

NO. SC88700

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IN THE  
SUPREME COURT OF MISSOURI

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TOMMY R. JARRETT and BEVERLY JARRETT,  
Plaintiffs-Appellants

vs.

MICHAEL B. JONES  
Defendant-Respondent.

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APPEAL FROM THE MISSOURI COURT OF APPEALS  
SOUTHERN DISTRICT, DIVISION ONE  
APPELLATE CASE NO. SD28259

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SUBSTITUTE REPLY BRIEF OF APPELLANT

\*APPELLANT REQUESTS ORAL ARGUMENT\*

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## **INTRODUCTION**

Respondent and the trial court have applied the wrong law in this case, refusing to recognize the clear standard for negligent infliction of emotional distress in direct victim cases. This, despite the fact that the Supreme Court of Missouri established this standard in the *Bass* case in 1983; the Supreme Court has never overruled this standard; and the Supreme Court continues to cite *Bass* as the proper standard in negligent infliction of emotional distress cases today.

Next, Appellants did not admit that the sole source of Tommy Jarrett's suffering was the death of a little girl. Appellants instead provided ample evidence to demonstrate that he suffered both because of Tommy Jarrett's fear for his own safety *and* the death of a young child. Most importantly, this alleged admission *is not relevant at all as to whether Appellants can recover under Missouri law and cannot properly form the basis for summary judgment in Defendant's favor.* The central questions in this case, and the questions that the trial court failed to answer, are (a) did the Respondent breach a duty owed to Appellant, and (b) did Tommy Jarrett suffer emotional distress as a proximate result of Defendant's negligent conduct? The answers are a resounding yes.

Respondent states repeatedly that Appellants admitted that the collision was not the cause of his emotional distress. This is simply not true. Appellants have maintained from the very beginning that the collision caused his distress. Even if the Court accepts the alleged admission that Tommy Jarrett did not fear for his own safety during the collision itself, the undisputed facts remain: Respondent negligently caused a head-on collision, the head-on collision killed a little girl, Tommy Jarrett witnessed it and he suffered greatly as a result. Thus, the collision was the proximate cause of Tommy Jarrett's emotional distress, and summary judgment for Respondent was inappropriate.

## **I. Reply to Respondent's Statement of Facts**

### **A. Reply to Motion to Strike and Dismiss**

The Court must overrule Respondent's motion to strike and dismiss because Appellants' brief complies fully with Missouri law and contains only those facts relevant to the appeal of the summary judgment decision. **Most importantly, the Appellate Court did not strike and dismiss Appellant's case and Respondent did not appeal that fact to this Court. It is only Appellant who has appealed the lower court rulings. Thus, Respondent cannot now reiterate his motion to strike and dismiss.**

Even if Appellants' brief were somehow deficient, the Supreme Court of Missouri and Missouri Courts of Appeal show a clear preference for reviewing appeals on their merits, regardless if there is some procedural deficiency. *See, e.g. Sibley v. Eagle Marine Industries, Inc.*, 607 S.W. 2d 431 (Mo. banc. 1980); *Snelling v. Michelin North America, Inc.*, 213 S.W. 3d 201 (Mo. App. 2007); *Shapiro Bros., Inc. v. Jones-Festus Props., LLC*, 205 S.W. 3d 270 (Mo. App. 2006). Further, though Respondent might not like Appellants' facts, the records supports these facts and there is no basis for a motion to strike.

Appellants' statement of the undisputed general substance of the underlying suit is very similar to Respondent's. In addition, Appellants provided the Court with a summary of the facts as established by the Accident Reconstruction Report, Tommy Jarrett's affidavit, and the medical records and testimony of Tommy Jarrett's physicians to assist the Court in understanding Appellants' arguments. The facts presented by Appellants in the "points relied on" subsections strike directly at

the heart of the trial court's decision and are crucial to this Court's decision as to whether to overturn the lower-court rulings.

Finally, Respondent cannot argue for dismissal of the appeal when he himself has included facts and argument in his statement of facts that have nothing to do with the underlying substance of the appeal. For example, Respondent raises the fact that Tommy Jarrett allegedly could have avoided this collision and that Defendant raised the affirmative defense of failure to mitigate in his answer. Respondent suggests to the Court that Appellants failed to mention these "Additional Material Facts Remaining in Dispute" because they are disfavorable to Appellants. To the contrary, the facts surrounding the collision, and Tommy Jarrett's inability to avoid the collision, support Appellants' position as to liability 100 percent. Appellants would in fact embrace the opportunity to explain to the Court how, if Tommy Jarrett had tried to avoid the collision, he would have killed or injured the driver of the vehicle next to him or himself. Appellants provided expert testimony demonstrating that Tommy Jarrett could not have reasonably avoided the collision unless he swerved into the right lane and ran traffic off the road, or unless he drove his semi-truck into a ditch, either one of which would have resulted in death or serious injury to himself or others. Appellants did not include a discussion on comparative fault because the trial court decision made no mention of comparative fault in its decision.

In the same vein, Appellants did not discuss facts surrounding affirmative defenses, or their responses to such affirmative defenses, because again, the trial court decision did not address Respondent's affirmative defenses.

Respondent's attempt to strike Appellants' brief must be overruled. Appellants merely present a rendering of the facts relevant to the issues of zone of danger and emotional distress. Appellants provided only those facts related to the circumstances of the traumatic event and Tommy Jarrett's emotional distress and subsequent treatment. Considering the trial court's opinion, which holds that Tommy Jarrett was not in the zone of danger and that he admitted he did not suffer the right "type" of emotional distress, Appellants' statement of facts is both appropriate and in compliance with Missouri rules.

#### **B. Reply to Respondent's Statement of Facts: The Collision at Issue**

So long as Respondent insists on focusing on the issue of liability, Respondent is obliged to provide the Court with *all* the facts related to liability. Respondent omits many of those facts from his brief. According to the investigation conducted by the Missouri State Highway Patrol, Respondent 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 Respondent's vehicle began to hydroplane, he over-steered, causing his vehicle to cross the median and hit Tommy Jarrett's vehicle head on. *Id.*, pp. 95-97. A highly-qualified accident reconstructionist



concluded that the accident would have been avoided had Respondent properly equipped his vehicle with adequate rear tires. *Id.*

Further, in his response to Respondent's Statement of Additional Material Facts Remaining in Dispute, Appellant not only denied that he could have done anything to avoid this collision, but also provided expert testimony to erase any doubt as to Respondent's 100 percent liability for this accident. Specifically, the Accident Reconstruction Report and the affidavit of accident reconstructionist Jack Holland demonstrate that Tommy Jarrett could not have avoided the accident; Tommy Jarrett was not contributorily negligent in any way; and Respondent's failure to maintain proper tread on his tires, maintain control of his car, and operate his vehicle at safe speeds were the sole cause of the collision. *Missouri State Highway Patrol Accident Reconstruction Report*, attached to Plaintiff's Motion for Summary Judgment, pp. 4, 7, 8, 10, 14-17, 20; *Affidavit of Jack P. Holland*, attached to Plaintiff's Response to Defendant's Additional Statement of Facts. Further, the Accident Reconstruction Report contains no indication that Tommy Jarrett could have avoided this accident in any way. There was nothing, in fact, that a reasonable person driving a tractor-trailer under the same circumstances could have done to avoid this collision. *Holland Aff.*, ¶4b.

Notwithstanding the fact that the trial court decision is devoid of any mention as to liability for the collision, the aforementioned facts demonstrate the absence of any genuine issue of material fact as to liability for the collision and

Plaintiffs'/Appellants' Motion for Summary Judgment on duty and breach of duty should have been sustained by the trial court.

## II. Reply to Argument

### A. Reply to Point Relied On I - Subsection B

The central question for this Court to decide is: In the state of Missouri, can a direct victim of negligence who suffers medically significant emotional distress as a proximate result of such negligence recover damages for negligent infliction of emotional distress? *Bass v. Nooney Co.*, 646 S.W. 2d 765 (Mo. banc. 1983). If the answer is in the affirmative, then the appellate court and trial court's decisions must be reversed. Respondent, however, continues to insist that the only standard for a claim of negligent infliction of emotional distress in Missouri is based on *Asaro v. Cardinal Glennon Memorial Hospital* (1990), 799 S. W. 2d 595. Appellants dispensed with this notion at pages 19 to 26 of Appellants' brief, where the Court is provided with current citations to the Missouri case law establishing two different standards for recovery, one in bystander cases and one in direct victim cases.

In addition, Appellants must point out that, in the years since *Asaro*, which allegedly "overruled" *Bass*, **the Supreme Court of Missouri has repeatedly cited *Bass* as the appropriate standard in negligent infliction of emotional distress cases.** *State ex rel. Laurie Dean v. The Honorable Jon A. Cunningham*,

182 S.W. 3d 561 (Mo. banc. 2006) (holding, per *Bass*, that, "[t]o establish such a claim [for negligent infliction of emotional distress], the plaintiff must show a medically diagnosed condition that resulted from the negligent act); *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W. 3d 809, 814 (Mo. banc. 2003); *Gibson, et. al. v. Father Michael Brewer*, 952 S.W. 2d 239, 249 (Mo. banc. 1997)(citing *Bass* for the proposition that, "To prevail under negligent infliction of emotional distress, a plaintiff must show: (1) the defendant should have realized that its conduct involved an unreasonable risk of causing the distress, and (2) the emotional distress or mental injury must be diagnosable and sufficiently severe to be medically significant); *K.G. v. R.T.R.*, 918 S.W. 2d 795 (Mo. banc. 1996) (citing *Bass* for the proposition that, "To plead an action for negligent infliction of emotional harm, a plaintiff must allege the duty exists, that the defendant should have realized that his conduct involved an unreasonable risk of causing emotional distress, and the distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant.") In the face of this overwhelming authority for the proposition that *Bass* is still good law, Respondent continues to argue against the application of *Bass*.

As the dissent in the Appellate Court decision makes clear, Appellants' application of the *Bass* test based on Tommy Jarrett's status as a "direct victim" mirrors other jurisdictions' treatment of similar factual scenarios. *Bass* stands for the clear proposition that under Missouri law, a victim who is placed negligently in the zone of danger and who suffers resulting mental distress can recover as a

direct victim. *Bass* does not limit the *type* of emotional distress, it holds only that the emotional distress must be related to the collision. Regardless whether the distress results from one's own injuries or the injuries of another, recovery is possible. Other courts see it the same way. In *Long v. PKS, Inc.*, for instance, the court classified plaintiff as a direct victim because she was the driver of the car that was involved in the collision, just as Tommy Jarrett was here. 12 Cal. App. 4th 1293 (1993). The public policy concerns attendant with bystander claims did not apply in *Long*; there can be no floodgates of litigation where the plaintiff is an actual direct victim of defendant's negligence. "With a direct victim...there is little fear that [the] claim is fraudulent or that defendants will be saddled with liability out of proportion to the degree of fault." *Id.*, at 1298. Thus, the requirement that bystander-plaintiffs be family members does not apply in direct victim cases.<sup>1</sup> The fact that the plaintiff is actually directly involved in the collision itself is guarantee enough that the plaintiff's claims for emotional distress are genuine. The only other limiting factor, then, per *Bass* and *Long*, is that the plaintiff suffered reasonably foreseeable emotional distress. "We are satisfied that once a plaintiff has been negligently placed within the area of physical risk and has actually sustained a physical impact, his cause of action for emotional distress is not limited to the psychological sequelae of fear for himself, but rather comprehends

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<sup>1</sup> Likewise, even if *Asaro* applies, *Asaro* does not impose a familial relationship requirement on plaintiffs, and in fact does not discuss this factor at all.

all the psychological sequelae which as a matter of reasonable foreseeability result from the episode as a whole." *Long*, 12 Cal. App. 4th, at 1301, quoting *Eyrich for Eyrich v. Dam*, 193 N.J. Super. 244 (1984). Respondent's suggestion that a direct victim's emotional distress must be based on fear for his own safety is simply not supported by Missouri case law or the law of any other jurisdiction. Rather, as the dissent in the Appellate Court below makes clear, other jurisdictions have adopted the very same reasoning Appellant sets forth in his interpretation of the *Bass* case. See, also, *Kately v. Wilkinson*, 148 Cal. App. 3d 576, 588 (1983) (holding that a direct-victim boat driver who struck and killed water-skiier he was pulling when boat malfunctioned presented viable claims for emotional distress, despite no familial relationship to the victim).

Like California, Indiana has adopted a direct victim standard similar to Missouri's standard in *Bass*. Even in Indiana, a state that has retained the much stricter impact rule, a plaintiff can still recover for emotional distress damages caused by witnessing harm to a third party. *Pieters v. B-Right Trucking, Inc.*, 669 F. Supp. 1463 (1987). So long as the plaintiff suffered some physical injuries (to satisfy Indiana's impact rule) and was directly involved in the collision at issue, the plaintiff can recover if she has suffered emotional distress, regardless whether that emotional distress arose from her own injuries or witnessing another's injuries. *Id.* As in *Long*, the *Pieters* court notes that the floodgates of litigation are secure in such cases because only direct victims injured in the collision itself can bring claims. *Id.* at 1469. These limitations on the tort eliminate the risk courts will be

flooded with fraudulent claims for emotional distress. The facts in *Helsel v. Hoosier Ins. Co.* are even more similar to the facts at hand. 827 N.E. 2d 155 (2005). Plaintiff saw what he believed to be the dead body of a passenger in a car that hit him head-on. Plaintiff only assumed the victim was dead and did not come as close to the victim as Tommy did here, yet he was still permitted to recover because he was a direct victim and he suffered emotional distress causally connected to the collision.

As the dissent notes correctly, Appellants' interpretation of the *Bass* case is strictly in line with other jurisdictions that have applied the direct victim approach. The only two limiting factors these courts apply, and the only factors required by *Bass*, are that the plaintiff be a direct victim and that the plaintiff suffer emotional distress as a direct result of defendants' negligence. Tommy Jarrett certainly meets those requirements. The majority in the Appellate decision below states that it has never before faced the precise issue now before the Court, that being whether a plaintiff can recover after witnessing harm to a third-party. The frank answer is that Missouri has faced, and answered, this question in *Bass*, which applies to direct victims. The Arizona case of *Hislop v. Salt River Agricultural Improvement and Power District*, relied on by the majority, does not support the conclusion that Tommy Jarrett cannot recover because he was but a mere bystander. 5 P. 3d 267 (2000). In fact, *Hislop* holds that plaintiffs *can* recover for emotional harm caused by witnessing injury to third persons. The *Hislop* court digresses into a discussion about how closely related the plaintiff must be to the victim, but that point is not

relevant here because, as the dissent below points out, Missouri has never held that a plaintiff must have a familial relationship with the victim.

Respondent first refuses to recognize the *Bass* standard, arguing that only the *Asaro* zone of danger standard applies. Conceding hypothetically that the *Bass* test may apply, Respondent next proceeds to apply the *Bass* test improperly. Respondent's brief reveals the fundamental fallacy in his arguments as to the *Bass* test and in the trial court's ruling on summary judgment. This fallacy suggests that the only type of distress that can be proximately related to a traumatic event such as a head-on collision is distress caused directly by the impact itself. This is simply not true. Any distress *proximately related* to the traumatic event constitutes compensable emotional distress and can form the basis for a claim of negligent infliction of emotional distress. The *Bass* standard simply does not include the condition that one has to fear for one's own life. *Bass*, 646 S. W. 2d at 772-773. *Bass* does not limit direct victim plaintiffs to certain "types" of distress. Whether the distress results from fear for one's own safety or some other proximate result of the event, such as the death of a child, such mental distress is compensable because it is proximately caused by the circumstances surrounding the collision.

In this instance, the distress stemmed from Tommy Jarrett's fear for his own life and safety and his distress at having witnessed the death of a small child, things that were all part of the same event—the collision negligently caused by the Respondent. Even if, as Respondent suggests, Tommy Jarrett suffered only because he witnessed a child die, he can still recover under Missouri law. But for

Respondent crossing the median and causing a head-on collision, the little girl would not have died, Tommy Jarrett would never have witnessed the death, and he would not have been emotionally scarred. The collision directly caused or directly contributed to cause the death of the little girl, and the death of the little girl was the direct and proximate cause of Tommy Jarrett's emotional distress. The scope of Tommy Jarrett's distress then, is exactly the type of distress contemplated by the *Bass* decision, i.e., emotional distress proximately caused by the traumatic event.

Again, Respondent suggests erroneously that the only distress that can be "caused by a traumatic event" is distress related to the fear of being involved in a traumatic event. Respondent is wrong. All fear proximately caused by the traumatic event is compensable. The accident caused the death of little girl, and the death of the little girl caused emotional distress to Tommy Jarrett, therefore, the emotional distress suffered by Tommy Jarrett was "caused by the traumatic event." Respondent's narrow interpretation of causation in this instance simply does not comport with Missouri law. Missouri law does not limit the "type" of emotional distress to distress caused by involvement in the accident itself, rather all distress proximately related to the accident is compensable. *Bass*, 646 S. W. 2d at 772-773.

For all these reasons, the alleged admission in paragraph seven does not dispose of Appellants' claims in any way. In the first instance, an alleged admission that Tommy Jarrett suffered only because he saw the little girl die does not in any way mean that there are no genuine issues of material fact as to whether



he suffered distress proximately caused by the accident. If anything, because the death of the little girl *is part of the collision* at issue, the admission that one suffered as a result of watching the child die *establishes* the type of emotional distress contemplated by *Bass*. Respondent has improperly characterized the actual impact and the viewing of the deceased child as two separate events. The impact of the truck and car and the horrific aftermath are not two separate events, rather they are one, continuous event. **Thus, it would be impossible for Appellants to admit that Tommy Jarrett suffered only from seeing the little girl, and not from the collision itself, because *the death of the little girl is part of the collision itself*.** Respondent's statement in paragraph seven that Tommy Jarrett suffered from seeing the little girl, not from the collision itself, therefore presents an anomaly to which there is no possible response. The trial court ruled improperly when it ruled that the alleged admission somehow dispensed with the issue of whether Appellant suffered the "right type" of emotional distress. The "right type" of emotional distress is emotional distress proximately caused by the traumatic, a type of emotional distress that certainly exists here.

Respondent next misinterprets the definition of "direct victim." Without question Appellants' have established that the alleged admission in paragraph seven does not dispense with issues of causation, and that summary judgment on the basis of the alleged admission was not appropriate. In the same way that the alleged admission does not dispense with causation, it does not dispense with the question of whether Tommy Jarrett was a direct victim. Again, using a narrow

interpretation not supported by case law, Respondent attempts to argue that the only way one can be a direct victim is to fear for one's own safety. Thus, in Respondent's misguided logic, admitting that you did not suffer significant harm<sup>2</sup> as a result of the collision itself equals admitting that you are not a direct victim. This is a *non sequitor*.

Again, the *Bass* test does not require fear for one's own safety; it requires only medically significant emotional distress proximately caused by the negligence of another. *Bass*, 646 S. W. 2d at 772-773. Even if this Court finds that Appellants admitted he did not suffer fear for his own safety, Appellants certainly have not admitted that Tommy Jarrett was not a direct victim. The definition for whether one is a direct victim has nothing to do with whether one suffers fear for his own safety. Once again, Respondent has conflated the *Asaro* zone of danger test with the *Bass* test, a completely different standard for direct victims. A direct victim is simply that: someone who was *directly involved in the traumatic event*. The notion that one cannot be a direct victim unless one feared for his own safety is simply a misinterpretation of what it means to be a direct victim, and Respondent is merely trying to use the alleged admission to support an inappropriate ruling on summary judgment.

In sum, the alleged admission at paragraph seven does not equate to an admission that Tommy Jarrett was not a direct victim. Tommy Jarrett was a direct victim. He was the driver of a vehicle hit head-on by Respondent. He could not

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<sup>2</sup> Tommy Jarrett did suffer injuries to his knee as a result of the collision.

have been more directly involved in this collision. The alleged admission has no bearing on the applicability and analysis of the *Bass* test, and it does not in any way support a ruling on summary judgment in Respondent's favor.

Assuming *in arguendo* that Missouri has only one standard for recovery in intentional infliction of emotional distress cases, Tommy Jarrett still meets the standard and can recover as a bystander, regardless of the alleged admission. Respondent unreasonably endangered Tommy Jarrett's safety, thereby causing him to suffer emotional distress, and Tommy Jarrett was threatened with bodily harm. *Asaro*, 799 S. W. 2d 595, 599-600, citing *Bovsun v Sanperi*, (1984) 61 N.Y. 2d 219; *Wyatt v. Hinton Enterprises, Inc.* (1995) 899 S. W. 2d 547. If a bystander is threatened with bodily harm, and defendant's negligent conduct endangers his safety, that bystander is in the "zone of danger" and can recover. *Id.*

No one could have been closer to the epicenter of the danger in this case than Tommy Jarrett. He was, after all, hit head-on by Respondent's vehicle after Respondent lost control and cross the median. Moreover, even if the alleged admission is true, and Tommy Jarrett did not fear for his own life and safety (a point that is vehemently disputed), Tommy Jarrett was still threatened with bodily harm, he was still in the zone of danger, and he can still recover under *Asaro*, regardless of the alleged admission.

With these facts, 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. As

Respondent explains for the Court, one's subjective fear for his own safety is but one indicator of presence in the zone of danger. *Asaro*, 799 S.W. 2d 595, 600, citing *Bovsun v. Sanperi* (1984) 61 N.Y. 2d 219. Respondent unfortunately conflated the concepts of “fear for one's own safety” and “zone of danger” and in the process may have confused this Court and misstated the law that the only way to be in the zone of danger is to fear for one's own safety. Given *Asaro's* reliance on *Bovsun*, so long as one is threatened with bodily harm, one is in the zone of danger and can recover. Thus, whether *Bass* or *Asaro* applies, Appellants' alleged admission as to Tommy Jarrett's fear for his own safety is not dispositive of the issue of whether he can recover under Missouri law for negligent infliction of emotional distress.

#### **B. Reply to Point Relied on II - Subsection A**

There are *two* standards for recovery for negligent infliction of emotional distress. Those different standards are reflected clearly in the vastly different scenarios presented by *Asaro*, where the victim is a bystander, and *Bass*, where the victim is a direct victim. Respondent presents no case law whatsoever to support the implication that there is only one standard. Quite to the opposite, the case law is clear: the holding in *Asaro* is designed to fill the gap left by the *Bass* decision. The *Asaro* court itself acknowledges that it addresses an entirely different situation than in *Bass*, where the victim was not a bystander, but a direct participant in the traumatic event. *Asaro*, 799 S. W. 2d, 595, 598-599. The Supreme Court of Missouri repeatedly acknowledges the *Bass* standard as good law in the years

following the *Asaro* decision. *State ex rel. Laurie Dean*, 182 S.W. 3d 561; *Kenney*, 100 S.W. 3d 809, 814; *Gibson*, (1997), 952 S.W. 2d 239, 249; *K.G. v. R.T.R.* (1996), 918 S.W. 2d 795.

Respondent's reliance on *Conrail v. Gottshall*, 512 U.S. 532 (1994), is entirely misplaced, as *Conrail*, like *Asaro*, is a bystander case. *Conrail* does nothing more than cite *Asaro* as the applicable Missouri law in *bystander* cases. Respondent's citations to *Wyatt* and *Bosch* are equally ineffective and inapplicable, both *Wyatt* and *Bosch* being bystander cases. *Bosch v. St. Louis Healthcare Network* (2001) 41 S.W. 3d 462; *Wyatt*, 899 S. W. 2d 547

Quite simply, no Missouri court has ever overturned or even questioned *Bass* and no Missouri court has ever indicated that the standard enunciated in *Bass* is not good state law. Appellants therefore recommend that this Court affirm that two distinct standards exist in this state for these two types of claims.

Having attempted to eradicate *Bass*, Respondent then proffers the "slippery slope" argument. According to Respondent, if there is a duty to protect people from viewing deceased persons, then everyone, including emergency personnel and witnesses would have a claim for emotional distress. Respondent misses the mark on the issue of duty entirely. In the first instance, Appellants wholeheartedly agree that there is no duty to shield witnesses from scenes of death and destruction. There is, according to Missouri law, a duty owed to direct victims to avoid *causing* such scenes of death and destruction and thereby inflicting emotional distress. There is no "broad category" of potential litigants here. That

category is limited by the *Bass* test itself, which provides that the duty is owed to direct victims, not emergency personnel or witnesses. The case law itself dispenses with any notion that allowing direct victims of negligence to recover would result in a slippery slope of litigation. That is, in fact, why the *Bass* test is the test for "direct victims." That very classification ensures that litigation will be limited to those instances where the victim is a direct participant in the traumatic event, not a post incident observer.

As a "direct victim" Tommy Jarrett is not required to prove that he was in the zone of danger; he is required to prove only that he suffered medically significant harm as a proximate result of Defendant's negligent conduct. Finally, even if Appellants are bound by *Asaro*, he was still in the zone of danger because he was placed in imminent risk of bodily harm. The fact that he may or may not have feared for his life does nothing to diminish the fact that he was at serious risk of bodily injury, and was thereby in the zone of danger. Thus, the alleged admission that he did not fear for his own life and safety cannot possibly form the basis for summary judgment against Appellants.

### **C. Reply to Point Relied on III- Subsection A**

Tommy Jarrett did not admit that he was a mere bystander and he did not admit that his emotional distress did not stem from the collision. In Subsection A of the Argument related to Respondent's Point III, Respondent again misinterprets the definition of "direct victim." A direct victim is one who is *involuntarily* involved in the traumatic event itself, not someone who volunteers to become

involved, such as an emergency respondent, or simply watches from a distance. The *Bass* test is much less complicated than Respondent's description. If one is directly involved in a traumatic event, such as a vehicle collision, and emotional harm proximately results, a claim for negligent infliction of emotional distress arises. *Bass*, 646 S. W. 2d 765. Respondent suggests that Tommy Jarrett was a direct victim during the collision itself, but that he stopped being a direct victim the minute the collision was over, therefore he was just a bystander when he saw the body of the deceased child. To the contrary, Tommy Jarrett was a direct victim of Respondent's negligence, period. He did not stop being a victim at some magical point. Most important to remember is that the collision and the aftermath constitute one, continuous event, not two separate events. Tommy Jarrett's direct involvement in this single event comprised of a head-on car collision and the horrific aftermath is undisputed. Thus, he need only demonstrate, per *Bass*, that he thereafter suffered medically significant harm proximately caused by Respondent's negligent acts. Appellants presented a mountain of evidence to the trial court to meet these elements of the *Bass* test. Therefore, Appellants' motion for summary judgment should have been sustained.

#### **D. Reply to Point Relied on III- Subsection B**

The trial court framed the issue of duty improperly in this case, and the trial court's findings are not an appropriate basis for summary judgment in Respondent's favor. Respondent's, and the trial court's, framing of the issue of duty is off point. The duty in this case, is, did the Respondent have a duty to act

with reasonable care to avoid a head-on collision and the emotional distress such a collision might cause? The answer, unequivocally, is yes. Respondent had a duty to operate his motor vehicle with reasonable care to avoid a head-on collision. According to the Accident Reconstruction Report, Respondent breached that duty by driving too fast on wet roads on near-bald tires, and by losing control of his vehicle, crossing the median and slamming into Tommy Jarrett's vehicle. Respondent fails to recognize the duty in this case. The duty was not to shield the victims of the accident from seeing the little girl, the duty, rather, was to act reasonably to avoid causing the head-on collision at all. Appellants' in fact would not argue with Respondent's assumption, and the trial court's decision, that there was no duty to shield Tommy Jarrett from seeing the deceased little girl. In fact, the duty started much earlier along the continuous chain of events. Again, Respondent had a duty to avoid causing serious death and injury to others in the first place.

The trial court likewise failed to recognize the proper duty in this case when it granted summary judgment based on the fact that "there was no duty to safeguard plaintiff from viewing the body." Of course there wasn't, but that fact alone does not make summary judgment appropriate for Respondent, especially in light of the existence of a clear duty to act reasonably to avoid head-on collisions. The absence of a specific duty to safeguard Tommy Jarrett from viewing the body does not in any way dispense with this case. Appellants' submit that there is no genuine issue of material fact as to duty because Respondent admitted in his



answer to the amended petition that he had a duty to "exercise the highest degree of care" in operating his motor vehicle. *Answer to Amended Petition for Damages*, First Cause of Action, ¶2.

Respondent has mischaracterized the duty in this case, and the court improperly granted summary judgment based on the irrelevant fact that there was no duty to protect Tommy Jarrett from seeing the deceased child. In fact, there was a duty to avoid causing the child's death in the first place, and to avoid causing a traumatic event that could give rise to emotional distress. When the issue of duty is properly framed, it becomes clear that Appellants have easily met the elements of general negligence to prevail on a claim for negligent infliction of emotional distress as a direct victim. Respondent had a duty to operate his vehicle with reasonable care, he breached that duty by driving too fast on bald tires in the rain, his breach proximately caused emotional distress to Tommy Jarrett, and damages resulted. The only question is the amount of damages. For these reasons, summary judgment for Respondent was not appropriate, especially because summary judgment was rendered based on Respondent's mischaracterization of the duty in this case.

Having first mischaracterized the issue of duty, Respondent then contends that Appellants cannot meet the element of proximate cause. Again, Tommy Jarrett's distress was the proximate result of Respondent's failure to control his vehicle. The clear, continuous and proximate link from the head-on collision to the

death of the child to Tommy Jarrett's distress renders it impossible to find that his distress was not caused by the collision.

#### **E. Reply to Point Replied on IV - Subsection A**

Respondent states repeatedly that Tommy Jarrett admitted that the collision was not the cause of his emotional distress. Appellants never made this admission and indeed could not possibly have made this admission. Tommy Jarrett's entire claim, in fact, is based on his assertion that the collision caused his emotional distress. Even if this Court accepts the alleged admission that Tommy Jarrett did not fear for his own safety, the facts remain: Respondent caused a head-on collision, the head-on collision killed a little girl, Tommy Jarrett witnessed it and he suffered greatly as a result. The death of the little girl *is* part of the collision, thus the collision is the proximate cause of the emotional distress. Appellants have never admitted otherwise.

#### **F. Reply to Point Relied on V - Subsection A**

So long as one is threatened with bodily harm, one is in the zone of danger and can recover. *Asaro*, 799 S.W. 2d 595, 600, citing *Bovsun v. Sanperi* (1984) 61 N.Y. 2d 219 (holding that danger of bodily harm places one in the zone of danger). Respondent's assertion that one can be in the zone of danger *only* by fearing for his own life is incorrect. Further, Respondent's continued assertion that Tommy Jarrett admitted he suffered no harm from the collision is incorrect, as explained above.

### **III. Reply to Respondent's Additional Argument**

### **A. Reply to Subsection A**

The issue of liability for the accident itself is not properly before this Court. Even if this issue were properly before this Court, Appellants have established the lack of genuine issues of material facts as to liability. (See above citations to Accident Reconstruction Report and affidavit of reconstructionist Jack Holland). Respondent's inclusion of a section addressing the issue of liability for the accident is inappropriate considering the fact that the trial court never addressed this issue in its ruling. Respondent's assertion that "the trial court properly determined that there remained a genuine issue of material fact as to the causation of the accident" is curious indeed because the decision makes no mention whatsoever of this issue. Respondent simply cannot surmise that the court made such a decision. The actual decision is devoid of any opinion as to who did or did not cause the accident, and Respondent simply cannot guess that genuine issues of material fact remain as to this issue because the trial court did not address this point at all. "Inherent in the granting of the Motion for Summary Judgment filed by Respondent was denial of Plaintiff's Summary Judgment," according to Respondent. That may be true, but Respondent is not free to fill in the blanks on the *basis* for the denial of Plaintiff's summary judgment. No one in this matter has any idea why Appellants' Summary Judgment Motion was denied because the trial court did not tell us why the motion was denied.

### **B. Reply to Subsection B.**

Respondent contends that even if there is no genuine issue of material fact as to causation, summary judgment is still not appropriate, because Appellants did not address the affirmative defense of failure to mitigate. Appellants moved for summary judgment on the issue of liability, i.e., duty and breach. Though Appellants submitted abundant evidence of causation, which remains undisputed, causation still could be and the extent of resulting damages actually is still at issue. Mitigation of damages is an issue that would be addressed by the jury. Nevertheless, how does one mitigate the damages associated with emotional distress? One goes to the doctor or to a mental health specialist counselor. One engages in therapy and tries to get better by moving forward and gaining closure. Appellants offered a detailed account in his motion of Tommy Jarrett's treatments with physicians and mental health counselors and his attempts to gain closure and put this nightmare behind him. Appellants' entire Motion, in fact, is a response to the affirmative defense of failure to mitigate.

For all these reasons, Respondent simply cannot sincerely argue that Tommy Jarrett did not respond to the affirmative defense of failure to mitigate. In the first instance, Respondent brings the argument in an inappropriate forum because it is not addressed in the trial court decision at all. In the second instance, even if such an argument were properly before this Court, as Appellants have explained, their entire Motion for Summary Judgment addresses and overcomes the affirmative defense of failure to mitigate by providing a detailed account of all of Tommy Jarrett's efforts to mitigate. His detailed account of his treatments for

post-traumatic stress disorder establish both that he did suffer damages as a result of this collision and that he made every attempt to mitigate those damages. No genuine issues of material fact remain on this point.

## **VI. Conclusion**

Appellants did not admit at any time that Tommy Jarrett's emotional distress was not caused by the collision. Under Respondent's misinterpretation of the *Bass* rule, the only distress that could be "caused by the accident" is fear of the accident itself. This is not true. Emotional distress can be any mental distress proximately related to the accident. In this instance, the death of a child in the accident certainly is proximately related to the accident and certainly forms the basis for a proper emotional distress claim under *Bass*. For all these reasons, Respondent's focus on the alleged admission is misplaced and the trial court's granting of summary judgment on this basis is likewise inappropriate. The trial court simply cannot grant summary judgment based on the fact that Appellants *may* have admitted that he did not suffer harm from the collision itself (notwithstanding the fact that the death of the little girl *is* part of the collision), because all harm that proximately results from the collision—not just fear for one's own safety—is compensable. The fact that Tommy Jarrett may have admitted he did not fear for his own safety, which is denied in his affidavit, simply does not equate to a finding that he did not suffer emotional distress as a result of the collision.

Likewise, the definition of "direct victim" has nothing to do with whether Appellants suffered for fear for his own safety. Thus, Appellants' alleged admission that Tommy Jarrett did not suffer fear for his own safety in no way means that he was not a direct victim. He is the most direct victim in this instance because his vehicle was hit head-on. The *Bass* test applies, and Appellants need only show that Tommy Jarrett suffered medically significant harm as a result of Respondent's negligence.

Even if this Court accepts Respondent's erroneous assertion that *Asaro* applies, Appellants have still presented evidence to show that he was in imminent danger of bodily harm, and was thus in the zone of danger. To be clear, Appellants did not admit at any time that Tommy Jarrett was merely a bystander in this case. They have always maintained that he was a direct victim. Even if he is classified as a bystander, Tommy Jarrett was put at imminent peril of bodily harm and he suffered emotional distress as a result of Respondent's negligent acts. Tommy Jarrett can therefore recover no matter which test this Court applies. Respondent's focus on the alleged admission is misplaced. Tommy Jarrett suffered emotional distress as a proximate result of the collision, and he was either a direct victim or a bystander in the zone of danger.

Respondent cannot prevail on his slippery slope argument. *Bass* and *Asaro* ensure that the class of plaintiffs is limited to those who are either directly involved in the traumatic event or who suffer imminent danger of bodily harm, both of which apply to Appellants here. Appellants do not argue for a wider class

of plaintiffs, they simply urge this Court to properly apply the limiting tests that already exist in *Asaro* and *Bass*.

Appellants also meet all the elements of general negligence. The duty here arose when Respondent chose to operate his vehicle on a roadway. He breached that duty by driving too fast on wet roads with bald tires. Appellants certainly do not dispute the fact that there was no duty to shield Tommy Jarrett's eyes from the little girl's body. There was a duty to act reasonably to prevent the death, and the resulting emotional trauma, in the first place. The trial court improperly characterized the duty in this case.

In addition, Appellants' brief is procedurally sound and should not be stricken or dismissed. Finally, the issue of whether Appellants properly addressed the affirmative defense of mitigation of damages is not properly before this Court because the trial court gives no indication of its opinion on this issue and it is an issue left for a jury to decide. Nonetheless, should this Court, or the trial court on remand, determine that Appellants have established all the elements of their claims, then Appellants are indeed entitled to summary judgment because they have clearly established duty, breach and causation; the defense of failure to mitigate will be decided by a jury.

In sum, Respondent's brief boils down to one point: the alleged admission renders summary judgment appropriate. Respondent is wrong for two reasons: 1) the alleged admission does not dispose of the issue of whether Respondent's conduct proximately caused emotional distress to Tommy Jarrett; and 2) the

alleged admission does not in any way constitute an admission by Tommy Jarrett that he was not a direct victim. Thus, the most crucial issue of fact in this case—whether Tommy Jarrett suffered compensable emotional distress as a proximate result of Respondent's negligence—remains. The trial court improperly granted Respondent's summary judgment on the basis of the alleged admission. For all these reasons, this Court must reverse and remand for trial.

Respectfully Submitted,



Dated: November 14, 2007

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing pleading, discovery or other document has been served upon:

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### **CERTIFICATE OF WORD COUNT**

The undersigned does hereby certify that Appellantss' Substitute Reply Brief, filed with the court this 14th day of November, 2007, complies with the limitations set forth in Rule 84.06(b) and that said brief contains 7, 699 words.

Dated: November 14, 2007

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