

FILED
COURT OF APPEALS
DIVISION II

2017 FEB -6 AM 11:49

STATE OF WASHINGTON

BY  DEPUTY

NO. 49426-4-II

**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

REPLY BRIEF

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

Table of Contents

Introduction.....1

Argument.....1

 I. A Person Who Arrives at the Scene of Incident Shortly After the Occurrence Is Not Barred from Recovering for Negligent Infliction of Emotional Distress Solely Because the Person Knew of the Incident before Arriving.....1

 II. Ms. Cortese’s Claim Is Based on Her Shock from a HorrendousEvent.....2

 III. The Defendants Cannot Escape Liability Based on Ms. Cortese’s Supposed Fault.....3

 IV. There Is No Requirement that a Person Seeking Damages for Negligent Infliction of Emotional Distress See the Victim before That Victim Dies.....4

 V. A t Least an Issue of Fact Exists as to Whether Ms.Cortese Arrived at the Scene Shortly After the Incident Incident.....6

Conclusion.....7

Table of Authorities

Cases:

Chavez v. Estate of Chavez, 148 Wn.App. 580, 201 P.3d 340
(2009).....4

Colbert v. Moomba Sports, Inc., 163 Wn.2d 63, 176 P.3d 497
(2007).....1, 2, 5

Hegel v. McMahon, 136 Wn.2d 122, 960 P.2d 424 (1998).....5, 6

Statutes:

RCW 4.22.005.....4

RCW 4.22.015.....3

INTRODUCTION

This reply brief will avoid reiterating arguments made in the Brief of Appellant. It will, however, point out the flaws in the arguments advanced on behalf of Lucas Wells, Cory Wells, Rochelle Wells, and State Farm Mutual Automobile Insurance Company (the Defendants).

ARGUMENT

I. A Person Who Arrives at the Scene of an Incident Shortly After the Occurrence Is Not Barred from Recovering for Negligent Infliction of Emotional Distress Solely Because the Person Knew of the Incident before Arriving.

The Defendants claim that Trina Cortese is not entitled to damages for negligent infliction of emotional distress simply because she knew of the incident and her son's injuries before she came to the scene. They appear to argue that the Court in *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 63, 176 P.3d 497 (2007), laid down a "bright line" rule that any person who knows of an incident before arriving at the scene cannot claim for negligent infliction of emotional distress notwithstanding the horrific nature of the scene or its effect upon the claimant.

This argument fails for two reasons both of which were discussed in the Brief of Appellant, and neither of which were addressed by any of the Defendants in their briefs. First of all, the Court in *Colbert v. Moomba*

Sports, Inc., supra, did not decide the case on the basis that Mr. Colbert knew of his daughter's predicament before he went to the scene. Secondly, the Court stated merely that a person's knowledge of an incident before arriving is a consideration as to whether that person can make a claim for intentional infliction of emotional distress, not a disqualifying factor. Brief of Appellant, pps. 8-14.

II. Ms. Cortese's Claim Is Based on Her Shock from a Horrendous Event.

The Defendants also contend that Ms. Cortese's claim stems from sorrow over the loss of her son. That is simply not the case. She has suffered posttraumatic stress disorder from the shock of being at and observing an horrendous scene. That is compensable. The Court analogized this condition to what should be compensated through the tort of negligent infliction of emotional distress. *Colbert v. Moomba Sports, Inc., supra*, 163 Wn.2d at 54-55

In any event, the Defendants give no reasoned argument as to why Ms. Cortese cannot recover even though she has suffered posttraumatic stress disorder other than to say that she knew of the incident before she went to the scene. Any argument to that effect would have to fail. If Ms. Cortese has suffered posttraumatic stress disorder from her observation at

the scene, she necessarily was affected by the shock of an horrendous event and is entitled to recover.

III. The Defendants Cannot Escape Liability Based on Ms. Cortese's Supposed Fault.

There is a suggestion in the Defendants' argument that Ms. Cortese brought about her own injury by going to scene of the incident. It is submitted that any similarly situated parent would do the same thing, and would do so even if the incident was a significant distance from the parent's location. Furthermore, this argument concedes that she did suffer an injury by going to the incident scene.

By making this argument, the Defendants are contending that Ms. Cortese is guilty of contributory fault based on unreasonable assumption of risk or unreasonable failure to avoid injury. As RCW 4.22.015 states in pertinent part:

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

(Emphasis added) Any fault attributed to Ms. Cortese would, of course, reduce her recovery proportionally. As RCW 4.22.005 says:

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery....

This is an issue for the trier of fact on remand.

IV. There Is No Requirement that a Person Seeking Damages for Negligent Infliction of Emotional Distress See the Victim before That Victim Dies.

The Defendants appear to argue, based on *Chavez v. Estate of Chavez*, 148 Wn.App. 580, 201 P.3d 340 (2009), that if the victim is killed in the incident, the person seeking damages for negligent infliction of emotional distress must actually see that person while he or she is still alive. The holding of *Chavez v. Estate of Chavez, supra*, does not support such a rule. In that case, the children sued for negligent infliction of emotional distress based on their mother's death in a motor vehicle collision. The Court ruled that the children could not make such a claim because they had not seen their mother at the time of the incident or shortly thereafter. Their father had shielded them from the sight of their mother's body. 148 Wn.App. at 584 Furthermore, and although one of

the plaintiffs in *Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998), did see his son after he was injured and before he died, the decision does not make that a requirement. There is also nothing to that effect in *Colbert v. Moomba Sports, Inc.*, *supra*.

A requirement that a person see a family member before that family member actually dies is arbitrary. And arbitrary distinctions should not be made in connection with the tort of negligent infliction of emotional distress. *Hegel v. McMahon*, *supra*, 136 Wn.2d at 130-1. Such a requirement would prevent a person from recovering for negligent infliction of emotional distress if he or she happened to arrive at the scene of a car crash moments after it occurred to find that a family member had died on impact. No one could doubt that such a person would experience the shock and horror of the situation and emotional distress as a result.

Finally, unlike the children in *Chavez v. Estate of Chavez*, *supra*, Ms. Cortese did see her son after he had died, albeit with most of his body underneath a sheet. It is submitted that seeing a family member in that position is an horrific experience. It had a significant effect on Ms. Cortese. She suffers from posttraumatic stress disorder which has caused, among other things, her inability to follow her chosen occupation.

In summary, Ms. Cortese can recover for negligent infliction of emotional distress even though she did not see her son before he died.

V. At Least an Issue of Fact Exists as to Whether Ms. Cortese Arrived at the Scene Shortly After the Incident.

A person cannot recover for negligent infliction of emotional distress unless that person witnesses the injury or arrives at the scene shortly thereafter. A person arrives "shortly thereafter" if there has been "no material change in the attendant circumstances" when he or she arrives at the scene. *Hegel v. McMahon, supra*, 136 Wn.2d at 131-32

The Defendants claim that there was a material change because Tanner Trosko was out of the cab of the truck and under a sheet when Ms. Cortese came to where the incident had taken place. Since this matter was decided on summary judgment, whether there was a "material change" must be viewed in the light most favorable to the non-moving party. "Materiality" should also be based on the effect on the plaintiff since the purpose of the tort is compensation for the shock and horror of witnessing the incident. If the plaintiff seeking damages for negligent infliction of emotional distress has indeed suffered mental trauma due to viewing the scene, then there cannot have been a material change in the circumstances. Since Ms. Cortese has suffered posttraumatic stress disorder as a result of viewing the scene, any change to the area cannot have been material.

It is submitted that there is significant shock and horror involved in seeing the body of a loved one under a sheet with limbs exposed, people

including the driver walking around the body, and being restrained from going to the loved one at the same time. There was simply no material change to the scene. At very least, a trier of fact would be entitled to find the absence of any material change and therefore that Ms. Cortese arrived shortly after the incident.

CONCLUSION

The Defendants arguments have no merit. The trial court erred by granting the summary judgment motion dismissing Ms. Cortese's claims for negligent infliction of emotional distress and dismissing claims against State Farm. Those decisions should be reversed and the matter should be remanded for trial.

DATED this 3 day of February , 2017.



BEN SHAFTON WSB#6280
Of Attorneys for the Appealing Parties