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COURT OF APPEALS  
DIVISION II

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NO. 49426-4-II STATE OF WASHINGTON  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II BY          DEPUTY

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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,

Defendants/Respondents

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE BERNARD VELJACIC

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BRIEF OF APPELLANTS

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### ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred by entering the Order Granting Summary Judgment Motion Regarding Plaintiff Trina Cortese's Claim for Negligence Infliction of Emotional Distress.

ASSIGNMENT OF ERROR NO. 2: The trial court erred by entering the Order Granting State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment.

ASSIGNMENT OF ERROR NO. 3: The trial court erred by entering the Judgment Granting Defendant's Motion for Summary Judgment.

### ISSUES PRESENTED

1. Does knowledge of incident prior to arriving at the scene shortly after the occurrence disqualify a family member from pursuing a claim for negligent infliction of emotional distress?
2. Is there a genuine issue of material fact as to whether Ms. Cortese has a viable claim for negligent infliction of emotional distress?
3. Does a person who suffers post traumatic stress disorder as a result of an occurrence have a claim for negligent infliction of emotional distress regardless of whether he or she knew of incident before arriving at the scene?

## STATEMENT OF THE CASE

### I. Operative Facts.

Tanner Trosko is the son of Trina Cortese. He was seventeen years of age on September 4, 2013, and was a senior at Ridgefield High School. At that time, he lived with his mother and stepfather—Richard Cortese—at 2048 N. Heron Dr., Ridgefield, Washington. (CP 58-59, 77)

In September of 2013, Ms. Cortese was employed as a respiratory therapist at PeaceHealth Southwest Washington Medical Center in Vancouver. She began at the hospital after she received her qualifying degree in 2003. She worked in the intensive care unit. (CP 61-63, 85)

On September 4, 2013, Tanner and Lucas Wells decided to go to L.A. Fitness in Vancouver. (CP 65-66) They were driving in a 1960 Ford pickup belonging to Cory Wells, the father of Lucas Wells. That truck had recently undergone extensive modifications. The younger Mr. Wells was driving and Tanner was sitting in the passenger seat. The truck was headed westbound on N.W. 291<sup>st</sup> St. That road curves to the south and becomes N.W. Main Avenue. There is a warning sign prior to the curve posting an advisory speed of 25 miles per hour. At that location, N.W. Main Avenue is a two lane road. As the young Mr. Wells went into the curve, he lost control of the vehicle. It veered to the east and rotated such that the front of the truck was pointed north. It went into the ditch on the

east side of the roadway, flipped over onto its top, and slid to a stop. Vancouver Police Department Officer Jeffrey Olson, the officer who investigated the incident, estimated the speed of the truck at between 52.85 and 58.63 miles per hour going into the curve. The incident occurred at 7:38 PM. (CP 76-82)

Tanner died from mechanical asphyxiation due to his position in the vehicle when it came to rest. (CP 74, 82)

The site of the incident was near 29811 N.W. Main St., Ridgefield. (CP 80) That is approximately 4,000 feet or about three-quarters of a mile as the crow flies and about 1.8 miles by car from the Cortese residence. (CP 83)

The Corteses were outside doing yard work at the time of incident. They heard sirens of emergency responders. Within minutes, 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 didn't survive. (CP 67-68)

The Corteses then got into their vehicle and immediately went to the scene. Ms. Cortese specifically wanted to get there as soon as she could so she could render aid to her son based on her training as a respiratory therapist. She wanted to try to revive him. This was well within her training and experience. By her estimate, she was involved in

an average of one to two resuscitations per shift at the hospital. (CP 70, 85)

The Corteses arrived at the scene at approximately 8:00 PM. (CP 85) When they arrived, they saw the flipped over truck upside down on the side of the road. One door was propped open. The cab was crunched down. The vehicle was not recognizable as a truck. Tanner was on the ground covered by a sheet. Part of one his legs was exposed. It was bent or “crooked up.” Emergency responders were present but were not processing the scene or doing any investigation. Ms. Cortese was shaken and began screaming. One of the emergency responders restrained her from going to her son. At that point, Ms. Cortese was on one side of the two lane road while her son lay on the other side. Tanner stayed in that position until the medical examiner arrived hours later. (CP 69, 71-73, 85)

Ms. Cortese has been diagnosed by a Dr. Carla Dorsey, a psychiatrist, with post traumatic stress disorder as a result of this incident. (CP 88-90) She did not return to her work as a respiratory therapist thereafter. (CP 64) Her mental functioning is not as good as it was before the occurrence. She found that ambulance sirens and persons being short of breath trigger memories of the incident. This causes her to be distracted. (CP 74-75)

II. Procedural Facts.

On June 20, 2014, Ms. Cortese, both personally and as personal representative of her son's estate, sued Lucas Wells and his parents. As personal representative, she sought relief under the survival statute, RCW 4.20.046. She also claimed damages for her son's death pursuant to RCW 4.24.010 and for negligent infliction of emotional distress. (CP 1-4)

At the time of the incident, the Corteses had in effect of policy of automobile insurance with State Farm Mutual Automobile Insurance Company (State Farm). The policy included underinsured motorists coverage. State Farm was allowed to intervene in the suit on May 22, 2015. (CP 5-8) Ms. Cortese then filed the Amended Complaint for Damages adding a claim for underinsured motorists benefits against State Farm. (CP 9-13) Ultimately, and on July 12, 2016, Ms. Cortese filed the Second Amended Complaint. (CP 34-39) By that time, State Farm had paid its policy limits in connection with the claims made on account of Tanner's death. (CP 15)

On June 21, 2016, State Farm moved for summary judgment seeking to dismiss Ms. Cortese's claim for negligent infliction of emotional distress—the Corteses' only remaining claim against it. The motion was made on one ground only—that Ms. Cortese had no claim for negligent infliction of emotional distress because she knew of the incident

before she arrived at the scene. (CP 22-31) State Farm also submitted an affidavit of counsel reciting resolution of the death claims and attaching portions of Ms. Cortese's deposition. (CP 15-21) On June 30, 2016, the Wellses moved for partial summary judgment. The motion states:

These defendants join in the motion for summary judgment brought by defendant State Farm on this issue. This motion is based upon the pleadings and files herein and the materials submitted in support State Farm's motion on this issue including, but not limited to, State Farm's Memorandum in Support of Summary Judgment and the Declaration of Douglas Foleys and attachments thereto.

(CP 32)

On August 26, 2016, the trial court entered the Order Granting Summary Judgment Motion Regarding Plaintiff Trina Cortese's Claim for Negligence Infliction of Emotional Distress (CP 118-121); the Order Granting State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment (CP 122-24); and Judgment Granting Defendant's Motion for Summary Judgment. (CP 127) These orders had the effect of dismissing Ms. Cortese's claim for negligent infliction of emotional distress. Since there were no further claims pending against State Farm, the Judgment Granting Defendant's Motion for Summary Judgment dismissed State Farm as a party defendant.

Ms. Cortese then appealed. (CP 128-41)

## ARGUMENT

### I. Standard of Review.

Ms. Cortese's negligent infliction of emotional distress claims were dismissed on summary judgment motions. The appellate court must review them *de novo* and engage in the same inquiry as did the trial court. It must first determine whether there is any genuine issue of fact based on the materials that are submitted. All evidence and inferences from the evidence are construed in favor of Ms. Cortese as the non-moving party. If there are no factual issues, it must decide whether the moving party is entitled to judgment as a matter of law. *Burton v. Twij Commander Aircraft, LLC*, 171 Wn.2d 204, 212, 254 P.3d 778 (2011); *Moeller v. Farmers Insurance Company of Washington*, 155 Wn. App 133, 140, 229 P.3d 857 (2010).

State Farm's summary judgment motion raised one and only one issue—that Ms. Cortese could not recover for negligent infliction of emotional distress because she knew of the incident before she arrived at the scene. Therefore, that is the only issue that could be considered by the trial court and can be considered at this juncture. *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 147, 969 P.2d 458

(1999); *White v. Kent Medical Center*, 61 Wn. App 163, 168, 810 P.2d 4 (1991)

As will be discussed below, the fact that Ms. Cortese knew of the incident before she reached the scene does not preclude her from recovering for negligent infliction of emotional distress. Out of an abundance of caution, and while not waiving any argument that the Court can decide this matter only on the issue of Ms. Cortese's knowledge, this brief will also demonstrate that there are, at least, factual issues concerning Ms. Cortese's claim for negligent infliction of emotional distress. Therefore, the trial court erred in granting summary judgment to State Farm and to the Wellses.

II. Ms. Cortese Is Not Disqualified from Obtaining Damages for Negligent Infliction of Emotional Distress Because She Was Told of the Incident before She Arrived at the Scene.

a. There Is No Rule Requiring that a Plaintiff Seeking Damages for Negligent Infliction of Emotional Distress Have No Knowledge of the Incident before Arriving at the Scene.

A close family member is entitled to recover for negligent infliction of emotional distress if that family member observes an incident causing injury or arrives at the scene shortly thereafter. State Farm and the Wellses contend that—regardless of any other circumstances—a relative

who knows that an incident has occurred before he or she comes to the scene is disqualified from claiming damages for negligent infliction of emotional distress. That is not the law. The trial court erred by ruling in favor of the Wellses and State Farm on this issue.

Resolution of this question requires a discussion of the evolution of Washington law on liability for negligent infliction of emotional distress.

The Court first recognized that persons who were not otherwise victims of a tortious act could recover for the emotional distress caused by observing the incident in *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976). In *Hegel v. McMahon*, 136 Wn.2d 122, 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 arriving at the scene shortly after the occurrence and before there is a substantial change in the relative's condition or location. 136 Wn.2d at 132. In taking this functional approach, it rejected not only the requirement that a relative observe the incident but also any requirement that the relative appear at the scene within a particular number of minutes after the occurrence. 136 Wn.2d at 131. It announced a distinction between the trauma 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. Neither plaintiff in *Hegel v. McMahon, supra*, knew that a relative had been injured before he arrived at the scene. The Court did not, however, state that the lack of knowledge of the incident before arrival was necessary for each plaintiff to recover.

Jay Colbert brought the next case dealing with this issue. His daughter, Denise Colbert, drowned after inhaling carbon monoxide fumes while hanging on to a moving motorboat. Her boyfriend called Mr. Colbert at approximately 3:00 AM to tell him that she had disappeared while swimming. Mr. Colbert drove a short distance to the lake where the events had occurred. By then, emergency responders were at the scene searching for Denise. Mr. Colbert waited at the dock for about three hours before her body was recovered. He saw her body taken to a boat and moved around the boat from a distance of about one hundred yards.

Mr. Colbert sued for negligent infliction of emotional distress. The trial court dismissed that claim, and he appealed. The Court of Appeals affirmed in *Colbert v. Moomba Sports, Inc.*, 132 Wn.App 916, 135 P.3d 985 (2006). It based its decision on a combination of several factors. First, it noted that Mr. Colbert did not see his daughter drown and did not see her when he arrived at the scene. Rather, he watched rescue efforts over the course of two to three hours. Second, he learned of his

daughter's death about ten minutes before Denise's body was pulled from the lake. Third, he saw the body from a long distance and then only briefly. He also did not witness the immediate aftermath of the drowning and never saw any accident scene. He also did not see his daughter's body before the condition was altered by emergency responders. Lastly, the Court relied on the fact that he knew of the incident before he arrived at the scene. 132 Wn.App at 934-36. It also noted the testimony of Mr. Colbert's physician to the effect that his emotional distress was no different than if he had not seen his daughter's body or the aftermath of the incident. 132 Wn.App at 932-33. Viewed as a whole, the decision of the Court of Appeals was based on the conclusion that Mr. Colbert did not arrive at the scene "shortly thereafter" as required by the decision in *Hegal v. McMahon, supra*. 132 Wn. App at 935.

The Supreme Court took review and ultimately rendered its decision in *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 63, 176 P.3d 497 (2007). The Court's opinion discussed a number of issues in the Court of Appeals' decision. The Court stated that a person need not be present at the scene before emergency responders as suggested by the Court of Appeals. 163 Wn.2d at 61-62. At length, it addressed the issue raised by the Wellses and State Farm here—whether a person seeking damages for

negligent infliction of emotional distress is disqualified from doing so by knowledge of the incident before arrival at the scene. It first stated:

Mr. Colbert also argues that the Court of Appeals erroneously imposed a requirement that the plaintiff arrive “unwittingly” at the accident scene. The Court of Appeals listed this as a circumstance showing that Colbert failed to establish a duty of care on the part of Skier's Choice, noting that other jurisdictions have required the plaintiff to arrive unwittingly at the accident scene. . .

163 Wn.2d at 59. In other words, the Court recognized that, despite Mr. Colbert’s contention, the Court of Appeals had not imposed any sort of bright line rule to the effect that a person must arrive on the scene “unwittingly” but rather had merely listed this as a circumstance that it considered. It then referred to language from a Pennsylvania decision indicating that a person’s learning of the problem from a third person may serve as a “buffer” to the emotional trauma of observing an accident scene. It noted that this language was a “logical extension” of Washington case law. It then said:

Whether the plaintiff arrived on the scene of the accident unwittingly is an appropriate consideration when determining whether he or she can bring a bystander negligent infliction of emotional distress claim based on the emotional trauma that results from experiencing another person's negligently inflicted physical injury. . .

163 Wn.2d at 60 In other words, while the Court allowed consideration of this factor, it too did not announce any bright line rule limiting negligent

infliction of emotional distress claims only to persons who arrive at the scene “unwittingly.”

The Court then affirmed the result reached by the Court of Appeals. In doing so, it said:

Despite its reliance on (the presence of emergency responders) on the facts in this case the Court of Appeals correctly concluded that when Colbert observed the scene conditions were significantly changed from those that existed at the time Denise suffered injury. He did not observe the “victim's injuries at the scene of [the] accident shortly after it occur[red] and before there [wa]s material change in the attendant circumstances.” As (*Hegel v. McMahon*, supra), explains, the essence of the tort is the shock resulting from an especially horrendous event. . . 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*. 163 Wn.2d at 62.

It went on to state:

The trial court properly granted summary judgment dismissing Mr. Colbert's claim for negligent infliction of emotional distress because he cannot meet the requirement that he was present at the scene either at the time of the accident or “shortly thereafter” as we have defined this term. Mr. Colbert did not observe his daughter's injuries shortly after they occurred or before there was a material change in the attendant circumstances, and he did not see the accident or his daughter suffering.

163 Wn.2d at 63. It made no mention of the call that Mr. Colbert received from his daughter's boyfriend in either of these statements. In this way, the Court's conclusion also did not announce any sort of bright line rule that any person with knowledge of an incident before arrival cannot make a claim for negligent infliction of emotional distress. Furthermore, it did not base its decision on the fact that Mr. Colbert had learned of the problem before he came to the scene.

If knowledge of the incident before coming to the scene disqualifies a person from claiming damages for negligent infliction of emotional distress, the Court would have clearly said so and would have decided *Colbert v. Moomba Sports, Inc.*, *supra*, on that basis alone. Knowledge of the incident is a simple factor and easy to determine. It does not require any in depth analysis of the surrounding circumstances to determine if the imprecise element of arriving "shortly thereafter" has been satisfied. Neither the Court of Appeals nor the Supreme Court decided the case on the basis of Mr. Colbert's knowledge before he went to the lake. Rather, both Courts analyzed the issue on the basis of whether Mr. Colbert had arrived at the scene "shortly thereafter" the incident. There is only one possible conclusion—a person's knowledge of the incident before arriving at the scene does not preclude a claim for negligent infliction of emotional distress. Rather, that knowledge is

merely one factor among several to be considered in determining whether that person arrived “shortly thereafter” as is required. Whether a person arrives “shortly thereafter” in turn depends on the status of the scene when the person arrives and what that person observes.

In short, there is no rule in Washington that precludes a person from recovering for negligent infliction of emotional distress if that person knows of the incident before arriving. Prior knowledge is merely a consideration in determining whether the plaintiff is entitled to be compensated. The focus is and should be whether the victim arrives shortly after the occurrence and in time to witness and be affected by the shock of the horrendous event.

b. Any Such Rule Would Be Arbitrary.

The tort of negligent infliction of emotional distress is supposed to compensate a person for “the shock caused by the personal experience in the immediate aftermath of an especially horrendous event of seeing the victim, surrounding circumstances, and effects of the accident as it actually occurred.” *Hegel v. McMahon, supra*, 136 Wn.2d at 130, citing *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986); *Colbert v. Moomba Sports, Inc., supra*, 163 Wn.2d at 55. Furthermore, as the Court has noted, distinctions as to who can recover should not be arbitrary. *Hegel v. McMahon, supra*, 136 Wn.2d at 13-32—ruling that a distinction

based on actually observing the incident as against arriving shortly thereafter is arbitrary; *Colbert v. Moomba Sports, Inc., supra*, 163 Wn.2d at 54—acknowledging the aforementioned discussion and reasoning in *Hegel v. McMahon, supra*.

Disqualifying a person with knowledge before arrival at the scene from making a claim for negligent infliction of emotional distress is inconsistent with what the tort is supposed to compensate. Clearly, persons can experience shock and emotional distress from viewing an especially horrendous event even though they might know what has occurred before they arrive. This is shown by the following hypothetical situations based on the facts of cases decided by the Supreme Court:

A child is hit by a motorist in a residential neighborhood about two blocks from the child's home. A neighbor who knows the child and her parents sees the collision and makes two phone calls. The first is to 911. The second is to the child's parent alerting him to what has occurred. The parent runs to the scene and arrives before the emergency responders. He sees where his child is laying, her injuries which have caused her to bleed, and the child's obvious distress.<sup>1</sup>

A group of middle schoolers accompanied by teachers and volunteer parents goes on a field trip to a zoo. Several of the youngsters decide to explore the facility away from the teachers and the parents. One of them falls approximately twenty feet, lands on some rocks, and sustains very serious injuries. One of the young people with him runs back to the group, a distance of about one-quarter mile, for help

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<sup>1</sup> This hypothetical is based on *Johnson v. Barnes*, 55 Wn.2d. 785, 350 P.2d 471(1960).

and assistance. The first adults he sees are the parents of the child who fell. He tells them what happened. They run to the scene and see their child laying on the rocks in his injured state.<sup>2</sup>

Plaintiff suffered burns over 70% of his body as a result of a pipeline fire at his place of employment. His brother worked for the same employer but at a location about a mile from the fire. He hears about the fire and his brother's injuries from another employee within minutes after the fire occurs because of his job with the company. He then races to the scene of the fire because of his concern for his brother and to see if he can help. He sees his brother lying on the ground hardly recognizable because of the burns.<sup>3</sup>

There can be no doubt that the parents in the first two hypotheticals and the brother in the third hypothetical experienced the immediate aftermath of horrendous events. A bright line rule requiring a lack of knowledge of the incident before arriving at the scene, however, would disqualify each of them from making a claim for negligent infliction of emotional distress.

The arbitrariness of any bright line rule is also illustrated by what transpired in this case. The Court has stated that who recovers for negligent infliction of emotional distress "should differentiate between the trauma suffered by a family member who views an accident or its

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<sup>2</sup> This hypothetical is based on *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994).

<sup>3</sup> This hypothetical is based on *Washburn v. Beatt Equipment, Inc.*, 120 Wn.2d 246, 840 P.2d 860 (1993).

aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured. *Hegel v. McMahon, supra*, 136 Wn.2d at 131. It then built upon that notion in *Colbert v. Moomba Sports, Inc., supra*, 163 Wn.2d at 54-55 as follows:

. . . 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 discovery that a relative has been severely injured” (Citations 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.’”

In this way, the Court emphasized that the touchstone of the tort is the effect that it has on the victim, which effect is analogous to posttraumatic stress disorder. Ms. Cortese has been diagnosed with posttraumatic stress disorder as a result of the incident. To impose a bright line rule that prohibits her from recovering because she was told about the incident before she arrived at the scene ignores what the tort of negligent infliction of emotional distress is supposed to compensate. Such a rule is just as arbitrary as that rejected by the Court in *Hegel v. McMahon, supra*—that the victim must observe the incident in order to recover. For that reason, there can be no rule disqualifying a family member from recovering for

negligent infliction of emotional distress for the sole reason that that family member knew of the incident before he or she arrived at the scene. The trial court therefore erred in granting the summary judgment motions of the Wellses and State Farm.

III. At Very Least, a Genuine Issue of Material Fact Exists as to Whether Ms. Cortese Can Recover.

a. Ms. Cortese Arrived Shortly After the Incident.

The issue presented by any summary judgment motion is whether the evidence presents a genuine issue of material fact. It is clear that a genuine issue of material fact exists concerning whether Ms. Cortese arrived “shortly after” the incident in question at very least. Whether or not she did should therefore be determined at trial by the jury.

The facts support Ms. Cortese’s claim. The incident occurred at 7:38 PM on September 4, 2013. Ms. Cortese heard sirens from emergency responders and learned what had occurred. She wanted to get to the scene as soon as possible so that she could help her son. She arrived at approximately 8:00 P.M., about twenty-two minutes after the collision. When she got there, the Wellses’ truck was flipped over where it came to rest on the side of the roadway. It was resting on its top. The roof of the cab was severely deformed. Her son was on a side of the roadway

under a sheet with a portion of his leg exposed. She was on the other side of the roadway, approximately twenty to twenty-five feet away.<sup>4</sup> She was restrained from going to him by the emergency responders. There was no substantial change to the scene. Critically, Tanner's body lay on the roadway for matter of hours before the medical examiner came.

There can be no doubt that Ms. Cortese suffered emotional distress from the shock and horror of observing the aftermath of what was a horrendous event. The Wellses' truck was upside down and barely recognizable as a vehicle. The body of her son lay under a sheet with part of a lower extremity exposed. And the body laid there for an extended period of time before the medical examiner arrived. Finally, she was restrained from going to her son for reasons that are not immediately clear. In this way, she was deprived of attempting to help him—her purpose in going to the scene. The shock and horror that she experienced is also demonstrated by her reaction to the scene—bawling and screaming. There can be little doubt that she suffered shock from the observation of the aftermath of a horrendous event.

Our case is much different from what occurred in *Colbert v. Moomba Sports, Inc.*, *supra*. In that case, and as the Court pointed out,

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<sup>4</sup> This distance is an estimate based on each lane of the roadway having a width of approximately twelve feet as is customary. No precise measurements appear in the record.

Mr. Colbert did not see his daughter's injuries before a material change in the circumstances. There was simply no accident scene for him to observe. Mr. Colbert went to the lake and waited for the resolution of the rescue efforts. And what he claimed he saw of her body was from a distance of one hundred yards. In this situation, there was a deformed and disfigured truck and a body partially exposed for an extended period.

The decision of the Court of Appeals in *Greene v. Young*, 113 Wn.App 746, 54 P.3d 734 (2002), is instructive. Ms. Greene and her young son were the victims of a car-jacking. When Ms. Greene was able to jump out of the car with her son, the perpetrator ran over her legs fracturing her ankles. Mr. Greene, her husband, arrived at the scene "a short time thereafter." 113 Wn.App at 749<sup>5</sup>. When he arrived, Ms. Greene was in a stretcher with her legs in splints. She was suffering from emotional distress. Their son was crying uncontrollably. The Court determined that Mr. Greene's claim for negligent infliction of emotional distress was covered by his underinsured motorists policy. In doing so, it noted that he had a viable claim for negligent infliction of emotional distress even though he had not observed the incident. 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

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<sup>5</sup> The opinion does not indicate whether he arrived with or without knowledge of the incident or exactly how soon he arrived after Ms. Greene had escaped.

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. His claim is cognizable under *Trinh*.<sup>6</sup>

This statement is critical in the way the Court analyzed whether Mr. Greene arrived “shortly thereafter” the incident. It focused on whether there was a change in the location of his family members and a change in their condition. Based on that analysis, Ms. Cortese would have a claim for negligent infliction of emotional distress because there was no change in her son’s condition between the time of the incident and her arrival and the location had also not changed.

In the final analysis, the tort of negligent infliction of emotional distress involves concepts that are imprecise. The family member must arrive shortly after the incident. Arriving shortly thereafter is defined to mean arriving before there is a substantial change to the injured person’s location or condition. Given this language, reasonable minds could at least conclude that Ms. Cortese arrived shortly after the incident. In that case, summary judgment is not appropriate and Ms. Cortese’s entitlement to compensation for negligent infliction of emotional distress must be determined by the trier of fact after suitable instruction.

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<sup>6</sup> *Trinh v. Allstate Insurance Company*, 109 Wn.App 927, 37 P.3d 1259 (2002), where the Court held that a person who observed her friend hit by a drunk driver had an underinsured motorists claim based on negligent infliction of emotional distress.

b. Ms. Cortese Has a Viable Claim Because She Suffered Posttraumatic Stress Disorder As a Result of the Incident.

The tort of negligent infliction of emotional distress is designed to compensate a family member for the shock of viewing an incident or its aftermath. This is analogous to suffering from posttraumatic stress disorder. As the Court in *Colbert v. Moomba Sports, Inc., supra*, stated:

Accordingly, in deciding the scope of the tort (in *Hegel v. McMahon, supra*), 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 discovery that a relative has been severely injured.” *Hegel v. McMahon, supra*, 136 Wn2d at 131 fn 2 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’...

163 Wn.2d at 54-55.

Ms. Cortese has suffered posttraumatic stress disorder as a result of the incident as Dr. Dorsey has stated. This is the precise condition that the tort of negligent infliction of emotional distress is

designed to compensate. She has suffered profound residuals as a result of this condition. She can no longer work as a respiratory therapist.

Since Ms. Cortese suffers from posttraumatic stress disorder from the incident, what she observed must also have amounted to the shock and horror of a horrendous event. And since the tort of negligent infliction of emotional distress is designed to compensate a close family member for the emotional distress from observing the shock and horror of a horrendous event, Ms. Cortese has a viable claim. Stated another way, Ms. Cortese's posttraumatic stress disorder from the event is not the grief or upset suffered by anyone upon discovering that a relative has been severely injured which is not compensable. Since it is posttraumatic stress disorder, it amounts to the trauma that she, as a family member, experienced by viewing the aftermath of the incident for which she can recover. *Hegel v. McMahon, supra*, 136 Wn.2d at 131; *Colbert v. Moomba Sports, Inc., supra*, 163 Wn.2d at 54-55. Therefore, Ms Cortese has a viable claim for negligent infliction of emotional distress.

CONCLUSION

The trial court erred by granting summary judgment for the reasons indicated above. The orders appealed from should therefore be reversed and this case should be remanded for further proceedings.

DATED the 15 of November, 2016.



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BEN SHAFTON WSB#6280  
Of Attorneys for the Appealing Parties

FILED  
COURT OF APPEALS  
DIVISION II

2016 NOV 16 AM 9:34

NO. 49426-4-II

STATE OF WASHINGTON

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

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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

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APPEAL FROM THE SUPERIOR COURT

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THE HONORABLE BERNARD VELJACIC

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DECLARATION OF MAILING

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

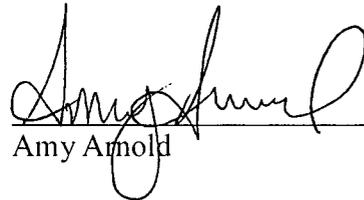
1. My name is Amy Arnold. I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and not a party to this action.

2. On November 15, 2016, 2016, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Brief of Appellant addressed to the following persons:

Donald Daniel  
P.O. Box 11880  
Olympia, WA 98508-1880

Douglas Foley  
13115 N.E. 4<sup>th</sup> St., Suite 260  
Vancouver, WA 98684

Dated at Vancouver, Washington, this 15<sup>th</sup> day of November, 2016.

  
\_\_\_\_\_  
Amy Arnold