

NO. SD28259

IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

TOMMY R. JARRETT and BEVERLY JARRETT,
Plaintiffs-Appellants

VS.

MICHAEL B. JONES
Defendant-Respondent.

APPEAL FROM THE CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI
HONORABLE THEODORE B. SCOTT, SENIOR JUDGE

LACLEDE COUNTY CASE NO. CV305-1104CC

BRIEF OF APPELLANT

APPELLANT REQUESTS ORAL ARGUMENT

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES.....	3
II. JURISDICTIONAL STATEMENT.....	4
III. STATEMENT OF FACTS.....	4
A. Overview.....	4
B. Undisputed General Substance of the Underlying Suit.....	5
C. Facts Material to Point One of this Appeal.....	5
D. Facts Material to Point Two of this Appeal.....	10
E. Facts Material to Point Three this Appeal.....	12
IV. POINTS RELIED ON AND AUTHORITIES.....	13
A. First Point.....	13
B. Second Point.....	13
C. Third Point.....	14
V. STANDARD OF REVIEW.....	14
VI. ARGUMENT.....	15
A. First Point.....	15
B. Second Point.....	19
C. Third Point.....	22
VII. Conclusion.....	23

I. TABLE OF AUTHORITIES

<i>Asaro v. Cardinal Glennon Memorial Hospital</i> (1990) 799 S. W. 2d 595.....	10,13,16, 19, 20
<i>Barnhill v. Davis</i> (Iowa 1981) 300 N.W. 2d 104.....	15
<i>Bass v. Nooney Co.</i> (1983) 646 S.W. 2d 765... ..	5,13,15,18
<i>Bosch v. St. Louis Healthcare Network</i> (2001) 41 S.W. 3d 462.....	16
<i>Bovsun v. Sanperi</i> (1984), 61 N.Y. 2d 219.....	20,22
<i>Hamilton v. Nestor</i> (2003) 265 Neb. 757.....	19
<i>Hayes v. Show Me Believers, Inc.</i> (2006) 192 S. W. 3d 706.....	14
<i>ITT Commercial Fin. Corp. v. Mid America Marine Supply Corp.</i> (1993) 854 S. W. 2d 371.....	14
<i>Lourcey v. Estate of Charles Scarlett</i> (Tenn. 2004) 146 S.W.3d 48.....	15
<i>Payton v. Abbot Labs</i> (1982) 386 Mass. 540.....	15
<i>Portee v. Jaffee</i> , (1980) 84 N.J. 88.....	15
<i>Sinn v. Burd</i> , (1979) 486 Pa. 146.....	15
<i>Thurmon v. Sellers</i> (Tenn. 2001) 62 S.W.3d 145.....	15
<i>Wyatt v. Hinton Enterprises, Inc.</i> (1995) 899 S. W. 2d 547.....	10, 16, 19, 20

II. JURISDICTIONAL STATEMENT

This is an appeal by Plaintiffs Tommy and Beverly Jarrett from the trial court's judgment in a personal injury action involving a head-on collision caused by Defendant Michael Jones. This appeal arises from the trial court's decision to grant Defendant's Motion for Summary Judgment as to Plaintiff Tommy Jarrett's claim for negligent infliction of emotional distress. Because Plaintiffs presented overwhelming evidence linking Plaintiff Tommy Jarrett's severe emotional distress to Defendant's negligent conduct, genuine issues of material fact remain. For these reasons, Plaintiffs now appeal.

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 or 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.

III. STATEMENT OF FACTS

A. Overview

This appeal is limited to three important points: 1) whether Missouri law allows *direct* victims of negligence to recover for negligent infliction of emotional distress so long as the risk of harm was unreasonable; 2) whether Plaintiff Tommy Jarrett was in the zone of danger when this Collision occurred; and 3) whether Plaintiff Tommy Jarrett feared for his own life and safety as Defendant's vehicle careened head-on towards him.

B. Undisputed General Substance of the Underlying Suit

On June 8, 2004, Plaintiff Tommy Jarrett, a professional truck driver, was driving his tractor-trailer unit west on Interstate 44, a divided four-lane highway, when Defendant Michael Jones lost control of his eastbound vehicle, crossed the grassy median, entered the westbound lanes, and caused a head-on collision with Plaintiff's truck. Mr. Jarrett feared for his own life and safety as Defendant's car hurtled toward him and he suffered Post-traumatic Stress Disorder as a result of the crash. A two-year-old child riding in Defendant's vehicle died and others were injured because of the collision.

C. Facts Material to Point One: Plaintiff Tommy Jarrett was a direct victim of Defendant Jones's negligent conduct.

Missouri law allows direct victims of negligence to recover so long as Defendant's conduct involved an unreasonable risk of harm and the resulting emotional distress was significant. *Bass v. Nooney Co.* (1983) 646 S.W. 2d 765. In this instance, Plaintiff Tommy Jarrett was the driver of the vehicle hit head-on by Defendant Jones. As such, Tommy Jarrett was the direct victim of Defendant Jones's negligence. Further, Defendant Michael Jones put Tommy Jarrett at an unreasonable risk of harm by operating his vehicle recklessly and causing a head-on collision; the resulting emotional harm to Plaintiff was significant.

Because Tommy Jarrett was a direct victim, not merely a bystander, he can recover under Missouri's direct victim standard, not the more difficult "bystander" standard. Defendant does not dispute that on June 8, 2004, his vehicle crossed a median and hit Plaintiff's vehicle. L.F. Tab 10, pp. 57-58 (*Defendant's Memorandum in Support of Motion for Summary Judgment*); L.F. Tab 9, p. 43 (*Defendant's Statement of Uncontroverted Material Facts*, ¶3). Defendant's negligence was, without question, the

cause of this accident. According to the investigation conducted by the Missouri State Highway Patrol, Defendant was traveling too fast for the wet road conditions at the time of the accident. L.F. Tab 11, pp. 88-104 (*Accident Reconstruction Report, Exhibit B to Plaintiffs' Statement of Uncontroverted Facts*). When Defendant's vehicle began to hydroplane, he over-steered, causing his vehicle to cross the median and hit Plaintiff's vehicle head on. *Id.*, pp. 95-97. An accident reconstructionist concluded that the accident may have been avoided had Defendant properly equipped his vehicle with adequate rear tires. *Id.*

As to the first element of the *Bass* test, there can be no doubt that causing a head-on collision involves an unreasonable risk of causing emotional distress, a risk that all drivers are presumed to appreciate. L.F. Tab 11, pp. 136-141 (*Hamilton v. Nestor* (2003) 265 Neb. 757, *Exhibit H to Plaintiffs' Statement of Uncontroverted Facts*). As to the second element, medically significant harm, Plaintiff Tommy Jarrett presented overwhelming evidence to support the fact that he suffered severe emotional distress as a result of Defendant's negligence. Attached to his Statement of Uncontroverted Facts were reports from one doctor and two social workers who were all firsthand witnesses to Tommy's emotional distress. During a visit on June 15, 2004, Tommy's family physician described him as having "considerable difficulty" because of the accident: "He's not sleeping. He's nervous. Can't concentrate. Obviously emotionally distressed." L.F. Tab 11, pp. 110-111 (*Progress Report of Dr. Kenneth Miller*). Tommy's doctor prescribed Ambien and Xanax at that time to help him cope with the emotional trauma of the collision. *Id.*

Tommy testifies that his wife began looking for mental health specialists immediately after the collision; he met first with social worker Carl Newcomer. L.F. Tab 11, pp. 82 (*Tommy Jarrett Dep.*, p. 41). Tommy reported feelings of nervousness,

nausea, sadness, anger toward himself, poor memory, poor judgment, inability to sleep, and fear of driving. L.F. Tab 11, pp. 107-108 (*Notes of Social Worker Carl Newcomer*).

Tommy testified that he told the social worker:

I couldn't focus on anything; I wanted to die; I didn't want anything to do with anybody; I just wanted to be left alone; and going over in my mind, trying to figure out what I could have done to avoid killing. L.F. Tab 11, p.83 (*Tommy Jarrett Dep.*, p. 42. ll. 13-17).

Social Worker Newcomer diagnosed Tommy with Post-Traumatic Stress Disorder. L.F. Tab 11, pp. 107-108 (*Notes of Social Worker Carl Newcomer*). Tommy also testified that he feared for his own life and safety when he saw Defendant's vehicle careening toward him. L.F. Tab 11, p. 79 (*Tommy Jarrett Dep.*, p. 26, ll. 21-25); pp. 105-106 (*Tommy Jarrett Aff.*, ¶¶3-9). He further testifies that he cried when he spoke to members of Defendant's family on the phone, and he apologized for "killing [their] child." L.F. Tab 11, p. 80 (*Tommy Jarrett Dep.*, p. 32, ll. 1-5). Later in his deposition, Tommy states:

I was an emotional wreck that afternoon after I learned that the child had died....I had called my wife from the scene of the accident. And that night at the hotel it was—it was very bad. I was beating myself up. And when I flew home the next day, I got home that evening, we were sitting at the kitchen table, and I told my wife—I told Bev that, "I can't deal with this on my own." L.F. Tab 11, p. 82 (*Tommy Jarrett Dep.*, p. 40. ll. 14-25)

Social worker Newcomer referred Tommy to Counselor Deborah Jessie because of the severity of his problems. L.F. Tab 11, p. 82 (*Tommy Jarrett Dep.*, p. 41); pp. 107-108 (*Notes of Social Worker Carl Newcomer*). Counselor Jessie also diagnosed Tommy with Post-Traumatic Stress Disorder, or PTSD. L.F. Tab 11, pp. 124-131 (*Jessie Notes*,

June 17, 2004, Exhibit C to the Affidavit of Deborah Jessie).¹ As Deborah Jessie testifies, PTSD is a mental disorder prompted by exposure to an extreme traumatic stressor involving actual or threatened death or serious injury to one's self, or witnessing an event that involves death or serious injury to another person. L.F. Tab 11, pp. 112-114 (*Jessie Aff.*, ¶3). Characteristic responses to the traumatic stressor include horror and helplessness, while characteristic symptoms include depression and severe anxiety. *Id.* A detailed description of Post-Traumatic Stress Disorder from the Diagnostic and Statistical Manual of Mental Disorders is attached to Jessie's affidavit as Exhibit B. L.F. Tab 11, pp. 118-123. Jessie testifies that Tommy exhibited all the classic symptoms of PTSD. L.F. Tab 11, pp. 112-114 (*Jessie Aff.*, ¶3). Tommy testified about his experiences during treatment with Jessie:

What she told me is that my mind had kind of locked in place, and she had to find a way to get me to go past that, to move forward. Many talks about the accident, what had transpired, how I was feeling. And then once I got to a certain point—it all led back to when I was at the car where Makayla was at. And she was doing this stuff with her hands....to get my mind to go past that point. L.F. Tab 11, p. 83 (*Tommy Jarrett Dep.*, p. 43, ll. 6-18)

Tommy reported that he was having nightmares, depression, flashbacks, fatigue, poor concentration, inability to make decisions, tension, edginess, inability to sleep, frequent crying, irritability, intrusive images and feelings of worthlessness. L.F. Tab 11, pp. 124-131 (*Jessie Notes, June 17, 2004, Exhibit C to Jessie Aff.*). On June 25, 2004, Tommy's second visit, Counselor Jessie reported that, "Tommy experienced the confusion, dissociation, and inappropriate guilt typical in PTSD." L.F. Tab 11, pp. 124-131 (*Jessie Notes, June 25, 2004, Exhibit C to Jessie Aff.*). Counselor Jessie also

¹ Also attached to Jessie's affidavit is a copy of her work history and training, marked as Exhibit A to the affidavit. As evidenced by these documents, which demonstrate Ms. Jessie's education in psychology and social work, her extensive background as a social worker and therapist, and her long list of continuing education courses, Ms. Jessie is well-qualified to assess patients and recognize the classic symptoms of Post-Traumatic Stress Disorder.

reported that Tommy was still unable to work. Tommy blamed himself for the accident, and he thought constantly of the horrendous scene of death and destruction. L. F. Tab 11, p. 83 (*Tommy Jarrett Dep.*, pp. 42-43).

On July 1, 2004, Jessie's notes reveal that Tommy was still having strong urges to cry, and that his first and last thoughts every day were of the accident; he was still unable to work at that time. L.F. Tab 11, pp. 124-131 (*Jessie Notes, July 1, 2004*, Exhibit C to Jessie Aff.). Jessie reported Tommy's affect during a July 8, 2004, session as anxious and tearful. *Id.* (*Jessie Notes, July 8, 2004*, Exhibit C to Jessie Aff.). On July 15, 2004, Tommy was still grieving intensely and experiencing intense irritability. *Id.* (*Jessie Notes, July 15, 2004*, Exhibit C to Jessie Aff.). The psychological trauma to Tommy was so great, in fact, that he was not able to return to work as a professional truck driver until October, 2004. *Id.* (*Jessie Notes, June 17, 25, 2004; July 1,8,15, 2004*, Exhibit C to Jessie Aff.); L.F. Tab 11, p. 132 (*Jessie, Letter to Attorney Boone, May 16, 2005*, Exhibit D to Jessie Aff.); L.F. Tab 11, p. 83 (*Tommy Jarrett Dep.*, pp. 44-45). Tommy suffered lost income as a result of not being able to work. L.F. Tab 11, pp. 85-86 (*Tommy Jarrett Dep.*, pp. 53-54). He also incurred medical expenses in excess of \$1,623.57 during his counseling sessions and visits with Dr. Miller. L.F. Tab 3, p. 10 (*Petition for Amended Damages*, ¶14(b)).

Beverly Jarrett's testimony about her husband describes a man who was deeply devastated by the accident:

Right after the collision...the night that he called me after work was probably one of the worst phone calls I'd ever got. On the other end of the phone was my husband, crying, sobbing, telling me that he had just been in an accident...and there was a death involved***I could tell by his voice that he was not with us***This was not my husband on the phone***It's not like him to say, "I want to die." It's not like him to not know what's happening, not to be in control of the situation, not to know what to do. You don't know what it's like to pick up somebody from the airport that there's not anything in their eyes anymore. He has not slept***When I got

him out of the airport, he wouldn't drive. He would not get behind the wheel of the car. He says, "Bev, I can't. I can't do this." And he didn't***He held onto the handrail in my car so tight that his knuckles were white. L.F. Tab 11, pp. 133-135 (*Deposition of Beverly Jarrett*, pp. 4-7).

Beverly went on to testify that her husband's intense fear of driving lasted for several weeks after the accident. *Id.* (*Beverly Jarrett Dep.*, p. 7, ll. 14-17). Beverly further testifies that her husband became extremely introverted after the accident; that he did not enjoy the activities he had formerly enjoyed; and that their relationship suffered for months as a result of the collision. *Id.* (*Beverly Jarrett Dep.*, pp. 8-9).

In sum, Tommy was diagnosed twice with Post-Traumatic Stress Disorder. The emotional trauma of the collision left him with feelings of depression, guilt, sadness, anger and tension. He was unable to drive or work, and unable to enjoy activities like camping and traveling that had brought him so much pleasure before the accident. Tommy's family physician described him as "obviously emotionally distressed"; two different social workers immediately recognized in Tommy the signs of Post-Traumatic Stress Disorder. Tommy attended counseling sessions for months and took prescribed anti-depressants to cope with the trauma related to the crash. With these facts, Tommy demonstrated for the trial court that he suffered medically significant harm as a result of Defendant's negligence.

D. Facts Material to Point Two: Plaintiff Tommy Jarrett can also recover as an innocent bystander.

Even if Missouri has only one standard for recovery in intentional infliction of emotional distress cases, Defendant Tommy Jarrett meets the standard and can recover as a bystander. A bystander-plaintiff in Missouri can recover damages for psychological injuries after witnessing harm to a third party so long as the negligent acts of the tortfeasor placed plaintiff in reasonable fear for his own safety, or in the zone of

danger. *Wyatt v. Hinton Enterprises, Inc.* (1995) 899 S. W. 2d 547; *Asaro v. Cardinal Glennon Memorial Hospital* (1990) 799 S. W. 2d 595.

Plaintiff Tommy Jarrett was in the zone of danger when this collision occurred because he feared for his own life and safety. Plaintiff was of course emotionally disturbed by the sight of a deceased two-year-old child, but his extreme sadness about the little girl's death was only one component of this emotional distress. Plaintiff in fact presented ample evidence to the Court that he feared for his own life and safety and was thus squarely in the zone of danger.

Tommy testifies that he feared for his own life and safety as he watched Defendant's car careening toward him. L.F. Tab 11, p. 79 (*Tommy Jarrett Dep.*, p. 26., ll. 21-25). Specifically, he testified that in the few seconds before the accident, he feared for his life because he did not know what was about to happen, whether his truck would roll and crush him or whether he would be propelled into oncoming traffic. L.F. Tab 11, p. 105 (*Tommy Jarrett Aff.*, ¶3). Tommy remembers grabbing the wheel and simply being gripped with fear of the unknown. *Id.* (*Tommy Jarrett Aff.*, ¶4). He testifies further that his life flashed before his eyes in the seconds leading up to the collision. L.F. Tab 11, p. 106 (*Tommy Jarrett Aff.*, ¶5). Even after the impact, Tommy was not sure whether the heavy tractor-trailer would stop or roll when it hit the embankment. *Id.* (*Tommy Jarrett Aff.*, ¶6). He testified that he was "terrified to death" just before, during, and after the accident. *Id.* (*Tommy Jarrett Aff.*, ¶7). He also feared that he would careen into the path of another tractor-trailer truck head-on and be killed. *Id.* (*Tommy Jarrett Aff.*, ¶8). He states that at the time of the accident he was afraid of ending up dead or seriously hurt. *Id.* (*Tommy Jarrett Aff.*, ¶9). The trauma Tommy experienced as a result of the collision, and his corresponding fear for his own safety, is well documented in the previously-cited medical records of Social Workers Deborah Jessie and Carl

Newcomer, and family physician Dr. Kenneth Miller. Tommy was anxious and tearful and unable to enjoy normal relationships with friends and family. The trauma was so great, in fact, that Tommy was unable to drive or return to work for months. His fear, anxiety, and sadness were a direct result of the traumatic experience of almost losing his life in a head-on collision. Again, extreme fear for one's own life is one traumatic stressor associated with PTSD. L. F. Tab 11, pp. 113, 118-123 (*Jessie Aff.*, ¶3; DSM-IV, Description of PTSD, Exhibit B to *Jessie Aff.*).

With these facts, Plaintiff Tommy Jarrett demonstrated for the trial court that he was in the zone of danger when the collision occurred and that he suffered severe emotional distress as a result of his fear for his own life and safety.

E. Facts Material to Point Three: Plaintiff Tommy Jarrett's emotional distress has two components.

While Tommy was certainly devastated by the death of an innocent child, he was, at the same time, devastated by the thought that he could have been seriously injured or killed in this accident as well. To say that Tommy's emotional trauma resulted only from seeing the young child's death is not accurate. As the victim of a head-on car collision, Tommy was certainly emotionally traumatized by thoughts that he, too, could have been killed or injured. L.F. Tab 11, p. 79 (*Tommy Jarrett Dep.*, p. 26., ll. 21-25); pp. 105-105 (*Tommy Jarrett Aff.*)

Despite the wealth of evidence supporting genuine issues of material fact as to whether Plaintiff was a direct victim or bystander, and whether Plaintiff was in the zone of danger and suffered significant emotional distress as a result of fear for his own safety, the trial court granted Defendant's summary judgment on these points, holding that Plaintiff could not recover for emotional distress because he was not in the zone of

danger. Plaintiffs filed their Notice of Appeal with the Laclede County Circuit Court on January 5, 2007.

IV. POINTS RELIED ON AND AUTHORITIES

A. First Point: Missouri has two standards for recovery in negligent infliction of emotional distress cases.

The trial court incorrectly applied the law as it relates to direct-victim claims for negligent infliction of emotional distress. Missouri law allows for recovery by direct victims and bystanders. *Bass v. Nooney Co.* (1983) 646 S.W. 2d 765; *Asaro v. Cardinal Glennon Memorial Hospital* (1990) 799 S. W. 2d 595. The standard in direct victim cases allows a plaintiff to recover so long as the risk of harm was unreasonable and the resulting emotional distress was significant. *Bass*, 646 S. W. 2d 765. The trial court applied only the bystander standard of recovery, a standard that requires that the Plaintiff be in the zone of danger to recover for negligent infliction of emotional distress. *Asaro*, 799 S. W. 2d 595. The trial court therefore erred by failing to consider the facts of this case in light of clearly-established Missouri law addressing direct-victim emotional distress cases.

Bass v. Nooney Co. (1983) 646 S.W. 2d 765.

Asaro v. Cardinal Glennon Memorial Hospital (1990) 799 S. W. 2d 595.

B. Second Point: Plaintiff Tommy Jarrett meets the standard for bystander recovery.

The trial court also erred in finding that Plaintiff did not submit enough evidence to demonstrate a genuine issue of material fact as to his presence in the zone of danger. Plaintiff can recover as a direct victim, but also as a bystander who was in the zone of danger when the accident occurred. Plaintiff in fact presented overwhelming evidence to demonstrate that, as the driver of a vehicle hit head-on, he feared for his life

and safety. Plaintiff therefore demonstrated a genuine issue of material fact as to whether he qualifies as a bystander in the zone of danger.

Bass v. Nooney Co. (1983) 646 S.W. 2d 765.

Asaro v. Cardinal Glennon Memorial Hospital (1990) 799 S. W. 2d 595.

Wyatt v. Hinton Enterprises, Inc. (1995) 899 S. W. 2d 547

C. Third Point: 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.

The trial Court erred in failing to account for evidence that Plaintiff suffered emotional distress stemming from two sources: 1) his grief about the death of an innocent child; and 2) his fear for his own life and safety. Plaintiff's grief at the death of a child was one source of his emotional distress, but not the only source of his emotional distress. The trial Court therefore erred in finding that Plaintiff could not recover as a bystander because he did not fear for his own life and safety.

Asaro v. Cardinal Glennon Memorial Hospital (1990) 799 S. W. 2d 595.

Wyatt v. Hinton Enterprises, Inc. (1995) 899 S. W. 2d 547

V. STANDARD OF REVIEW

The standard of review on an appeal from summary judgment is essentially *de novo*. *Hayes v. Show Me Believers, Inc.* (2006) 192 S. W. 3d 706, 707. The Court shall consider the record in the light most favorable to the party against whom judgment was entered, and need not defer to the trial court's order granting summary judgment. *ITT Commercial Fin. Corp. v. Mid America Marine Supply Corp.* (1993) 854 S. W. 2d 371, 376. Judgment shall be upheld by the appellate court only if it determines that there are no genuine issues of material fact and respondent is entitled to judgment as a matter of law. *Hayes*, 192 S. W. 3d at 707.

VI. ARGUMENT

A. First Point: Missouri has two standards for recovery in negligent infliction of emotional distress cases.

Modern Missouri tort law regarding negligent infliction of emotional distress was established by the Supreme Court of Missouri in *Bass v. Nooney Co.* (1983) 646 S.W. 2d 765. In *Bass*, the Court abandoned the impact rule, which required that a plaintiff's emotional distress be accompanied by a contemporaneous physical injury, in favor of a rule of recovery based primarily on foreseeability. *Id.* at 772-3. The plaintiff in *Bass* suffered severe anxiety after being trapped in an elevator for half an hour. The court held that plaintiff would prevail on her claim for negligent infliction of emotional distress if she showed that 1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress and 2) the emotional distress or mental injury was medically diagnosable and of sufficient severity to be medically significant. *Id.*

As exemplified by *Bass*, the state of Missouri abides by a liberalized view of recovery for negligent infliction of emotional distress, a view which allows Plaintiff to recover if the risk of harm was unreasonable and the resulting emotional harm was significant. Other jurisdictions share Missouri's view. See, e.g., *Sinn v. Burd*, (1979) 486 Pa. 146; *Portee v. Jaffee*, (1980) 84 N.J. 88; *Barnhill v. Davis* (Iowa 1981) 300 N.W. 2d 104; *Payton v. Abbot Labs* (1982) 386 Mass. 540; *Lourcey v. Estate of Charles Scarlett* (Tenn. 2004) 146 S.W.3d 48; *Thurmon v. Sellers* (Tenn. 2001) 62 S.W.3d 145.

In addition to overruling the impact rule, the *Bass* court further overruled the requirement that physical injury must result from the emotional distress. *Id.* at 772. Thus, plaintiffs need not show that their emotional distress was *caused* by a physical injury, nor must they show that their emotional distress *manifested* itself physically. Instead, Plaintiff must show only that the tortfeasor's conduct presented an

unreasonable, foreseeable risk of causing distress, and that medically significant harm resulted.²

Had Tommy been merely a bystander, instead of a direct victim, the zone of danger rule announced in *Asaro v. Cardinal Glennon Memorial Hospital* (1990), 799 S. W. 2d 595, would apply. *Bass*, however, is still good law, especially in light of the fact that *Asaro* did not overrule *Bass*, it simply stated a new rule for *bystander* recovery. Thus, *Bass* applies in cases where the Plaintiff is the direct victim of Defendant's negligence; *Asaro* applies in cases where Plaintiff is simply a bystander. Nothing in *Asaro* would indicate differently.

The *Asaro* court, in fact, makes clear that its holding addresses a set of facts quite different from the facts in *Bass*, stating, "This case addresses the issue left open in footnote 3 of *Bass*. May a plaintiff recover for emotional distress resulting solely from observing injury to a third party caused by a defendant's negligence." *Asaro*, 799 S. W. 2d at 596. Likewise, *Wyatt v Hinton* (1995), 899 S. W. 2d 547 and *Bosch v. St. Louis Healthcare Network* (2001) 41 S. W. 3d 462, both post-*Bass* cases, do not erase the distinction between direct victims and bystander victims, as Defendants would suggest. These cases are both bystander cases in which the zone of danger rule applies. In *Wyatt*, the victim was on the other side of a parking lot when he saw his brother crushed by a truck. The victim was nowhere near the scene of the accident, and thus was properly classified as a bystander victim, charged with the extra burden of showing that he feared for his own safety before he could recover. In *Bosch*, the "victim" was the husband of a nurse who had pricked herself with a contaminated needle. He, too, was

² Defendant asserts incorrectly that, to be actionable, Plaintiff's emotional distress must have resulted from fear for his own safety. However, because Tommy Jarrett was a *direct victim* of Defendant's negligence, and not a bystander, *Bass* makes clear that he can recover if he demonstrates "medically significant harm" resulting from Defendant's negligence. The harm need not be tied to a specific aspect of the negligence, such as fear for one's safety or fear for another's safety, it need only be significant and proximately caused by the Defendant's negligence.

properly classified as a bystander, charged with the burden of showing that he was at least in the zone of danger. Unlike plaintiffs in *Wyatt* and *Bosch*, Plaintiff Tommy Jarrett is a direct victim, the kind of victim envisioned in *Bass*. *Asaro* and *Bass* present widely divergent theories of recovery, depending on the status of the victim. Contrary to Defendant's assertion, Missouri courts have not extinguished the distinction between a direct victim and a bystander. In the instant case, *Bass* applies because Plaintiff is, without question, a direct victim of Defendant's negligence. The trial court erred therefore in failing to apply the *Bass* standard to the facts of this case. As Plaintiff Tommy Jarrett demonstrated to the trial court, the facts of his case meet both elements of the *Bass* test.

As to the first element, there remain no genuine issues of material fact: Defendant unlawfully and negligently crossed a grassy median and caused a head-on collision that involved an unreasonable risk of harm to the Plaintiff. Defendant was driving too fast for wet road conditions and he was driving a vehicle with severely deficient rear tires. L.F. Tab 11, pp. 95-97 (*Accident Reconstruction Report, Exhibit B to Plaintiffs' Statement of Uncontroverted Facts*). Defendant's failure to equip his vehicle with safe tires and his failure to operate cautiously under wet road conditions caused a tragedy. His car hydroplaned and he oversteered, causing his vehicle to leave the road and slam head-on into Plaintiff Tommy Jarrett's truck. *Id.* Defendant most assuredly should, and could, have understood the risk of harm to others of driving too fast on a wet road, over-steering and failing to equip his vehicle with safe tires.

As to the second element of the *Bass* standard, Plaintiff presented the testimony of a social worker and a licensed counselor as support for the fact that he suffered medically significant emotional distress. Social worker Carl Newcomer and Counselor Deborah Jessie both diagnosed Plaintiff with Post-Traumatic Stress Disorder. L.F. Tab

11, pp. 107-108 (*Notes of Social Worker Carl Newcomer*); pp. 124-131 (*Jessie Notes, June 17, 2004*, Exhibit C to the Affidavit of Deborah Jessie). Tommy had nightmares, depression, flashbacks, fatigue, poor concentration, inability to make decisions, tension, edginess, inability to sleep, frequent crying, irritability, intrusive images and feelings of worthlessness. L.F. Tab 11, pp. 124-131 (*Jessie Notes, June 17, 2004*, Exhibit C to Jessie Aff.). Throughout his counseling sessions with Jessie, Tommy experienced the confusion, dissociation, and inappropriate guilt typical of PTSD. L.F. Tab 11, pp. 124-131 (*Jessie Notes, June 25, 2004*, Exhibit C to Jessie Aff.). Finally, under *Bass*, Tommy's harm need not be related to a specific source, i.e. fear for one's own safety or the safety of others, it need only be *medically significant*. Nowhere in the pleadings does Defendant dispute that Plaintiff suffered medically significant harm.

The trial court first erred by failing to apply the *Bass* test. Had the trial court applied *Bass*, Plaintiff would have easily overcome Defendant's Motion for Summary Judgment because he demonstrated genuine issues of material fact as to both elements of the *Bass* test. For these reasons, Plaintiff-appellant Tommy Jarrett respectfully requests that this Court find that *Bass* applies to this case, reverse the trial court's decision, find in favor of the Plaintiff's motion for summary judgment and remand this matter to the trial court for a trial on damages only.

B. Second Point: Plaintiff Tommy Jarrett meets the standard for bystander recovery.

Bass of course governs only those cases where a plaintiff was the *direct* victim of the tortfeasor's negligence. 646 S.W. 2d at 770. Plaintiff submits first that indeed he was the direct victim of Defendant's negligence. Plaintiff was not a *bystander* in this crash, rather Plaintiff was the occupant of the vehicle struck head-on by Defendant.

Thus, Plaintiff was a direct victim of Defendant's negligence in crossing the roadway and causing the collision, and *Bass* applies.³

Nevertheless, should this Court find that only the *Asaro* bystander test applies, Plaintiff can still recover as a bystander. A bystander-plaintiff in Missouri can recover damages for psychological injuries after witnessing harm to a third party so long as the negligent acts of the tortfeasor placed plaintiff in reasonable fear for his own safety, or in the zone of danger. *Asaro v. Cardinal Glennon Memorial Hospital* (1990) 799 S. W. 2d 595; *Wyatt v. Hinton Enterprises, Inc.* (1995) 899 S. W. 2d 547. The Supreme Court of Missouri sets forth the zone of danger rule in the *Asaro* case. The specific issue in *Asaro* was whether a plaintiff may recover for emotional distress that results from observing physical injury to a third person. The answer was the "zone of danger" rule. Again, it is important to remember that *Asaro* and *Bass* address two totally different scenarios; the *Asaro* Court specifically stated that its holding was limited to those situations not previously addressed by *Bass*. *Asaro*, 799 S. W. 2d at 596. *Bass* addresses direct victims of negligence, while *Asaro* addresses only those cases where the plaintiff was not involved in the incident or crash itself, but was close enough to recover as a bystander. *Asaro* does not overrule *Bass*, rather it simply addresses a scenario beyond the scope of the *Bass* holding. Here, of course, Plaintiff was the occupant of the vehicle hit head-on by Defendant, and thus a direct victim, per *Bass*. Nevertheless, Plaintiff also can recover under *Asaro* if the Court affirms that only the *Asaro* test applies.

³ The Nebraska case of *Hamilton v. Nestor* (2003) 265 Neb. 757 (L.F. Tab 11, pp. 136-141), presents facts almost identical to the facts at hand. Plaintiff in that case was involved in a two-car accident in which the tortfeasor's daughter was killed. Plaintiff brought a claim for negligent infliction of emotional distress. The Supreme Court of Nebraska held that because Plaintiff was a direct victim of the tortfeasor's negligence, he could recover so long as he proved the negligence was the proximate cause of severe emotional distress.

Appellant in *Asaro* claimed she suffered severe emotional distress after doctors at the Glennon Memorial Hospital failed to properly correct her young son's heart deformity during major surgery. In adopting the "zone of danger" rule enunciated by the New York Court of Appeals in *Bovsun v Sanperi*, (1984) 61 N.Y. 2d 219, the court held that,

[i]n 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) the plaintiff was present at the scene of the 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.

Applying this standard to the facts, the *Asaro* court rejected appellant's claim for emotional distress because she was not the actual patient and she was at no time in reasonable fear for her own safety. It is important to note that the *Bovsun* holding, on which *Asaro* relies so heavily, framed the zone of danger rule as a question of whether the defendant's conduct had threatened plaintiff with bodily harm and unreasonably endangered plaintiff's safety. *Bovsun*, 61 N.Y. 2d 219, 228-229, 231. *Bovsun* thus indicates that so long as a plaintiff was in danger, objectively, recovery is possible. A plaintiff's subjective fear for his own safety is but one indicator of whether the plaintiff's safety was endangered. Defendant implies erroneously that the only way to be in the zone of danger is to fear for one's own safety. This is simply not true. Per *Bovsun*, a plaintiff is in the zone of danger if defendant's conduct threatens him with bodily harm, whether plaintiff knows it or not.

In *Wyatt*, the Missouri Court of Appeals for the Eastern District applied the *Asaro* test and found that a young boy was in the zone of danger after walking across the parking lot of an auto repair center and witnessing his brother being crushed by a tow

truck. 899 S.W. 2d 547. Though the boy saw only the tow truck moving in reverse, and did not see his brother under the wheels, the court held that plaintiff submitted sufficient evidence to show he suffered emotional distress because of his fear for his own safety. Plaintiff in that case prevailed on his claim for negligent infliction of emotional distress.

Again, Tommy Jarrett was not a casual bystander—he was a victim. However, even if the Court views Tommy Jarrett as a bystander, he is still entitled to judgment as a matter of law because he was in fact in the zone of danger and his injuries resulted from his presence at the scene of a horrible collision and its resulting aftermath caused by Defendant. Plaintiff presented ample evidence to show that Defendant's conduct placed him in reasonable fear for his own life and safety. Tommy himself testifies that he feared for his own life and safety as he watched Defendant's car careening toward him. L.F. Tab 11, p. 79 (*Tommy Jarrett Dep.*, p. 26., ll. 21-25). He feared for his life because he did not know what was about to happen, whether his truck would roll and crush him or whether he would be propelled into oncoming traffic. L.F. Tab 11, p. 105 (*Tommy Jarrett Aff.*, ¶3). He was gripped with fear of the unknown, his life flashing before his eyes in the seconds before impact. L.F. Tab 11, pp. 105-106 (*Tommy Jarrett Aff.*, ¶¶3-5). Tommy had no idea where his truck would come to rest. Would he end up dead or seriously hurt? Would his truck slam into another tractor-trailer? These were the awful thoughts running through his mind. L.F. Tab 11, pp. 105-106 (*Tommy Jarrett Aff.*). Only Tommy can testify as to his fear for his own life and safety. Whether such fear was reasonable is, of course, a question for the jury. In this instance, the jury never had an opportunity to ponder that question, despite the mountain of evidence as to Plaintiff's fear for his own life and safety. Further, there is no doubt that, regardless whether Tommy feared for his safety, Defendant's conduct certainly endangered Tommy's life and threatened him with bodily harm. Defendant did, after all, drive his car

straight into Tommy's vehicle. Per *Asaro's* reliance on *Bovsun*, this alone is enough to allow Tommy to recover as a bystander.

Missouri courts have, in the past, determined that a victim standing a parking lot's length away from an accident was in fact in the zone of danger. *Wyatt*, 899 S.W. 2d 547. In this instance, Plaintiff was right in the middle of the zone of danger. No one could have been closer to the zone of danger than Tommy Jarrett, the driver of the vehicle hit head-on by Defendant, and no one could have feared more for his life and safety than Tommy himself.

Plaintiff Tommy Jarrett presented evidence to show that Defendant's negligence placed Tommy squarely in the zone of danger. Defendant presented no evidence to the contrary. Further, there are no genuine issues of material fact as to whether Tommy reasonably feared for his own life and safety. For all these reasons, summary judgment in Defendant's favor was inappropriate. Plaintiff respectfully requests that this Court reverse the trial court's decision, find in favor of the Plaintiff's motion for summary judgment and remand this matter to the trial court for a trial on damages.

C. Third Point: Plaintiff Tommy Jarrett's severe emotional distress arose both from his fear for his own life and safety and his distress over the resulting death of a child.

Tommy testifies that he was "terrified to death" just before, during, and after the accident. L.F. Tab 11, pp. 105-106 (*Tommy Jarrett Aff.*, ¶7). He also feared that he would careen into the path of another tractor-trailer truck head-on and be killed. *Id.* (*Tommy Jarrett Aff.*, ¶8). Social Workers Deborah Jessie and Carl Newcomer and family physician Dr. Kenneth Miller are firsthand witnesses to the trauma Tommy experienced following his near-death experience. And again, Tommy was diagnosed twice with Post-Traumatic Stress Disorder, and extreme fear for one's own life is one

traumatic stressor associated with PTSD. L. F. Tab 11, pp. 113, 118-123 (*Jessie Aff.*, ¶13; DSM-IV, Description of PTSD, Exhibit B to *Jessie Aff.*).

Despite the fact that Plaintiff's fear for his own life and safety is supported by his own testimony, his affidavit, and the medical records of his treating doctor, social worker and counselor, the trial court determined erroneously that Plaintiff's sole source of emotional distress was the grief Tommy experienced after learning a toddler died in the accident. Tommy testified, however, that the death of the little girl was the *partial* source of his emotional distress, not the *only* source of his distress. As Plaintiff repeatedly testified in his affidavit and deposition, from the time he saw Defendant's car careening toward him, to the point of impact, until Plaintiff's truck came to a stop, Plaintiff feared he would die. There is simply no support for the proposition that a plaintiff cannot recover if his emotional distress had two different components. A bystander-plaintiff can recover so long as he fears for his own life and safety. Indeed, Plaintiff Tommy Jarrett's terrifying account of this head-on collision leaves little doubt that he feared this collision would result in his death.

Despite the evidence of Plaintiff's fear for his own life and safety, the trial erroneously determined that Plaintiff suffered only because he viewed the body of a dead child. Plaintiffs respectfully request that this Court reverse and remand for trial on damages only.

VII. Conclusion

Defendant improperly implied that the only source of Plaintiff's distress was the death of the little girl in the accident. The trial court then erroneously determined that Plaintiff could not recover because he did not fear for his own safety and therefore could not have been in the zone of danger.

In the first instance, per the *Bass* standard, Plaintiff is not required to prove he was in the zone of danger. Plaintiff is required only to show that Defendant's conduct caused an unreasonable risk of harm and that medically significant harm resulted. The Accident Reconstruction Report presented by Plaintiff leaves little doubt that Defendant was entirely at fault for this accident. Defendant was well aware that driving too fast on wet road conditions with near-bald tires posed a significant risk to other drivers. Nonetheless, he drove so fast that he lost control of his vehicle and slammed into Plaintiff's truck. Plaintiff's medical records and his own testimony about the devastating effects of the accident demonstrate medically significant harm.

Even if *Bass* does not apply, Plaintiff is still entitled to recover under the *Asaro* zone of danger standard. The trial court erroneously failed to consider Plaintiff's testimony regarding his fear for his own life and safety. Plaintiff sincerely thought he was about to die when he saw Defendant's car careening across the median toward him. That testimony alone creates a genuine issue of material fact as to whether Plaintiff was in the zone of danger.

Finally, the trial court erred in determining that Plaintiff's sole source of distress was the death of a child. Plaintiff's extensive testimony as to his fear of dying in the collision dispenses with any notion that he was distressed *only* because he saw a child die. While the death of the child was extremely emotionally upsetting to Plaintiff, his Post-Traumatic Stress Disorder stemmed in large part from his *own* brush with death.

In sum, the trial court erred in three respects. First it applied the wrong law—*Asaro*, instead of *Bass*— to the facts at hand. Second, even if *Asaro* did apply, the court improperly determined that Plaintiff was not in the zone of danger, despite ample evidence to the contrary. Finally, the court disregarded Plaintiff's testimony about his fear for his own life and erroneously determined that Plaintiff's only source of distress

was the death of a child. For all these reasons, Plaintiffs respectfully request that this Court reverse the judgment of the trial court and remand for trial on damages only on Plaintiff Tommy Jarrett's claim for negligent infliction of emotional distress and Plaintiff Beverly Jarrett's corresponding claim for loss of consortium, with specific instructions indicating the applicability of the *Bass* case.

Respectfully Submitted,

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