



**I Said What I Meant and I Meant What I Said:
Providing Students With Meaningful Feedback**

LWI One-Day Workshop:
Tips and Advice for Novice Legal Writing Professors

Penn State Law
December 9, 2020

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Assistant Dean for Legal Writing and Adjunct Instruction
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Roadmap for Trial Brief

Cover Page (posted on TWEN)



Statement of Facts

[There must be appropriate citation to the facts referenced in the Complaint as per the Blue Pages of the Bluebook]



ARGUMENT

[Umbrella paragraph including the same information as Assignment Three presented persuasively; your first sentence should reference the Motion to Dismiss standard with citation to the statute].

A. subheading- Case-by-Case

Full Paradigm [C,R,RP,RA]- use the “Big 4”

B. sub heading- Bright Line







Full Paradigm [C,R,RP,RA]-discuss the 3 Elden reasons and refute them, using the cases from Sub A.

*When citing to facts contained in the Complaint in your Rule App, you must cite to it.



Conclusion (posted on TWEN)

General Comments:

-  There are no issues or brief answers in this motion memo, nor is there a memo heading; follow the format above. You will not be including a preliminary statement.
-  **Your paper must be double-spaced, 12-point font, with 1” margins all around. You still have 8 pages on this draft (including the conclusion)- papers not complying with these rules will receive a grade deduction.**
-  Be sure to incorporate my individual comments in your rewrite, as well as what we discuss at the group critique. Even though it’s a brief instead of a memo, the rules of good writing and analysis still apply, so my comments are relevant.
-  Remember to write persuasively, you are not merely informing, you are persuading. This is a change from your office memo.
-  The only change to the Bluebooking on this assignment is the requirement that you cite to the Complaint where necessary in your Statement of Facts and Rule Application- be certain that all of your citation is correct; follow the samples that I distributed; make any corrections that are indicated on your individual comment sheet and discussed at the group critique.
-  You may consult the Neumann book; as always if something I said in class or in the handouts conflicts with the Neumann sample, follow my instructions.

GENERAL COMMENTS:

Cover Page

You correctly included the correct cover page, as posted on TWEN.

Facts

Is your Statement of Facts an accurate and complete summary?

Is it purely factual and yet still persuasive, devoid of legal argument?

Does this section touch on all of the facts that you will include in your RA?

Discussion- Large Scale Organization

Does the umbrella paragraph refer to Rule 12.02 (e), and make clear why the motion should be denied pursuant to that standard?

Does this section make clear the outcome that you are seeking and why?

Does your paper contain an umbrella paragraph that correctly identifies all four elements of NIED (using *Engler*) and disposes of the three elements that are not in dispute?

Does this paragraph clearly identify the fourth element, using *Jensen* to discuss the status of Minn. law on that element (*Jensen* took no position on which test to use but rather left it to the Supreme Court or the legislature to decide), and clearly identify the gap that you will be addressing?

Does the section briefly explain the two tests (with citation) and identify which test you would prefer the Minn. Courts to adopt?

Point Headings

Do the point headings persuasively and effectively reflect both the facts and the law in such a way as to suggest the desired outcome?

Discussion- Small Scale Organization

Paradigm One- Case-by-Case

Does your analysis conform to the paradigm?

Does the paradigm begin with a short conclusion which details what you believe the outcome will be?

Are the “Big 4” cases used (*Dunphy, Graves, St. Onge, Yovino*)?

Does your rule include the definition of the CBC test and is it appropriately supported with citation?

Do you identify the specific factors that the courts examine in the cases to determine if a relationship is sufficiently close?

Does your rule proof include a brief discussion of the details of the relationship in each case?

Does the rule proof properly explain the rule through a thorough analysis of the cases (highlighting similarities and explaining distinctions); does case discussion include relevant facts and minimize less relevant ones?

Does rule application synthesize the facts of the *Morgan* case and the cited cases?

Nothing is discussed about the cases in rule application that has not been previously discussed in rule proof?

Do you keep rule proof and rule application separate?

Do you focus on the strongest arguments and best authorities, and minimize weaker ones?

Did you successfully incorporate my suggestions as to how to improve this section from the comment sheet on Assignment 3?

Is the subheading persuasive overall?

Paradigm Two- Bright Line

Does your analysis conform to the paradigm?

Is the bright line test clearly defined in your rule, and is it appropriately supported with citation?

Are the three policy reasons which are used to justify the bright line test clearly explained in your rule proof, using *Elden* and/or *Biercevicz*?
Have you appropriately refuted the three policy reasons, using appropriate cases such as *Yovino*, *Dunphy*, and *Graves*?
Does your short rule application refer back to these three policy reasons and demonstrate why their application will lead to an unfair result in this case?
Have you successfully incorporated my suggestions as to how to improve this section from the comment sheet on Assignment 3?
Is the subheading persuasive overall?

Conclusion

Did you use the correct format, which was posted on TWEN?

Citation

Have you used correct citation form throughout (long form the first time a statute or case is cited, short form or *Id.* thereafter)?

Have you cited to your cases where necessary?

Have you used signals correctly and effectively?

Have you effectively used parentheticals to convey additional substantive information about the cited case?

Did you properly make each citation its own sentence, rather than breaking up the flow of your discussion by including citations in the middle of a sentence?

Did you cite to the Complaint to support your factual assertions; are those cites in proper Bluebook form?

Style

Are your arguments clearly written, neither too wordy nor too vague?

Are there misspellings or other careless errors?

Is your overall written expression appropriate (tone, grammar, punctuation, spelling/typos, flow and readability)?

Does your paper successfully reflect an understanding of the subject matter?

Does your paper successfully reflect the transition from objective to persuasive writing?

INDIVIDUAL COMMENTS:

You correctly included the cover page, as posted on TWEN. I think the S/F works well and is somewhat persuasive, it could be more so. You do focus both on their life together and on the accident. Pointheads are good; perhaps relate them to our facts as well; e.g. for Sub A- The CBC Test limits recovery to close relationships such as Morgan and McCall's. The umbrella section is well done as it was on your earlier draft. Nice job with both Jensen and explaining the motion to dismiss standard. With regard to the CBC discussion, your RP is somewhat improved though you can make it a bit more persuasive. You did improve your discussion of the facts of each of the relationships. I think you can do a better job with the facts of St. Onge and showing how this negative case proves your positive point; your RA is better though it could be tied more to your cases. The BL section shows some improvement structurally, though you can make this section more persuasive and more deeply reasoned. Conclusion is fine. Cites look good, you added some signals and parentheticals. Be sure to cite where necessary. You did cite to the Complaint in both your S/F and RA. You are taking nicely to persuasion. Your writing style still needs work, there are spots where I strained to understand what you are saying. The depth of analysis still need some work, but you are starting to do the type of synthesis and analysis that you need to do. Your progress continues!

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Attorney for the Plaintiff

STATE OF MINNESOTA
LAKE OF THE WOODS COUNTY

DISTRICT COURT
NINTH JUDICIAL DISTRICT

JASON MORGAN,)
Plaintiff,)
)
vs.)
)
WINTER ADVENTURES, INC., SONNY)
CORINTHOS, and NOAH DRAKE,)
Defendants)
_____)

Case No.: LWC-2034

**MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS MOTION TO DISMISS**



STATEMENT OF FACTS

Mr. Morgan and his fiancée Dr. McCall were involved in a treacherous dog sledding accident. Compl. ¶ 7. Her sled crashed hard and she flew helplessly through the air into a tree, severely injuring several bones and sustaining a concussion. Compl. ¶ 13. Mr. Morgan claims to be significantly traumatized by witnessing his fiancée's near-death experience. Compl. ¶ 14.

Mr. Morgan and Dr. McCall have known each other since college (about ten years) and have lived together for about five years in a condo they jointly own. Compl. ¶ 16. Since 2013, he had financially supported her through medical school and residency. Compl. ¶ 15. Once she entered practice as a physician two years ago, she began to support him financially. Compl. ¶ 15. They have a joint checking account, share all household expenses and had planned their wedding for this summer. Compl. ¶ 16. Mr. Morgan reports that he has trouble sleeping and experiences recurring nightmares where he imagines his fiancée as dead. Compl. ¶ 17. Mr. Morgan has been receiving ongoing psychiatric treatment for his emotional distress. Compl. ¶ 17.

ARGUMENT

WITH A PROVEN CLOSE RELATIONSHIP, MR. MORGAN SHOULD BE ABLE TO BRING A BYSTANDER NIED ACTION

Defendants motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12.02(e) of the Minnesota Civil Rules of Civil Procedure should be

(c)

denied. Minn. R. Civ. P. 12.02. The Minnesota Courts will certainly permit Mr. Morgans action to recover bystander damages for Negligent Infliction of Emotional Distress (NIED) after witnessing the serious injury of his fiancée Dr. McCall if the courts adopt the case-by-case closeness of relationship test. In *Engler*, the Minnesota Supreme Court held that an NIED claim requires plaintiff prove elements: 1) within the zone of danger of physical impact created by defendants negligence; 2) reasonably feared for his own safety; and 3) consequently suffered severe emotional distress with attendant physical manifestations. *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). The court in *Engler* did not define the fourth element that plaintiff stands in a close relationship to the third-party victim. *Id.* at 770.

satisfies elements 1-3, *this is the fourth element that is in dispute*

The court in *Jensen* attempted to address this gap because the relationship was perhaps as close as possible between two adults who are not married. *Jensen v. Arndt*, No. A17-0791, 2018 WL 1702408 at *8 (Minn. Ct. App. Apr. 9, 2018). As an unreported case, *Jensen* is not binding precedent and the Minnesota State Courts must look to other states for guidance to resolve the split. *Engler*, 706 N.W.2d at 768. Courts have held that an engaged couple can satisfy flexible closeness factors, while other courts apply a rigid bright-line test, defining closely related as by

Jensen left it to the SC as legislative to decide

blood or marriage only. *Yovino v. Big Bubba's BBQ, LLC*, 896 A.2d 161, 165 (Conn. Super. Ct. 2006); *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988). Minnesota Courts should adopt and apply the superior case-by-case test to permit recovery to cohabiting engaged couples in serious, committed relationships that satisfy the flexible factors.

A. Minnesota Courts Should Adopt the Flexible Case-by-Case Test to Determine Closeness

The Minnesota Courts should apply the practical case-by-case test to determine closeness

of relationship. Mr. Morgan will most likely be found to be closely related to Dr. McCall.

The New Jersey Supreme Court held that the standard is duration, degree of mutual dependence, extent of common contributions to a life together, extent and quality of shared experience, whether members of the same household, [and] emotional reliance on each other.

Dunphy v. Gregor, 642 A.2d 372, 377 (N.J. 1994). An unmarried cohabitant can recover if the relationship is stable, enduring, substantial, and mutually supportive. *Id.* at 380. Likewise, a

Connecticut trial court held in favor of the engaged couple as they intended to be married and committed themselves to be married. *Yovino*, 896 A.2d at 165.

The flexible standard set forth in *Dunphy* should allow an unmarried cohabitant in an intimate familial relationship with the victim to recover for NIED. *Dunphy*, 642 A.2d at 380. In

Because

to determine closeness

lead w/ this

Dunphy, plaintiff and victim had been cohabiting with a wedding date set. *Id.* at 373. They had taken out life insurance policies making each other beneficiaries, had a joint checking account, and jointly purchased an automobile. *Id.* at 373. The court held that their stable and enduring relationship was tantamount to marriage and was enough to allow bystander recovery. *Id.* at 380.

In *Graves*, the New Hampshire Supreme Court used a flexible approach that allowed the court to account for quality and factual nuances in a couples relationship. *Graves v. Estabrook*, 818 A.2d 1255, 1261 (N.H. 2003). The court in *Graves* rejected the mechanical, bright-line approach because allowing couples married a week before the accident and denying recovery to a fiancée who has lived with her betrothed for seven years made no logical sense. *Graves*, 818 A.2d at 1261. This inflexibility would guarantee recovery for married couples with the label but without the commitment. *Id.* The court ruled in favor of plaintiff fiancée and victim who had been living together in a committed relationship akin to a marriage for seven years immediately preceding the accident. *Id.* at 1262.

The standards of mutual dependence[,], common contributions[and] emotional reliance in a cohabitation relationship were further applied in *Yovino*. *Graves*, 818 A.2d 1255; *Yovino*, 896

good

A.2d 161. In *Yovino*, the plaintiff alleged that an automobile collision resulted in the death of his fiancée, to whom he had given his right kidney. *Yovino*, 896 A.2d at 163. The court held that fiancé was considered closely related to bring the action. *Id.*

The New Hampshire Supreme Court applied the factors from *Graves* to determine that a couple was not closely related when they could not financially support each other, could [not] become members of the same household or that they could make any more than minimal contributions to a life together. *St. Onge v. MacDonald*, 917 A.2d 233, 237 (N.H. 2007). In *St. Onge*, plaintiff and victim had a relationship lasting approximately six months in which they had not shown they could build a mutually supportive life or attend to life's mundane requirements together. *St. Onge*, 917 A.2d at 237. The court held that plaintiff and victim were not closely related. *Id.* at 237.

The definition of closely related in the flexible case-by-case test set forth in *Dunphy* and *Yovino* will allow Mr. Morgan to bring a bystander NIED action for witnessing his fiancée's dreadful injury. Compl. ¶ 14. Similar to *Dunphy*, Mr. Morgan reported a deep emotional security to Dr. McCall, and they shared an intimate, mutually supportive relationship. Compl. ¶ 15.

Though the victim did not die like in *Dunphy*, Mr. Morgan thought she was going to die and felt as close to her as if he were watching a spouse die. Compl. ¶ 13. As in *Yovino*, Mr. Morgan and Dr. McCall have committed to get married but have put off the wedding due to the accident. Compl. ¶ 16.

Like in *Graves*, Mr. Morgan and Dr. McCall had lived together for over five years. Compl. ¶ 16. Their lengthy cohabitation resulted in mutual dependence, reliance, joint life contributions, and attending to life's mundane requirements, which allowed bystander recovery in *Graves*. Compl. ¶ 16. By the reasoning in *St. Onge*, Mr. Morgan would surely be able to contrast his multi-year cohabitation with the short six-month relationship in *St. Onge*. Compl. ¶ 16. Because Mr. Morgan and Dr. McCall have financially supported each other, shared ownership of a household and its expenses, split a joint checking account, and made significant contributions to a life together, Mr. Morgan could bring a bystander NIED claim in the Minnesota Courts if they adopt the case-by-case standard. Compl. ¶ 16.

B. Minnesota Should Not Adopt the Rigid Bright-Line Test for Closeness of Relationship.

The Minnesota Courts will not allow unmarried engaged couples to recover under the inflexible bright-line test, and the courts should not adopt this inferior test. Mr. Morgan will not

yes

be found to be closely related to Dr. McCall using this strict, unworkable test.

Under the bright-line test, an unmarried cohabitant may not recover damages for emotional distress based on such injury. *Elden*, 758 P.2d at 586. The court limits the right to recover to persons closely related by blood or marriage. *Biercevicz v. Liberty Mut. Ins. Co.*, 865 A.2d 1267, 1269 (Conn. Super. Ct. 2004).

The court in *Elden* presented three policy reasons to justify rejection of a plaintiff fiancés bystander NIED claim, though the court in *Yovino* refuted each reason. First, the court in *Elden* emphasized the states interest in the marriage relationship. *Elden*, 758 P.2d at 587. The court in *Yovino* argued that an engaged couple intended and committed to be married, tort recovery is not an actual incentive to marry, and marriage will still maintain its preferential status. *Yovino*, 896 A.2d at 165. Second, the court in *Elden* stated that allowing the case-by-case test would impose a difficult burden on the courts to inquire into the relationship of the partners. *Elden*, 758 P.2d at 587. The court in *Yovino* stated that judges often deal with the complexities of relationship dynamics in loss of consortium and dissolution of marriage cases. *Yovino*, 896 A.2d at 166. Third, the court in *Elden* stated there is a need to limit the number of persons to whom a

also

✓

negligent defendant owes a duty of care. *Elden*, 758 P.2d at 587. The court in *Yovino* countered that engaged couples are a foreseeable class of plaintiffs who would still have to satisfy both the close relationship factors and the other three NIED elements, thereby limiting liability. *Yovino*, 896 A.2d at 167. *See also St. Onge*, 917 A.2d 233 (proving the case-by-case test controls for bright-line tests argument by denying recovery for couples who do not meet close relationship standard).

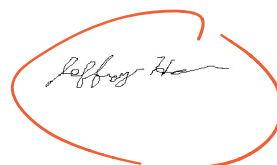
good

The Minnesota Courts should not adopt the bright-line test since it does not consider the depth of an engaged couples relationship. Since the bright-line standard limits closely related to marriage or blood, Mr. Morgan will not recover using this test because he is not married to or related to Dr. McCall. Compl. ¶ 7. However, this inflexible test will lead to an unfair result because they have a committed, cohabiting relationship tantamount to a devoted, mutually supportive marriage. Compl. ¶ 16.

CONCLUSION

For all the foregoing reasons, the defendants motion to dismiss should be denied and Mr. Morgan should be permitted to bring his claim for bystander recovery of NIED.

Dated: November 3, 2020
Baudette, Minnesota



I like this!

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Attorneys for Plaintiff

GENERAL COMMENTS:

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GRADE: P-