NO. 76748-8-I

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

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,

Plaintiffs/Appellants

vs.

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

Defendant/Respondents

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE BERNARD VELJACIC

PETITION FOR REVEW

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I. Petitioning Parties.

This Petition for Review is filed on behalf of Plaintiffs and Appellants Trina Cortese and Richard Cortese and Trina Cortese, husband and wife and their marital community (the Corteses).

II. Remaining Parties.

The Respondents in this matter have included Lucas Wells, Cory Wells, Rochelle Wells, and the marital community of Cory and Rochelle Wells, and Cory and Rochelle Wells dba TLC Towing, an unincorporated business (the Wellses). All claims between the Wellses and the Corteses were recently settled. The sole remaining respondent is State Farm Mutual Automobile Insurance Company (State Farm).

III. Court of Appeals Decision.

Petitioners seek review of the decision of the Court of Appeals filed in this case on June 12, 2017. That decision affirmed the Superior Court's grant of a motion for summary judgment dismissing Ms. Cortese's claims for negligent infliction of emotional distress in connection with her observations at the scene of an incident that claimed the life of her son, Tanner Trosko.

IV. Issues Presented for Review.

This case presents the following issues for review:

1. Is a family member disqualified from making a claim for negligent infliction of emotional distress even though that that family member suffers posttraumatic distress disorder as a result of witnessing the aftermath of an incident where another family member is killed?

2. Is there a genuine issue of fact as to whether Ms. Cortese arrived shortly after the incident in question?

V. Statement of the Case.

Tanner Trosko, the son of Trina Cortese, died in a motor vehicle incident on September 4, 2013, when he was seventeen years of age. At the time of the incident, Tanner was a passenger in a 1960 Ford Pickup driven by Lucas Wells and owned by Cory Wells, Lucas' father. The younger Mr. Wells lost control of the pickup as he sped around a curve well in excess of the recommended speed limit of twenty-five miles per hour. The vehicle rotated, went into a ditch on the opposite side of the roadway, flipped onto its top, and skidded to a stop. (CP 76-82) Tanner died of mechanical asphyxiation due to his position in the pickup when it came to rest. (CP 74, 82)

At the time of the incident, Mr. and Ms. Cortese were outside doing yard work at their home in Ridgefield, Washington. Within minutes of the occurrence, a friend of Tanner's came to their house and told them

that Tanner had been hurt. Cory Wells also came to their residence and told Ms. Cortese that Tanner did not survive. (CP 67-68)

In September of 2013, Ms. Cortese had been employed for a number of years as a respiratory therapist in the intensive care unit at PeaceHealth Southwest Washington Medical Center in Vancouver. She has estimated that she participated in one to two resuscitations per shift at the hospital. She wanted to get the scene as soon as possible to see if she could resolve her son based on her training and experience. (CP 61-63, 70, 85)

The Cortese's residence is approximately three-quarters of a mile from the scene of the incident as the crow flies and about 1.8 miles by car. (CP 80, 83) They arrived at the scene approximately twenty minutes after the occurrence. (CP 76-82, 85) When they got there, they saw the truck upside down in the ditch on the side of the road. One door was propped open. The cab was crunched down. It was not recognizable as a truck. Tanner was on the ground covered by a sheet. One of his legs was exposed. Emergency responders were present but were not processing the scene. Ms. Cortese was understandably shaken and began screaming. One of the emergency responders restrained her from going to her son. At that point, he was one side of the two lane road while she was on the other

side, a distance of about twenty to twenty-five feet. He stayed in that position until the medical examiner arrived hours later. (CP 69, 71-73, 85)

Dr. Carla Dorsey, a psychiatrist, has diagnosed Ms. Cortese with post traumatic stress disorder as a result of this incident. For her part, Ms. Cortese found that her mental functioning was not as good as it was before Tanner's death. Ambulance sirens and persons being short of breath triggered memories of the incident. She became distracted at work. These factors caused her to be unable to return to her job as a respiratory therapist. (CP 74-75, 88-90)

Ms. Cortese sued the younger Mr. Wells and his parents on June 20, 2014. She sought damages under RCW 4.20.046 as her son's personal representative. She also asked for recovery under RCW 4.24.010 and for damages for negligent infliction of emotional distress. (CP 1-4) Ms. Cortese also made a claim for underinsured motorists benefits against State Farm. At length, State Farm was added to the litigation. (CP 5-13, 34-39) It ultimately paid its policy limits for the wrongful death claims. (CP 15)

State Farm then moved for summary judgment to dismiss Ms. Cortese's claim for negligent infliction of emotional distress. (CP 22-31) The trial court granted the motion and dismissed all claims against State

Farm. (CP 122-26) Ms. Cortese then appealed. (CP 128-41) The Court of Appeals, Division One, affirmed.

VI. Argument.

a. The Decision of the Court of Appeals Conflicts with Decisions of the Supreme Court.

The decision of the Court of Appeals conflicts with decisions of the Supreme Court. First of all, it denies recovery to Ms. Cortese even though she suffers from post traumatic stress disorder as a result of her observations at the scene. Secondly, it denies her relief even though there is at least a genuine issue of material fact as to whether she arrived shortly after the incident. Third, it is based in part on the fact that emergency responders were present when Ms. Cortese arrived. The Supreme Court should therefore take review. RAP 13.4(b)(1)

In *Hegel v. McMahon,* 136 Wn.2d 122, 132, 960 P.2d 424, 1998), the Court ruled that a family member may recover for emotional distress caused by observing a relative being injured or by observing the relative shortly after the incident and before there is a substantial change in the relative's condition or location. The Court adopted this rule to allow "recovery only to the class of claimants who are present at the scene before the horror of the accident has abated" and who witness the aftermath of an accident in all its alarming detail. 136 Wn.2d at 130. 132

The Court distinguished between the trauma that a person suffers by viewing the incident or its aftermath—which is compensable—and the emotional upset that a person feels knowing that a family member has been injured—which is not. 136 Wn.2d at 131 In making that distinction, it suggested that the tort of negligent infliction of emotional distress compensates post traumatic stress disorder. 136 Wn.2d at 131 fn. 2

Nine years later, the Court decided *Colbert v. Moomba Sports, Inc.,* 163 Wn.2d 63, 176 P.3d 497 (2007). The majority opinion in that case reiterated its statement in *Hegel v. McMahon, supra,* concerning the purpose of the rule enunciated in *Hegel v. McMahon, supra.* It stated:

> Accordingly, in deciding the scope of the tort, we sought to identify a rule that permitted recovery for those who suffer emotional distress because they personally experienced the immediate aftermath of an accident that is in reality a continuation of the event. We identified the proper scope of the phrase "shortly thereafter," by recognizing first that "[a]n appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured." (Citation omitted) We analogized to diagnosing those suffering from "posttraumatic stress disorder, [where the] traumatic event is one where a person experiences or witnesses actual or threatened physical injury or death, and has a response that involves 'intense fear, helplessness, or horror.'" (Citations omitted). . .

The Court also ruled that a family member did not lose a claim for negligent infliction of emotional distress if emergency responders were present when he or she arrived. 160 Wn.2d at 61-62

By any measure, Trina Cortese arrived at the scene shortly after the incident that claimed her son's life. There clearly had been no change to his condition because he had died. There had also been no substantial change to his location. His body had been moved from the cab of the truck to the roadway and placed under a sheet where it laid for hours until the medical examiner arrived. Moving him to that location did not mitigate the horror of the incident's aftermath. To the contrary, it exacerbated it, especially because the medical examiner did not come to the scene for several hours. There can be little doubt that the scene presented the horror of the incident's aftermath.

The Court of Appeals based its decision on the fact that when Ms. Cortese arrived, emergency responders were at the scene, had blocked traffic off, and would not let Ms. Cortese to approach her son's body; that Ms. Cortese saw her son's body under a sheet and therefore did not observe any blood; that he was already dead and his body and been removed from the truck when she arrived; and that she had been told that he had died while she was still at her home. Slip Opinion, pps. 8-9 While it noted that she had been diagnosed with post traumatic stress disorder,

that factor played no part in its decision. The analysis of the Court of Appeals was flawed.

First of all, whether the victim is already dead when the family member arrives should have no bearing. In this case, it should militate in favor of allowing the claim because there was no change to the condition of young Mr. Trosko before his mother came to the scene. Given that he died from mechanical asphyxiation, there may have been no blood to see. Disqualifying Ms. Cortese on the basis that her son had died would preclude her from making a claim if she had come onto the scene without any knowledge of what had happened and before emergency responders had arrived. There is no requirement that the victim be alive when the family member arrives in either *Hegel v. McMahon, supra,* or *Colbert v. Moomba Sports, Inc., supra.*

Secondly, prior knowledge of the incident is merely a consideration, not a disqualifying factor as was noted in *Colbert v. Moomba Sports, Inc., supra,* 163 Wn.2d at 60

Third, and as the Court made clear in *Colbert v. Moomba Sports, Inc., supra,* the presence of emergency responders on the scene does not foreclose her claim.

Finally, and most importantly, Ms. Cortese suffered the precise type of injury that the tort of negligent infliction of emotional

distress was designed to compensate as discussed in both *Hegel v. McMahon, supra,* and *Colbert v. Moomba Sports, Inc., supra.* She has been diagnosed with post traumatic stress disorder. The effect upon her has been so profound that she has not been able to continue in her work as a respiratory therapist. This fact clearly indicates that the horror of the scene had not dissipated by the time that she arrived. Since the object of the "shortly thereafter" rule is to include the claims of those who suffer from observing the horror of the scene of an incident, Ms. Cortese must have been deemed to have arrived "shortly thereafter" and therefore qualify for relief.

Under all of the facts, which must be viewed in a light most favorable to Ms. Cortese—especially her diagnosis of post traumatic stress disorder, a reasonable juror could conclude that she had arrived shortly after the incident. This is especially true because the terms "shortly thereafter" and "substantial" change in the victim's condition or location are imprecise. That means that the trial court erred by granting summary judgment, and the case must be tried. *Wilson v. Steinbach,,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) Therefore, the contrary decision of the Court of Appeals conflicts with a long line of decisions of the Supreme Court, such as *Wilson v. Steinbach, supra,* that address the proper disposition of a summary judgment motion.

The Court has ruled that arbitrary limitations cannot be placed on the tort of negligent infliction of emotional distress. In *Hegel v. McMahon, supra,* 136 Wn.2d at 130-31, it rejected presence at the scene at the time of injury as a requirement and temporal limitations upon arrival as being arbitrary. If Ms. Cortese cannot recover for injuries that the tort is supposed to compensate, then the requirements for the tort of negligent infliction of emotional distress must also be considered arbitrary and should be re-examined. Rather than a litmus test based on the presence or absence or certain factors—such as whether the family member knew of the incident before arrival—the inquiry should focus on the scene as a whole when the family member arrived. Stated another way, the factors should be viewed as a guide to determining the overall character of the scene of the incident. Was it relatively fresh? Or had it been changed in such a way as to mitigate its initial horror? Was the scene sufficiently horrible that it could be expected to engender an emotional reaction in a reasonable person or not? Cf. *Hunsley v. Giard,* 87 Wn.2d 424, 436, 553 P.2d 1096 (1976) The claimant's injuries should also be considered. Were they based on observation of the scene itself or concern for the injured victim?

State Farm based its motion on the fact that Ms. Cortese knew of the incident prior to her arrival. Such knowledge is a

consideration but is not by itself a disqualifying factor as the Court stated in *Colbert v. Moomba Sporst, Inc., supra.* It should not preclude a claim for negligent infliction of emotional distress. Observing the actual scene may lead to emotional injury to the claimant even if he or she has an idea what is in store. The truth of that assertion is clearly demonstrated by Ms. Cortese.

Trina Cortese arrived at the scene of the incident before there had been any substantial change to her son's location or condition. She suffered post traumatic stress disorder as a result. Under decisions from the Supreme Court in both *Hegel v. McMahon, supra,* and *Colbert v. Moomba Sports, Inc., supra*, she has presented at least an issue of fact as to whether she should recover for negligent infliction of emotional distress. The decision of the Court of Appeals is at odds with these two decisions as well as decisions concerning the propriety of summary judgment. The Supreme Court should take review for that reason.

b. <u>The Supreme Court Should Take Review Because the Decision of the Court of Appeals Conflicts with Another Decision of the Court of Appeals.</u>

The decision of the Court of Appeals in this case is in direct conflict with the decision in *Greene v. Young,* 113 Wn.App. 746, 54 P.3d

734 (2002). The Supreme Court should therefore take review. RAP 13.4(b)(2)

In *Greene v. Young, supra,* Ms. Greene and her young son were victims of a car-jacking. Ms. Greene jumped out of the car with her son to get away from the perpetrator. The car then ran over her legs and fractured her ankles. Her spouse arrived at the scene a "short time thereafter." 113 Wn.App. at 749 Emergency responders were present. He observed his emotionally distraught wife in a stretcher with her legs in splints. The son was in the arms of a stranger—perhaps an emergency responder—and was crying uncontrollably. Mr. Greene was subsequently diagnosed with post traumatic stress disorder. Citing *Hegel v. McMahon, supra,* the Court held that Mr. Greene had a viable claim for negligent infliction of emotional distress because he had arrived shortly after the incident and before there was any substantial change to the condition or location of his wife or son. It stated:

> Here, (Mr. Greene) came upon the scene shortly after the incident concluded. He observed his injured wife at the scene, hysterically crying while being carried on a stretcher. He observed his son in a stranger's arms, also crying and screaming uncontrollably. The location had not changed and there was little change in the condition of his wife and child. . .

113 Wn.App. at 752 The Court was not concerned with whether Mr. Greene knew of the occurrence before he arrived—although it is likely that he had been summoned to the scene.

The Court in *Greene v. Young, supra,* came to its decision even though Ms. Greene and the couple's child had been moved and splints had been applied to Ms. Greene's legs. In other words, it viewed the location as encompassing the entire area where the incident occurred and where Mr. Greene found his wife and child. It also focused on the obvious horror of the aftermath rather than applying a litmus test based on certain factors.

Under the Court's view in *Greene v. Young, supra,* there was no change in Tanner Trosko's location by the time Ms. Cortese arrived. He was still at the scene, albeit under a sheet. There was also no change in his condition since he had died in the incident. Therefore, under what the Court said in *Greene v. Young, supra,* Ms. Cortese arrived shortly after the incident and is entitled to make a claim for negligent infliction of emotional distress.

The comparison of our case with *Greene v. Young, supra,* shows that there are different analyses of whether there has been a substantial change in the location of the family member for the purposes of determining whether a family member arrives shortly after an incident.

In our case, it appears that any movement of the victim—however, slight—will amount to a disqualifying change in the victim's location. In *Greene v. Young, supra,* on the other hand, the victim can be moved about the scene without the family member losing a claim for negligent infliction of emotional distress. The Supreme Court should take review to clarify the quantum of movement of the victim necessary to eliminate the family member's claim for negligent infliction of emotional distress.

c. Review Should Be Taken Even Though the Decision of the Court of Appeals Is Unpublished.

It may be suggested that review should not be taken because the decision of the Court of Appeals is an unpublished decision that has been determined by the Court of Appeals not to have precedential value. RCW 2.06.040 It can be cited, however, for such value as is deemed appropriate. As GR 14.1(a) has provided since September 1, 2016:

> Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

At this point, it is not uncommon for recent unpublished decisions of the Court of Appeals to be cited to and to be relied upon by trial courts. This represents a significant change from the law as it existed prior to September 1, 2016, when a party could be sanctioned for citing an unpublished decision, and no court could consider an unpublished decision. *State v. Fitzpatrick*, 5 Wn.App. 661, 668, 491 P.2d 262 (1971); *Johnson v. Allstate Insurance Co.,* 126 Wn.App. 510, 519, 108 P.3d 1273 (2005)

If the Supreme Court does not take review, the Court of Appeals decision in this case will be cited to a trial court in a future case. When that happens, the trial court will no doubt give some consideration to the decision because, at the end of the day, it is a decision of the Court of Appeals. As pointed out above, the decision is flawed and is in conflict decisions of both the Supreme Court and the Court of Appeals. The Supreme Court should take review, as it would with any other case where such conflicts exist, to prevent confusion as to how claims for intentional infliction of emotional distress should be evaluated.[1]

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[1] This confusion may be magnified by *Haynes v. State Farm Mutual Insurance Companies,* 198 Wn.App. 1009, 2017 Lexis Wn.App. 556 (2017), where the Court ruled in an unpublished decision that a wife was not disqualified from making a claim for negligent infliction of emotional distress because she was called to come to the scene of a motorcycle crash that injured her husband. That decision may also be cited to trial courts.

VII. Conclusion.

The Supreme Court should take review of this case. After due consideration, it should reverse the decision of the Court of Appeals and remand the matter to the Superior Court for trial on Ms. Cortese's claim for negligent infliction of emotional distress against State Farm.

Dated this 7 day of July, 2017.

BEN SHAFTON WSB#6280
Of Attorneys for the Corteses

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.
>
> 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."
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> 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.
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> . . . .
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> 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.
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> . . . .
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> 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.

NO. 76748—8-I

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

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,

Plaintiffs/Appellants

vs.

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

Defendant/Respondents

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE BERNARD VELJACIC

DECLARATION OF MAILING

BEN SHAFTON
Attorney for Plaintiffs/Appellants
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

COMES NOW Amy Arnold and declares as follows under penalty of perjury under the laws of the State of Washington:

1. My name is Amy Arnold. I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and not a party to this action.

2. On July 7, 2017, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Petition for Review along with this declaration addressed to the following persons:

Donald Daniel P.O. Box 11880 Olympia, WA 98508-1880	Douglas Foley 13115 N.E. 4th St., Suite 260 Vancouver, WA 98684

Dated at Vancouver, Washington, this 7th day of July, 2017.

Amy Arnold

CARON, COLVEN, ROBISON & SHAFTON, P.S.

Attorneys at Law
900 Washington Street, Suite 1000
Vancouver, Washington 98660

Ben Shafton
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Licensed in Washington & Oregon

VIA FEDERAL EXPRESS

July 7, 2017

Richard Johnson
Clerk of the Court
Court of Appeals, Division One
One Union Square
600 University St.
Seattle, WA 98101-4170

Re: *Cortese v. Wells,* No. 76748-8-I

Dear Mr. Johnson:

Please find enclosed for filing the original and one copy of the Petition for Review, the Declaration of Mailing, and our check for $200.00.

Thank you for your attention to this matter.

Very truly yours,

Ben Shafton
Enclosures

BTA

Cc: Trina Cortese
Donald Daniel
Douglas Foley