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STANDARD FRUIT & VEGETABLE CO. V. JOHNSON

YATES: The issue in this case is whether a witness to a vehicle accident can recover in the tort of intentional infliction of emotional distress. The majority of the CA answered that question, yes. And that decision now is the only decision anywhere in the US, in any court, that's held that the tort of intentional infliction of emotional distress can arise with respect to reckless driving in a car accident.

We think the majority got it wrong in the CA. Their error was that they allowed the defendant's reckless driving to act as a proxy for the reckless mental state component for the tort of intentional infliction of emotional distress.

GONZALEZ: You also had a supplemental filing for negligence?

YATES: Yes, that was a negligent infliction of injury claim in *Hill v. Kimble* and *Dorsett* cases. That claim is not before this court. The CA refused to reverse with respect to that claim, because the CA held that...

GONZALEZ: They refused to write on it.

YATES: Well they didn't just refuse to write on it. They did write on it and they said: The plaintiff had not preserved it in the appellate court. And, therefore, they refused to reverse with respect to it. And so, it's a ruling. It's not just a refusal to address the issue. It's a ruling that they had waived it. And so our view is, they needed to file a petition for review in this court, because they were seeking a more favorable judgment than that they got in the CA. They were seeking a judgment reversing as to their negligent infliction of physical injury claim. They didn't file a petition for review. The claim's not here. And in any event, we think the CA was clearly correct to say the claim was waived in the CA.

So the only claim that we're here on is intentional infliction of emotional distress.

Now, CJ Phillips said in his concurring opinion in the *Twyman* case: That to get there for the reckless component of the tort of intentional infliction, you have to have actual awareness on the part of the defendant of a high probability of what risk? A risk that you're going to sustain emotional distress, not some other risk, not awareness of a risk that the plaintiff might suffer physical injury, but a risk that the plaintiff will suffer severe emotional distress.

In a witness case, with respect to a witness to an accident, this court has held in *Freeman* by adopting the *Dillon* standard for bystander recovery: That it isn't even foreseeable to

the driver that a witness is going to suffer emotional distress unless the witness is a family member. It's not even foreseeable. Well if it's not foreseeable, the lower mental standard can't possibly be that the driver has actual awareness, which is the higher mental state that a mere witness is going to sustain emotional distress damages.

So we believe there is no way given the *Freeman* rule that the defendant can get there with respect to the reckless mental state for intentional infliction. And what's really going on is that the intentional infliction tort is being distorted by the plaintiff's view in order to make an end-run around the bystander limitations.

But there is a broader reason why we're right about this, and it would apply whether the plaintiff wants to style himself as a victim or a witness of the accident. And that is, that reckless driving is "directed at" the general driving public. In our poster booklet that we put on the bench, Tab 1, you will see that courts across the country have said: You don't get there for an intentional infliction of emotional distress tort in instances where the defendant's conduct is "directed at" some broad nebulous group, like the general driving public, or the reading public, or the general public. And the California SC in the *Christianson* case articulated the standard this way: The conduct has got to be "directed at" the plaintiff or plaintiffs, or particularized group of plaintiffs, or it's got to have occurred in the plaintiff's presence of which the defendant is aware. And that's another way to require that mental state that CJ Phillips talked about in *Twyman*. That is, to require that the plaintiff actually prove that the defendant had actual awareness of a high probability that he was going to inflict emotional distress on the plaintiff, that the defendant have that awareness.

Justice Taft in his CA dissent spoke to this very issue. And remember, the majority said: Well where does this "directed at" standard come from? And Justice Taft answered that. He said: It's from the structure of §46, of the Restatement. Section 46, is the statement that this court adopted in *Twyman*, §46 paragraph 1. And remember §46, paragraph 2 says: If the conduct is "directed at" a third-party, then the plaintiff can recover if a, b, or c. And so, Justice Taft said: Obviously, paragraph 1 must imply that the conduct has to be directed in some fashion at the plaintiff. Just like for paragraph 2, it has to be "directed at" a third-party. Paragraph 1, has to be "directed at" the plaintiffs. And it's not just the *Christianson* court that's written in terms of this "directed at" standard. There are a number of courts in other jurisdictions that we've cited to in our brief that have framed the mental state component for this tort in terms of the "directed at" standard.

Now think about a reckless car crash. What is the risk of harm that the driver has when he gets in the car and he's too sleepy, and he's driving 15 miles over the speed limit? What's the risk of harm...

GONZALEZ: This is a fully-loaded 18-wheeler. It's just not any car.

YATES: Actually it wasn't fully loaded. The CA has that wrong, and we can give you the record cites on that. It was actually empty. But it was still an 18-wheeler. You're right. But

what's the risk of harm that that driver has actual awareness of? That he's going to hurt somebody. Now there may be emotional distress damages that are going to be appended to that that's going to be an element of damage. But the risk of harm is, he's going to hurt somebody. And you know, the Restatement speaks to this too. It's Restatement Section 47, Tab 2 of our booklet. In 47, the restatement makes clear. It says: Look, the rule for 46 is, if you intend to inflict emotional distress, you have a tort, a standalone tort for emotional distress. If what you really have is actual awareness of, if what you're reckless with respect to is bodily injury and emotional distress is just an element of the damage, that's not what 46 is there for. It's not suppose to apply to that situation. Because, after all, the tort of intentional infliction is to fill-in a gap in the law where there is outrageous conduct and the other requirements are satisfied, where you wouldn't otherwise have a recovery for emotional distress. It's not supposed to proliferate causes of action where you can already get to emotional distress.

And if you allow the reckless driving, the gross negligence with respect to the driving to be a proxy for the reckless mental state for the tort of intentional infliction of emotional distress here's where you end up: Every time there's a gross negligence tort where mental anguish is an element of damage, you will append a tort for intentional infliction of emotional distress.

GONZALEZ: Why is that so wrong?

YATES: It's wrong for the same reason that you wrote about in *Natividad(?)* on the bad faith tort. Remember in that case, you wrote: Just because it's bad faith, just because it's tortious doesn't mean we always want to append an intentional infliction claim on that. Now, I understand you were writing about the outrageous prong and, in fact, that's all this court has already written about, is the outrageous prong. You've never really written on this reckless prong. And that's why I think this case is so significant to get the reckless prong right so we don't have proliferation of all intentional infliction torts being added to all kinds of other torts like car crashes.

ENOCH: How do you keep this directed at language from really making reckless synonymous with intentional? It seems to me reckless is something different than actual intentional.

YATES: It is. You're right. Intentional is: I intend to inflict emotional distress or I'm substantially certain it's going to occur. Whereas, reckless is: I know, I have actual awareness of a high probability that it will incur. And the way the California court deals with your question in *Christianson*, is: We're not going to say when it's just 'directed at.' We're also going to say you get there on the reckless prong if it's done in the plaintiff's presence, and I'm aware the plaintiff is there. And that could work with respect to a group. In other words, the justices here are a group. If I came in here and stood here and did something outrageous in front of you, I'm aware of your presence, I'm doing it in your presence, I know you're here, and if I do something of which I should have actual awareness it's going to cause you extreme emotional distress, and it's outrageous, even though you're a group, I've done it in your presence, I'm aware of your presence, it's reckless if I have this awareness factor.

Think of the reckless driving. When the defendant here gets in the 18-wheeler and he is sleepy, and let's get this straight - my driver is not a drunk. My driver was off on Saturday and Sunday, and he got in the car on Monday morning and apparently was too sleepy. He hadn't even been driving all weekend or anything like that.

GONZALEZ: The CA said he was fatigued?

YATES: He was fatigued. I thought about that the other morning when I was driving to work. I'd been up several nights working on this, and I think: You know, I'm fatigued, and I'm going 15 mph over the speed limit. I wonder if I have actual awareness, am I going to inflict emotional distress. It just can't be that reckless driving gets you there. And what I feel like the court has to do is figure out what's the right legal standard, how do we articulate this reckless component of the tort so that we keep this tort in the box and confine where it's supposed to be instead of unleashing a flood gate of intentional infliction torts that the court doesn't mean to do.

Now there's another reason why they don't get there on this tort, and that's the outrageous prong. The last time this court wrote about outrageous was in *Southwestern Bell ____ v. Mendez*, per curiam opinion, and the court commented that the standard for outrageous is rigorous. And every time you've written on the outrageous prong, you've quoted the restatement and you've said: It has to be conduct that is beyond the bounds of human decency, utterly intolerable in a civilized society. It seems to me that it cannot be the case, that driving when you're fatigued, going 15 mph over the speed limit, even in a big vehicle is beyond the bounds of human decency and utterly intolerable in a civilized society.

HANKINSON: Looking at the record in this case, would you go back to the test that you are proposing and review it in light of the evidence in the record in this case to show us how it would be applied?

YATES: When the defendant driver gets in the 18-wheeler and he's sleepy - he knows he's sleepy - he knows that vis-a-vis, the driving public, that is whoever he might encounter on the road, he has actual awareness that there's a risk of physical injury that he could impose on people on the road. When he does undertake the conduct of getting in the car and driving, he's not doing that in the presence of a specific group of people like I said about this court. It's just whoever he runs into on the road. And so when the CA's majority said: Well it was directed at the whole parade in this case. It wasn't directed at the parade. He didn't even know the parade was going to be there. He just happened upon the parade. It's directed at the general driving public. Whoever he happens to encounter. And under that circumstance, the court cannot be sufficiently assured that the defendant has the actual awareness of inflicting emotional distress as opposed to some other risk of harm. And that's why the *Christianson* court, I think, would say that this case doesn't get there. And that's how the standard would be applied.

HECHT: With respect to outrageousness, the trouble is it's how you put the question. If the question is: Is reckless driving outrageous? Ordinarily not. If the question is: Is going to sleep

at the wheel of an 18-wheeler that's capable of causing immense injury, then it's a harder question. And it depends on how you look at it.

YATES: Yes, it is hard, and as this court has written, it's a lot of policy questions that go into that, or rationale. But remember, you can't use gross negligence as a proxy for outrageousness. Justice Gonzalez wrote in *Natividad*, that just because it's tortious it's not outrageous. The Restatement says: Just because it would get you to punitive damages, doesn't mean it's outrageous. So what you pose may well be gross negligence, because there may well be an actual awareness of a risk of physical injury. But I question whether it's really outrageous.

HECHT: If the test is doing something that's not tolerable in civilized society, driving a large vehicle recklessly is hardly tolerable in a civilized society, but it doesn't strike you as outrageous?

YATES: That's right, because it may not be tolerable in the sense that the victim deserves tort compensation. It's not tolerable in that sense: we're going to get that person that's hurt compensation. But that doesn't mean that it's intolerable for purposes of the intentional infliction of emotional distress tort.

SPECTOR: Supposing the truck had hit a school bus, and that was the only vehicle it hit. Would the 'directed at' apply there?

YATES: It would under our analysis. You would always apply it to see if the mental state was satisfied. The defendant's conduct, the defendant driver is still 'directed at' the general driving public. So we would still say they don't get there on the mental state. The people in the school bus, if there's a car accident with a school bus, it doesn't mean they are not going to get their emotional distress damages. They obviously can get those emotional distress damages. If there's a physical injury they can get it.

SPECTOR: Suppose there's no physical damage?

YATES: If you get there under *Hill v. Kimbell*, or *Dorsett,* as Justice Phillips wrote about in *the City of Tyler v. Lights*, there may be a negligent infliction of physical injury through mental anguish. Remember that line of cases is where you put somebody in fear of hitting them, so they have mental anguish and it causes them to have physical injuries. You may have that kind of claim, the claim that they waived in this case. You may have a bystander claim if it's a familiar relationship. But it doesn't mean you have to have an intentional infliction of emotional distress claim.

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RESPONDENT

MITCHELL: I am proud to represent Mr. Johnson, a Viet Nam veteran who lost his legs in Viet Nam. Mr. Johnson is here in the courtroom. I want to begin by saying that the issue has been misphrased by the respondent. The issue is not whether or not a witness can recover. It is better phrased: Can a witness within the zone of danger recover for the type of injuries that Mr. Johnson suffered?

GONZALEZ: Then this would be a bystander action as opposed to an intentional infliction of emotional distress?

MITCHELL: No. Because comment D and comment I to the restatement of intentional infliction of emotional distress specifically defines and suggests that 'directed at', which is what petitioner is talking about, 'directed at' includes people within the zone of danger.

And the point I want to make, I want to get back to the facts of this case from the standpoint of what was presented to the TC, because although petitioner says: Car accident; and although petitioner says: Eyewitness, over and over again, I think the facts that the TC had before it from a summary judgment standpoint have been missed. Remember this is a flashing deputy sheriff's car that is escorting this group of veterans going down the highway, led by my client. This flashing light could be seen for over 1 mile. It was flat. It was straight. The eyewitnesses have testified that this 18-wheeler was going anywhere from 5 to 15 to 20 miles over the speed limit. A fair interpretation of the facts is, that the version of what occurred from the standpoint of the driver was based on lies. He manufactured a truck that nobody else saw - a red container truck. He claimed that he tried to brake. That was controverted in the court below. And remember our petition sets out some facts pertaining to the company that this driver worked for. For example: This company had, we pled and it was not controverted, been repeatedly cited for violations of federal transportation safety law, as to the safety of persons on the roadway. This company had a policy of paying drivers, and remember this is an 18-wheeler, not by the hour but by the mile, which means that the policy of this company was: If you drive fast, and you drive long, you're going to make more money.

ENOCH: I really didn't understand Ms. Yates to argue about gross negligence. I understand she was wanting to correct some facts, but her issue really isn't gross negligence. Her issue is, that assuming gross negligence, that doesn't provide the mental state for an intentional infliction of emotional distress. So I want to focus on that. Suppose there was no accident here, but I am on the side of the road and a truck races past me 15 mph above the speed limit and I notice that the driver in the truck is asleep. There is no accident. How is that, in your estimation, intentional infliction of emotional distress because the truck is 15 mph over the speed limit, and the driver is asleep, and I guess I'm in the zone of danger, or is it something else that makes this an intentional infliction of emotional distress?

MITCHELL: I think that particular hypothetical is fairly raised under the *Houston Electric v. Dorsett*. The facts that you've just described and contrary to Ms. Yates' assertion, one way we can

get to recovery under the fact situation that you described is if we have *Houston Electric v. Dorsett* case. Now, she says that we waived the argument that Mr. Johnson suffered physical injury as a result of this incident. I disagree with that. I think that argument was fairly raised in the CA. Our point of error in the CA says: The TC erred in granting summary judgment. It does not specifically limit it to an appeal on intentional infliction of mental distress. So if we have the *Dorsett* situation, and in that situation a transportation bus for the City of Houston just barely missed a lady who was standing on the corner and this court held: Under those circumstances, and has held under a variety of circumstances, including a case that was argued by Justice Hill in 1955, that involved a worker who visualized and saw someone fall from a scaffold. In both of those cases, the type of physical manifestations of emotional distress occurred. We have that in this case, and we provided evidence of that to the court below.

ENOCH: Again, you're talking about a near-miss.

MITCHELL: Yes.

ENOCH: I'm not talking about a near-miss. I'm talking about: I'm just on the side of the road and I see the truck pass, and I see the driver is asleep, and I estimate it's 15 mph above the speed limit, and it's an 18-wheeler, is that all it takes for an intentional...

MITCHELL: No. You've got to add one additional fact, and that is, that the person is within the zone of danger.

ENOCH: I'm assuming it's a zone of danger, because it would pass within 15 feet of me, whatever the side of the road...

MITCHELL: If it is within the zone of danger, I don't even need to get to intentional infliction of mental distress if the person suffers physical manifestations from his injury. That's been the law of this court since 1946, which is when the *Dorsett* case was decided.

ENOCH: I thought in *Dorsett* there was a personal fear that it was a near-miss?

MITCHELL: That's right.

ENOCH: But I wouldn't notice that the driver was asleep until the car is passing me.

MITCHELL: But of course, we have a personal fear in this case. From Mr. Johnson's point of view, what he saw: He heard a bang and he turned around and saw coming towards him an 18-wheeler. And that 18-wheeler was airborne. It had decapitated a deputy sheriff; went airborne landing in a pick-up truck causing the speedometer in the pick-up truck to shoot up to 50 mph, which tells you how fast this 18-wheeler was going, and landed in front of him 2 car links away, which is a far different cry than simply standing by the side of the roadway and watching the truck go by. I

mean, Mr. Johnson for a short period of time, and remember this is a man in a wheelchair, he couldn't get out of the way, he saw that 18-wheeler coming towards him. Now from Mr. Johnson's point of view, I don't know of anything that is more directed than that.

ENOCH: But that's the crash then. So it is the crash that sets up this _____?

MITCHELL: Well it's the crash, and the fact that he is in the zone of danger. All that truck needed to do was come two more car links and he would have been hit.

HANKINSON: Ms. Yates argues that what this case is about is asking the court to clarify the mental state requirement in this cause of action. How do you propose that the mental state requirement should be established?

MITCHELL: I think that the mental state in terms of 'reckless' as defined by this court in *Twymann*, is a sufficient definition given the facts of this case. I think some of the issues that have been raised by some of the judges today, for example: Justice Hecht said: Maybe it would be outrageous if we're talking about an 18-wheeler. That's why these facts need to be what the *Twymann* test and the *Twymann* elements as set out by this court in that decision should be submitted to a jury and let a jury decide.

HECHT: A jury of 18-wheeler drivers might decide differently than a jury of paraders?

MITCHELL: They might, but that - I'm assuming that we're going to have a jury that is fairly picked by both sides. And I'm assuming that that jury can look at the facts of this case. Ms. Yates has talked about some facts that are not in the record regarding this case. I could do that as well. Because I tried the case that involved two of the people that were involved in this particular accident - people who received a closed head injury. And so I could talk about the facts of this case for two weeks. I did it one time. My point is, you can take the *Twymann* elements - outrageous conduct...

HANKINSON: But in *Twymann,* the reckless requirement was not defined, is that right? *Twymann* did not define what reckless means in the context of this tort. So how do you propose the court should state what the requirement is?

MITCHELL: Was the plaintiff present? Was the defendant aware specifically or should he have been aware specifically that his reckless disregard had a high degree of probability of inflicting mental distress?

HANKINSON: On whom? There doesn't have to be any aspect of identification of to who it was directed at?

MITCHELL: Remember, we are talking about a group that is on the highway - under the

facts of this case, I think it could be argued that this driver was specifically aware of this group. Now, did the driver know driving into this parade...

HANKINSON: What is it the driver has to know or have reckless disregard of in order to meet the recklessness requirement as you propose it?

MITCHELL: He has to have an actual awareness that his conduct creates a high degree of risk of injury to the plaintiff. He doesn't need to know specifically who the plaintiff is, but he has to have objectively - if we objectively look at the facts: 1) Do his actions create a high degree of risk? and 2) If we look at the defendant, do we have some proof of subjective awareness that despite his high awareness that he's creating a high degree of risk to the plaintiff, do we have some evidence that he is disregarding that high degree of risk of his actions, that he is aware that what he does is wrong?

HANKINSON: So the awareness is, that what he is doing is wrong as opposed to his conduct will cause some particular type of harm?

MITCHELL: I think that if this court imposes a requirement on me that a defendant must specifically foresee that Rubin Johnson, a Viet Nam veteran whose legs were blown-off by a landmine in Viet Nam is going to be injured - I'm not going to win. But if defendant's conduct creates a high - if by his actions and by looking at the evidence, we can tell that he knows that what he is doing is wrong and creating a high degree risk of harm - and remember he's doing this every single day, because every single day he is...

HECHT: It seems a little different if you said: I see a guy on the corner down there, I think I will see how close I can brush this 18-wheeler up against him - give him a little thrill to saying: Well I'm going to drive along this deserted highway 20 mph over the speed limit and hope that there's nobody present. It turns out there is. Why shouldn't there be some directive to component?

MITCHELL: For one thing, I will say that - I think the question is is how do you find 'directed at'? And I think if you know that your conduct creates a high degree of risk, and something occurs, and there are people within the zone of danger, people whose lives actually potentially are at risk within that zone of danger, I think that that defines the field. And if you limit it either by following the *Hill v. Campbell* line of cases, which are physically manifestations, which I have, which I believe I have preserved before this court and before the CA, if you say either physical manifestation as this court has done for 100 years, or you say let's limit it to people within the zone of danger, which Mr. Johnson was, you can do either one of those two things, those limitations will prevent this specter of floodgate litigation that petitioners argue.

OWEN: When you keep talking about zone of danger, you're basically asking the court to change the bystander law and now say: If there's gross negligence we're going to list the historical restrictions that our court and other courts have placed on the bystander through recovery; isn't that

what it boils down to?

MITCHELL: No. I am asking this court to follow the restatement on intentional infliction of mental distress...

OWEN: But what's the difference between what you're asking us to do and just simply saying: In bystander cases if there is gross negligence that's enough?

MITCHELL: The difference is, is that in a bystander case that bystander is not at risk at losing his life, he's not at risk of being injured.

OWEN: In some bystander cases they are in the zone of danger.

MITCHELL: I'm not aware of a zone of danger case where the cause of action has not been - where someone has not been allowed a cause of action if they are actually at-risk and they actually are within the zone of danger. I think that that is what the comment in the restatement is talking about. One of the things this comment is talking about. And I would also point out - I mean this court certainly has other options. For example: in *Boyles v. Kerr*, this court specifically left open - and I will tell the court that when this court decided *Boyles v. Kerr*, that my pleading in the court below was done directly in response to that. I pled every cause of action I could think of after reading the *Boyles v. Kerr* decision. I pled negligent infliction of physical harm, which I think I have under the physical manifestation cases. I pled intentional infliction of emotional distress, which I believe if you take those elements without adding the 'directed at' additional element. And by the way, talking about preserving error, I would point out that you can pick-up the motion for summary judgment that was filed by the defendant in this case, and you can't find an argument for this 'directed at' element in the motion for summary judgment. And certainly if that argument was made in the motion for summary judgment, certainly our response in the TC would have been different.

OWEN: You say bystander _____ is enough in this case. Why do we need to expand or even tinker with IIED(?) if bystander is enough?

MITCHELL: I am not suggesting that this court expand the law. What I am suggesting simply is is that we have a man who is deserving of compensation. I have tried, and I think the record supports the ability of this court to solve this issue several different ways.

OWEN: Did you plead bystander recovery?

MITCHELL: Yes.

OWEN: And what happened to that claim?

MITCHELL: It was not ruled upon - it's hard to decide what exactly happened to that. The

CA gives us my intentional tort and at that point I am satisfied. When you say bystander are you talking about the *Dillion* case?

OWEN: Under the bystander case law, you say that's enough..

MITCHELL: To be honest with you, we argued that in the TC certainly, and I can't remember if we specifically briefed that in the CA.

PHILLIPS: What type of relationship did you allege with the people who suffered physically?

MITCHELL: The only relationship that we alleged was that Mr. Johnson was the person who organized this parade, he was in his wheelchair, he was leading the march that was trying to bring attention to POW and MIAs, he was the organizer of it, and he certainly has suffered because of what occurred on that day.

ENOCH: You've argued that you have a client who deserves compensation. But the purpose of this gathering is to ask the court to enunciate a principle of law that affects all cases, or cases of similar facts. And the principle that you're asking to be enunciated is the principle that if I, the defendant, am a negligent driver and there is evidence that my negligence rises to the level of gross negligence and I have an accident, then my liability extends to everybody who witnesses that accident?

MITCHELL: Who is within the zone of danger, or who suffers physical manifestations.

ENOCH: But the zone of danger is sort of ill-defined. You've talked about it being two car links perhaps...

MITCHELL: That's why the jury needs to hear this case, because the jury is going to find out a lot more about the facts of this accident.

ENOCH: Depending on how fast the car is, the larger zone of danger, how slow the car is...

MITCHELL: There was testimony when I tried the case involving a few ladies that were in this incident, that this company had had repeated problems with drivers who were...

ENOCH: We're assuming it's gross negligence. The question will be: When will the liability be for witnesses to the accident and what principle comes from this such that tomorrow a driver driving down the street can adjust their conduct so that they limit their liability to just those they injure as opposed to those on the street who witness the accident?

MITCHELL: I don't believe that grossly negligent driving, which I guess everybody is assuming that's what occurred in this case, that we have gross negligence, and the court certainly could recognize a tort for grossly negligent infliction of mental distress.

ENOCH: No, the operation of the vehicle is grossly negligent. You're argument is, if the operator of the vehicle is grossly negligent that provides the mental state for intentional infliction of emotional distress.

MITCHELL: A driver is going to be required to not violate the law regardless of what this court holds. I don't think that the driving public is...

ENOCH: Maybe I'm not being clear on my question. The principle I'm looking at is, what could I do as a driver tomorrow, accepting your premise that gross negligence provides the mental state for intentional infliction of emotional distress, such that you're liable to witnesses to an event? What principle do we enunciate that would permit a driver tomorrow to adjust their conduct such that they would not be liable in a gross negligence case for intentional infliction of emotional distress to witnesses? What is it I could do as a driver to adjust my conduct that would eliminate the risk that I would be liable to witnesses of an accident I might have?

MITCHELL: Well I don't think a driver can if someone was within the zone of danger. My point simply is, that this court can follow the law set out in *Hill v. Kimble*, which is physical manifestation, or they can simply impose a zone of danger requirement.

ENOCH: In other words, if I am grossly negligent and that causes an accident, then I am liable to anyone who can prove to a jury that they were within the zone of danger at the time of the accident occurred?

MITCHELL: Or have physical manifestations.

ENOCH: Physical manifestations is a different issue. I'm talking about intentional inflictions. So the intentional infliction would be a viable claim to witnesses as long as to the satisfaction of a jury they prove they are within the zone of danger when there was an accident that was a result of gross negligence?

MITCHELL: Yes, and I think that's a fair interpretation and the _____ to the restatement on intentional infliction of mental distress.

HANKINSON: What you're asking us to do today would put Texas out-of-step with most other jurisdictions, wouldn't it? Ms. Yates has cited to us her search of the other states and what they have done and says that if we adopt her test of 'directed at', we will be in-line with the majority of other jurisdictions.

MITCHELL: I disagree. And the reason I disagree is because this court can decide this case with a very narrow holding that is based on physical manifestation or zone of danger, and it can define this issue very narrowly. And in doing so, it can follow precedent that this court has handed down since *Hill v. Kimble*, which was decided in 1890.

HANKINSON: So it's your view that this does not expand Texas law in any way?

MITCHELL: What I am saying is, the court has the opportunity to write the opinion in such a way that it does not expand Texas law given the record in this case. I mean if the court wants to expand Texas law, that's fine. I don't care how the court gets there if my client gets an opportunity to have these facts heard by a jury. What my point is, is it is not necessary under the facts of this case for this court to expand the tort of intentional infliction of mental distress.

HANKINSON: But you don't have any quarrel with the research that's been provided in the brief of your opponent that the test that's being proposed is the majority rule?

MITCHELL: Well I disagree with her interpretation of what 'directed at' means.

HANKINSON: I understand, but you don't quarrel with the fact that this mental state requirement having some sort of 'directed at' component is the majority rule?

MITCHELL: Well the question is, is 'what directed at' means, and we disagree on that subject. I would concede that what you have suggested is correct.

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REBUTTAL

YATES: I would like to answer Justice Owen's question about what happened to the bystander cause of action. Because what happened to the bystander cause of action is that the plaintiffs wrote a brief for appellant to the CAs. It had a broad point of error, and right under that point they said: We have these 4 theories, one of which was bystander, and they said: But we don't want to appeal anything but two theories: intentional infliction and negligent infliction of emotional distress. That's what they told the CA. They dropped the bystander cause of action, they dropped the negligent infliction of physical injury cause of action. That's why the CA wrote what they wrote about the waiver. And in their response to our brief on the merits in this court they admit that their negligent infliction claim was an 'additional' claim, they used that word, that they tried to add in the CA after oral argument. So that's what happened on the negligent infliction.

Justice Gonzalez is dead right about the zone of danger. In the *Freeman* case, when this court adopted the *Dillion* standard for the bystander recovery, Justice Kilgarlin wrote: We're getting rid of the zone of danger. He said: We're getting rid of the more restrictive zone of danger theory in favor of the *Dillion* elements. So this an attempt by the plaintiff to bring back in

something the court's already rejected, and he's trying to do it based on the comments to restatement §46.

GONZALEZ: He's got a right to do that. Mr. Mitchell was Kilgarlin's briefing attorney.

YATES: Of course, but comment I on intentional and recklessness does refer back to §500 of the restatement. That's where he's getting the zone of danger is out of §500, not out of §46. But remember, the zone of danger has to be considered in the context of the intentional infliction tort, not just any tort.

PHILLIPS: But for the waiver that you claim in the brief in the CA, a *Hill v. Kimble* type claim has been set out under these facts, has it not?

YATES: What the CA's majority said: Is the facts are most analogous to *Dorsett*. Then they dropped a footnote and they said: There is a viable cause of action. You need to read that footnote carefully because they are not saying that this plaintiff has a viable cause of action. I think what the majority is saying is, is there's a cause of action out there and he might have pursued it and we might have ruled on it if he had pursued it. So I ask the court to read their footnote carefully. I don't think they get there. The reason I don't think they get there if you will look at Tab 3 of your poster booklet, and I'm not talking about stuff outside of the record, I didn't try this case, all I have is the appellate record. What the plaintiff said in his deposition in this record is: He was not physically impacted by any part of this accident, he wasn't physically injured, and the accident came to rest no closer than 2 car links from him. And then if you will flip to Tab 4, we've given you the parade. This is the parade as described in the appellate record. There is the record site. This plaintiff says: 5 car links at the beginning of the parade, is him to the beginning of the patrol car - 5 car links. So he's talking about some long cars. And then he says: that the accident ended up no closer than 2 car links from him. So if you think long car links, which is obviously what this plaintiff has in mind, that's across the street. I mean two car links turned sideways, that would be across the street, so he's across the street from this accident. He is not a *Dorsett*. You remember the lady in *Dorsett* her mother was killed...

GONZALEZ: Well he may be across the street, but he's got several tons coming straight at him.

YATES: Well, see, I disagree with his interpretation of the record.

GONZALEZ: This is a summary judgment, we have to take the facts.

YATES: But I don't think even giving him the inferences, that you can get it was coming straight at him. He heard the crash in the back of the parade. He turned around to look. He saw the 18-wheeler coming to rest on the brown pickup truck, the brown pick-up truck moved to the right of the road, and it ended up no closer than 2 car links from him. See, he moved to the right.

Everybody moved to the right. It wasn't ever coming at him. I mean that's the way I think a fair inference from the record would be. But in any event this is not a near-miss like *Kimble*. The lady in *Kimble* is standing right next to her mother. And it really could have been dealt with as a bystander case because her mother was killed. So we would say this is not a near- miss. But again, he's waived the negligence infliction claim. Even if it were a near-miss, under our analysis, he still shouldn't get there on the intentional infliction claim under the basis of the other arguments that we've raised.

I wanted to address Judge Hankinson's question about what is the directed primarily at? There are a number of courts that have analyzed it in terms of directed primarily at. I'm not saying that the majority of the courts have adopted that rule. I do say that if you read all those cases in all the other jurisdictions, and we've tried to, you won't find one that says: a reckless car accident. The recklessness for the car accident gets you there on intentional infliction and that would put this court, I think the CA decision in this case does put this court out of step with all the other jurisdictions.