Mercer Law Review

Volume 52
Number 2 *Lead Articles Edition - A Symposium - Brown v. Board of Education: An Exercise in Advocacy*

Article 11

3-2001

Lee v. State Farm Mutual Insurance Company: A Partial Exception to Georgia's Impact Rule to Allow Parental Recovery for Emotional Distress from Witnessing the Suffering and Death of a Child

Joseph I. Marchant

CASENOTE

Lee v. State Farm Mutual Insurance Company: A Partial Exception to Georgia's Impact Rule to Allow Parental Recovery for Emotional Distress from Witnessing the Suffering and Death of a Child

In *Lee v. State Farm Mutual Insurance Co.*,[1] the Georgia Supreme Court created a partial exception to Georgia's impact rule. The court held that when "a parent and child sustain a direct physical impact and physical injuries through the negligence of another, and the child dies as a result of such negligence, the parent may attempt to recover for serious emotional distress from witnessing the child's suffering and death" regardless of whether the emotional distress arises from the physical injury to the parent.[2]

I. FACTUAL BACKGROUND

Bridget Lee ("Lee") and her daughter were injured in an auto accident caused by an unknown hit-and-run driver. Lee witnessed her daughter's suffering, which ended in death an hour later. State Farm Mutual

1. 272 Ga. 583, 533 S.E.2d 82 (2000).
2. *Id.* at 588, 533 S.E.2d at 86-87.

Automobile Insurance Company ("State Farm") and Allstate Insurance Company ("Allstate") were Lee's and her husband's uninsured motorist carriers. They paid the limits for the claim of Lee's daughter's wrongful death. Lee brought suit to recover for her physical injuries and for the emotional distress she experienced as a result of witnessing her daughter's suffering and death. Lee's husband sued for loss of consortium. State Farm intervened on behalf of itself; Allstate defended in the name of "John Doe," the unknown motorist.[3]

The DeKalb County State Court entered summary judgment for defendants on Lee's claim for emotional distress. Lee appealed, arguing that "Georgia law allow[ed] a mother to recover for emotional distress from witnessing her child's injuries and death where the mother is also physically impacted and injured by the same tortious act."[4] Based on *OB-GYN Associates of Albany v. Littleton (Littleton IV)*,[5] the Georgia Court of Appeals affirmed, holding that Georgia's impact rule prevented Lee from recovering for emotional distress caused by witnessing her daughter's injuries and death.[6] The Georgia Supreme Court reversed the judgment of the court of appeals and remanded the case for further proceedings.[7]

II. LEGAL BACKGROUND

Georgia's impact rule allows plaintiff to recover for negligently inflicted emotional distress only when plaintiff has suffered a physical impact, which causes a physical injury that in turn causes the emotional distress.[8] Georgia's impact rule began with the Georgia Supreme Court's decision in *Chapman v. Western Union Telegraph Co.*[9] in 1892. In *Chapman* plaintiff sought recovery of damages for mental suffering caused by defendant's failure to deliver with due promptness a telegraphic message announcing the impending death of plaintiff's brother. Consequently, plaintiff was unable to reach his brother before his brother died.[10] In affirming the judgment of the trial court and denying recovery to plaintiff, the court stated:

---

3. *Id.* at 584, 533 S.E.2d at 83-84.
4. Lee v. State Farm Mut. Auto. Ins. Co., 238 Ga. App. 767, 767, 517 S.E.2d 328, 328 (1999), *rev'd*, 272 Ga. 583, 533 S.E.2d 82 (2000).
5. 261 Ga. 664, 410 S.E.2d 121 (1991), *abrogated by Lee*, 272 Ga. 583, 533 S.E.2d 82.
6. 238 Ga. App. at 769, 517 S.E.2d at 330.
7. 272 Ga. at 588, 533 S.E.2d at 87.
8. *Id.* at 586, 533 S.E.2d at 85.
9. 88 Ga. 763, 15 S.E. 901 (1892).
10. *Id.* at 763, 15 S.E. at 901.

> So far as mental suffering originating in physical injury is concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical. So in cases of physical injury, the mental suffering is taken into view. But according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered.[11]

Georgia's impact rule soon became the subject of criticism. For example, fifteen years later in *Glenn v. Western Union Telegraph Co.*,[12] the Georgia Court of Appeals recommended that the legislature take action to allow plaintiffs to recover damages for mental suffering absent a showing of physical injury.[13] In *Glenn* plaintiff's husband was a Macon police officer who left his home and family in anger. Two days later, plaintiff received through defendant telegraph company a telegram from her husband who was in Memphis. Plaintiff's husband asked plaintiff if he still had a job and advised her to let him know by telegram. Plaintiff sent her husband a telegram through defendant advising him that his position on the police force was still available. Defendant failed to deliver the telegram in a reasonable time. In despair, plaintiff's husband left Memphis, but he did not return home. Plaintiff located her husband nine months later in Fort Worth. Plaintiff's husband returned to Macon and resumed his position as a police officer. The absence of plaintiff's husband forced her to get a job and live for a time apart from her children. Plaintiff sued defendant seeking damages for among other things, mental suffering.[14] The court reluctantly held that *Chapman* precluded plaintiff from recovering damages for mental suffering.[15] In criticizing *Chapman*, the court stated:

> To our minds it is monstrous that you can recover damages if you sustain loss on your car load of oxen by reason of unreasonable delay or failure to deliver a message relating to this, your property, but if you are summoned to the death-bed of your mother (whose dying blessing you would not exchange for all the cattle upon a thousand hills), and a telegraph company sees fit not to send or deliver the message which might have brought you to her side, you are completely helpless.[16]

---

11. *Id.* at 768, 15 S.E. at 902.
12. 1 Ga. App. 821, 58 S.E. 83 (1907).
13. *Id.* at 827, 58 S.E. at 86.
14. *Id.* at 822-24, 58 S.E. at 84-85.
15. *Id.* at 832, 58 S.E. at 88.
16. *Id.* at 827, 58 S.E. at 86.

In 1928, the Georgia Court of Appeals, in *Christy Bros. Circus v. Turnage*,[17] broadly construed the physical injury requirement of Georgia's impact rule.[18] In *Christy Bros. Circus*, plaintiff attended a circus performance given by defendant as a guest of defendant. During the performance, a dancing horse ridden by defendant's servant backed toward plaintiff and defecated on her lap. Many people, including some of defendant's employees, laughed at the incident. Plaintiff sued defendant seeking damages for mental pain and suffering.[19] In affirming the judgment of the trial court and allowing plaintiff to seek recovery for mental pain and suffering, the court expanded the impact rule by stating that any unlawful touching, although not causing physical pain, constitutes a physical injury because it violates a personal right.[20] The court further stated that "[t]he unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance."[21]

The Georgia Court of Appeals, in *Kuhr Bros., Inc. v. Spahos*,[22] noted that an exception to the impact rule exists when plaintiff suffers monetary loss due to a nonphysical personal injury that in turn causes a physical injury.[23] Spahos contracted with Altman for the purchase of a house. Altman agreed to supply a furnace for the house and arranged for Kuhr Bros., Inc. to install the furnace. The furnace was allegedly installed with a pipe touching the woodwork. The house burned, and Spahos brought an action for negligence against Altman and Kuhr Bros., Inc. Spahos sought damages for mental suffering arising from his fear for the safety of his family.[24] The trial court overruled defendants' general demurrers, but sustained special demurrers to the allegations of mental suffering.[25] In affirming the judgment, the appellate court stated:

---

17. 38 Ga. App. 581, 144 S.E. 680 (1928), *overruled by* OB-GYN Assoc. of Albany v. Littleton ("Littleton II"), 259 Ga. 663, 666, 386 S.E.2d 146, 149 (1989).

18. *Id.* at 581, 144 S.E. at 681.

19. *Id.*

20. *Id.*

21. *Id.*

22. 89 Ga. App. 885, 81 S.E.2d 491 (1954), *overruled by* Whiten v. Orr Constr. Co., 109 Ga. App. 267, 270, 136 S.E.2d 136, 138 (1964). This case was overruled on the unrelated ground that an action for negligence cannot lie when brought by a buyer against a seller based on a defect in the premises resulting in damage to the property. *Id.*

23. 89 Ga. App. at 890-91, 81 S.E.2d at 495-96.

24. *Id.* at 885-87, 81 S.E.2d at 492-94.

25. *Id.* at 887, 81 S.E.2d at 492.

> In cases where mere negligence is relied on, before damages for mental pain and suffering are allowable, there must also be an actual physical injury to the person, or a pecuniary loss resulting from an injury to the person which is not physical; such an injury to a person's reputation, or the mental pain and suffering must cause a physical injury to the person.[26]

In *Sanders v. Brown*,[27] the Georgia Supreme Court recognized an exception to the impact rule when malicious, wilful or wanton conduct has been directed at the plaintiff.[28] The Sanders and Brown families owned adjoining properties and had a longstanding dispute between them. The Brown property was subsequently purchased at a foreclosure sale by Sanders Farm Services, Inc. ("SFS"), which was owned by John Sanders, Sr. ("Senior") and John Sanders, Jr. ("Junior"). The Browns remained on the property for several weeks. Five members of the Brown family filed a multicount tort complaint against SFS, Senior and Junior. Some of the claims involved a Brown child being sprayed with insecticide from a passing farm machine. The jury found for the Browns on some of the claims and for the Sanders on others. The trial court granted a motion for judgment not withstanding the verdict ("j.n.o.v.") as to Junior, but denied the motion as to Senior and SFS. Senior and SFS appealed from entry of judgment on the verdict. The Browns cross-appealed from the judgment and the j.n.o.v. as to Junior.[29] Affirming in part and reversing in part, the court held that the child who was allegedly sprayed with insecticide had a legitimate claim for damages for emotional distress because the evidence would support a finding that this contact was wanton and wilful.[30] The court stated that the other Browns could not recover for emotional distress because the wanton and wilful act was not directed toward them.[31]

The current form of the impact rule was shaped largely by the "*Littleton*" cases,[32] a series of four appeals between 1989 and 1991.[33]

---

26. *Id.* at 890, 81 S.E.2d at 495-96.
27. 178 Ga. App. 447, 343 S.E.2d 722 (1986).
28. *Id.* at 450, 343 S.E.2d at 726.
29. *Id.* at 447-50, 343 S.E.2d at 724-26.
30. *Id.* at 450, 343 S.E.2d at 726.
31. *Id.*
32. Littleton v. OB-GYN Assoc. of Albany, P.C. ("Littleton I"), 192 Ga. App. 634, 385 S.E.2d 743 (1989), *rev'd*, 259 Ga. 663, 668, 386 S.E.2d 146, 150 (1989), *abrogated by Lee*, 272 Ga. 583, 533 S.E.2d 82; OB-GYN Assoc. of Albany v. Littleton ("Littleton II,") 259 Ga. 663, 386 S.E.2d 146, *abrogated by Lee*, 272 Ga. 583, 533 S.E.2d 82; Littleton v. OB-GYN Assoc. of Albany, P.C. ("Littleton III"), 199 Ga. App. 44, 403 S.E.2d 837 (1991), *aff'd*, 261 Ga. 664, 410 S.E.2d 121 (1991), *abrogated by Lee*, 272 Ga. 583, 533 S.E.2d 82; OB-GYN Assoc. of Albany v. Littleton ("Littleton IV"), 261 Ga. 664, 410 S.E.2d 121, *abrogated by Lee*,

In these cases, parents filed a "suit for wrongful death, loss of services, and the mother's mental suffering and emotional distress resulting from the allegedly negligent delivery of the parents' infant daughter and the child's death two days later."[34] The trial court granted defendants' motion for partial summary judgment as to the Littletons' claim for emotional distress.[35]

In *Littleton I*,[36] the Littletons appealed from the trial court's grant of partial summary judgment.[37] The Georgia Court of Appeals reversed, holding that Georgia's wrongful death statute[38] did not preclude the Littletons from seeking damages for emotional distress.[39] The court reasoned that the statute was enacted to supplement rather than supplant existing law.[40] The Georgia Supreme Court granted certiorari.[41]

In *Littleton II*,[42] the Georgia Supreme Court held that although the wrongful death claim did not preclude recovery of damages for emotional distress, Littleton's claim for emotional distress would need to be based on a malpractice claim alleging injuries to her.[43] The court stated that "Georgia follows the so-called 'impact rule,' which requires that, there must have been actual bodily contact with plaintiff as a result of defendant's conduct for a claim for emotional distress to lie."[44] The court then expressly overruled *Christy Bros. Circus* and stated that the impact must result in a physical injury.[45] The court reasoned that *Christy Bros. Circus* reduced the impact rule to an absurdity.[46]

The court then denied Littleton's assertion that the monetary loss which she suffered would support her claim for emotional distress.[47] The court stated that the monetary loss which will support a claim for emotional distress must result from an injury to the person that is not

---

272 Ga. 583, 533 S.E.2d 82.

33. 272 Ga. at 585, 533 S.E.2d at 84.
34. *Id.*
35. 192 Ga. App. at 634, 385 S.E.2d at 744.
36. 192 Ga. App. 634, 385 S.E.2d 743 (1989).
37. *Id.* at 634, 385 S.E.2d at 744.
38. O.C.G.A. §§ 51-4-1 to -5 (2000).
39. 192 Ga. App. at 634-35, 385 S.E.2d at 744.
40. *Id.* at 634, 385 S.E.2d at 744.
41. 259 Ga. at 663, 386 S.E.2d at 147.
42. 259 Ga. 663, 386 S.E.2d 146 (1989).
43. *Id.* at 663-64, 386 S.E.2d at 147.
44. *Id.* at 665, 386 S.E.2d at 148.
45. *Id.* at 666, 386 S.E.2d at 149.
46. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54 (5th ed. 1984)).
47. *Id.* at 666-67, 386 S.E.2d at 149.

physical, but in turn causes a physical injury to the person.[48] The court emphasized that a monetary loss from an injury to property would not support a claim for emotional distress.[49]

Next, the court addressed Littleton's claims that she should recover for emotional distress because she was present when the child was born, witnessed the failed efforts to revive her daughter and later held the baby as she died.[50] The court stated that "Georgia does not recognize the so-called 'zone of danger' or 'fear for another' rule which permits recovery of damages for emotional distress by [those] who witness[] injury to another."[51]

Lastly, the court stated that the order granting partial summary judgment contained no findings of fact and that it was "therefore uncertain as to whether the trial judge considered the presence or absence of material facts which would show an injury to Mrs. Littleton."[52] The court noted that because an unborn fetus at full term is considered a separate person from the mother for many purposes in Georgia, every action toward a fetus is not necessarily an action toward the mother.[53] The court reversed and remanded the case to the trial court for a hearing to determine whether Littleton suffered a physical injury due to defendants' negligence.[54]

The Littletons, on remand, amended their complaint and filed supplemental answers to interrogatories that set out the physical injuries claimed by Littleton. Finding no evidence that Littleton suffered physical injury as a result of alleged negligence, the trial court granted partial summary judgment to defendants on Littleton's claim for her injuries. The Littletons appealed.[55]

In *Littleton III*,[56] the Georgia Court of Appeals first addressed defendants' assertion that Littleton's claim of physical injury should be disregarded as self-contradictory.[57] In rejecting this assertion, the

---

48. *Id.* at 667, 386 S.E.2d at 149 (citing *Kuhr Bros.*, 89 Ga. App. at 890, 81 S.E.2d at 495-96).

49. *Id.* (quoting *Kuhr Bros.*, 89 Ga. App. at 890, 81 S.E.2d at 495-96).

50. *Id.*, 386 S.E.2d at 149.

51. *Id.*

52. *Id.* at 668, 386 S.E.2d at 150.

53. *Id.*

54. *Id.* Justice Smith authored a specially concurring opinion in which he stated that he would allow a claim for serious emotional distress regardless of whether plaintiff suffered physical injury or illness. *Id.* at 670, 386 S.E.2d at 151 (Smith, J., concurring specially).

55. 199 Ga. App. at 44-45, 403 S.E.2d at 838.

56. 199 Ga. App. 44, 403 S.E.2d 837 (1991).

57. *Id.* at 45, 403 S.E.2d at 838.

court stated that Littleton's claim that she was physically injured did not contradict her previous claim that she suffered mentally and emotionally.[58] The court concluded that evidence showing defendants administered Pitocin[59] to Littleton even after the drug should have been discontinued, and failed to perform a Caesarian section, created a genuine issue of fact as to whether Littleton suffered a physical injury.[60] Therefore, the court reversed the trial court's grant of defendants' motion for partial summary judgment.[61] The Georgia Supreme Court granted certiorari.[62]

In *Littleton IV*,[63] the Georgia Supreme Court affirmed the court of appeals' reversal of the trial court's grant of defendants' motion for partial summary judgment.[64] The court stated:

> We emphasize that any 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.[65]

Several cases followed the "*Littleton*" cases, which reiterated that a mother's recovery for emotional distress must arise out of the mother's own physical injuries, and not out of the child's separate physical injuries.[66] For example, in *DeKalb County v. Wideman*,[67] Wideman was nineteen weeks pregnant when she experienced signs of premature labor. EMTs took Wideman to Shallowford Hospital because it was closer than Piedmont Hospital, even though Wideman asked to be taken to Piedmont. After being examined at Shallowford, Wideman was taken to Piedmont where she suffered a miscarriage. Wideman sued alleging negligence, intentional infliction of emotional distress, and false imprisonment. Wideman sought to introduce evidence regarding the death of the baby. The trial court excluded the evidence and entered

---

58. *Id.*
59. Pitocin is a powerful drug that increases the frequency and strength of contractions.
60. 199 Ga. App. at 45-46, 403 S.E.2d at 839.
61. *Id.* at 46, 403 S.E.2d at 840.
62. 261 Ga. at 664, 410 S.E.2d at 122.
63. 261 Ga. 664, 410 S.E.2d 121 (1991).
64. *Id.* at 664, 410 S.E.2d at 122.
65. *Id.* (quoting *Littleton III*, 199 Ga. App. at 46 n.1, 403 S.E.2d at 837 n.1).
66. 238 Ga. App. at 768, 517 S.E.2d at 329.
67. 262 Ga. 210, 416 S.E.2d 498 (1992), *abrogated by Lee*, 272 Ga. 583, 533 S.E.2d 82.

judgment for the defendants. The Georgia Court of Appeals reversed.[68] The Georgia Supreme Court reversed the decision of the court of appeals because Georgia law "precluded any claim by Mrs. Wideman for her emotional distress based on the alleged wrongful death" of her daughter.[69]

In *Goins v. Tucker*,[70] plaintiff filed a negligence and wrongful death action arising out of the stillbirth of her child.[71] The only issue on appeal was whether the trial court was correct in granting defendants' motions for partial summary judgment and failure to state a claim.[72] However, in dictum, the Georgia Court of Appeals stated that "'[a]ny mental suffering or emotional distress [plaintiff] suffered as a result of injuries to her child [was] not compensable in this claim.'"[73]

By contrast, in *Thomas v. Carter*,[74] the Georgia Court of Appeals allowed a mother to recover for emotional distress from her injuries related to the death of her fetus.[75] Thomas was seven months pregnant when her automobile collided with an automobile driven by Carter. The next day it was discovered that Thomas' fetus was dead, and she was later required to have labor induced to deliver the dead child. Thomas sued Carter and included a claim for pain and suffering. State Farm, Thomas' uninsured motorist carrier, filed an answer in its own name. State Farm moved for partial summary judgment arguing Thomas was not entitled to a recovery for emotional distress suffered as a result of the death of her child. The trial court granted State Farm's motion, and Thomas appealed.[76] The court reversed the trial court's grant of partial summary judgment to State Farm.[77] The court reasoned that it was the injury to the mother (trauma to the placenta) that caused the death of the fetus rather than a separate injury to the child.[78] This fact distinguished the case from the "*Littleton*" cases.[79] After *Thomas*, there were no major developments in the impact rule until *Lee*.

---

68. *Id.* at 210, 416 S.E.2d at 499.
69. *Id.* at 211, 416 S.E.2d at 499.
70. 227 Ga. App. 524, 489 S.E.2d 857 (1997), *abrogated by Lee*, 272 Ga. 583, 533 S.E.2d 82.
71. *Id.* at 524, 489 S.E.2d at 859.
72. *Id.*
73. *Id.* at 526, 489 S.E.2d at 859 (quoting *Littleton III*, 199 Ga. App. at 46 n.1, 403 S.E.2d at 840 n.1).
74. 234 Ga. App. 384, 506 S.E.2d 377 (1998), *abrogated by Lee*, 272 Ga. 583, 533 S.E.2d 82.
75. *Id.* at 389, 506 S.E.2d at 381.
76. *Id.* at 384-85, 506 S.E.2d at 378.
77. *Id.* at 389, 506 S.E.2d at 381.
78. *Id.* at 387, 506 S.E.2d at 380.
79. *Id.*

III. RATIONALE OF THE COURT

Justice Hines authored the majority opinion, which was joined by four other justices.[80] The court based its decision on policy considerations and the benefits of the impact rule.[81]

The court identified three traditional policy reasons for the impact rule, but it conceded these have been held by some to be wholly invalid.[82] First, the impact rule prevents a flood of litigation of emotional distress claims.[83] Second, the rule reduces the number of fraudulent claims.[84] Third, there is a belief that, absent impact, it would be difficult to prove a causal connection between defendant's negligence and plaintiff's claims of emotional distress.[85] The court, however, noted that these policy concerns did not exist in this situation.[86]

The court also noted the benefits of the impact rule.[87] The impact rule provides a bright line rule for liability.[88] The rule also provides a "clear relationship between the plaintiff's being a victim of [defendant's] breach of duty and compensability to the plaintiff."[89] Because of these benefits and a reluctance to "abandon over a hundred years of Georgia precedent," the court refused to abandon the impact rule.[90]

In creating a partial exception to the impact rule, the court stated:

> When, as here, 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 without regard to whether the emotional trauma arises out of the physical injury to the parent.[91]

This is only a partial exception to the impact rule because the parent is still required to sustain a physical injury.[92] The only distinction is that

---

80. 272 Ga. at 583, 588, 533 S.E.2d at 83, 87.
81. *Id.* at 587-88, 533 S.E.2d at 86.
82. *Id.* at 587, 533 S.E.2d at 86.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 588, 533 S.E.2d at 86.
87. *Id.* at 587, 533 S.E.2d at 86.
88. *Id.*
89. *Id.*
90. *Id.* at 588, 533 S.E.2d at 86.
91. *Id.*, 533 S.E.2d at 86-87.
92. *Id.*, 533 S.E.2d at 87.

the parent's emotional distress is no longer required to be the result of the parent's physical injury.[93]

Justice Hunstein, joined by Justice Sears, concurred in the judgment only.[94] The concurring justices would abandon the impact rule in favor of some version of the foreseeability of emotional harm test to determine bystander liability.[95] That test takes into account the proximity of plaintiff to the scene, whether plaintiff observed the incident firsthand, and whether plaintiff is closely related to the victim.[96] Justice Hunstein criticized the majority's use of precedent as justification for maintaining the impact rule.[97] She pointed out that by allowing bystander liability for the first time, Georgia has already abandoned precedent.[98] Justice Hunstein also noted that the impact rule creates an irrational distinction between injured and uninjured parents who witness a serious injury to their child.[99]

IV. IMPLICATIONS

By creating a partial exception to the impact rule, the court triggered a number of future implications. First, the court narrowly defined the breadth of its holding, by addressing only parental recovery for witnessing the suffering and death of a child. However, future plaintiffs will likely test the limits of the court's holding and urge the court to extend the exception. Such future plaintiffs might include grandparents who witness the suffering and death of a grandchild, legal guardians other than parents who witness the suffering and death of a child in their custody, children who witness the suffering and death of a parent, parents who witness the suffering of a child that does not end in death, etc. Thus, the court may have set the stage for a flood of litigation, at least in the short term, despite the fact that one of the primary justifications for the impact rule is to prevent such a flood.[100]

Second, by distinguishing between parents who witness their child's death, the court has ensured that Georgia's impact rule will continue to be the subject of criticism among legal commentators. Consider the following hypothetical: A father watches as his wife and child pull out of the driveway and onto the street where they are struck by a

93. *Id.*
94. *Id.* at 588, 533 S.E.2d at 87.
95. *Id.* at 589, 533 S.E.2d at 87.
96. *Id.*
97. *Id.* at 590, 533 S.E.2d at 87-88.
98. *Id.*
99. *Id.*, 533 S.E.2d at 88.
100. *Id.* at 587, 533 S.E.2d at 86.

negligently driven automobile. Both are injured, and the child subsequently dies. Both parents suffer emotional distress from witnessing the suffering and death of their child. Prior to *Lee*, neither parent could recover because their emotional distress did not result from physical injuries sustained by them. However, based on *Lee*, the mother may recover for emotional distress from witnessing the suffering and death of her child because she sustained a physical impact and injury. The father cannot recover because he did not sustain the requisite physical impact and injury, even though he too suffered emotional distress from witnessing the suffering and death of his child. This is an absurd result.

Third, this decision may affect insurance premiums. In *Lee*, the court established bystander liability for the first time in Georgia. Thus, insurance companies will be paying claims that they would not have paid in the past, and premiums may be increased to offset the increased payment of claims. The likelihood of increased premiums depends on how broadly the court defines its holding in future cases and the number of claims falling within this exception.

Georgia is unlikely to abandon the impact rule in the near future. The court has had several opportunities in recent years and has refused to do so. When faced with the most recent compelling situation, the court chose only to carve out an exception rather than abandon the rule. Justice Hunstein and Justice Sears advocate abandoning the rule.[101] However, the rest of the court appears to be wedded to over one hundred years of precedent.[102]

JOSEPH I. MARCHANT

101. *Id.* at 589-90, 533 S.E.2d at 87-88.
102. *Id.* at 588, 533 S.E.2d at 86.