

No. S14G1775

In the
SUPREME COURT OF GEORGIA

Jerome Clifford Oliver, Crider Transportation, LLC, and Travelers Property
Casualty Company of North America

Appellants,

v.

John David McDade, and Jessica Ann McDade,

Appellees.

***AMICUS CURIAE BRIEF OF THE
GEORGIA DEFENSE LAWYERS ASSOCIATION***

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STATEMENT OF THE ISSUE

This case raises the issue whether Georgia’s pecuniary loss rule allows a bystander to recover – in a negligence action – emotional distress damages arising from injury to another. The answer is no. With only limited exception not applicable here, Georgia’s impact rule allows a plaintiff to recover for emotional distress arising from his own physical injuries, but not emotional distress arising out of injury to a friend. The Court of Appeals’ decision erroneously allows a plaintiff to use the pecuniary loss rule to do an end-run around the impact rule where the plaintiff’s emotional distress manifests an “identifiable psychological injury.” This Court should reverse because the opinion below constitutes an unlawful expansion of Georgia law that erases the impact rule’s bright line affirmed by this Court in *Lee v. State Farm Mutual Insurance Company*.

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The Georgia Defense Lawyers Association (“GDLA”) has more than 700 members, ranging from sole practitioners to lawyers in large firms. Though its members are diverse, they share a common interest in improving the adversary system of jurisprudence, among other goals. The GDLA respectfully submits this *amicus curiae* brief to show why the Court of Appeals’ articulation and application of the pecuniary loss rule is unworkable and contrary to the strong public policy of this State.

BACKGROUND

From the summary judgment record, it appears that John David McDade's claim includes damages for emotional distress arising from the injuries and gruesome death experienced by his good friend Matthew Wood. The accident occurred when McDade was riding in the passenger seat of his own pickup truck while Wood was driving on I-16. Wood had stopped in the emergency lane to check on the trailer hitched to the truck, but when he stepped out of the truck and walked toward the back, a tractor-trailer swerved onto the shoulder and struck his vehicle. Wood was crushed between the trailer and the truck, and was killed instantly. McDade, who was still sitting in the passenger seat at the time of impact, was thrown against the interior of the truck and sprayed with glass from the truck's rear window and tissue from Wood's body. McDade then found his friend's mangled body on the ground, at risk of being hit by other traffic.

McDade suffered some physical injury from being thrown inside the truck but, as the trial court found, there was no evidence that he was physically injured by the glass or tissue from Wood's body. There is evidence, however, that he has suffered emotional distress over what happened to his friend, as well as himself, that night. McDade has been diagnosed as having "[m]ajor depression, recurrent."

Relying on the impact rule, the trial court initially granted the defendants' motion for partial summary judgment on McDade's emotional distress claim

insofar as it relates to Wood’s injuries and death. But McDade did not appeal that order under O.C.G.A. § 9-11-68(h), as was his right. Instead, nine months later, he filed a motion for reconsideration, arguing that he can recover for his emotional distress under the pecuniary loss rule regardless of the impact rule. The trial court agreed and then vacated the partial summary judgment. An interlocutory appeal was granted and, in a splintered whole court opinion, the Court of Appeals affirmed. *Oliver v. McDade*, 328 Ga. App. 368 (2014).

The majority opinion found that, on this record, McDade’s emotional distress could not be apportioned to what he suffered over his friend’s fate as opposed to emotional distress arising from his own physical injuries. *Id.* at 369. But, the majority also held that even if such a distinction could be made, McDade is permitted to “recover emotional distress damages under the pecuniary loss rule” because in this case “we have evidence of identifiable nonphysical injuries (including an episode of depression) as well as pecuniary loss (the cost of medical treatment arising from depression).” *Id.* at 370; *see also id.* at 370 n.6 (referring to “identifiable psychological injury”). The effect of this ruling is to allow the jury to award immeasurable damages based on inflammatory evidence of the harm that befell McDade’s friend – evidence that would be barred by the impact rule. As shown by Judge Andrews’ dissent, however, this result cannot be reconciled with Georgia law. *See Oliver*, 328 Ga. App. at 374 (Andrews, J., dissenting).

ARGUMENT AND CITATION OF AUTHORITIES

A reversal is in order because the impact rule bars a recovery for emotional distress over harm to a friend; the Court of Appeals' articulation and application of the pecuniary loss rule cannot be reconciled with the impact rule; and an exception to the impact rule based on the pecuniary loss rule would contravene public policy.

A. With Limited Exception Not Applicable Here, Georgia's Impact Rule Does Not Permit A Bystander to Recover – In A Negligence Action – Emotional Distress Damages Arising From Injury To Another

Georgia law generally does not permit a bystander to recover for negligent infliction of emotional distress. Georgia follows the impact rule, stated succinctly by the Court in *Ryckley v. Callaway*, 261 Ga. 828 (1992): "In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury." Thus, in order for a plaintiff to recover for the negligent infliction of emotional distress, the plaintiff must show "(1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff's mental suffering or emotional distress." *Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 586 (2000).

Georgia's impact rule is over 100 years old, but its current contours were shaped by *Lee v. State Farm Mutual Insurance Company*, *supra*, and the earlier *Littleton* cases. See *OB-GYN Associates of Albany v. Littleton*, 261 Ga. 664, (1991)

(“*Littleton IV*”); *OB-GYN Associates of Albany v. Littleton*, 259 Ga. 663 (1989) (“*Littleton II*”); *Littleton v. OB-GYN Assocs. of Albany*, 199 Ga. App. 44 (1991) (“*Littleton III*”); and *Littleton v. OB-GYN Assocs. of Albany*, 192 Ga. App. 634 (1989) (“*Littleton I*”).

The *Littleton* cases involved a lawsuit by parents for a child’s wrongful death, and included a claim for the mother’s mental suffering from the allegedly negligent delivery of their infant daughter. The court in *Littleton II* held that the trier of fact can and must distinguish between the plaintiff’s emotional distress flowing from her own injuries and the plaintiff’s emotional distress at having witnessed the suffering death of her daughter. 259 Ga. at 663-64. The Court in *Littleton IV* later summed up the key holding of the *Littleton* cases:

[A]ny potential award of damages to Mrs. Littleton in the malpractice claim for her injuries is limited to compensation for any physical injury she suffered as a result of the alleged negligence, and any mental suffering or emotional distress she incurred as a consequence of her physical injuries. Any mental suffering or emotional distress she suffered as a result of injuries to her child is not compensable in this claim.

261 Ga. at 664 (quoting *Littleton III*, 199 Ga. App. at 46 n.1).

Mrs. Littleton was considered a bystander to her daughter’s death, even though she alleged that she suffered her own injuries as a result of the delivery. Thus, under the impact rule, she was barred from recovering damages for the mental anguish she suffered over having her daughter die in her arms.

In *Lee*, the Court reaffirmed the impact rule, but also recognized a very limited exception to the general prohibition on bystander recovery:

When . . . a parent and child sustain a direct physical impact and physical injuries through the negligence of another, and the child dies as the result of such negligence, the parent may attempt to recover for serious emotional distress from witnessing the child's suffering and death.

272 Ga. at 588 (overruling the *Littleton* cases to the extent they barred recovery of a parent's claim for emotional distress under the circumstances in *Lee*). And the Court in *Lee* continued to recognize the distinction between the emotional distress stemming from one's own injuries and the emotional distress of the bystander who witnessed the suffering and death of a child. *Id.*

Though the *Lee* Court created a narrow exception to the impact rule for a parent who was not just physically injured but also witnessed the suffering and death of a child in the same automobile accident, it upheld the impact rule as the law of Georgia in all other circumstances. The Court noted that "any rule seeking to circumscribe a defendant's liability to bystanders must necessarily involve a degree of arbitrariness." *Id.* at 587. Yet it concluded that the "brighter line of liability" under the impact rule provides benefits that outweigh any concern about arbitrariness. *Id.* Moreover, the Court "decline[d] to adopt any rule which might, in effect, create a separate tort allowing recovery of damages for the negligent infliction of emotional distress." *Id.* at 588.

B. The Opinion Below Cannot Be Reconciled With The Impact Rule.

The majority opinion of the Court of Appeals erases the bright line provided by the impact rule, and does the very thing this Court said it would not do in *Lee*. In effect, it creates a new, separate tort allowing recovery of damages for the negligent infliction of emotional distress. Under the guise of the pecuniary loss rule, the Court of Appeals held that McDade can recover – in a negligence action – for emotional distress arising from physical harm to his friend as opposed to arising from his own physical injury, which was relatively minor.

The decision below makes no attempt to reconcile the pecuniary loss rule with Georgia’s impact rule and the general prohibition against bystander recovery. Instead, it relies on *Nationwide Mutual Insurance v. Lam*, 248 Ga. App. 134 (2001), for the proposition that “a plaintiff may . . . recover damages for emotional distress flowing from a defendant’s negligence, notwithstanding the absence of physical injury,” but only where “the plaintiff has suffered a pecuniary loss and has suffered an injury to the person, albeit not physical.” 328 Ga. App. at 370 (quoting *Lam*, 248 Ga. App. at 138); *see also* Appellees’ Br. *passim*. However, as Judge Andrews’ dissent points out, this holding eviscerates the impact rule. 328 Ga. App. at 374 (Andrews, J., dissenting).

The *Lam* opinion appears to be the seed of the Court of Appeals’ error in this case. But *Lam* inaccurately depicts the provenance of the pecuniary loss rule.

Whereas the impact rule has a clear meaning and has been repeatedly and recently reaffirmed, the pecuniary loss rule is not a “well-established” doctrine, as Judge McFadden’s concurrence suggests. *Id.* at 373 (McFadden, J., concurring). Rather, the pecuniary loss rule is of questionable origin and uncertain meaning. This Court has recognized the theoretical existence of the pecuniary loss rule, but it has never held that a plaintiff is entitled to recover damages for the negligent infliction of emotional distress under the pecuniary loss rule. Indeed, until now no Georgia court has ever applied the pecuniary loss rule to allow a *bystander* to recover in negligence for emotional distress over harm inflicted on another.

In *Lam*, where the plaintiff suffered no physical injuries from a car accident but suffered the aggravation of a preexisting mental illness, the court recognized that the plaintiff “may not recover” under the impact rule for her emotional or mental injury. 248 Ga. App. at 136. But the court then extrapolated from dicta in *Littleton II* that a plaintiff may recover emotional distress damages in a negligence action even where there is no physical injury. *Id.* at 136-37. However, the section in *Littleton II* discussing the pecuniary loss rule on which *Lam* relies cannot mean what *Lam* says it means.

First, in *Littleton II* the Court *rejected* the notion that the pecuniary loss rule supported a recovery for emotional distress. Mrs. Littleton argued that she suffered a pecuniary loss from a non-physical personal injury because the hospital had to

give her a valium injection to treat the “mental suffering and emotional distress” she suffered after she witnessed her daughter’s death. *See Littleton I*, 192 Ga. App. at 635-36 (1989) (Beasley, J. concurring). But the Court in *Littleton II* nonetheless held that her emotional distress claims, which were barred by the impact rule, could not be saved by the pecuniary loss rule. Thus the *Littleton II* decision does not support the Court of Appeals’ decisions in either *Lam* or in this case.

Second, in its discussion of the pecuniary loss rule, the Court in *Littleton II* emphasized that “the pecuniary loss must occur as a result of a *tort* involving an injury to the person even though this injury may not be physical. An injury to the reputation would be such an injury.” 259 Ga. at 667 (emphasis added). Though *Littleton II* cited the rule articulated in *Kuhr Brothers v. Spahos*, 89 Ga. App. 885, 890 (1954), which “extracted” the principle in *Chapman* to suggest that the pecuniary loss rule could apply in a negligence action, the *Littleton* court did not hold that the pecuniary loss rule applies in cases of simple negligence. The example given in *Littleton II* of “an injury to the reputation” demonstrates this point – injury to reputation is not recoverable in an action for ordinary negligence. *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 167 Ga. App. 411, 416 (1983) *aff’d*, 252 Ga. 149 (1984). Rather, “damages for this type of personal injury are recoverable only in actions alleging intentional or wanton misconduct, for example, libel and slander, malicious prosecution or malicious arrest.” *Id.*

As Appellants argue, what this Court was saying in *Littleton II* is that for the pecuniary loss rule to apply to allow a claim for emotional distress damages there must be a separate tort (other than ordinary negligence) involving a non-physical injury that results in a pecuniary loss. This is the only conceivable reading of the pecuniary loss rule that is consistent with the impact rule.

Instead of reconciling the pecuniary loss rule with the impact rule, the Court of Appeals has expanded it to allow a recovery for negligent infliction of emotional distress where “an identifiable injury” is shown. This ruling has no legal basis, however. For example, if that were the historical rule, Mrs. Littleton would have been able to recover due to the identifiable psychological injury she suffered when her baby died in her arms. And there would have been no need for the limited exception to the impact rule for Mrs. Lee because her identifiable psychological injury from watching her daughter suffer and die would have been enough.

Moreover, no other jurisdiction has such a pecuniary loss rule. Elsewhere the “pecuniary loss rule” refers to the largely-abandoned limitation on a parent’s recovery in the wrongful death of a child – a parent could recover only the “pecuniary loss” from the child’s service. *See e.g. Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983); *Robinson v. Wroblewski*, 704 N.E.2d 467, 468 (Ind. 1998). Thus it appears that the pecuniary loss rule is nothing more than a vestigial appendage, and its application in this case is an aberration without justification.

C. This Court Should Not Adopt A “Pecuniary Loss” Exception To The Impact Rule

In *Lee*, this Court concluded that “the benefits of an impact rule are plain in that it provides a brighter line of liability and a clear relationship between the plaintiff’s being a victim of the breach of duty and compensability to the plaintiff. *Lee*, 272 Ga. at 587. And the “pecuniary loss” analysis adopted by the Court of Appeals cannot overcome the reasons why this Court approved the impact rule in *Lee v. State Farm*. See *Oliver*, 328 Ga. App. at 379-80 (Andrews, J., dissenting).

Indeed, the majority opinion of the Court of Appeals adopted an unworkable rule because it does not define “identifiable injury” as needed to rationally distinguish between emotional distress that is compensable and that which is barred by the impact rule. Is a diagnosis by a health care professional needed to convert emotional distress into a compensable item of damages? There are many questions left unanswered by the Court of Appeals’ decision in this case, which is the antithesis of the bright line approach lauded by this Court in *Lee*.

The *Lee* Court expressly limited the exception to the narrow circumstances of that case – where a parent injured in the same accident suffers emotional distress from witnessing the suffering and death of her child. 272 Ga. at 588. And, the courts have refused to expand the exception even to other familial relationships. See *Floyd v. Travelers Prop. Cas. Corp. of Am.*, No. 1:05-CV-82 (WLS), 2006 WL

1735906, at *3 (M.D. Ga. June 22, 2006). Moreover, while some other jurisdictions have “abandoned” the impact rule, none has adopted the unworkable, open-ended “pecuniary loss” rule embraced by the Court of Appeals in this case. *See* Appellees’ Br. at 6. n.24. As noted in *Lee*, after issuing the seminal case on bystander recovery for emotional distress, the California Supreme Court has “acknowledged the necessity of setting limitations on the recovery of bystander emotional distress” *Lee*, 272 Ga. at 587 n.7 (citing *Thing v. LaChusa*, 48 Cal. 3d 644 (1989)); *see also Restatement (Third) of Torts: Phys. & Emot. Harm*, Reporters Note cmt. a (collecting cases, and stating “a number of courts, including the same court that decided *Dillon*, have decided that the open-ended foreseeability approach to bystander liability was unworkable and have instead employed a rule-based approach to bystander claims.”); Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 391 (2d ed.).

Allowing a bystander to use the newly expanded pecuniary loss rule to recover emotional distress damages would provide no safeguards against unlimited liability. In *Lee*, this Court recognized the policy consideration that “[i]n order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.” 272 Ga. at 587 n.7 (quoting

Thing, 48 Cal. 3d at 663-64); *see also Restatement (Third) of Torts: Phys. & Emot. Harm* § 48 cmt. g (2012) (“Limits are required for emotional harm because of its ubiquity, and an alternative to workable and effective limits for such liability could be a rule of no liability.”). Such “policy considerations justify restrictions on recovery for emotional distress notwithstanding the sometimes arbitrary result, . . . [because] if the consequences of a negligent act are not limited an intolerable burden is placed on society.” *Thing*, 48 Cal. at 664. Therefore, “[a] ‘bright line in this area of the law is essential.’” *Id.* (citation omitted). For these reasons, a plaintiff in Georgia must not be permitted to use the pecuniary loss rule to recover damages that would be barred by the impact rule.

CONCLUSION

The GDLA urges the Court to reverse the Court of Appeals.

Respectfully submitted this 14th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify that on January 14, 2015, before filing, I served a true and correct copy of the foregoing on all parties to this action, or their attorney of record, by email and by placing it in the United States Mail, first class postage prepaid, and properly addressed as follows:

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