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COMMENTS

RIDINGS v. MAZE: SHOULD THE OKLAHOMA SUPREME COURT LOOSEN THE REINS AND ALLOW RECOVERY FOR EMOTIONAL DISTRESS UNDER THE BYSTANDER THEORY?

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I. INTRODUCTION

An estimated “40 million lawsuits are filed every year in the United States.”¹ It is the duty of a court to assure the judicial system is not flooded with meritless claims and lawsuits;² the court fears that if it allows recovery for mental pain and anguish, it will not be able to uphold this duty.³ Oklahoma is especially reluctant to the idea of allowing recovery for emotional distress unless it is supported by some physical injury.⁴ The hesitation is even more prevalent when it involves emotional distress

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1. U.S. Financial Education Foundation, *What is a Frivolous Lawsuit?*, (Oct. 2, 2018), <https://perma.cc/YN4C-UN5W>.

2. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 545-46 (1994).

3. *Id.*

4. *St. Louis & S.F.R. Co. v. Keiffer*, 150 P. 1026, 1028 (Okla. 1915).

claims to third parties.⁵ For many years, the Oklahoma Supreme Court has followed a strict rule for a third-party's right of recovery.⁶ The rule strictly limits recovery to those who are actually injured in the incident that caused the mental pain and suffering.⁷

Today, the Oklahoma Supreme Court faces some tough questions: Should the Supreme Court overrule the applicable Oklahoma precedent? Or should the Supreme Court loosen the reins on the *direct-victim* requirement for recovery of emotional distress? Unfortunately, there is no right or wrong decision in dealing with third-party claims of mental anguish and emotional distress. If the Court decides to adopt the more lenient Bystander Theory or continue to uphold the principles of the common law, either decision will come with its own set of burdens and benefits. However, the Oklahoma Supreme Court should take into consideration that nearly half of the jurisdictions in the United States have adopted the Bystander Theory.⁸

The beginning of this Case Comment focuses on the historical background of emotional distress or mental anguish as a form of damages in Oklahoma. The historical background demonstrates Oklahoma's skepticism on emotional distress as an accurate measure of damages. Next, the Comment explores one of Oklahoma's most current cases on emotional distress damages, *Ridings v. Maze*.⁹ The facts, procedural history, and the Oklahoma Supreme Court's reasoning for denying the plaintiffs' recovery for their emotional distress claims are discussed in detail. This Comment explains why the Oklahoma Supreme Court was correct to reverse the decision of the District Court of Cleveland County. The Comment further expands on how the Oklahoma Supreme Court's decision to once again reject the Bystander Theory does not best serve the goals and aims of tort law.

II. HISTORICAL BACKGROUND

A. *Physical Manifestation Requirement*

Dating back to the early 1900s, Oklahoma has been hesitant to allow

5. *Id.*

6. *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 1996 OK 141, ¶ 12, 916 P.2d 241.

7. *Id.* ¶ 12, 916 P.2d at 250.

8. *See Gottshall*, 512 U.S. at 549.

9. *Ridings v. Maze*, 2018 OK 18, 414 P.3d 835.

an individual to recover for emotional distress without proof of some sort of physical manifestation of suffering.¹⁰ Guided by the Tenth Circuit:

Oklahoma courts have committed to the rule that “No recovery can be had for mental pain and anguish, which is not produced by, connected with, or the result of, some physical suffering or injury, to the person enduring the mental anguish.” In other words, Oklahoma law does not compensate for mental anguish or disturbance alone—it must be part of the physical suffering¹¹

The Oklahoma Supreme Court’s desire to identify a physical aspect of the emotional distress lies in the fact that it is otherwise difficult to determine mental suffering.¹² The Oklahoma Supreme Court reasons that “mere mental pain and anxiety are too vague for legal redress where no injury is done to persons, property, health or reputation.”¹³

B. Common Law Beginnings

The Oklahoma Supreme Court’s hesitation to permit any recovery for mental anguish or emotional distress falls in line with the common law’s viewpoint.¹⁴ Under the common law, mental anguish without the presence of injury was considered “too intangible and too remote to form a basis for the recovery of damages.”¹⁵ The Court has even gone as far as referring to mental anguish as “imaginary injuries.”¹⁶

Oklahoma has also looked at the opinions of other jurisdictions across the United States to gain insight on recovery for emotional distress or mental anguish,¹⁷ such as the Supreme Courts of Indiana, Mississippi, Georgia, Minnesota, Florida, Missouri, Wisconsin, Ohio, and the Appellate Division of the Supreme Court of New York.¹⁸ The early cases that allowed recovery for mental anguish if accompanied by injury were

10. *St. Louis & S.F.R. Co. v. Keiffer*, 1915 OK 381, ¶ 8, 150 P. 1026, 1028.

11. *Belt v. St. Louis-San Francisco Ry. Co.*, 195 F.2d 241, 243 (10th Cir. 1952) (quoting *Keiffer*, ¶ 8, 150 P. at 1028).

12. *W. Union Tel. Co. v. Choteau*, 115 P. 879, 881 (Okla. 1911).

13. *Id.*

14. *Id.* at 880.

15. *Id.* at 881.

16. *Id.* at 888.

17. *Id.* at 880.

18. *Id.* at 887-92.

those involving distress from the negligent delivery of a telegram.¹⁹ Across the board, it is clear that the majority of jurisdictions agreed that an individual could not recover solely on mental distress—the courts prefer objective concrete proof.²⁰ “The Tenth Circuit has recognized difficulty sleeping, crying, and weight gain as evidence of physical harm in a negligent infliction of emotional distress case.”²¹

Despite Oklahoma’s requirement that physical injury must be present before one can recover for emotional damages, the Oklahoma Supreme Court lessened the requirements in certain circumstances.²² Beginning in the 1940s, the Court permitted recovery absent physical injury if the defendant’s conduct could be characterized as a “willful wrong of such a character that the mental suffering is recognized as an ordinary, natural and proximate result of such a wrong.”²³ The leading case involved mental pain and anguish to a plaintiff who was fraudulently induced into a marriage contract by the defendant.²⁴ The Oklahoma Supreme Court believed the act was sufficient to “constitute such a wrong, and the resulting mental pain and suffering would support an independent action for damages.”²⁵ The Court’s expanded view and acceptance of “willful or wanton” conduct as an independent claim of damages acted as a gateway to the right to recovery of intentional infliction of emotional distress.²⁶ In 1976, in *Dean v. Chapman*, the Oklahoma Supreme Court confirmed that it would follow the guidelines of section 46 of the Restatement (Second) of Torts.²⁷ Section 46 of the Restatement (Second) of Torts specifically reads:

The cases thus far decided have found liability only where the defendant’s conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is

19. *Id.* at 886.

20. *Id.*

21. *Hutchinson v. City of Okla. City*, 919 F. Supp. 2d 1163, 1183 (W.D. Okla. 2013) (citing *Wilson v. Muckala*, 303 F.3d 1207, 1213 (10th Cir. 2002)).

22. Matthew B. Free, Note, *Torts: Kraszewski v. Baptist Medical Center of Oklahoma, Inc. – The Oklahoma Supreme Court Recognizes the Tort of Intentional Infliction of Severe Emotional Distress in a New Context*, 51 OKLA. L. REV. 403, 407 (1998).

23. *Id.* at 407 (quoting *Dean v. Chapman*, 1976 OK 153, ¶ 20, 556 P.2d 257, 261).

24. *Mashunkashey v. Mashunkarshey*, 1941 OK 113, ¶ 1, 113 P.2d 190, 190-91.

25. *Id.* ¶ 9, 113 P.2d at 191.

26. Free, Note, *supra* note 22, at 407.

27. *Id.* (citing *Dean*, ¶ 22, 556 P.2d at 261). See Restatement (Second) of Torts § 46 cmt. d (Am. Law Inst. 1965).

tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.²⁸

The Oklahoma Supreme Court’s statement laid the groundwork for the modern form of recovery—intentional infliction of emotional distress.

B. Emotional Distress to a Third Party

The reluctance to allow a party to recover for mental anguish becomes even heavier when it involves the rights of a third party not involved in the incident. Oklahoma first assessed third-party rights in “common carrier, telegraph, and bottling cases” (most of which involved mental anguish from negligence directed at the primary victim).²⁹ In 1949, the Oklahoma Supreme Court stated the general rule for a third-party’s right to recovery under a mental anguish or emotional distress claim.³⁰ The rule is as follows:

In law mental anguish is restricted, as a rule, to such mental pain or suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompaniment of sympathy or sorrow for another’s suffering or which arises from a contemplation of wrongs committed on the person of another. Pursuant to the rule stated, a husband or wife cannot recover for mental suffering caused by his or her sympathy for the other’s suffering. Nor can a parent recover for mental distress and anxiety on account of physical injury sustained by a child or for anxiety for the safety of his child placed in peril by the negligence of another.³¹

28. Restatement (Second) of Torts § 46 cmt. d (Am. Law Inst. 1965).

29. Free, Note, *supra* note 22, at 405.

30. *Thompson v. Minnis*, 1949 OK 29, ¶¶ 16-18, 202 P.2d 981, 985.

31. *Id.* ¶ 18, 202 P.2d at 985.

This general rule has adapted over the years. The Oklahoma Supreme Court has laid out two modes of recovery for mental anguish or emotional distress, both of which continue to provide evidence of Oklahoma's general skepticism toward emotional damages.³²

The first form of recovery is negligent infliction of emotional distress. Negligent infliction of emotional distress is not recognized as an independent tort but is considered a tort of negligence.³³ In other words, a third party cannot recover for negligent infliction of emotional distress without establishing a duty on the part of the defendant.³⁴ Oklahoma law recognizes recovery for *direct victims*, or those who are "directly physically involved in the incident."³⁵ Recovery is not permitted if the plaintiff is a mere *bystander*, or an individual not directly involved in the accident, who is seeking damages for emotional distress resulting from witnessing the injury of another.³⁶ Although other jurisdictions have allowed recovery under the Bystander Theory, the Oklahoma Supreme Court continues to uphold the general rule that recovery for mental anguish or emotional distress is restricted to individuals who show physical injury.³⁷

The second means of recovery for mental or emotional distress is intentional infliction of emotional distress. It was not until 1976, in *Dean v. Chapman*, that the Oklahoma Supreme Court discussed the tort of intentional infliction of emotional distress, stating that liability has only been found if the defendant's conduct was "extreme and outrageous," not merely intentional.³⁸ The Court applies the Restatement's definition of a defendant whose outrageous conduct causes emotional distress: "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."³⁹

Years later, the Oklahoma Supreme Court clarified what the plaintiff

32. *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 1996 OK 141, n.1, 916 P.2d 241, 243 n.1.

33. *Id.*

34. *Id.* ¶ 6, 916 P.2d at 245.

35. *Id.* ¶¶ 8, 12, 916 P.2d at 246, 248.

36. *Ridings v. Maze*, 2018 OK 18, ¶¶ 7, 12, 414 P.3d 835, 837-39.

37. *Id.* ¶¶ 8-11, 414 P.3d at 838.

38. *Dean v. Chapman*, 1976 OK 153, ¶ 22, 556 P.2d 257, 261.

39. *Breeden v. League Services Corp.*, 1978 OK 27, ¶ 7, 575 P.2d 1374, 1376 (internal quotation marks and emphasis omitted).

must prove in order to claim intentional infliction of emotional distress:

- 1) The plaintiff was directly physically involved in the incident;
- 2) the plaintiff was damaged from actually viewing the injury to another rather than from learning of the accident later; and
- 3) a familial or other close personal relationship existed between the plaintiff and the party whose injury gave rise to the plaintiff's mental anguish.⁴⁰

III. *RIDINGS V. MAZE*

A. *Facts*

“On October 30, 2015, H.R. a minor child, [exited] his school . . . bus[,] provided by Defendant, Independent School District No. 29 of Cleveland County, Oklahoma (hereafter ‘The School District’).”⁴¹ As the bus began to stop and allow H.R. to depart from the bus, Co-Defendant “Alexandra Maze travel[ed] towards the School District’s bus.”⁴² Following the “instruction of the School District’s bus driver, H.R. [proceeded to get] off the bus, [and] immediately crossed the street in-front of the bus.”⁴³ Co-Defendant Alexandra Maze then struck H.R.⁴⁴ As a result of the accident, H.R. suffered from severe personal injuries.⁴⁵ H.R.’s parents and siblings allegedly watched the accident “from the window of their” home.⁴⁶ Upon investigation by “the Norman Police Department, the Oklahoma State Bureau of Investigation[,] and a Nationally Certified Drug Recognition Expert,” it was confirmed that Alexandra Maze was “not under the influence of drugs” or alcohol during the time of the accident, and she was driving “at a safe and reasonable speed.”⁴⁷

40. *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 1996 OK 141, ¶ 4, 916 P.2d 241, 245 (emphasis omitted).

41. Plaintiffs’ Response to the School District’s Motion to Dismiss and Brief in Support at 1, *Ridings v. Maze*, 2018 OK 18, 414 P.3d 835 (No. CJ-2016-1028).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1-2.

46. *Ridings*, ¶ 2, 414 P.3d at 837.

47. Petitioner’s Brief in Chief at 2, *Ridings*, 2018 OK 18, 414 P.3d 835 (No. CJ-2016-1028).

B. Procedural History

On September 7, 2016,⁴⁸ Plaintiffs Jason and Katherine Ridings, parents of H.R., “brought suit on behalf of H.R., . . . on their own behalf[,] and on behalf of [their] two . . . minor children who are all alleged to have witnessed the accident from the window of their house.”⁴⁹ The plaintiffs filed suit in Cleveland County District Court alleging seven separate causes of action against the defendants.⁵⁰ “The Plaintiffs alleged that Alexandra Maze violated [numerous] Oklahoma Statutes, including title 47, section 11-705 of the Oklahoma Statutes.”⁵¹ The statute provides:

The driver of a vehicle meeting or overtaking a school bus that is stopped to take on or discharge school children, and on which the red loading signals are in operation, is to stop the vehicle before it reaches the school bus and not proceed until the loading signals are deactivated and then proceed past such school bus at a speed which is reasonable and with due caution for the safety of such school children and other occupants. Any person convicted of violating the provisions of this subsection shall be punished by a fine of not less than One Hundred Dollars (\$100.00).⁵²

The plaintiffs alleged that “Alexandra Maze’s violations of 47 Okla. Stat. Ann. §§ 11-504, 11-705, 11-901, and 11-901(b) caused or contributed to the cause of [the] Plaintiffs’ injuries and damages.”⁵³ Plaintiffs further asserted causes of action against Alexandra Maze for *negligence per se*.⁵⁴ They also asserted a claim of negligent entrustment against Lance and Cheryl Maze (Alexandra Maze’s parents).⁵⁵ The plaintiffs asserted causes of action against The School District for respondeat superior—alleging negligence on the part of the school-bus driver—negligent training and supervision, and intentional and negligent infliction of emotional distress.⁵⁶

48. *Id.* at 2.

49. *Ridings*, ¶ 2, 414 P.3d at 837.

50. Petition at 1, *Ridings*, 2018 OK 18, 414 P.3d 835 (No. CJ-2016-1028).

51. Petitioner’s Brief in Chief, *supra* note 47, at 2.

52. OKLA. STAT. tit. 47 § 11-705 (2011).

53. Petition, *supra* note 50, at 2.

54. *Id.*

55. *Id.* at 3.

56. *Id.* at 4-6.

In response to these allegations, The School District moved to dismiss all of the plaintiffs' causes of action against it "for failure to state a claim [for] which relief [can] be" sought.⁵⁷ The School District reasoned that because H.R. had already gotten off the bus, The School District no longer owed a duty to H.R.⁵⁸ The School District also argued that "Oklahoma law does not recognize an independent tort for Negligent Infliction of Emotional Distress."⁵⁹ Lastly, The School District argued that because it is considered a governmental entity, it cannot be held liable for the tort of intentional infliction of emotional distress.⁶⁰ Plaintiffs responded to The School District's motion by arguing that their negligence claim should not be dismissed because it was possible that discovery may uncover facts that would support their claims of negligence against The School District.⁶¹ The plaintiffs also responded they were not pursuing a claim for intentional infliction of emotional distress but were pursuing a claim for negligent infliction of emotional distress, which is a negligence claim.⁶² "Following a hearing, the District Court of Cleveland County dismissed the Plaintiffs' claim for intentional infliction of emotional distress but declined to dismiss the negligence and negligent infliction of emotional distress claims."⁶³ On February 14, 2017, the district court certified its decision for interlocutory appeal.⁶⁴

Defendants Lance and Cheryl Maze also moved to dismiss the claims against them for negligent entrustment.⁶⁵ Defendants reasoned that because H.R. was the only direct victim in the accident, Oklahoma does not recognize the claims from his parents and siblings as a matter of law; therefore, the plaintiff failed to state a claim upon which relief could be sought.⁶⁶ Judge Tracy Schumacher denied the motion in the District Court of Cleveland County.⁶⁷ Defendants subsequently petitioned for certiorari

57. School District's Motion to Dismiss and Brief in Support at 4, *Ridings*, 2018 OK 18, 414 P.3d 835 (No. CJ-2016-1028).

58. *Id.* at 3-4.

59. *Id.*

60. *Id.* at 7-8.

61. See Plaintiffs' Response to the School District's Motion to Dismiss and Brief in Support, *supra* note 41, at 1.

62. *Id.* at 10.

63. Petitioner's Brief in Chief, *supra* note 47, at 3.

64. *Id.*

65. Defendants Lance Maze and Cheryl Maze's Motion to Dismiss at 1, *Ridings*, 2018 OK 18, 414 P.3d 835 (No. CJ-2016-1028).

66. *Id.*

67. Order at 1, *Ridings*, 2018 OK 18, 414 P.3d 835 (No. CJ-2016-1028).

review, and the petition was granted.⁶⁸

C. Majority Opinion

The majority opinion in *Ridings v. Maze* focused on three issues. The first issue the Court analyzed was the negligent infliction of emotional distress claim against Lance and Cheryl Maze.⁶⁹ The Court answered whether or not H.R.'s parents and siblings were bystanders, as opposed to direct victims, for the purposes of recovering damages against the defendants for infliction of emotional distress.⁷⁰ Justice Winchester delivered the opinion of the Court in order to review the interlocutory orders, and he retained the matters which were appealed separately.⁷¹ The Court concluded the plaintiffs in *Maze* were bystanders, rather than direct victims; therefore, they were unable to state a claim for recovery, and their claims for emotional distress against the defendants should be dismissed.⁷² In beginning its analysis, the Court recognized that before one can have a sufficient claim for negligent infliction of emotional distress, the plaintiff must establish the elements of negligence: (1) the defendant must have a duty to protect the plaintiff from harm; (2) the defendant must fail to perform that duty; and (3) the plaintiff must suffer harm due to the failure to perform.⁷³ The governing law in Oklahoma requires: "a plaintiff must . . . be a 'direct victim' rather than a 'bystander.'"⁷⁴ A direct victim is an individual that is "directly . . . involved in the accident,' [and] whose emotional distress results from the suffering of another."⁷⁵ The Court compared a bystander to be an "individual[] . . . [that is] not directly involved in the accident, but [is] seeking damages for emotional distress resulting from witnessing the injury of another."⁷⁶

The Court utilized *Kraszewski* to aid in determining whether or not the plaintiffs at hand were bystanders or direct victims.⁷⁷ In *Kraszewski*, the

68. *Id.*

69. *Ridings v. Maze*, 2018 OK 18, ¶ 6, 414 P.3d 835, 837.

70. *Id.* ¶ 7, 414 P.3d at 837.

71. *Id.* ¶ 0, 414 P.3d at 837.

72. *Id.* ¶¶ 11-12, 414 P.3d at 839.

73. *Id.* ¶ 6, 414 P.3d at 837.

74. *Id.* ¶ 7, 414 P.3d at 838 (quoting *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 1996 OK 141, ¶ 10, 916 P.2d 241, 247).

75. *Id.* (quoting *Kraszewski*, ¶ 8, 916 P.2d at 246).

76. *Id.*

77. *Id.* ¶¶ 7-8, 414 P.3d at 838.

plaintiff was permitted to recover for emotional distress when he and his wife were struck by a drunk driver in a parking lot; therefore, he “was [directly involved in the] accident which caused the mental suffering.”⁷⁸ The Court then turned to *Slaton*, a case in which the Bystander Theory was again rejected in Oklahoma because “recovery for mental anguish is restricted to such mental pain or suffering as arises from an injury or wrong to the person rather than from another’s suffering or wrongs committed against another person.”⁷⁹

Despite the precedent weighing heavily against them, the plaintiffs herein urged that the Court should consider *Dillon v. Legg*’s “more lenient approach.”⁸⁰ In *Dillon*, a California court allowed a mother to recover for emotional distress because of her “physical closeness” to the accident; she was not a direct victim.⁸¹ Justice Winchester reasoned that the Oklahoma Supreme Court declined to adopt the *Dillon* approach in the past, and *Maze* would not be the exception.⁸² Because H.R.’s parents and siblings only watched the accident from the window of their home, the Court concluded that under *Slaton*, the plaintiffs were bystanders and had no basis for recovery.⁸³ The plaintiffs were unable to recover for the intentional infliction of emotional distress claim because the “extreme and outrageous” element was not met.⁸⁴ There was nothing in the facts to indicate Alexandra Maze had “totally . . . exceeded the bounds of acceptable social interaction.”⁸⁵

IV. ANALYSIS

A. *The Law Is the Law*

In this case, based on Oklahoma precedent, the Oklahoma Supreme Court was correct in reversing the ruling of the trial court; the District Court of Cleveland County was incorrect in its decision to deny Lance and Cheryl Maze’s motion to dismiss the negligent entrustment claims

78. *Id.* ¶ 8, 414 P.3d at 838 (quoting *Kraszewski*, ¶ 11, 916 P.2d at 247).

79. *Id.* ¶ 9, 414 P.3d at 838 (citing *Slaton v. Vansickle*, 872 P.2d 929, 931 (Okla. 1994)).

80. *Id.* ¶ 10, 414 P.3d at 838.

81. *Id.* (citing *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968)).

82. *Id.* ¶ 11, 414 P.3d at 838.

83. *Id.* ¶¶ 11-12, 414 P.3d at 838-39.

84. *Id.* ¶ 13, 414 P.3d at 839.

85. *Id.* (quoting *Miller v. Miller*, 1998 OK 24, ¶ 33, 956 P.2d 887, 901).

because, under the facts of the case, the plaintiffs failed to state a claim upon which relief could be granted.⁸⁶ In the opinion, the Oklahoma Supreme Court relied on Oklahoma case law that demonstrated when a claim for negligent infliction of emotional distress should be upheld and when a claim should not be upheld.⁸⁷ Before any analysis of recovery could be done, the Court needed to decide what class of victims the plaintiffs would fall under.⁸⁸ The Oklahoma Supreme Court has only recognized recovery for plaintiffs that are direct victims; therefore, it was correct to compare the facts of *Maze* to the facts of both *Slaton* and *Kraszewski*.⁸⁹

It was very clear that H.R.'s parents and siblings did not fall within the definition of "direct victims" as defined under Oklahoma law.⁹⁰ The Court reached the conclusion that the plaintiffs were only bystanders by considering the facts that H.R.'s parents and minor siblings were not physically injured by the acts of Alexandra Maze, nor were they even near the school bus where the accident occurred.⁹¹ Permitting recovery for the negligent infliction of emotional distress claims would have completely undermined the holding in *Slaton* and *Kraszewski*, and the Oklahoma Supreme Court is not quick to overrule valid precedent unless 100% necessary. The plaintiffs in this case were able to meet the requirement that their emotional distress was the result of witnessing H.R. get hit by Alexandra Maze's car, but in no way would they meet the second requirement of recovery—that the plaintiffs be "directly physically involved in the accident."⁹² Plaintiffs herein could have only been considered bystanders.⁹³

The Oklahoma Supreme Court in *Maze* reversed the trial courts opinion for one reason and one reason only: the law is the law.

Courts have the power . . . of departing from rules which have been previously established. The strong respect for precedent

86. *Id.* ¶ 12, 414 P.3d at 839.

87. *See id.* ¶¶ 8-11, 414 P.3d at 838 (citing *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 1996 OK 141, ¶ 11, 916 P.2d 241, 247; *Slaton v. Vansickle*, 1994 OK 39, ¶ 15, 872 P.2d 929, 931).

88. *See id.* ¶ 7, 414 P.3d at 837 (quoting *Kraszewski*, ¶¶ 7-8, 10, 916 P.2d at 246).

89. *See id.* ¶¶ 8-9, 414 P.3d at 838.

90. *Id.* ¶ 7, 414 P.3d at 837-38 (quoting *Kraszewski*, ¶ 10, 916 P.2d at 246).

91. *Id.* ¶ 11, 414 P.3d at 838-39.

92. *Kraszewski*, ¶ 1, 916 P.2d at 243.

93. *Id.*

which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrine of stare decisis subordinate to legal reason and justice and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error.⁹⁴

Even if Justice Winchester and the rest of the Oklahoma Supreme Court personally believed adopting the *Dillon* or Bystander Theory would have better fit the needs of the case, it does not change the fact that the case law demonstrated exactly why recovery should not have been permitted in *Maze*.

B. Walking the Line

A third-party's right to recover for emotional damages for harm done to another coincides with the goals and aims of tort law. Tort law is designed to serve many functions, but the primary goal is to "restore [the plaintiff], so far as money damages can, to his status prior to the injury caused by [the defendant], and to compensate him for harm or losses that cannot be restored."⁹⁵ There seems to be a grey area when determining exactly what a plaintiff's status was before the emotional distress occurred, and this is what feeds into the fears of the Oklahoma Supreme Court.⁹⁶ However, one could argue that mental anguish and emotional distress do not qualify as the types of harm tort law seeks to compensate for.

In *Ridings v. Maze*, the Oklahoma Supreme Court was clearly correct in their holding based on Oklahoma law, but the issue lies in whether Oklahoma's standard of recovery for negligent infliction of emotional distress really best serves the purpose of tort law, and whether the court should have adopted the Bystander Theory of recovery suggested by Plaintiffs. On one hand, individuals are permitted to recover only if they are part of the accident or direct victims.⁹⁷ On the other hand, the more lenient bystander approach says the plaintiff may recover for mental and emotional distress so long as he is a foreseeable plaintiff.⁹⁸ Under the

94. Okla. Cty. v. Queen City Lodge, 1945 OK 55, ¶ 20, 156 P.2d 340, 245.

95. Edward J. Kionka, *Black Letter Outline on Torts* 129 (5th ed. 2013).

96. Free, Note, *supra* note 22, at 415-18.

97. *Kraszewski*, ¶ 8, 916 P.2d at 246.

98. *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).

Bystander Theory, the court assesses three factors to determine if the plaintiff is considered a direct victim:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁹⁹

The Court is forced to walk the line. Whatever theory the Court adopts will cause controversy; it will be required to deny individuals recovery for valid emotional distress or possibly allow individuals recovery for claims that could be arbitrary.

C. *Loosening the Reins*

The Oklahoma Supreme Court should consider the implications that could go along with rejecting the *Dillon* theory. The *Dillon* or Bystander Theory best serves the purpose of tort law. When an individual is wronged by the negligent act of another, and consequently suffers mental distress in some physically manifested way, he or she should be permitted to recover damages. Adoption of the Bystander Theory; however, does not come without its downfalls or complications.

The question of bystander recovery really is, "How far is too far?" How far can we stretch the limits of the law until we end up flooding our court system with ridiculous lawsuits? There are a number of policy concerns the Court must think about before expanding the general rule of recovery for negligent infliction of emotional distress.¹⁰⁰ The United States Supreme Court discussed many of these concerns in *Consolidated Rail Corp. v. Gottshall*.¹⁰¹ The United States Supreme Court has expressed concern that the inability to directly pinpoint mental anguish or emotional distress could "inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may

99. *Id.*

100. *See* *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 545 (1994).

101. *Id.*

be imposed for highly remote consequences of a negligent act.”¹⁰² The United States Supreme Court has further voiced their opinion:

Emotional injuries may occur far removed in time and space from the negligent conduct that triggered them. Moreover, in contrast to the situation [of] physical injury, there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act. The incidence and severity of emotional injuries are also more difficult to predict than those of typical physical injuries because they depend on physiological factors that ordinarily are not apparent to potential tortfeasors.¹⁰³

Oklahoma reasons that the direct victim approach is the better approach because, “[i]n bystander cases, no preexisting duty exists between the plaintiff and the defendant, whereas in ‘direct victim’ cases, the defendant has assumed a duty to avoid causing the plaintiff severe emotional distress.”¹⁰⁴ The Supreme Court of Oklahoma’s fears are valid and should be considered. It is true, the Bystander Theory faces great public policy concerns; however, it is also important to recognize the fact that “[t]he courts of nearly half the States now allow bystanders outside of the zone of danger to obtain recovery in certain circumstances for emotional distress brought on by witnessing the injury or death of a third party.”¹⁰⁵ Some states that allow this recovery include Alaska, California, Florida, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, West Virginia, Virginia, and Wyoming.¹⁰⁶ The fact that an overwhelming number of states in the United States have adopted the Bystander Theory is proof that it is an effective and efficient limitation on negligent infliction of emotional distress claims.¹⁰⁷

It is even more important to note that many of these jurisdictions have put their own spin on the Bystander Theory, and many of these jurisdictions also require the “plaintiff demonstrate a ‘physical

102. *Id.* at 545 (quoting *Maloney v. Conroy*, 545 A.2d 1059, 1061 (Conn. 1988)).

103. *Id.* at 545-46 (internal citation omitted).

104. Free, Note, *supra* note 22, at 411.

105. *Gottshall*, 512 U.S. at 549.

106. *Id.* at 549 n.10.

107. *Id.* at 549.

manifestation' of an alleged emotional injury."¹⁰⁸ Therefore, adopting this more lenient expansive theory does not mean that the Oklahoma Supreme Court would have to entirely throw out the common law principles that it is so afraid to let go of; the Court, like many of the other jurisdictions that apply this theory, would be able to adjust and tweak the *Dillon* factors in a way that best serves Oklahoma.

V. CONCLUSION

Regardless of surrounding jurisdictions' readiness to expand the rights to third parties for negligent infliction of emotional distress claims, the Oklahoma Supreme Court still clings to the ideals of the past.¹⁰⁹ Throughout the history of Oklahoma, its courts have never favored recovery for mental anguish and emotional distress because there is no concrete way to measure something that can only really be felt and understood by the person "suffering."¹¹⁰ Oklahoma continues to require some sort of physical manifestation or injury before it will even think twice about granting recovery.¹¹¹ Physical manifestation is something that has been a requirement since the early 1900s, and the Oklahoma Supreme Court is not going to break that requirement any time soon.¹¹² Oklahoma further limits recovery by requiring that a plaintiff is a direct victim, or someone who is actually involved in the accident, as opposed to a bystander, or someone who just witnesses the harm done to another without being actually involved.¹¹³ Moving forward, the Oklahoma Supreme Court should attempt to find a balance between the common law ideals and the modern Bystander Theory.

108. *Id.* at 549 n.11.

109. *Ridings v. Maze*, 2018 OK 18, ¶ 11, 414 P.3d 835, 838.

110. *St. Louis & S.F.R. Co. v. Keiffer*, 1915 OK 381, ¶ 8, 150 P. 1026, 1028.

111. *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 1996 OK 141, ¶ 18, 916 P.2d 241, 250.

112. *W. Union Tel. Co. v. Choteau*, 115 P. 879, 892 (Okla. 1911).

113. *Ridings*, ¶ 12, 414 P.3d at 839.