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WHITE PAPER ALERT

*Bystander Liability for Emotional Distress
Motion for Summary Judgment Granted*

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Fortman v. Forvaltingsbolaget Insulan AB (Cal. Ct. App. – Jan. 10, 2013)

Scuba diver witnessing brother's apparent heart attack is unable to satisfy the Supreme Court's second prong under Thing v. La Chusa – appreciation that cause of brother's injury was the defective product.

We have seen many automobile versus pedestrian cases where a family member sues alleging negligent infliction of emotional distress (NIED). Years ago in *Thing v. La Chusa*, the California Supreme Court formulated the legal framework by which a mere *bystander* could receive compensation as a witness to serious physical injury to a close family member. The Second Appellate District Court (Los Angeles) found, based on the reasoning in *Thing*, that a sister witnessing a physical injury without appreciating the cause of the harm fails to satisfy the *Thing* standard resulting in the denial of her claim.

Facts and Analysis

The *Fortman* case involves a family scuba diving off the coast of Catalina Island. Plaintiff Fortman alleges she and her brother Myers were diving when Myers signaled to ascend to the surface. Myers was wearing a Catalyst 360 dry suit equipped with a low pressure hose incorporating a small plastic flow-restriction insert. The insert was manufactured by the defendant (whose name I really can't pronounce.) Fortman held onto her brother's arm as they rose to the surface. However, she soon realized she was the only one kicking, as they settled back down to the ocean floor. She held his head back as they began to re-ascend (so he surely could breathe through his regulator) but soon realized he wasn't breathing as his regulator fell out of his mouth half way to the surface.

Fortman thought her brother had a heart attack. He was pronounced dead after transport to the USC Hyperbaric Chamber at Two Harbors on Catalina Island. Subsequent investigation by the Los Angeles County Sheriff's Office concluded a "flow restriction insert" dislodged from the low-pressure dry suit hose and became lodged in the regulator restricting air flow and causing the regulator to fail.

Negligently causing emotional distress is not an independent tort; it is the tort of negligence which requires the traditional elements of duty, breach, causation and damage. When emotional distress is the only injury a plaintiff alleges, courts must consider the tenuous nature of the connection between plaintiff's alleged emotional injury and defendant's alleged breach of duty. (*Dillon v. Legg* (1968) 68 Cal.2d 728.)

The *Thing* legal standard for recovery for purely emotional injury requires that the plaintiff:

1. is closely related to the physically-injured victim;
2. is present at the scene and is then-aware that it is causing injury; and
3. the event results in serious emotional distress beyond that ordinarily expected.

Remember, purely emotional injury is of the type of injury most easily faked or embellished and sound public policy compels a more rigorous legal test before liability is established.

At the time of injury-causing event, as the brother and sister slowly ascended to the ocean's surface, plaintiff was not aware of the nature of her brother's distress. In fact, she thought he had suffered a heart attack, etiology unknown. It was not until sometime later, at the conclusion of the law enforcement investigation that she learned of the alleged product defect involving the plastic flow-restriction insert. Accordingly, the second prong of the *Thing* test was not satisfied – she did not have contemporaneous sensory awareness of the causal connection between the company's defective product and resulting injury. Therefore, summary judgment was granted.

Please contact us with any questions.

A Copy of the Opinion is Available Here.

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