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COURT OF APPEALS
DIVISION II

2017 JAN 13 PM 1:40

STATE OF WASHINGTON

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NO. 49426-4-II

COURT OF APPEALS, DIVISION II
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,

Appellants,

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,

Respondents.

BRIEF OF RESPONDENT STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Douglas F. Foley, WSBA #13119
Vernon S. Finley, WSBA #12321
Douglas Foley & Associates, PLLC
13115 NE 4th Street, Suite 260
Vancouver, WA 98684
(360) 883-0636
Attorneys for Respondent State Farm
Mutual Automobile Company

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A. INTRODUCTION.

This case involves a bystander claim for negligent infliction of emotional distress under Appellant Trina Cortese's Underinsured Motorist Coverage ("UIM") against State Farm. The NIED claims were based on the death of her son Tanner Trosko which occurred when he was a passenger in a truck that overturned. Ms. Cortese was not present for the accident. 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.

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. The trial court correctly applied the *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 60, 176 P.3d 497 (2008) decision which held "[W]hether 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."

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Respondent acknowledges Appellants' assignment of error, but believes that the assignment of error could be more appropriately formulated as follows:

(1) Assignment of Error.

1. Did the trial court correctly enter the Order of Summary Judgment for the dismissal of Ms. Cortese's claim for negligent infliction of emotional distress when she was informed of the death of her son prior to her arrival at the accident scene?

(2) Issues Pertaining to Assignments of Error.

Respondent acknowledges Appellant's assignment of error and designates the following issues for consideration:

1. Washington law requires that the plaintiff meet certain elements to establish the tort of NIED, including the requirement that the plaintiff arrive at the scene unwittingly.

C. RESTATEMENT OF THE CASE.

1. Operative Facts.

This appeal involves a motor vehicle accident where a vehicle operated by Lucas Wells, in which Tanner was a passenger, overturned resulting in the death of Tanner on September 4, 2013. (CP 50) Tanner was seventeen years old on September 4, 2013, and was a senior at

BRIEF OF RESPONDENT - 2

Ridgefield High School. He lived with his mother and stepfather Richard Cortese in Ridgefield, Washington. (CP 58-59).

Tanner and Lucas Wells planned to go to L.A. Fitness in Vancouver. (CP 65-66) They were driving a 1960 Ford pickup belonging to Cory Wells, who was the father of Lucas Wells. (CP 80, 82) Lucas Wells was driving the truck and lost control in a curve. (CP 82) The truck rolled over and slid to a stop. Tanner died from mechanical asphyxiation due to his position in the vehicle when it came to rest. (CP 82)

Ms. Cortese discussed the sequence of events leading up to her arrival at the accident scene in her deposition, testifying in pertinent part:

“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 LA 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 his 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 his friend blocked our cars.

...

And pretty soon Luke'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." And I said, "Oh, my God. I just saw him. He was just here. Oh, my God, no. "And, and I had to go to him."

...

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

(CP 67-69)

Richard Cortese drove his wife to the accident scene and arrived at approximately 8:00 P.M. (CP 85) The area surrounding the accident scene was surrounded by emergency vehicles and blocked off, denying Ms. Cortese entry. CP 69. Ms. Cortese testified she was able to see her son's feet that were under a sheet.

(CP 71, 72)

Ms. Cortese was aware, by her own admission that her son, Tanner, was in an accident and was deceased prior to her arrival at the scene. (CP 68-69) Ms. Cortese was told by Defendant Cory Wells that Tanner was in an accident. (CP 68)

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 states that she was forced to quit her job as a respiratory therapist. (CP 90)

2. Procedural Facts.

Respondent acknowledges Appellants' Statement of Procedural Facts. State Farm intervened in this case, with the Amended Complaint filed by Plaintiff on December 28, 2015, adding State Farm as a Defendant. (CP 9)

On June 21, 2016, State Farm moved for summary judgment seeking to dismiss Ms. Cortese's claim for negligent infliction of emotional distress. (CP 22) State Farm's Summary Judgment motion stated that "State Farm moves for summary judgment on the basis that Plaintiff has not met the requirements of a NIED claim, specifically, Plaintiff cannot show she unwittingly arrived at the scene of the accident that Plaintiff alleges caused her emotional injury." (CP 23)

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 trial court entered a separate Order Granting State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment (CP 122-24). The Judgment was entered on August 26, 2016 in favor of State Farm (CP 125-127) The Notice of Appeal was filed on September 9, 2016. (CP 128-41)

D. ARGUMENT.

(1) Standard of Review.

This is an appeal from an order granting a summary judgment. In *Van Nay v. State Farm Mut. Auto Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001), the Washington Supreme Court set forth the applicable standard of review:

Summary judgment orders are reviewed de novo by this court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash.2d 55, 1 P.3d 1167 (2000). In doing so we observe the well-known principle that summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

This Court will affirm an order granting summary judgment when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. CR 56(c); *Van Nay*, 142 Wn.2d 790. When reasonable minds can reach only one conclusion, questions of fact may be determined as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

(2) The Elements of the Bystander Claim for Negligent Infliction of Emotional Distress Are Not Established.

In Washington, the tort of negligent infliction of emotional distress “is a limited, judicially created cause of action that allows a family member a recovery for ‘foreseeable’ intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident.” *Colbert*, 163 Wn.2d 43, 49, 176 P.3d 497 (2008) (citing *Hegel v. McMahon*, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998); *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 261, 787 P.2d 553 (1990)). In order to recover, the bystander plaintiff must be present at the scene of the injury-causing accident or arrive thereafter, and must demonstrate objective symptoms of emotional distress. *Hegel*, 136 Wn.2d at 126; *Gain*, 114 Wn.2d at 261. Moreover, a plaintiff must come across the scene of an event “unwittingly” rather than having been alerted to the event ahead of time. *Colbert*, 163 Wn.2d at 59.

(3) Ms. Cortese Was Informed of the Accident and Did Not Arrive Unwittingly.

Ms. Cortese was informed that Tanner had been in an accident and did not survive. (CP 68-69) After receiving the news that her son was in an accident, Ms. Cortese immediately drove to the accident scene. (CP 69) The facts are undisputed that Ms. Cortese drove knowingly and willingly to the accident scene and did not arrive unwittingly.

Colbert v. Moomba Sports is directly on point and presents facts similar to the matter before this court. In *Colbert*, Jay Colbert received a phone call informing him that his daughter had disappeared from a boat on a lake and a search was taking place for her. *Colbert*, 163 Wn.2d at 46. When he arrived at the lake, police cars, ambulances, and a rescue boat were on the scene. *Id.* A few hours later, Colbert was told that rescuers had found his daughter's body, and he watched as her body was pulled onto a boat. *Colbert*, 163 Wn.2d at 47. Colbert brought an NIED claim against the manufacturer of the boat and other parties. *Id.*

The Washington Supreme Court held that the trial court properly dismissed Colbert's NIED claim where the undisputed evidence showed that his arrival on the scene did not occur unwittingly, but instead had been prompted by the phone call advising him of his daughter's disappearance. *Colbert* 163 Wn.2d at 59. In affirming the dismissal, the court stated:

As we observed in *Hegel*, 136 Wn.2d at 130 ..., "[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.

Colbert, 163 Wn.2d at 60.

The *Colbert* court cited with approval *Mazzagatti v. Everingham*, 512 Pa. 266, 516 A.2d 672, 679 (1986). In that case, the plaintiff's teenage

daughter was riding her bike when she was struck and fatally injured by a car operated by the defendant. The plaintiff “received a phone call immediately after the collision informing her that her daughter had been involved in an automobile accident.” *Mazzagatti*, 516 A.2d at 674. The *Mazzagatti* court held that because the plaintiff had prior knowledge of the accident before she arrived at the scene, the trial court’s dismissal of the NIED claim was proper. *Mazzagatti*, 516 A.2d at 679.

The Washington Supreme Court in *Colbert* agreed with the Pennsylvania court’s analysis stating:

“We agree with the Pennsylvania court’s reasoning. 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. This comports with our prior case law that limits the cause of action to those who suffer emotional trauma from the shock caused by personally experiencing the immediate aftermath of an especially horrendous event that is in actuality a continuation of the event. As we observed in *Hegel*, 136 Wn.2d at 130 (quoting *Gates*, 719 P.2d at 199), “[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.** As we have also emphasized, negligent infliction of emotional distress is a limited tort theory of recovery.”

Colbert, 163 Wn.2d at 60. (Emphasis supplied)

The *Colbert* decision remains good law and was followed by the Court of Appeals in *Chavez v. Estate of Chavez*, 148 Wn. App. 580, 201 P.3d 340, 341 (.2009). The facts in *Chaves* involved Ms. Chavez rolling the van in which the family was riding on a trip back to Mexico for Christmas. Ms. Chavez was ejected from the van. Mr. Chavez was the only member of the family to see Ms. Chavez shortly after the accident. He did not let the children see her. He simply told the children that their mother had died. The children next saw their mother at her funeral. *Chavez*, 148 Wn. App. 581. The Court applied *Colbert* finding that there was no liability, stating:

The *Colbert* court, however, seems to hold that a plaintiff who alleges negligent infliction of emotional distress must personally witness the victim's suffering or death. *Id.* at 55, 56. A plaintiff who does *not* personally witness a victim's suffering or death *cannot* prevail on a claim for negligent infliction of emotional distress. *Id.* at 55.

The pertinent facts here are analogous to those in *Colbert*. Like Mr. Colbert, the Chavez children did not personally witness their mother's injuries or hear her suffer or cry out. Only Mr. Chavez, who is not a plaintiff here, witnessed his wife's injuries and death. He then told his children that their mother had died. The Chavez children, therefore, cannot recover for negligent infliction of emotional distress because they did not have an "actual sensory experience of the pain and suffering of" their mother. *Id.* at 56

Chavez, 148 Wn. App. at 584.

Ms. Cortese was aware, by her own admission that her son, Tanner, was in an accident and was deceased prior to her arrival at the

scene. Like the Plaintiff in *Colbert*, Ms. Cortese was informed by Cory Wells (the father of Lucas Wells) that Tanner had died in an accident.

In *Colbert* the court acknowledged the veracity of the Plaintiff's distress at the loss of his daughter while waiting for divers to locate and recover her body. *Colbert*, 163 Wn.2d at 62. However, the court found that the Plaintiff "simply did not experience conditions that are comparable to actually witnessing a loved one's accidental death or serious injuries." *Id.*

In summary, Ms. Cortese did not experience conditions akin to witnessing her son sustain serious injuries or die without having already been informed. The elements of the tort of NIED are not established as Ms. Cortese had prior knowledge of the accident.

(4) Response to Specific Arguments.

1. There Is No Issue Of Fact As The Circumstances Surrounding Ms. Cortese's Arrival At The Accident Scene Are Undisputed.

There is no factual dispute that Ms. Cortese was informed that her son had been in an accident and did not survive prior to her arrival at the accident scene. It is not disputed that Ms. Cortese made her own decision to go to the accident scene with her husband. Ms. Cortese did not arrive at the accident scene unwittingly – she had prior knowledge. Therefore, there is no factual dispute to defeat the Order of Summary Judgment.

2. State Farm Is Not Seeking To Impose A New Requirement For NIED As *Colbert* Expressly States That The Plaintiffs Unwitting Arrival Is An Important Consideration.

Colbert v. Moomba Sports, Inc. is controlling authority. In *Colbert* the court reasoned that the unwitting requirement is “the logical extension of our case law.” *Colbert*, 163 Wn.2d at 59. The Court specifically stated in determining that no NIED claim existed by holding: “We hold that the Court of Appeals properly considered the fact that Mr. Colbert did not arrive at the scene unwittingly.” (Emphasis supplied). *Colbert*, 163 Wn.2d at 60. The court determined that whether a bystander Plaintiff arrived at the scene of an accident unwittingly is fundamental when determining whether he or she can bring a claim for NIED. *Id.*

Ms. Cortese claims that State Farm is attempting to “engraft a new rule, one that requires a claimant to have no knowledge of the injury before coming to the scene.” State Farm is making no rule. The Supreme Court in *Colbert* stated that “[W]hether the Plaintiff arrives at the scene of an accident unwittingly is an appropriate consideration when determining whether he or she can bring a bystander claim for negligent infliction of emotional distress...” as shown below:

“Whether the Plaintiff arrives at the scene of an accident unwittingly is an appropriate consideration when determining whether he or she can bring a bystander claim for negligent infliction of emotional distress based on the emotional trauma that results

from experiencing another person's negligently inflicted physical injury. This comports with our prior case law that limits the cause of action to those who suffer emotional trauma from the shock caused by personally experiencing the immediate aftermath of an especially horrendous event that is in actuality a continuation of the event. As we observed in *Hegel*, 136 Wn.2d at 130 (quoting *Gates*, 719 P.2d at 199), “[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. As we have also emphasized, negligent infliction of emotional distress is a limited tort theory of recovery.

Colbert, 163 Wn.2d at 60 (“Emphasis Supplied”)

The trial court’s decision does not change existing case law. Considering whether the plaintiff arrives at the scene unwittingly is an appropriate consideration under *Colbert*, and the argument that this is an arbitrary “bright line” rule that should defeat summary judgment misses the mark. Ms. Cortese had prior knowledge of the accident - this was not a continuation of the accident.

3. Plaintiffs’ Argument That Ms. Cortese Arrived Shortly After The Accident Occurred Does Not Change the *Colbert* Court’s Requirement Of An Unwitting Arrival.

This argument can be addressed on two different grounds. As discussed above, the court in *Colbert* clarified the rule set forth in *Hegel v. McMahon* by stating “that a bystander Plaintiff must arrive at the scene unwittingly in order to maintain a cause of action for negligent infliction of emotional distress is the logical extension of our case law.” *Colbert*,

163 Wn.2d at 60. The rationale behind the “unwitting arrival” requirement for a NIED claim is that the emotional distress one experiences at the scene after already learning of the accident before coming to the scene is not akin to the “shock caused by personally experiencing the immediate aftermath of an especially horrendous event that is in actuality a continuation of the event.” *Id.*

Ms. Cortese contends her claim is valid because she arrived at the accident scene before there was any substantial or material change. There was a substantial and material change in circumstance as the body was removed from the vehicle by emergency personnel. Tanner was lying on the ground with a sheet over his body. This was not an immediate continuation of the accident. The court can decide that there was a material change in circumstance based on the factual record and consideration of the unwitting requirement.

4. There Is No Authority For Ms. Cortese’s Claim That A Diagnosis of PTSD Preempts Consideration of the Unwitting Requirement.

There is no direct authority cited for the argument that a person who suffers post traumatic disorder has a claim for negligent infliction of emotional distress regardless of whether he or she knew of the incident before arriving at the scene. Ms. Cortese cites the *Hegel v. McMahon* opinion stating that “[S]uch a rule is just as arbitrary as that rejected by the

Court in *Hegel v. McMahon, supra* - that the victim must observe the accident in order to recover.” Ms. Cortese is seeking an extension of the law, and the prior opinions of the Washington Supreme Court discussed below have not expanded the tort of NIED in this manner to allow the diagnosis of PTSD to justify negating consideration of the unwitting requirement. In *Colbert*, the Washington Supreme Court expressly stated that “[W]e 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 60.

Washington law on NIED has evolved, but the basic elements of the tort are unchanged. Originally, the relative had to be physically present at the time and personally experience the horrific event involving a loved one. *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1968). In *Hunsley*, a car crashed into a home. The wife suffered emotional distress believing either that she herself was going to be injured, or that her husband in another room had been injured. It was foreseeable that a car crashing into a home might cause the occupants emotional distress.

The scope of the NIED tort was clarified in *Cunningham v. Lockard*, 48 Wn. App. 38, 736 P.2d 305 (1987), where the court restricted the class of plaintiffs to those who are “actually placed in peril by the defendant’s negligent conduct and to family members present at the time

who fear for the one imperiled.” *Cunningham*, 48 Wn. App. at 45. The court reasoned that a liability scheme limited by foreseeability alone was contrary to public policy. *Cunningham*, 48 Wn. App. at 43-45. The plaintiffs in that case were the minor children of a mother who was struck by a vehicle while she was walking on the street. The children did not witness the accident nor did they come upon the scene shortly thereafter. The court concluded that as a matter of law, the children could not recover for the emotional distress.

In *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 260, 787 P.2d 553 (1990) the Washington Supreme Court case held that the “mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law.” In *Gain*, relatives of a state trooper learned about his death in a car accident while watching the evening news. The Court dismissed the claim because it was unforeseeable as a matter of law that relatives who were not present at the scene would suffer the kind of mental distress required to establish the tort of negligent infliction of emotional distress. *Id.* at 261.

In *Hegel v. McMahon*, 136 Wn.2d 122, 128, 960 P.2d 424 (1998), the court had accepted review of two cases. In one, *Marzolf*, a father came upon the accident scene within 10 minutes of the collision, before the aid crew arrived. He observed his son on the ground still alive, but with his

leg cut off and his body about split in half. In the other case, *Hegel*, a son came upon his father who was lying in the ditch severely injured having been hit by a passing car. The father had been pouring gasoline into his car. Both cases had been dismissed in the trial court because the bystander plaintiffs had not been at the scene when the accident occurred. The court, in reviewing the Washington case law, noted how the *Cunningham* court had restricted the broad scope of *Hunsley*. *Hunsley* had created a potentially unlimited liability situation. This very real specter of virtually unlimited liability required that the court draw a definite boundary as to who exactly could bring a bystander claim. *Cunningham* held that bystander claims should be limited to “claimants who were present at the time the victim was imperiled.” *Cunningham*, 136 Wn.2d at 127. The court in *Hegel* articulated the need for limits on liability, stating:

We agree with the Court in *Cunningham*, that unless a reasonable limit on the scope of defendants’ liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one.

Id. The court in *Hegel* held that a family member may recover for emotional distress if he or she arrives at the scene shortly after the accident before substantial change has occurred in the victim's condition or location. The plaintiff's emotional distress must be reasonable, and the

plaintiff must present objective symptoms of the distress that are susceptible to medical diagnosis and proved through qualified evidence.

Hegel, 36 Wn.2d at 136.

The Washington Supreme Court in *Colbert* in 2008, as previously discussed, found as a logical extension of the case law that a bystander plaintiff must arrive on the scene unwittingly in order to maintain a cause of action for negligent infliction of emotional distress. *Colbert* at 163 Wn.2d at 59. Read as whole, these decisions limit the scope of the tort of NIED as there is the threat of unlimited liability. *Colbert* provides a reasonable limit to the scope of a defendant's liability. The fact that Ms. Cortese suffers from a diagnosis of PTSD does not preempt existing Washington law which places express limits on the class of plaintiffs who may bring the tort of NIED.

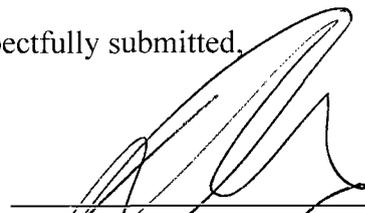
E. CONCLUSION.

The decision of the trial court should be upheld in this appeal.

DATED this 10th day of January, 2017.

Respectfully submitted,

By:



Douglas Foley, WSBA #13119
Vernon Finley, WSBA #12321
Douglas Foley and Associates, PLLC
13115 NE 4th Street, Suite 260
Vancouver, WA 98684
(360) 883-0636
*Attorneys for Respondent State Farm
Mutual Automobile Company*

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I, Douglas F. Foley, certify that I mailed, or caused to be mailed, a copy of the foregoing Respondent's Brief, postage prepaid, via U.S. Mail

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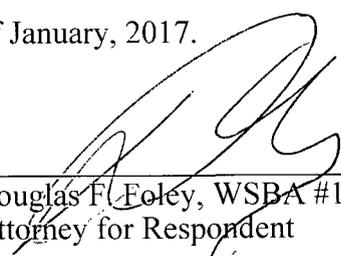
and by email, to the following counsel of record at the following address:

William D. Robison
Caron, Colven, Robison & Shafton
900 Washington, Ste. 1000
Vancouver, WA 98660
Of Attorneys for Plaintiffs/Appellants

Don G. Daniel
Law Lyman Daniel Kamerrer et al
PO Box 11880
Olympia, WA 98508-1880

Stephen G. Leatham
Heurlin Potter Jahn Leatham & Holtmann
211 E. McLoughlin Boulevard, Suite 100,
Vancouver, WA 98663
Of Attorneys for Defendants

DATED this 10th day of January, 2017.



Douglas F. Foley, WSBA #13119
Attorney for Respondent