NO. 94737-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TRINA CORTESE, AN INDIVIDUAL, AND TRINA CORTESE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TANNER TROSKO, RICHARD CORTESE AND TRINA CORTESE HUSBAND AND WIFE AND THEIR MARITAL COMMUNITY,

Petitioner,

v.

LUCAS WELLS, CORY WELLS, ROCHELLE WELLS, AND THE MARTIAL COMMUNITY OF CORY AND ROCHELLE WELLS, AND CORY AND ROCHELLE WELLS DBA TLC TOWING, AN UNINCORPORATED BUSINESS, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

State Farm Mutual Automobile Insurance Company ("State Farm"), the Defendant in the trial court and Respondent in this Court, files this Answer to the Petition for Review.

This case involves a claim under Appellant Trina Cortese's Underinsured Motorist Coverage ("UIM") against State Farm for the death of her son Tanner Trosko which occurred when he was a passenger in a truck that overturned. The Court of Appeals applied well-established Washington common law principles to determine that the trial court correctly applied the law for a bystander claim for negligent infliction of emotional distress ("NIED"). In this lawsuit, all other claims have settled except for the claim by Ms. Cortese for emotional distress.

Ms. Cortese was at her home when the accident occurred. She was informed that her son had been in an accident and did not survive prior to arriving at the accident scene. She did not arrive at the

accident scene unwittingly. She saw her son lying on the side of the road under a sheet after he was removed from the vehicle by the emergency personnel. There was a material change in the accident scene.

The NIED cause of action was properly dismissed on summary judgment by the trial court because the plaintiff did not meet the criteria required to establish this judicially-created cause of action as set forth in *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 60, 176 P.3d 497 (2008). Review should be denied as this case does not conflict with any decision of the Washington Supreme Court. There is no issue of fact present and no conflict with *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Counsel did not brief this case in either the trial court or the Court of Appeals to advocate a change in the law for the legal standard for bystander emotional distress as set forth in *Colbert v. Moomba Sports, Inc*.

Petitioner's second argument that this case conflicts with a published decision of the Court of Appeals does not provide a

compelling basis for review as *Greene v. Young*, 113 Wn. App. 746, 54 P.3d 734(2002) can be factually distinguished and predates *Colbert*. *Colbert* found that that there was a material change in circumstances at the accident scene and under the facts of the case stated that the "unwitting arrival" factor was appropriate for consideration by the court. *Colbert*, 163 Wn.2d at 60. The argument that this case should be reviewed because unpublished decisions can now be cited is without legal basis pursuant to RAP 13.4(b)(2).

It is respectfully submitted that review for this unpublished decision should be denied.

II. STATEMENT OF THE CASE

Unlike the Statement of the Case in the Petition for Review, the recitation of facts in the Court of Appeals opinion is an accurate and fair description of the facts and procedure in this case. The *Cortese v. Wells* slip opinion succinctly sets forth the operative facts as follows:

> Trosko's parents, Trina and Richard Cortese lived near the accident scene and were outside doing yard work when the accident occurred. Trina

discussed the sequence of events leading up to her arrival at the scene in her deposition:

And, and then I heard the sirens, you know, and they didn't stop. They just kept on going. And I said, oh, my God, you know, somebody really got hurt. But, but I knew that my son went the other way. He went I-5. He was going to L.A. Fitness.

So, you know, phew, he was okay. Because this was like behind the house when the sirens just kept going on and on. And, and so a little bit later one of [Trosko's] friends comes to the door and the dog's barking. And I said, "Tanner's not here."

And he goes, "No. Have you heard from him?" I said, "He went to LA Fitness." You know, I don't, I don't like to call or anything when, you know, I know if he's driving. And he told me, "No. Call him. There's been an accident." And so I tried to call him and there was no answer.
….

And pretty soon [Wells's] dad comes with somebody and they come in the house and they tell me that [Trosko]'s been in an accident and he didn't survive. And I said, "Oh, my God. I just saw him. He was just here. Oh, my God, no." And, I had to go to him.
….

So my husband drove us to [the accident scene].

> When the Corteses arrived roughly 20 minutes after the accident, the accident scene was surrounded by emergency vehicles and blocked off, denying the Corteses entry. Trosko had been removed from the truck and was laying on the other side of the road covered with a sheet. Trina testified she was able to see her son's feet under the sheet.

Op. Pgs. 2-3.

State Farm moved for summary judgment to dismiss Ms. Cortese's claims for emotional distress. (CP 22-31). The trial court granted the motion and dismissed all claims against State Farm. (CP 122-126) The Court of Appeals affirmed on June 12, 2017.

III. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Correctly Applied The Applicable Law.

The Court of Appeals in *Cortese* correctly applied the criteria in the *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 60, 176 P.3d 497 (2008) and *Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998). The *Cortese* slip opinion sets forth the standard for bystander emotional distress as shown below:

> "The tort of negligent infliction of emotional distress is a limited, judicially created cause of action that allows a family member to a recovery for 'foreseeable' intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident."
>
> In Washington, a cause of action for negligent infliction of emotional distress is recognized "'where a plaintiff witnesses the victim's injuries at the scene of an accident shortly after it occurs and before there is a material change in the attendant circumstances.
>
> A plaintiff cannot recover if he or she did not witness the accident and did not arrive shortly thereafter, meaning that he or she did not see the accident or the horrendous attendant circumstances such as bleeding or other symptoms of injury, the victim's cries of pain, and, in some cases, the victim's dying words, all of which would constitute a continuation of the event. Emotional distress from such circumstances is not the same as the emotional distress that … a person suffers after learning of the suffering of the victim from others who were present, but does not personally see the injuries or the aftermath of the accident before there is a material change. There must be actual sensory experience of the pain and suffering of the victim—personal experience of the horror.

Op. at Pgs. 2-3.

The Court of Appeals properly concluded that there was a material change in circumstances and Ms. Cortese did not arrive unwittingly, stating:

> In this case, Trina was informed of her son's accident by a third party, and she arrived at the scene of the accident roughly 20 minutes after the accident had occurred. Emergency responders were already there and had the area blocked off. The first time Trina saw her son, he was laying on the other side of the road covered by a sheet. She could see the bottom of one of his feet and noticed his leg was bent under the sheet. Trina "did not see any blood because they wouldn't let me get close enough."
>
> Under these circumstances, there was a "material change" in the scene because, unlike *Hegel* where the plaintiffs happened upon the scene of the accident, Trosko had already been removed from the truck where he died and was laying on the road when Trina first saw him. Additionally, similar to *Colbert*, emergency crews had already responded to the scene and Trina did not witness the "horrendous attendant circumstances such as bleeding or other symptoms of injury, the victim's cries of pain, [or] the victim's dying words." As difficult as it would be for any parent to see their deceased child, she did not have an "actual sensory experience of the pain and suffering of" her son because he died before she arrived. Finally, Trina

> had prior knowledge that her son did not survive the accident. As the Supreme Court observed in *Colbert*, "'[t]he kind of shock the tort requires is the result of the immediate aftermath of an accident.' It is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene."

Op. at Pgs. 8-10.

In *Colbert*, the court explained that when a bystander plaintiff learns of a close relative's accident from a third party, the prior knowledge serves as a "buffer against the full impact of observing the accident scene." *Colbert,* 163 Wn.2d at 59-60, citing *Mazzagatti v. Everingham*, 512 PA. 266, 279-80, 516 A.2d 672 (1986). The *Colbert* court stated that the "unwittingly arrival" factor comports with prior case law that limits the cause of action to those who suffer emotional trauma from the shock of personally experiencing the immediate aftermath of an especially horrendous event that is in actuality a continuation of the event." *Id*. at Pg. 60.

The court specifically held that this required shock "is not the emotional distress one experiences at the scene after already learning

of the accident before coming to the scene." *Id*. The *Colbert* court agreed with the *Mazzagatti* court's reasoning that a plaintiff's prior knowledge of a relative's accident before arriving at the scene serves as a buffer against the emotional trauma experienced from the immediate aftermath of an accident. *Id*.

The facts in the present case are very similar to the facts in *Colbert*. The decision properly places limits on the tort of bystander emotional distress consistent with existing Washington precedent.

B. Review under RAP 13.4(b)(1) Is Not Authorized As There Is No Conflict With A Decision of the Washington Supreme Court.

Petitioner's brief attempts to create a factual issue by arguing that there was no change to the deceased because he had already died and there was no substantial change to his position. Pet., Pg. 7. The facts are undisputed that Tanner Trosko was removed from the vehicle by the emergency workers and was placed on the side of the road. There was a material change in circumstance. Ms. Cortese was told

that her son had been in a motor vehicle accident and passed away prior to arriving at the accident. This is consistent with *Colbert*. There is simply no factual issue and no conflict with either *Hegel v. McMahon* or *Colbert v. Moomba Sports, Inc.*

Summary Judgment was properly granted here. There is no factual dispute. The trial court made the correct decision under the applicable legal standard. This case does not present an issue of fact, but rather involves the application of the legal standard to undisputed facts. The argument that the phrase "shortly thereafter" and "substantial change in the victim's condition or location" is imprecise does not create an issue of fact or a conflict with *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

That shock that Ms. Cortese experienced was related to watching the workers at the accident scene and experiencing the loss of her son, as explained by *Colbert* as shown below:

> As *Hegel* explains, the essence of the tort is the shock resulting from an especially horrendous

> event. *Id*. at 130. Mr. Colbert did not suffer the trauma of seeing the accident or the suffering of his daughter. Instead, on these facts the emotional distress he experienced was related to viewing the rescue efforts, the stress of waiting and watching and then having his worst fears confirmed, and the shock that is always attendant to a vital, healthy loved one's sudden, unexpected death.
> Mr. Colbert was an unforeseeable plaintiff as a matter of law under *Gain* and *Hegel*.

Colbert, 163 Wn.2d at 62.

Finally, there was no briefing in either the trial court or the court of appeals for the adoption of an alternate legal standard for bystander emotional distress. This case was not presented as a test case to expand bystander liability under a new legal theory. Having failed to present these issues and questions to the trial court or to the Court of Appeals, Ms. Cortese cannot raise them now. RAP 2.5(a).

In summary, this case is strikingly similar to the Washington Supreme Court decision in *Colbert*. The *Cortese* decision follows existing precedent and there is no inconsistency with any case of the Supreme Court. Review should be denied under RAP 13.4(b)(1).

C. Review Under RAP 13.4(b)(2) Is Not Warranted As There Is No Conflict With A Prior Decision of the Court of Appeals.

There is no conflict with any prior published decision of the Court of Appeals that compels review of this decision. *Greene v. Young*, 113 Wn. App. 746, 54 P.3d 734(2002) is not in direct conflict with this decision. *Greene* can be distinguished.

In *Greene* the injured wife was screaming in pain at the accident scene with two fractured ankles, as shown below:

> Mitchell Greene arrived at the scene a short time thereafter. He observed that there were fire trucks, ambulances, and police cars at the scene. He witnessed his wife lying on a stretcher with both of her legs in splints, and exhibiting extreme emotional distress. His son was screaming uncontrollably.

Id. at 749. Unlike the facts in the present case, Mitchell Green, the plaintiff's husband, was witnessing his injured wife in extreme emotional distress. The opinion in *Greene* does not describe how the husband learned of the criminal assault and auto accident.

Greene was decided in 2002 well before the *Colbert* decision

that was issued in 2009. The *Colbert* court expressly stated that "We hold that the Court of Appeals properly considered the fact that Mr. Colbert did not arrive on the scene unwittingly." *Colbert*, 163 Wn.2d at 61. Tanner Trosko was deceased, and Ms. Cortese was aware of that fact before she arrived at the accident scene.

The argument that the court should take review to clarify the quantum of movement of the victim to eliminate the family member's claim for negligent infliction of emotional distress should be rejected. Pet. Pg. 14. It is a decision for the trial judge based on all of the factors and not a mechanical construct.

Trina Cortese has failed to demonstrate that there is a conflict under RAP 13.4(b)(2). It is respectfully submitted that this Court should decline review.

D. The Fact That A Decision Is Unpublished Is Not A Reason for Review

The *Cortese* opinion is unpublished and has no precedential value. Ms. Cortese did not move to publish the decision. The point

that the decision will have precedential value because attorneys will cite it in in briefs is addressed by the express language of GR 14.1(a). The rule unambiguously states that unpublished decisions have no precedential value and are not binding on any court.

In summary, RAP 13.4(b)(2) provides for review of decisions that conflict with published Court of Appeals decisions. It is respectfully submitted that no conflict exists and review should be denied.

IV. CONCLUSION

The Court of Appeals faithfully applied this Court's well-developed common law principles for the tort of negligent infliction of emotional distress. Ms. Cortese was aware that her son had passed away prior to arriving at the accident scene. There was a material change to the accident scene as her son had been removed from the

vehicle by the emergency responders. This Court should deny the Petition for Review.

Dated this 31st day of July, 2017.

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V. APPENDIX

Cortese v. Wells, No. 76748-8-I, Washington Court of Appeals, Div. I, 2017 Wash. App. LEXIS 1385 (Wash. Ct. App. June 12, 2017)

CERTIFICATE OF SERVICE

I, Douglas Foley, certify that I served the foregoing document on the following by the means indicated:

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Vancouver, WA 98660

DATED this 31st day of July, 2017 2017.

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Attorneys for Respondent State Farm Mutual Automobile Insurance Company

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TRINA CORTESE, an individual, and TRINA CORTESE, as personal representative of the ESTATE OF TANNER TROSKO; RICHARD CORTESE and TRINA CORTESE, husband and wife, and their marital community, Appellants, v. LUCAS WELLS, CORY WELLS, ROCHELLE WELLS, and the marital community of Cory and Rochelle Wells, CORY AND ROCHELLLE WELLS d/b/a TLC TOWING, an unincorporated business, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Respondents.	No. 76748-8-I UNPUBLISHED OPINION FILED: June 12, 2017

VERELLEN, C.J. — Trina Cortese's son, Tanner Trosko, died from mechanical asphyxiation after a pickup truck he was a passenger in overturned. Trina sued State Farm Mutual Automobile Insurance Company, her underinsured motorist insurer, and others on several theories, including negligent infliction of emotional distress. The trial court dismissed Trina's negligent infliction of emotional distress claim on summary judgment. Trina appeals, arguing she has a viable negligent infliction of

emotional distress claim even though she learned of her son's accident and that he died before she drove to the accident scene. But negligent infliction of emotional distress "is a limited tort theory of recovery."[1] The "'kind of shock the tort requires is the result of the immediate aftermath of an accident.' It is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene."[2] Accordingly, we affirm.

FACTS

On September 4, 2013, Lucas Wells lost control of his 1960 Ford pickup truck while driving around a curve. The truck overturned and slid to a stop. Seventeen-year-old Tanner Trosko, who was a passenger in the truck, died from mechanical asphyxiation due to his position in the truck when it came to rest.

Trosko's parents, Trina and Richard Cortese lived near the accident scene and were outside doing yard work when the accident occurred.[3] Trina discussed the sequence of events leading up to her arrival at the scene in her deposition:

> And, and then I heard the sirens, you know, and they didn't stop. They just kept on going. And I said, oh, my God, you know, somebody really got hurt. But, but I knew that my son went the other way. He went I-5. He was going to L.A. Fitness.
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> So, you know, phew, he was okay. Because this was like behind the house when the sirens just kept going on and on. And, and so a little bit later one of [Trosko's] friends comes to the door and the dog's barking. And I said, "Tanner's not here."
>
> And he goes, "No. Have you heard from him?" I said, "He went to LA Fitness." You know, I don't, I don't like to call or anything when,

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[1] Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 60, 176 P.3d 497 (2008).

[2] Id. (quoting Hegel v. McMahon, 136 Wn.2d 122, 130, 960 P.2d 424 (1998)).

[3] For clarity, the Corteses are referred to by their first names.

> you know, I know if he's driving. And he told me, "No. Call him. There's been an accident." And so I tried to call him and there was no answer.
>
> . . . .
>
> And pretty soon [Wells's] dad comes with somebody and they come in the house and they tell me that [Trosko]'s been in an accident and he didn't survive. And I said, "Oh, my God. I just saw him. He was just here. Oh, my God, no." And, I had to go to him.
>
> . . . .
>
> So my husband drove us to [the accident scene].[4]

When the Corteses arrived roughly 20 minutes after the accident, the accident scene was surrounded by emergency vehicles and blocked off, denying the Corteses entry. Trosko had been removed from the truck and was laying on the other side of the road covered with a sheet. Trina testified she was able to see her son's feet under the sheet.

A psychiatrist diagnosed Trina with posttraumatic stress disorder as a result of her son's accident. Trina has not returned to work as a respiratory therapist since the accident.

On June 20, 2014, Trina, both individually and as personal representative of her son's estate, sued Wells and his parents on several theories, including negligent infliction of emotional distress. At the time of the accident, the Corteses had an automobile insurance policy in effect with State Farm Mutual Automobile Insurance Company. The policy included underinsured motorist coverage. State Farm

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[4] CP at 67-69.

intervened in the suit and Trina filed an amended complaint on December 28, 2015, adding State Farm as a defendant.

On June 21, 2016, State Farm moved for summary judgment seeking to dismiss Trina's claim for negligent infliction of emotional distress—Trina's only remaining claim against State Farm. State Farm argued Trina had no claim of negligent infliction of emotional distress because she was informed that her son did not survive the accident before she arrived at the scene.

On August 26, 2016, the trial court granted summary judgment dismissing Trina's claim for negligence infliction of emotional distress. Since there were no further claims pending against State Farm, the judgment granting State Farm's motion for summary judgment dismissed State Farm as a party defendant.

Trina appeals.

ANALYSIS

Trina contends the trial court erred in dismissing her negligent infliction of emotional distress claim on summary judgment. We disagree.

We review a summary judgment order de novo, engaging in the same inquiry as the trial court.[5] We view the facts and all reasonable inferences in the light most favorable to the nonmoving party.[6] Summary judgment is proper if there are no

[5] Beaupre v. Pierce County, 161 Wn.2d 568, 571, 166 P.3d 712 (2007).

[6] Fulton v. Dep't of Soc. & Health Servs., 169 Wn. App. 137, 147, 279 P.3d 500 (2012).

genuine issues of material fact.[7] "A material fact is one that affects the outcome of the litigation."[8]

"The tort of negligent infliction of emotional distress is a limited, judicially created cause of action that allows a family member to a recovery for 'foreseeable' intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident."[9] In Washington, a cause of action for negligent infliction of emotional distress is recognized "'where a plaintiff witnesses the victim's injuries at the scene of an accident shortly after it occurs and before there is a material change in the attendant circumstances.'"[10]

> A plaintiff cannot recover if he or she did not witness the accident and did not arrive shortly thereafter, meaning that he or she did not see the accident or the horrendous attendant circumstances such as bleeding or other symptoms of injury, the victim's cries of pain, and, in some cases, the victim's dying words, all of which would constitute a continuation of the event. *Emotional distress from such circumstances is not the same as the emotional distress that . . . a person suffers after learning of the suffering of the victim from others who were present, but does not personally see the injuries or the aftermath of the accident before there is a material change.* There must be actual sensory experience of the pain and suffering of the victim—personal experience of the horror.[11]

In Hegel v. McMahon, our Supreme Court reviewed consolidated cases involving the issue of negligent infliction of emotional distress.[12] In the first case,

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[7] CR 56(c); Lowman v. Wilbur, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013).

[8] Janaszak v. State, 173 Wn. App. 703, 711, 297 P.3d 273 (2013).

[9] Colbert, 163 Wn.2d at 49 (citing Hegel, 136 Wn.2d 125-26; Gain v. Carroll Mill Co., 114 Wn.2d 254, 261, 787 P.2d 553 (1990)).

[10] Id. at 55 (quoting Hegel, 136 Wn.2d at 132) .

[11] Id. at 55-56 (emphasis added).

[12] 136 Wn.2d 122, 960 P.2d 424 (1998).

Dale Hegel was struck by a car and knocked into a ditch by the side of the road severely injured.[13] His relatives, the plaintiffs, discovered him when they drove along the same road shortly after the accident.[14] In the second case, the victim was killed when his motorcycle collided with a school bus.[15] His father, the plaintiff, happened on the scene within 10 minutes, before emergency crews arrived.[16] He saw his son on the ground, still conscious, but with his leg cut off and another severe injury leading to his death soon afterward.[17] The Washington Supreme Court concluded that it was improper for the lower courts to dismiss the plaintiffs' claims for negligent infliction of emotional distress.[18] The court stated that the plaintiffs in both cases were present at the scene and may have witnessed their family members' suffering before there was a substantial change in the victim's condition or location.[19]

In Colbert v. Moomba Sports, Inc., Jay Colbert and his wife were awakened by a 3:00 a.m. telephone phone call from their daughter's boyfriend.[20] The boyfriend told them their daughter had disappeared from the back of a boat at a nearby lake and a search was taking place for her.[21] Colbert drove to the lake, which was about

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[13] Id. at 124-25.

[14] Id.

[15] Id. at 125.

[16] Id.

[17] Id.

[18] Id. at 132.

[19] Id.

[20] 163 Wn.2d 43, 46, 176 P.3d 497 (2008).

[21] Id.

five minutes away.[22] When he arrived, police cars, ambulances, and the fire department were at the scene.[23] A few hours later, rescuers found Colbert's daughter's body.[24] From about 100 yards away, Colbert could see his daughter's body being pulled onto the rescue boat.[25] The Washington Supreme Court affirmed the Court of Appeals decision in holding that Colbert was not a foreseeable plaintiff as a matter of law.[26] The Supreme Court explained that when Colbert arrived, "the accident had already occurred—he did not observe his daughter's suffering or her condition while she was drowning."[27] The court also explained that it is appropriate to consider whether a plaintiff arrives on the scene of an accident unwittingly when determining whether a plaintiff can bring a negligent infliction of emotional distress claim.[28] The court accepted the reasoning in a Pennsylvania decision, Mazzagatti v. Everingham, regarding an unwitting plaintiff:

> "[W]here the close relative is not present at the scene of the accident, *but instead learns of the accident from a third party, the close relative's prior knowledge of the injury to the victim serves as a buffer against the full impact of observing the accident scene.* By contrast, the relative who contemporaneously observes the tortious conduct has no time span in which to brace his or her emotional system."[29]

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[22] Id.

[23] Id.

[24] Id.

[25] Id.

[26] Id. at 58.

[27] Id. at 57.

[28] Id. at 60.

[29] Id. at 59-60 (emphasis added) (quoting Mazzagatti v. Everingham, 512 Pa. 266, 279-80, 516 A.2d 672 (Pa. 1986)).

In this case, Trina was informed of her son's accident by a third party, and she arrived at the scene of the accident roughly 20 minutes after the accident had occurred. Emergency responders were already there and had the area blocked off. The first time Trina saw her son, he was laying on the other side of the road covered by a sheet. She could see the bottom of one of his feet and noticed his leg was bent under the sheet. Trina "did not see any blood because they wouldn't let me get close enough."[30] Under these circumstances, there was a "material change" in the scene because, unlike Hegel where the plaintiffs happened upon the scene of the accident, Trosko had already been removed from the truck where he died and was laying on the road when Trina first saw him. Additionally, similar to Colbert, emergency crews had already responded to the scene and Trina did not witness the "horrendous attendant circumstances such as bleeding or other symptoms of injury, the victim's cries of pain, [or] the victim's dying words."[31] As difficult as it would be for any parent to see their deceased child, she did not have an "actual sensory experience of the pain and suffering of" her son because he died before she arrived.[32] Finally, Trina had prior knowledge that her son did not survive the accident.[33] As the Supreme Court observed in Colbert, "'[t]he kind of shock the tort requires is the result of the

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[30] CP at 72.

[31] Colbert, 163 Wn.2d at 55.

[32] Id. at 56.

[33] CP at 68 ("And pretty soon [Wells's] dad comes with somebody and they come in the house and they tell me that Tanner's been in an accident and he didn't survive.").

immediate aftermath of an accident.' It is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene."[34]

Accordingly, the trial court did not err in concluding that Trina was not a foreseeable plaintiff as a matter of law.[35]

Affirmed.

WE CONCUR:

[34] Colbert, 163 Wn.2d at 60 (quoting Hegel, 136 Wn.2d at 130).

[35] Trina's argument that a genuine issue of material fact exists whether she arrived "shortly thereafter" the accident fails. As explained above, the arriving "shortly thereafter" element of negligent infliction of emotional distress is not merely a temporal limit—it is a limit on the type of emotional trauma that is recoverable. See Colbert, 163 Wn.2d at 60; Hegel, 136 Wn.2d at 130.

DOUGLAS FOLEY & ASSOCIATES, PLLC

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