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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0791**

Misty Jensen,
Appellant,

vs.

Susan Arndt, as Personal Representative
for the Estate of Charles A. McQuinn, Deceased,
Respondent.

**Filed April 9, 2018
Affirmed in part, reversed in part, and remanded.
Johnson, Judge
Concurring in part, dissenting in part, Kirk, Judge**

Crow Wing County District Court
File No. 18-CV-16-2091

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Considered and decided by Johnson, Presiding Judge; Kirk, Judge; and Klaphake,
Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Judge

Misty Jensen was injured in an automobile crash as a passenger in a car driven by her fiancé, Charles A. McQuinn, who died in the accident. Jensen sued McQuinn's estate, alleging claims of negligence and negligent infliction of emotional distress. The district court granted McQuinn's estate's motion for summary judgment. We conclude that the district court did not err in its ruling on Jensen's negligence claim because the district court properly applied a statute precluding evidence of Jensen's use or non-use of a seat belt. We also conclude that the district court erred in its ruling on Jensen's negligent-infliction-of-emotional-distress claim because there is a genuine issue of material fact as to whether Jensen suffered severe emotional distress with physical manifestations. We further conclude that the district court's grant of summary judgment on Jensen's negligent-infliction-of-emotional-distress claim can be affirmed in part on the alternative ground that Jensen cannot establish the requirements for bystander damages. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

In the fall of 2011, Jensen and McQuinn were living together in Brainerd with their respective children from previous relationships. On September 23, 2011, Jensen and McQuinn were returning from a short vacation near Lake Superior, where they had agreed to get married. McQuinn was driving his Chevrolet Corvette; Jensen was riding in the passenger seat and was wearing a seat belt. McQuinn commented to Jensen that they were

traveling too slowly, “like a couple of old people,” at which point he grabbed Jensen’s hand and accelerated. The car left the road and rolled.

When the car came to a stop, Jensen saw that McQuinn’s neck was broken. She performed CPR to no avail. McQuinn was pronounced dead at the scene. Jensen was transported to a nearby hospital. She was treated for a sore and bruised left shoulder, a chest contusion, an injury to the left side of her buttocks, and swollen lips. Jensen testified in a deposition that, for a period of time after the accident, she experienced increased depression and insomnia. She also testified that she continues to experience anxiety attacks that involve difficulty breathing, uncontrollable crying, and a spike in body temperature that leads to headaches and sweating.

In August 2015, Jensen commenced this action against McQuinn’s estate. She alleged two claims: negligence and negligent infliction of emotional distress. In October 2016, McQuinn’s estate moved for summary judgment. On February 10, 2017, the district court issued an order in which it granted the motion with respect to the negligent-infliction-of-emotional-distress claim. The district court denied the motion with respect to the negligence claim but limited the evidence that Jensen could introduce at trial, stating, “Defendant’s request that Plaintiff be precluded from introducing any evidence as to her use or nonuse of a seat belt is granted.”

In March 2017, counsel for the parties entered into a stipulation that states, “Plaintiff stipulates and admits that as a result of the Court’s February 10, 2017 order that Plaintiff cannot maintain a tort threshold solely for injuries other than the injuries to her shoulder and buttocks caused by the seatbelt.” Counsel also stipulated to the entry of a proposed

amended order on McQuinn's estate's summary-judgment motion, which was attached to the stipulation. In April 2017, the district court signed the proposed amended order without any revisions. The amended order states, in relevant part, "Based upon Plaintiff's admission that she is unable to meet a tort threshold on her remaining claim, [the negligence claim] is hereby dismissed." Accordingly, the amended order concludes that McQuinn's estate's summary-judgment motion is granted with respect to both claims. The district court administrator entered final judgment in favor of McQuinn's estate. Jensen appeals.

D E C I S I O N

A district court must grant a motion for summary judgment if the evidence demonstrates "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could "find for the non-moving party." *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008) (quotation omitted). This court applies a *de novo* standard of review to a district court's legal conclusions on summary judgment and "view[s] the evidence in the light most favorable to the" non-moving party. *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015); *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012) (quotations omitted); *Day Masonry v. Independent Sch. Dist.* 347, 781 N.W.2d 321, 325 (Minn. 2010).

I. Negligence Claim

Jensen argues that the district court erred by granting McQuinn's estate's summary-judgment motion with respect to her negligence claim.

The parties' arguments focus on a statute commonly known as the "seat belt gag rule." *See Olson v. Ford Motor Co.*, 558 N.W.2d 491, 494 (Minn. 1997). The statute provides:

(a) Except as provided in paragraph (b), *proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.*

(b) Paragraph (a) does not affect the right of a person to bring an action for damages arising out of an incident that involves a defectively designed, manufactured, installed, or operating seat belt or child passenger restraint system. Paragraph (a) does not prohibit the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system in an action described in this paragraph.

Minn. Stat. § 169.685, subd. 4 (2016) (emphasis added). In light of the statute, a plaintiff in a case arising from an automobile collision may not introduce evidence that he or she suffered an injury that was caused by direct contact with the strap of a seat-belt system, which clearly demonstrates that the plaintiff was using a seat belt at the time of the accident. *Burck v. Pederson*, 704 N.W.2d 532, 535-36 (Minn. App. 2005), *review denied* (Minn. Dec. 13, 2005). Likewise, a defendant in such a case may not introduce evidence that a

child's death was caused by the child's parent's failure to use a child-passenger-restraint system. *Swelbar v. Lahti*, 473 N.W.2d 77, 78-79 (Minn. App. 1991).

On appeal, Jensen does not challenge the principle that the seat-belt statute prevents her from introducing evidence of injuries to her shoulder and her chest, which were caused by direct contact with the strap of the seat belt that she was using at the time of the accident. *See Burck*, 704 N.W.2d at 535. She contends that the evidence of her buttocks injury is admissible because that injury—which apparently occurred when her buttocks came into contact with the seat-belt buckle that was affixed to the passenger seat—was not caused by her use or non-use of the seat belt. In response, McQuinn's estate contends that evidence of Jensen's buttocks injury is inadmissible under the statute because the injury was caused by direct contact with a component of the seat-belt system.

Before considering the parties' respective arguments, we note that, in its initial decision on McQuinn's estate's summary-judgment motion, the district court *denied* the motion with respect to Jensen's negligence claim, thereby permitting her to go to trial on that claim. Moreover, the district court did *not* rule that Jensen would be precluded from introducing evidence of her buttocks injury. Rather, the district court merely stated that Jensen is "precluded from introducing any evidence as to her use or nonuse of a seat belt." The district court did not make a ruling that was adverse to Jensen on her negligence claim until it issued the amended order. But Jensen's counsel agreed to the amended order and specifically asked the district court to issue it.

In circumstances such as these, some courts have concluded that a party may not appeal from an order or judgment to which the party agreed. For example, the United

States Court of Appeals for the Eighth Circuit has stated that if “a party consents to a judgment, it has waived its right to appeal the claims disposed of by that judgment.” *Williams v. Employers Mut. Cas. Co.*, 845 F.3d 891, 897 (8th Cir. 2017). A party who has consented to an adverse judgment, however, may appeal from the judgment if “the consent judgment follow[s] a ruling that was, as a practical matter, case-dispositive.” *Id.* In such a case, the party consents merely “to putting the ruling in its final form, not to the substance of the judgment.” *Id.* That was, in essence, the procedural posture of *Burck*, in which the defendant moved *in limine* to preclude the plaintiff from introducing certain evidence. 704 N.W.2d at 533. The district court granted the motion *in limine* and then, with the agreement of the parties, treated the defendant’s motion as a motion for summary judgment, which the district court granted. *Id.* at 533-34.

In contrast to *Burck*, the district court in this case *denied* a summary-judgment motion and made a ruling on admissibility that was *not* dispositive. But an appellant’s waiver of the right to appeal must be raised by an opposing party; an appellate court will not *sua sponte* deem an appeal to have been waived. *See Williams*, 845 F.3d at 896-97; *Taylor Brands, LLC v. GB II Corp.*, 627 F.3d 874, 877-78 (D.C. Cir. 2010); *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1353 (11th Cir. 2008). Because McQuinn’s estate has not argued that Jensen waived her right to appeal, we decline to consider the issue of waiver. Nonetheless, our review of the district court’s orders must be tailored to the disputed issues that actually were presented to the district court and to the district court’s resolution of those issues. We will seek to determine whether the district court made an erroneous decision. We will not assume that the district court made a

decision that the district court did not actually make, even if an appellant and a respondent agree on the issues to be resolved on appeal.

In this case, the district court issued two orders. The second order (the stipulated amended order) cannot reasonably be challenged on appeal because it was prepared by the parties and jointly submitted to the district court, which signed it in exactly the same form in which it was presented. Accordingly, we confine our review to the district court's first order, in which the district court denied McQuinn's estate's motion for summary judgment with respect to Jensen's negligence claim. The district court ruled against Jensen only to the extent that it limited the evidence she could introduce at trial, concluding that she is "precluded from introducing any evidence as to her use or nonuse of a seat belt." That statement is a general statement and is an accurate reflection of the seat-belt gag rule. *See* Minn. Stat. § 169.685, subd. 4 ("proof of the use or failure to use seat belts . . . shall not be admissible in evidence in any litigation involving personal injuries . . . resulting from the use or operation of any motor vehicle").

We acknowledge that the district court's analysis of the seat-belt gag rule is somewhat unclear. In paragraph 11 of its conclusions of law, the district court stated, "Plaintiff's Answers to Interrogatories and her medical records indicate that the injury to [her] buttocks arose from the use of a seat belt. Therefore, the seat belt gag rule precludes Plaintiff from presenting any evidence that she suffered an injury caused by the use of a seat belt." The first sentence quoted here does not accurately describe the evidence in the summary-judgment record. Jensen's answer to interrogatory No. 20 states, in relevant part, "Plaintiff had an indent disfigurement on her buttocks caused by the seatbelt in the

collision.” The interrogatory answer does not state whether she was using a seat belt at the time of the crash and does not state whether her buttocks injury was caused by her use or non-use of a seat belt. Similarly, a physician’s March 19, 2012 treatment note (which is the only medical record in the summary-judgment record) refers to an “injury to buttocks” and refers to a “seat belt buckle” but does not say whether Jensen was using a seat belt at the time of the crash or whether her buttocks injury was caused by her use or non-use of a seat belt.

Notwithstanding paragraph 11 of the conclusions of law, the district court’s first order, when read as a whole, allowed Jensen to go to trial and allowed her to introduce evidence that does not relate to the use or non-use of a seat belt. Jensen would have been free to testify about the crash and her injury without making reference to whether she was using or not using a seat belt. In her deposition, Jensen testified that “the seat belt . . . hit underneath my butt like where you clip the seat belt.” Such testimony would not have been inadmissible at trial because it would not have indicated whether Jensen was using or not using a seat belt at the time of the crash. Furthermore, such testimony would not lead a jury to speculate about whether Jensen was using or not using a seat belt at the time of the crash because, given the evidence about its nature and cause, the injury could have occurred during a rollover if Jensen were using a seat belt or if she were not using a seat belt. *Cf. Lind v. Slowinski*, 450 N.W.2d 353, 355, 359 (Minn. App. 1990) (affirming exclusion of expert evidence in part because “it would have put before the jury the fact that [plaintiff] was not wearing a seat belt” while sitting on lap of front-seat passenger), *review denied* (Minn. Feb. 21, 1990). Because the district court’s first order did not preclude Jensen from

introducing evidence of her buttocks injury so long as she did not reveal the use or non-use of a seat belt, the district court did not misapply the seat-belt statute.

Thus, the district court did not err in its February 10, 2017 order by denying McQuinn's estate's motion for summary judgment with respect to Jensen's negligence claim and by ruling that Jensen would be "precluded from introducing any evidence as to her use or nonuse of a seat belt."

II. Claim of Negligent Infliction of Emotional Distress

Jensen also argues that the district court erred by granting McQuinn's estate's summary-judgment motion with respect to her claim of negligent infliction of emotional distress (NIED).

To prove an NIED claim, a plaintiff must establish all elements of a negligence claim and also establish additional elements that are specific to an NIED claim. *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). "The four elements of negligence are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury." *Id.* (citing *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001)). The additional elements of an NIED claim are that the plaintiff "(1) was within the zone of danger of physical impact [created by the defendant's negligence]; (2) reasonably feared for her own safety; and (3) [consequently] suffered severe emotional distress with attendant physical manifestations." *Id.* (quoting *K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995)) (alternations in original). A plaintiff who establishes all seven elements listed above may

recover damages for her “distress arising from her fear for her own safety.” *Id.*; see also *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980).

Furthermore, a plaintiff may recover damages on an NIED claim for “distress caused by fearing for another’s safety or witnessing serious injury to another” if she can establish one more element. *Engler*, 706 N.W.2d at 770. Specifically, a plaintiff may recover so-called bystander damages if she can prove all of the following:

(1) was in the zone of danger of physical impact; (2) had an objectively reasonable fear for her own safety; (3) had severe emotional distress with attendant physical manifestations; and (4) stands in a close relationship to the third-party victim. [Moreover,] the plaintiff also must establish that the defendant’s negligent conduct—the conduct that created an unreasonable risk of physical injury to the plaintiff—caused serious bodily injury to the third-party victim.

Id. at 770-71. In this case, Jensen seeks to recover both types of damages that are available on an NIED claim: zone-of-danger damages for her distress arising from her fear for her own safety, and bystander damages for her distress arising from her witnessing McQuinn’s death.

A. Physical Manifestations of Severe Emotional Distress

The district court granted summary judgment on Jensen’s NIED claim on the ground that she does not have sufficient evidence to create a genuine issue of material fact on the third element, whether she suffered severe emotional distress with attendant physical manifestations. Jensen contends that the district court erred because she submitted evidence that she has experienced increased depression and insomnia and evidence that she

experiences anxiety attacks that involve difficulty breathing, uncontrollable crying, and a spike in body temperature that leads to headaches and sweating.

Historically, “the general rule regarding the negligent infliction of emotional distress has been that there can be no recovery absent some accompanying physical injury.” *Langeland v. Farmers State Bank*, 319 N.W.2d 26, 29 (Minn. 1982) (citing W. Prosser, *Handbook of the Law of Torts* § 54, at 328-29 (4th ed. 1971)). The requirement of a “physical injury or symptom” is “a judicial obstacle designed to insure a plaintiff’s claim is real.” *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 443 (Minn. App. 1985) (citing Restatement (Second) of Torts § 436A, cmt. b. (1965)), *review denied* (Minn. Apr. 18, 1985). Thus, to recover on an NIED claim, a plaintiff must “exhibit[] physical manifestations of the emotional distress.” *Leaon v. Washington County*, 397 N.W.2d 867, 875 (Minn. 1986). In analyzing a plaintiff’s evidence of physical manifestations of emotional distress, courts consider not only the physical symptoms themselves but also their source; whether the physical symptoms arose from an especially traumatic event also is relevant. *See Quill*, 361 N.W.2d at 443. As this court has explained, a plaintiff is more likely to be successful on an NIED claim if there is “an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.” *Id.* (quoting Prosser, *supra*, § 54, at 328).

Jensen’s evidence is fairly similar to the evidence of the plaintiff in *Quill*, who was a passenger in a commercial airplane that “suddenly rolled over and plunged downward” in a “tailspin [that] continued for the next 40 seconds at speeds just below the speed of sound, causing the plane to violently shake” before the pilots regained control and averted

a crash. *Id.* at 440. The plaintiff subsequently experienced “adrenaline surges, sweaty hands, elevated pulse and blood pressure.” *Id.* at 441. This court reasoned that, although Quill’s physical symptoms were “less severe” than the symptoms of plaintiffs in other cases, his evidence of physical manifestations was sufficient given “the circumstances” of the case. *Id.* at 443. This court explained as follows:

[T]he unusually disturbing experience plaintiff endured combined with his physical symptoms assure that his claim is real. There can be few experiences as terrifying as being pinned to a seat by gravity forces as an airplane twists and screams toward earth at just under the speed of sound. The nature of that experience guarantees plaintiff suffered severe emotional distress during the descent and the emergency detour His sweaty hands, elevated blood pressure and other signs of distress provide, in this case, sufficient physical symptoms to warrant the law’s recognition of his claim.

Id.

The circumstances of this case are similar. Jensen was a passenger in a car that left the road at a high speed and rolled. The accident was sufficiently forceful that it caused the death of the driver. Jensen’s physical symptoms may be lacking in severity, like those of the plaintiff in *Quill*. See 361 N.W.2d at 443; see also *State by Woyke v. Tonka Corp.*, 420 N.W.2d 624, 627 (Minn. App. 1988) (concluding that evidence of hair loss and frequent colds was insufficient due to lack of objective “medical evidence”), review denied (Minn. May 4, 1988). But the circumstances underlying her emotional distress and the physical symptoms provide assurances that her emotional distress is real, not contrived. See *Quill*, 361 N.W.2d at 443.

McQuinn's estate cites *Leaon*, in which the supreme court held that the plaintiff's evidence of physical manifestations was insufficient. The plaintiff in *Leaon* alleged that he experienced emotional distress after being subjected to unwanted sexual contact with a nude female dancer at a bachelor party. 397 N.W.2d at 869. Thereafter he "he lost weight (later regained), became depressed, and exhibited feelings of anger, fear, and bitterness." *Id.* at 875. The supreme court rejected his NIED claim, stating, "These symptoms do not satisfy the physical manifestations test, a test designed to assure the genuineness of the alleged emotional distress." *Id.* In the following sentence, the supreme court compared Leaon's evidence to the evidence in *Quill*, noting that the emotional distress in *Quill* was "undoubtedly attributable to a terrifying experience (the sudden, violent tailspin of a commercial airliner)" and "was under those circumstances sufficiently manifested by the objective, physical symptoms." *Id.* The implication of *Leaon* is that the supreme court determined that the circumstances of that case were not disturbing enough or terrifying enough to guarantee the genuineness of the alleged emotional distress. *See id.* The circumstances of this case, however, are unlike *Leaon* because Jensen's claim of emotional distress arises from a sudden and traumatic event, similar to the event in *Quill*. *See* 361 N.W.2d at 443; *see also Silberstein v. Cordie*, 474 N.W.2d 850, 853, 856-57 (Minn. App. 1991) (concluding that plaintiffs' evidence of physical symptoms was sufficient in light of home invasion and shotgun murder of plaintiffs' husband and father), *rev'd & remanded on other grounds*, 477 N.W.2d 713 (Minn. 1991) (mem.).

Thus, the district court erred by granting McQuinn's estate's summary-judgment motion on Jensen's NIED claim on the ground that she does not have sufficient evidence

to create a genuine issue of material fact as to whether she has suffered severe emotional distress with attendant physical manifestations.

B. Bystander Damages

McQuinn's estate argues that the district court's grant of summary judgment on Jensen's NIED claim should be affirmed in part on alternative grounds because she cannot satisfy the fourth element of an NIED claim, which requires her to prove that she was "in a close relationship to the third-party victim." *Engler*, 706 N.W.2d at 770. As a general rule, a respondent on appeal may assert an alternative ground for affirmance so long as the respondent preserved the alternative argument by presenting it to the district court. See *Day Masonry*, 781 N.W.2d at 331.

McQuinn's estate contends that, as a matter of law, Jensen cannot prove the fourth element for two reasons: first, because there was no "third-party victim" and, second, because the relationship between Jensen and McQuinn was not sufficiently close. Jensen does not contend that McQuinn's estate did not preserve its alternative arguments in the district court. The alternative grounds are relevant only to Jensen's request for bystander damages, *i.e.*, damages for her emotional distress arising from witnessing McQuinn's death; the alternative grounds are not relevant to her request for zone-of-danger damages, *i.e.*, damages for her emotional distress arising from her fear for her own safety.

1. Tortfeasor as Victim

McQuinn's estate contends that the district court's grant of summary judgment on Jensen's NIED claim can be affirmed in part on the alternative ground that McQuinn is both the allegedly negligent tortfeasor and the victim whose death Jensen witnessed.

In *Engler*, the only appellate opinion addressing bystander damages on an NIED claim, the plaintiff was the mother of a four-year-old child who was struck by a car driven by a stranger. *Id.* at 766. The supreme court recognized for the first time a plaintiff's ability to recover bystander damages, so long as the plaintiff could "establish that *the defendant's* negligent conduct—the conduct that created an unreasonable risk of physical injury to the plaintiff—caused serious bodily injury to *the third-party victim.*" *Id.* at 770-71 (emphasis added). McQuinn's estate relies on this language in *Engler* and contends that bystander damages are permitted only if the person who caused a plaintiff's emotional distress and the person whose injury was witnessed by the plaintiff are different persons.

Because *Engler* is the only opinion in Minnesota on bystander damages, and because the defendant and the victim in *Engler* were different persons, there is no caselaw directly on point. We note that the supreme court historically has been cautious about expanding the scope of the NIED tort. *See id.* at 772; *Stadler*, 295 N.W.2d at 555. To endorse Jensen's bystander theory in this case would imply that a person who has been physically injured due to his or her own negligence may be liable to a person whose injuries are merely derivative of, and often less serious than, the defendant's injuries. To endorse Jensen's bystander theory would tend to encourage lawsuits between family members or other persons who are closely related. Because Jensen's invocation of the bystander theory is unprecedented, illogical, and contrary to the supreme court's assumptions in *Engler*, we conclude that Jensen may not recover bystander damages from McQuinn's estate for her emotional distress arising from witnessing his death.

2. *Closeness of Relationship*

McQuinn's estate also contends that the district court's grant of summary judgment on Jensen's NIED claim can be affirmed in part on the alternative ground that Jensen was not in a close relationship with McQuinn because she was not married to or otherwise in a familial relationship with him at the time of the crash.

In *Engler*, the plaintiff was the mother of a four-year-old child who was struck by a car. *Id.* at 766. The supreme court easily concluded that the mother and her child had a close relationship. *Id.* at 772. The supreme court refrained from further analysis of the close-relationship test, stating, "In keeping with our historic cautiousness in expanding the NIED tort, we decline in this case to define the precise contours of the 'close relationship' requirement because the facts of this case do not require us to do so." *Id.* The court added, "By limiting our opinion to the facts before us, we allow the common law NIED tort to develop gradually." *Id.* In a concurring opinion, one justice stated that the close-relationship requirement should be limited to cases in which "the third-party victim is a spouse, parent, child, grandparent, grandchild, or sibling of the plaintiff," which are "universally recognized relationships" that are susceptible to a workable, bright-line rule. *Id.* at 772-73 (G.B. Anderson, J., concurring).

In this case, the evidence in the summary-judgment record indicates that there was a meaningful relationship between Jensen and McQuinn at the time of the accident. The relationship was not as close as the relationship in *Engler*, but the relationship was perhaps as close as possible between two adults who are not married to each other. Nonetheless, given the supreme court's "historic cautiousness in expanding the NIED tort," and in the

absence of any indication that the supreme court would consider this relationship to be a basis for bystander damages, we refrain from reaching such a legal conclusion. *See id.* at 772; *see also Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that “the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court”), *review denied* (Minn. Dec. 18, 1987).¹ Because Jensen and McQuinn were not married at the time of the accident, we conclude that Jensen may not recover bystander damages for her emotional distress arising from witnessing his death.

Accordingly, the district court’s grant of summary judgment on Jensen’s NIED claim is affirmed in part on alternative grounds because Jensen cannot satisfy the fourth element of an NIED claim, which requires her to prove that she was “in a close relationship to the third-party victim.” *Engler*, 706 N.W.2d at 770. To reiterate, the alternative grounds are relevant only to Jensen’s request for bystander damages, *i.e.*, damages for her emotional distress arising from witnessing McQuinn’s death; the alternative grounds are not relevant to her request for zone-of-danger damages, *i.e.*, damages for her emotional distress arising from her fear for her own safety.

¹The dissenting opinion in this case asserts that the close-relationship issue is a question of fact that should be submitted to a jury. To the contrary, a footnote in the opinion of the court in *Engler* states that “the parties in this case did not address the question of how a close relationship requirement should be defined” and further states that “we would benefit from briefing on this important question before adopting a particular definition.” *Id.* at 772 n.5. Similarly, the concurring opinion in *Engler* states that, if the close-relationship requirement were to apply to persons who are not members of the same family, the law would need to be expanded by “some future court.” *Id.* at 773 (G.B. Anderson, J., concurring). Both of these opinions indicate that all seven justices in *Engler* viewed the issue as a question of law, not a question of fact.

Thus, for the reasons stated in part II.A., the district court erred by granting McQuinn's estate's motion for summary judgment on Jensen's NIED claim. But for the reasons stated in part II.B., the district court did not err by granting McQuinn's estate's motion for summary judgment on Jensen's NIED claim with respect to her request for bystander damages, *i.e.*, damages for her distress arising from witnessing McQuinn's death. Jensen may proceed on her NIED claim to the extent that she seeks zone-of-danger damages, *i.e.*, damages for her distress arising from her fear for her own safety.

Affirmed in part, reversed in part, and remanded.

KIRK, Judge (concurring in part, dissenting in part)

I respectfully dissent from the majority's resolution of the close-relationship element, as well as its analysis of the tortfeasor as victim.

The majority acknowledges that the supreme court has expressly declined "to define the precise contours of the 'close relationship' requirement." *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 772 (Minn. 2005). Nevertheless, the majority concludes that an extension of the law would be required to determine that appellant Misty Jensen and Charles McQuinn were in a close relationship because they were not married at the time of the automobile accident. I disagree.

Justice Anderson's concurring opinion in *Engler* advocated for a bright-line rule that a spouse (and, therefore, not a fiancée) could assert a bystander claim for negligent infliction of emotional distress (NIED). *Id.* (G.B. Anderson, J., concurring). The *Engler* majority declined to adopt this bright-line rule, and rather, elected to "allow the common law NIED tort to develop gradually." *Id.* (majority opinion).

Based on the supreme court's clear rejection of specific parameters on the close-relationship requirement in *Engler*, I cannot conclude as a matter of law that Jensen and McQuinn were not in a close relationship. The close-relationship requirement, like the physical-manifestation requirement, "serves to authenticate the plaintiff's distress and to place limits on a negligent tortfeasor's liability." *Id.* In these modern times, as the practical and legal definition of a family continues to evolve, the closeness of relationships not legally recognized should be a question of fact for the jury to decide in a bystander claim for NIED. Viewing the evidence in the light most favorable to Jensen, there was a genuine

issue of material fact whether Jensen and McQuinn—who planned to marry the next month and lived together—were in a close relationship. *See STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (noting that we review the evidence in the light most favorable to the party against whom summary judgment was granted).

I also disagree that allowing bystander recovery when the tortfeasor is the victim would encourage lawsuits between close relatives. Passengers routinely sue drivers who are their close relatives for physical injuries caused by the driver's negligence, and a rule of law allowing bystander recovery when the tortfeasor is the victim is neither unprecedented nor illogical.

Finally, while I concur in the majority's analysis regarding evidence of the use or non-use of a seat belt with respect to Jensen's negligence claim, I believe that it is time for the legislature to reconsider the seat-belt gag rule. The seat-belt gag rule precludes an injured plaintiff in an automobile accident from introducing evidence that he or she used or failed to use his or her seat belt. Minn. Stat. § 169.685, subd. 4 (2016). The gag rule, in effect, provides no consequence for damages in a civil action for those who fail to wear their seat belts, but it does, as in this case, punish a person who is faithful to the law by buckling up, where the seat belt causes the injuries. *See Burck v. Pederson*, 704 N.W.2d 532, 535-36 (Minn. App. 2005) (barring an injured driver from recovering for injuries related to seat-belt use because evidence of seat-belt use or non-use was inadmissible under Minn. Stat. § 169.685, subd. 4(a) (2004)), *review denied* (Minn. Dec. 13, 2005).

The seat-belt gag rule originated in 1963, when cars in Minnesota were first required to be equipped with seat belts. *See* 1963 Minn. Laws ch. 93, § 1, at 151-52 (codified at

Minn. Stat. § 169.685 (1964)). It was rooted in our frontier past, along with the sense that personal freedom extends to the right to endanger one's self. But today, Minnesota law requires drivers and passengers to use "a properly adjusted and fastened seat belt, including both the shoulder and lap belt when the vehicle is so equipped" and penalizes failure to do so. Minn. Stat. § 169.686, subd. 1(a), (b) (2016). Further, since 2009, peace officers in Minnesota have had "the authority to issue a seat-belt citation independent of any other moving violation." *State v. Wendorf*, 814 N.W.2d 359, 361 (Minn. App. 2012); see 2009 Minn. Laws ch. 168, § 6, at 2270 (removing restriction on a peace officer's ability to stop a vehicle and issue a citation for a seat-belt violation alone). Thus, there has been a paradigm shift in Minnesota's public policy on the use of seat belts in this specific context.

Nonetheless, Minnesota's seat-belt gag rule inexplicably continues to punish those who follow the law and comply with the seat-belt requirement. This is so despite the reality that seat-belt use likely reduces the severity of injuries, thereby reducing the amount of damages, and in this case, likely saved Jensen's life. Our neighbors to the south in Iowa do not endorse a nonsensical law on seat-belt use like ours. See Iowa Code § 321.445 (2018) ("[T]he trier of fact may find that the plaintiff's failure to wear a safety belt . . . contributed to the plaintiff's claimed injury . . . and may reduce the amount of plaintiff's recovery by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault."). Iowa's law very reasonably reduces the tort recovery of those who fail to use seat belts, while our law limits recovery of injuries resulting from the proper use of a seat belt. Minnesota's seat-belt gag rule is outdated, and the legislature should reconsider it.