danger

Appellants' conjured bifurcation of the single tort of negligent infliction of emotional distress rests in the assumption that a plaintiff under the test announced in *Bass v. Nooney Company*, 646 S.W.2d 765 (Mo.banc 1983) does not have to be in the zone of danger to recover. However, such a "direct victim" must by definition be in the zone of danger. The *Bass* Court may not have specifically stated the plaintiff was in the zone of danger, but it is clear that she did reasonably fear for personal injury to herself during the time of the alleged negligent act. *Id.* at 766-767. She was, therefore, in the zone of danger and subsequent Missouri cases such as *Asaro*, *Wyatt*, and *Bosch* recognize the zone of danger test for the tort generally. Simply put, Tommy Jarrett had to have been in the zone of danger at the time the distress was allegedly caused to recover. He was not.

The only possible time that Mr. Jarrett was a "direct victim" of a negligent act was during the collision, not during the viewing of Michael Jones' deceased daughter after the

collision.⁵ Appellants admit, however, that Tommy Jarrett’s alleged emotional distress was not caused by the collision. Therefore, even if separate standards for recovery existed, which is not admitted, the alleged distress did not originate from a point when he was might qualify as a “direct victim.” In any case, “direct victim,” “bystander,” or no distinction, Tommy Jarrett was not in the zone of danger at the time of the alleged negligent act and therefore has no claim for negligent infliction of emotional distress in Missouri.

To be in the zone of danger, Tommy Jarrett must have reasonably feared for personal injury to his own person at the time the alleged emotional distress was caused. *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 599 (Mo.banc 1990). Appellants admit that the alleged emotional harm was caused when Tommy Jarrett viewed the deceased body of Michael Jones’ daughter, not during the collision. Tommy

⁵ The only possible explanation for Tommy Jarrett’s status as a “direct victim” while viewing the body of Mikayla Jones is to foist a duty upon Mr. Jones to safeguard Mr. Jarrett from viewing the body while Mr. Jones was crushed under the dash of his vehicle in a coma. No such duty exists, and indeed it is unconscionable to create one. For this reason, and because the general elements of negligence must be met in cases of negligent infliction of emotional distress, (*Thornburg v. Federal Express Corporation*, 62 S.W.3d 421, 427 (Mo.App.2002)) Defendant’s Motion for Summary Judgment was properly granted. The lack of duty of Respondent to safeguard Mr. Jarrett from viewing his deceased daughter is discussed in Section B below.

Jarrett did not reasonably fear for personal injury to his own person when viewing the body of Mikayla Jones. He was therefore, not in the zone of danger when the alleged emotional distress was caused. In sum, Appellants admit that Tommy Jarrett was not in the zone of danger at the time the alleged emotional harm occurred. This admission disposes of their claim of negligent infliction of emotional distress.

B. Appellants Fail to Meet the Elements of General Negligence

Assuming, *in arguendo*, that Appellants were correct that only the two *Bass* elements must be established to claim negligent infliction of emotional distress and Tommy Jarrett was a “direct victim” (which Appellants have admitted he was not), they still fail to establish a claim for negligent infliction of emotional distress. Appellants must meet the elements of general negligence in addition to the elements of negligent infliction of emotional distress. “The tort of negligent infliction of emotional distress is a negligence action. The general elements of a negligence action are 1) a legal duty of the defendant to protect plaintiff from injury, 2) breach of the duty, 3) proximate cause, and 4) injury to the plaintiff.” *Thornburg v. Federal Express Corporation*, 62 S.W.3d 421, 427 (Mo.App.2002).

Appellants admit Tommy Jarrett did not suffer emotional distress due to the collision; rather his emotional distress occurred after the collision when he viewed Respondent’s deceased daughter. Appellants admit that Tommy Jarrett never saw any occupant of Respondent’s vehicle until after the collision, after Tommy Jarrett spoke with a witness, exited his vehicle, and walked over to Respondent’s vehicle. What duty can the law reasonably impose upon a man who is rendered unconscious in a coma,

crushed under the dashboard of his car, to safeguard against a person walking up to the wreckage of his vehicle and viewing a deceased occupant? None. No such duty has ever been imposed under the law. To expand the realm of liability to such an extent as is proposed by Appellants is unconscionable. The case law of negligent infliction of emotional distress repeatedly refers to a need to *limit* the class of plaintiffs who may avail themselves to the remedy. “With the abrogation of the impact rule, the potential for extended liability and new causes of action arose.” *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 598 (Mo.banc 1990). “Courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants. Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on injuries that may be compensable.” *Consolidated Rail Corporation v. Gottshall*, 114 S.Ct. 532, 546 (1994).

Appellants would expand the class of plaintiffs for negligent infliction of emotional distress by creation of an unthinkable duty and insistence of no zone of danger requirement. This approach would suddenly vest responding emergency personnel, witnesses of accidents, and any person who was emotionally harmed by viewing a deceased person or horrible injury with a cause of action against the operator of a vehicle involved. The law must not undertake to cure all emotional harms as Appellants desire. The costs would be inconceivable and those persons who had true claims for negligent infliction of emotional distress would be lost in a wave of frivolous litigation.

Lastly, Appellants repeatedly refer to Michael Jones' duty to operate his vehicle with the highest degree of care. This point lacks weight. Appellants admit that the collision between the vehicles in this case is not the cause of Tommy Jarrett's emotional harm. Therefore, even if Michael Jones was negligent in his operation of his vehicle, such was not the proximate cause of the injuries allegedly sustained by Appellants.

Michael Jones owed no duty to safeguard Tommy Jarrett from walking over to the wreckage of his car and viewing his deceased daughter's body. Further, Appellants admit that the collision, which is the result of the only possible negligent act of Michael Jones, was not the cause of Appellants' alleged injuries. Appellants' admissions and a reasonable consideration of legal duty militate that the general elements of negligence are not met, and therefore the trial court's Judgment granting Defendant's Motion for Summary Judgment was wholly proper.

ARGUMENT

POINT RELIED ON IV.

PLAINTIFF TOMMY JARRETT DID NOT ADMIT THAT THE SOLE SOURCE OF HIS EMOTIONAL DISTRESS WAS THE VIEWING OF THE DECEASED BODY OF DEFENDANT’S CHILD, NOR DID HE ADMIT THAT HE DID NOT SUFFER EMOTIONAL TRAUMA STEMMING FROM THE ACCIDENT ITSELF.

A. Appellants Are Bound to Their Admission That the Alleged Emotional Distress Was Not Caused by the Collision

Appellants cannot avoid their admission that the emotional harm allegedly sustained by Tommy Jarrett was not caused by the collision in this case. Appellants simply ignore that they admitted the entirety of paragraph 7 of Defendant’s Statement of Uncontroverted Material Facts, which stated:

“7. Plaintiff’s emotional struggles, grief and feelings of guilt after the collision stemmed from his viewing of defendant’s deceased daughter, not from the collision itself.”⁶

⁶ Paragraph 7 of Defendant’s Statement of Uncontroverted Material Facts went on to list specific references from the treatment notes of Tommy Jarrett which evidence the fact his injuries are solely from viewing the body of Mikayla Jones, not from the collision.

Appellants' response to paragraph 7 did not specifically deny any portion thereof, and constitutes an admission of the truth the paragraph. Missouri Rule of Civil Procedure 74.04(c)(2). Appellants attempt to rely on assertions contained in their own Statement of Facts accompanying Plaintiff's Motion for Summary Judgment. This is wholly improper. As stated above, the rules of summary judgment are mandatory and a responding party who does not specifically deny a movant's statement of fact admits the same. Missouri Rule of Civil Procedure 74.04(c)(2), see also *Ford v. Cedar County*, 216 S.W.3d 167 (Mo.App.S.D.2006), and *Wehmeyer v. Fag Bearings Corp.*, 190 S.W.3d 643 (Mo.App.S.D.2006).

Inexplicably, Appellants misstate paragraph 7 of Defendant's Statement of Uncontroverted Material facts by omitting the critical phrase "not by the collision itself." Omission of this phrase would indeed aid the Appellants, but it is not so. Appellants are bound to their admission that the emotional harm of Tommy Jarrett was not caused by the collision. Any reasonable reading of Defendant's Statement of Uncontroverted Material Facts leads to this inexorable conclusion.

It is of no moment that Appellants executed affidavits, filed their own motion for summary judgment, or referenced other portions of discovery after their admission of Defendant's Statement of Uncontroverted Material Facts. The law of summary judgment is mandatory and Appellants are bound thereby.

Appellants and the dissent opinion also fixate on the term "sole." While it is true that the term "sole" does not appear in paragraph 7 of Defendant's Statement of Uncontroverted Material Facts, the seminal consideration is that Appellants admit the collision is not the cause of Tommy Jarrett's alleged emotional harm. Notably, they do admit that Tommy Jarrett's "emotional

struggles, grief and feelings of guilt after the collision stemmed from his viewing of defendant's deceased daughter." This admission establishes that the alleged damages were caused when Tommy Jarrett was not a "direct victim" and not in the zone of danger.

In sum, Appellants make every effort to avoid their admission that the collision caused no emotional harm to Tommy Jarrett. He was, therefore, not a "direct victim" as Appellants would assert. Neither was he in the zone of danger when he alleges his emotional harm was caused, i.e. when he viewed the body of Mikayla Jones. The trial court's Judgment reflects this and was proper in denying Plaintiff's Motion for Summary Judgment and granting Defendant's Motion for Summary Judgment.

ARGUMENT

POINT RELIED ON V.

PLAINTIFF TOMMY JARRETT'S RESPONSE TO DEFENDANT'S STATEMENT OF FACTS IN NO WAY NEGATES HIS CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

A. Appellants Are Bound to Their Admission That Tommy Jarrett Did Not Fear for Personal Injury to Himself at the Time of the Alleged Emotional Distress Was Caused and Therefore Was Not in the Zone of Danger

“The zone of danger rule permits recovery for emotional distress if the plaintiff can show that he or she is threatened with bodily harm by defendant’s negligence **and emotional distress results from reasonable fear of personal physical injury.**” *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 599 (Mo.banc 1990) (Emphasis added). Appellants’ citations to *Asaro* however, fail to include the requirement any emotional harm occur when the claimant reasonably fears for his or her own safety. This simply misstates the law.

Appellants maintain by affidavit and several pleadings and briefs after their response to Defendant’s Motion for Summary Judgment that Tommy Jarrett feared for his life at the time of the collision. They do so in attempted remediation of their admission that Tommy Jarrett did not suffer his alleged emotional distress due to the collision. However, these later allegations that Tommy Jarrett feared for his life or injury

at the time of the collision are totally irrelevant and without weight given Appellants' admissions.

Appellants admit that Tommy Jarrett's emotional distress was caused by the viewing of Michael Jones' deceased daughter. They admit his emotional distress was not due to the collision. Further, Tommy Jarrett was in no way threatened with bodily harm at the time he viewed the body of Mikayla Jones, nor do Appellants allege so. The reality of the case is that Tommy Jarrett allegedly suffered emotional distress after any threat of personal physical injury had passed. He therefore was not in the zone of danger and cannot recover under a theory of negligent infliction of emotional distress.

CONCLUSIONS

Appellants admitted that the emotional harm alleged to have been sustained by Tommy Jarrett was not caused by the collision in this case. This admission was made in the proceedings of summary judgment because Appellants failed to deny Respondent's assertion of the same. Appellants are bound by this admission. Introduction of affidavits, reference to discovery, and repetitious statements that they did not make this admission in no way render this admission unbinding.

The rules of summary judgment are mandatory. *Ford v. Cedar County*, 216 S.W.3d 167, 171 (Mo.App.S.D.2006). To allow Appellants to avoid their admissions pursuant to the rules of summary judgment would rob summary judgment of the very purpose for which it was created. Litigants could no longer prove a fact by admission that renders a claimant's (or indeed a defendant's) position untenable. Parties would simply attempt to undo any admission contrary

to their interest as the Appellants do here. To allow such renders summary judgment utterly without effect.

The rules of summary judgment are strict and mandatory for a purpose. That purpose is to allow a litigant an opportunity to achieve a just result without incurring the great expense and inconvenience of a trial. Herein, Michael Jones constitutes the very type of litigant for whom summary judgment is so necessary. Appellants do not have a remedy at law in Missouri, yet would proceed to trial and force Michael Jones and his family to relive the terrible events of June 8, 2004 when their two-year old daughter died. Forcing such a trial and burden upon Respondent so that Appellants can argue a claim that has no legal merit is beyond the pale. Further, the costs and inconvenience of such an unnecessary trial also demand that summary judgment be upheld in this case.

Appellants argue that *Bass v. Nooney Company*, 646 S.W.2d 765 (Mo.banc 1983) constitutes the appropriate legal standard in this case, and Tommy Jarrett did not have to be in the zone of danger to recover. A careful analysis of Missouri case law dictates otherwise. A “direct victim” is *de facto* in the zone of danger because they are directly emotionally affected by the alleged negligent act. Therefore, if *Bass* is truly a “direct victim” standard, it is inclusive of the requirement that the claimant be in the zone of danger. Indeed, it is nonsensical to allow one who is not in the zone of danger to recover for their emotional injuries. If allowed, every observer of a negligent act or the consequences thereof would suddenly discover entitlement to a cause of action against the tortfeasor despite their proximity or distance to the event. The class of plaintiffs must be limited, and the zone of danger element provides that limitation pursuant to Missouri law.

Irrespective, Appellants admitted that Tommy Jarrett was a “bystander” by their own definition. They admit his emotional distress was not caused by the collision, but by the viewing of the deceased body of Mikayla Jones after the collision. There was no threat of physical harm to Tommy Jarrett as he walked to the wreckage of the Jones’ car and peered inside. He was witness to an injury to a third party. He was a “bystander” by his own admission. Therefore, pursuant to Missouri law under *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595 (Mo.banc 1990), Tommy Jarrett had to be in the zone of danger at the time he alleges his emotional distress to have been caused. By admission, he was not in the zone of danger when his distress was allegedly caused, and may not recover under a theory of negligent infliction of emotional distress.

Negligent infliction of emotional distress requires the general elements of negligence to be met. Duty must be established. What duty did Michael Jones owe to safeguard Tommy Jarrett from approaching the wreckage of his vehicle? Michael Jones had lapsed into an eight-day coma, with massive trauma to his head. His wife and children were terribly wounded, one mortally. Appellants would place a duty upon him to prevent any person from approaching the wreckage of his family’s vehicle so that they would not be emotionally affected by the sight. This cannot stand. First, the class of potential litigants for what has historically been a tort of limited application would increase exponentially. Witnesses, first responders, family members, and passengers would be vested with causes of action. Moreover, to impose this duty upon one who has suffered the tragic death of an infant, severe physical injuries, and the resulting trials and tribulations of living with these memories for a lifetime is unconscionable.

The analysis of general negligence returns this analysis to its origin. Tommy Jarrett's alleged emotional distress was not caused by the collision between his tractor-trailer and the vehicle operated by Michael Jones. It was therefore not caused by any potential negligent act of Michael Jones in the operation of his vehicle. Tommy Jarrett's alleged emotional distress, and therefore his wife's alleged loss of consortium, was caused by the fact that he chose to approach the Jones' vehicle and viewed the body of Mikayla Jones.

No doubt may remain as to the tragedy of this case. However, the law does not afford monetary remedies for every conceivable emotional harm. In this case, the law is clear. Appellants' admissions are clear. The trial court's Judgment granting Defendant's Motion for Summary Judgment was proper and should be upheld for the reasons stated herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Timothy J. Boone, 1349 East Broad Street, 2nd Floor, Columbus, Ohio 43205; and David W. Ransin, 1650 E. Battlefield Rd., Suite 140, Springfield, MO 65804-3766 by:

- Hand delivery
- United States mail
- Federal Express overnight mail
- Fax
- Email

Dated this 5th day of November, 2007.

Kregg T. Keltner

CERTIFICATE OF COMPLIANCE

Respondent hereby certifies that this Respondents' brief includes the information required by Rule 55.03, complies with the word limitations set forth in Rule 84.06(b) and contains 8,983 words of type, exclusive of the cover, signature block, certificates of service and compliance and appendix.

Respondent further certifies that the disk filed with this brief was scanned for viruses and was found virus-free.

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