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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 345921

SHAILA HAYNES,

Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY, et al.

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

A. State Farm Concedes That Genuine Issues of Material Fact Exist That Preclude a Grant of Summary Judgment in Its Favor.

State Farm's Respondent's Brief establishes that the trial court erred in granting its motion for summary judgment. State Farm's position on appeal concedes that *Colbert* **did not** establish a "bright line" rule that automatically bars a bystander plaintiff from stating a claim for negligent infliction of emotional distress ("NIED") if the plaintiff has *any* prior knowledge of the accident before arriving at the scene. Instead, State Farm now affirms that *Colbert's* "unwittingly arrival" analysis is a fact-specific issue that must be decided based upon the unique circumstances of each case.¹

State Farm thus agrees, as the *Colbert* Court indicated: The "unwittingly arrival" requirement is but one, non-dispositive factor that must be considered when determining whether a bystander plaintiff can state a claim for NIED. *Colbert*, 163 Wn.2d at 60 ("We agree with the Pennsylvania court's reasoning. Whether the plaintiff arrived at the scene of the accident unwittingly **is an appropriate consideration** when determining whether he or

¹ See Respondent's Brief at 1 ("The *Colbert* court did not use 'bright line' language but did establish the 'unwittingly arrival' requirement in a bystander NIED case as a logical extension of Washington case law.") (italics added); *id.* at 3 ("The *Colbert* court held that the unwittingly arrival requirement 'comports with our prior case law that limits the cause of action to those who suffer emotional trauma from the shock **from personally experiencing the immediate aftermath** of an especially horrendous event **that is in actuality a continuation of the event.**") (quoting *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 60, 176 P.3d 497 (2008) (emphasis added)).

she can bring a bystander [NIED] claim based upon the emotional trauma that results from experiencing another person's negligently inflicted physical injury." (emphasis added)).

B. Correcting the Record as Presented by State Farm.

Before proceeding further, it is important to point out that State Farm takes out of context and overstates the facts; it also presents facts that are irrelevant to deciding this appeal. For example, State Farm asserts: "As a result of that phone call [received by Shaila's friend, Nicole Crossett, in which Nicole learned that Shaila's husband, Randy, "went down on his motorcycle"], Mrs. Haynes had a feeling that her husband's condition was bad."² State Farm then claims: "Before arriving at the scene Mrs. Haynes was panicked, worried, scared, had a bad feeling, visibly shaken up, in a state of shock and very upset."³ A review of State Farm's citations to the record, however, when read in context of what Shaila and Nicole actually said, establishes that State Farm has not made a complete and accurate presentation of the facts. *See* CP at 26-27, 53, and 227.

When Shaila stated she had a bad feeling upon learning of her husband's accident, she clarified that she did not know the severity of the accident at that time. *See* CP at 53 (where Shaila corrects her answer at page

² *See* Respondent's Brief at 2 (citing CP at 26-27).

³ *Id.* (citing CP at 227).

37, line 10, of her deposition transcript (CP at 27) to state "No", she did not "have the impression as to the severity of the accident at that point"). And the remainder of Shaila's testimony, when read in context, confirms that, when she and Nicole left Nicole's house to drive to the accident scene, Shaila did not know "the severity of [the accident]." *See* CP at 27.

Likewise, Nicole herself confirmed that, between the time she and Shaila got into [Nicole's] pickup until the time [they] arrived at the scene", she and Shaila "*didn't know what to expect* . . . I mean, he's on a motorcycle and he wrecks. *You don't know how bad it is*. So it's just we're trying to get there as fast as we can." CP at 227 (emphasis added).

And contrary to State Farm's assertion, Nicole did not testify that Shaila was "in a state of shock" or had "a bad feeling" before she and Shaila arrived at the accident scene.⁴ In fact, Nicole's testimony, as cited by State Farm, made clear that she could not recall anything Shaila said to her, and that "we didn't know what to expect", or "how bad" the accident was, before arriving at the scene. CP at 227.

State Farm also states: "Mr. Haynes already had a neck brace on and was strapped to a backboard and the ambulance attendants were trying to get air into him after having cut off his leather jacket and clothes."⁵ Jennifer

⁴ *See* Respondent's Brief at 2 (citing CP at 227).

⁵ *Id.* (citing CP at 25).

Fordham, however, who witnessed the accident as it happened, and who was with Shaila's husband from the time it occurred until Shaila and Nicole arrived at the scene, testified that Shaila was already at the accident scene when Jennifer assisted the ambulance personnel in rolling Shaila's husband onto the backboard and before they began to cut off his clothing. CP at 179-184. Ms. Fordham's testimony is also corroborated by the report of the Medic One emergency responders. CP at 311, 314.

In any event, regardless of any immaterial discrepancies as to whether Shaila's husband was or was not on a backboard, or whether or not his clothes were being cut away, when Shaila arrived at the accident scene, the uncontroverted fact is that Shaila arrived "before [there had been a] substantial change in [her husband's] condition or location", which is the key element for stating a claim for bystander NIED. *Hegel v. McMahon*, 136 Wn.2d 122, 132, 960 P.2d 424 (1998); *Colbert*, 163 Wn.2d at 58.

Lastly, State Farm's statements - that Shaila had been "at the scene for approximately ten minutes before her husband was taken away by ambulance", and that "State Farm paid Mrs. Haynes the separate \$50,000 per person UIM limit for the wrongful death damages she was legally entitled to recover from the underinsured motorist"⁶ - are simply not relevant to the issue

⁶ See Respondent's Brief at 2.

of whether Shaila can, in her own right, state a separate claim for NIED, which itself turns on what she observed when she arrived *at the scene*, not what occurred after the fact.

II. REPLY ARGUMENT

A. State Farm's Own Analysis of *Colbert* Confirms That, at a Minimum, the Issue of Whether Shaila Suffered Compensable Emotional Distress, From Observing Her Husband's Horrific Injuries Upon Arriving at the Accident Scene, is an Issue of Fact That is Not Appropriate For Determination on Summary Judgment.

State Farm concludes its analysis of the *Colbert* Court's 5-4 majority opinion by agreeing with Shaila's position that (1) *Colbert* **does not** stand for the proposition that any prior notice whatsoever of an accident creates an automatic bar to recovery under the Court's "unwittingly arrival" analysis; and (2) each case must be decided based upon its own unique set of facts:

Contrary to the argument at page 22 of Appellant's Brief, State Farm does not contend that any prior notice whatsoever of an accident creates a bright line rule that automatically bars a plaintiff's ability to legally recover NIED damages as a matter of law. Instead, State Farm relies upon the unwittingly arrival requirement and its reasoning established in *Colbert* as the legal basis precluding Mrs. Haynes' recovery for NIED damages ***given the undisputed facts specific to her case.***⁷

Thus, both State Farm and Shaila agree that *Colbert's* "unwittingly arrival" requirement (i.e., arriving at the accident scene without prior

⁷ See Respondent's Brief at 7 (underscoring original) (emphasis added).

knowledge of its occurrence) is consistent with *Hegel*; thus it does not create a "bright line" rule that operates as a *per se* bar to a bystander plaintiff's claim for NIED.

Accordingly, the parties' dispute is not over *Colbert's* holding. Instead, the dispute is over whether, under the facts of this case, the trial court was correct in determining, as a matter of law, that Shaila's brief prior knowledge of the accident, but not the nature or extent of her husband's injuries, preclude her NIED claim as a matter of law. Shaila's position is that, under the uncontroverted *material facts*, her motion for summary judgment should have been granted, and State Farm's summary judgment motion should have been denied. In this regard, it cannot be overstated that Shaila presented uncontroverted evidence that she in fact suffered emotional distress as a result of observing her husband's fatal injuries shortly after the accident occurred, and before there had been a "substantial change in [his] condition or location." *Hegel*, 136 Wn.2d at 126; *Colbert*, 163 Wn.2d at 56-57.⁸

Alternatively, it is Shaila's position, which she offers for the sake of argument only, that the trial court should have at least allowed this case to proceed to trial on the issue of whether Shaila arrived at the accident scene,

⁸ See CP at 50-52, 191, 195, and 320-22 regarding the evidence proffered by Shaila establishing that she suffered objective symptomology of emotional distress, which is capable of medical diagnosis, as required under *Hegel*, 136 Wn.2d at 136. State Farm offered no rebuttal evidence at all on this issue.

close enough in time after learning of the accident, so that her emotional distress was in fact caused by what she observed at the accident scene, as opposed to a situation where "the plaintiff has no contemporaneous sensory perception of the injury, [so that] the emotional distress results more from the particular emotional makeup of the plaintiff rather than from the nature of the defendant's actions." *Colbert*, 163 Wn.2d at 59-60 (quoting with approval *Mazzagatti v. Everingham*, 512 Pa. 266, 279-80, 516 A.2d 672 (1986)).⁹

The *Colbert* Court's actual holding drives home the point that both Shaila and State Farm have correctly interpreted that case as standing for the proposition that the "unwittingly arrival" analysis involves a fact-specific inquiry, which must be determined on a case-by-case basis. The *Colbert* Court specifically held: "We hold that the Court of Appeals *properly considered the fact* that Mr. Colbert did not arrive on the scene unwittingly." *Colbert*, 163 Wn.2d at 60 (emphasis added). The *Colbert* Court's concluding comments further make this clear:

The trial court properly granted summary judgment dismissing Mr. Colbert's claim for negligent infliction of

⁹ Unless reasonable minds can reach but one conclusions from the facts in evidence, a claim for NIED, like any other claim sounding in negligence, is generally not appropriate for determination on summary judgment. "Negligence is generally a question of fact for the jury, and should be decided as a matter of law *only in the clearest of cases* and when reasonable minds could not have differed in their interpretation of the facts." *Millson v. City of Lynden*, 174 Wn. App. 303, 312, 298 P.3d 141 (2013) (italics added) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 741, 927 P.2d 240 (1996)). Whether a legal duty exists is a question of law, but whether a party has breached a duty is a question of fact. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

emotional distress *because he cannot meet the requirement that he was either present at the scene 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*.

The kind of shock the tort requires is, as we have held, ""*the result of the immediate aftermath* of an accident. It may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words."" . . . Accordingly, as a matter of law Mr. Colbert was not a foreseeable plaintiff."

Colbert, 163 Wn.2d at 63 (emphasis and underscoring added) (quoting *Hegel*, 136 Wn.2d at 130) (quoting *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986)).

Furthermore, a reading of the entire *Colbert* decision in context establishes that the "unwittingly arrival" element does not turn on whether a bystander plaintiff had *any* prior knowledge of the accident before arriving at the scene; rather, it turns on *the length of time* between when the plaintiff is informed of the accident and when he or she actually arrives at the scene. *See, Colbert*, 163 Wn.2d at 54-60. In other words, as long as the plaintiff's prior knowledge of the accident is, as is the case here, sufficiently close in time so that the plaintiff arrives at the accident scene in order to personally observe her family member's suffering "*before there is **substantial change in the relative's condition or location***", the prior knowledge of the accident *does not* operate as a *per se* bar to recovery, as long as the plaintiff can

establish that her emotional distress was proximately caused by what she witnessed at the accident scene. *Colbert*, 163 Wn.2d at 57-58 (citing *Hegel*, 136 Wn.2d at 130, 132).

B. The Cases Relied Upon by State Farm Are Readily Distinguishable From the Facts Presented Here.

Colbert is the primary case relied upon by State Farm and, because the facts of that case were fully analyzed and distinguished in Shaila's opening brief, they will not be further addressed here. The remaining three cases relied upon by State Farm are from other jurisdictions: *Mazzagatti*, 512 Pa. 266 (cited in *Colbert*); *Clifton v. McCammack*, 43 N.E. 3d 213 (Ind. 2015) (also cited in *Colbert*) and *Coleman v. American Commerce Ins.*, WD WA 2010 WL 3672345 (2010). Before specifically addressing these cases, it is worth pointing out that cases from other jurisdictions are not binding precedent on this Court. *See, e.g., Riojas v. Grant County Pub. Utility Dist.*, 117 Wn. App. 494, 700, 72 P.3d 1093 (Div. 3 2003); *Nelson v. Bartell*, 4 Wn.2d 174, 185, 103 P.2d 30 (1940); *Humleker v. Gallagher Basset Serv., Inc.*, 159 Wn. App. 667, 681, 246 P.3d 249 (2011) ("A federal district court's determination is not binding on Washington courts.")

In *Mazzagatti*, the Pennsylvania court held that, under the law of that state, there must be "*a contemporaneous observance* of an injury to a close relative" in order to state a claim for NIED. *Mazzagatti*, 512 Pa. at 279

(emphasis added). The court thus held that the plaintiff, who was approximately one mile away from where the accident occurred, could not state a claim for negligent infliction of emotional distress. *Id.* at 269, 279. Both *Hegel* and *Colbert*, however, hold that a plaintiff does not need to contemporaneously observe the accident to sustain a claim for NIED; rather, the claim can be maintained as long as the plaintiff arrives at the scene "shortly after" its occurrence and before there has been "a substantial change in the relative's condition or location." *Hegel*, 136 Wn.2d at 132; *Colbert*, 163 Wn.2d at 59.

In *Clifton*, the Indiana Court reached its decision based upon that jurisdiction's "bystander rule" for recovery of emotional distress damages, which is somewhat analogous to Washington's rule as articulated in *Hegel*. Under Indiana law, "[t]o recover from emotional distress under a bystander theory, a claimant has to view the scene that is 'essentially as it was at the time of the incident' with the victim . . . in essentially the same condition as immediately following the incident." *Clifton*, 43 N.E.3d at 221 (quoting *Smith v. Toney*, 862 NE.2d 656, 663 (Ind. 2007)). "Unless these factors are satisfied, a claimant will not have witnessed the 'gruesome aftermath' which refers "to an 'uninterrupted flow of events following closely on the heels of the accident.'" *Id.* (quoting *Smith*, 862 N.E.2d at 662 n. 3) (quoting *Beck v. Dep't of Transp. & Pub. Facilities*, 837 P.2d 105, 110 (Alaska 1992)).

"When a bystander witnesses this 'uninterrupted flow of events,' he or she is essentially subjected to 'a sudden sensory observation' of the accident itself." *Id.* (quoting *Beck*, 837 P.2d at 110). Unlike *Hegel* and *Colbert*, however, the *Clifton* Court, in stating that "the claimant must not have been informed of the accident before coming upon the scene", held "that major public policy concerns dictate that ***we draw bright lines***, especially in terms of this particular tort", even though this factor "involves a degree of fortuity." *Id.* at 222 (emphasis added) (quoted citations omitted).

Both *Hegel* and *Colbert*, however, ***expressly rejected the application of "bright line rules"*** to bystander claims for NIED, emphasizing instead that each case must be decided upon its own unique set of facts and circumstances. *See Hegel*, 136 Wn.2d at 130; *Colbert*, 163 Wn.2d at 54 (a "bright line rule that limits recovery of emotional distress to those who witness the accident . . . draws an arbitrary line that serves to exclude plaintiffs without meaningful distinction").

Moreover, contrary to State Farm's assertion, the facts in *Clifton* are dramatically different than those presented here. In *Clifton*, "after watching a news story about a fatal car crash, a father drove to the scene of the accident, fearing his son was involved. By the time he arrived at the scene, "**forty minutes after the accident**, the unsuccessful resuscitation efforts had ended, ***and his son's body had been moved and "covered with a white sheet"***, so

that he "could not see any blood or physical signs of injury." *Clifton*, 43 N.E.3d at 215, 221-22 (emphasis and underscoring added). Thus, unlike the facts presented here, in *Clifton*, substantial time had elapsed (40 minutes) before the father arrived at the scene after learning of the accident; there had clearly been a substantial change in both the victim's condition and location; and the father never saw his son's injured body.

The *Coleman* case is also readily distinguishable. Unlike the facts presented here, *Coleman* also involved a "substantial change" in both the condition and location of the injured family member, thus precluding a claim for NIED under *Hegel* and *Colbert*: "It appears that the first time Ms. Coleman saw Kayla was when the paramedics were loading her into the ambulance. . . . There was a substantial change in the scene because, unlike *Hegel* where the plaintiffs happened upon the scene of the accident, *Kayla had already been removed from the overturned vehicle and was being placed in the ambulance* when Ms. Coleman first saw her." *Coleman* at 5 (italics added).

By contrast, Shaila's husband had not been removed from where he laid at the time of the accident and when Shaila first arrived at the scene. And neither his condition nor location had substantially changed prior to Shaila's arrival. CP at 46-48, 52, 180-82, 184, 189, 311, and 314. State Farm's argument - that the facts here are "[n]early identical to the facts in

Coleman" - is grossly misplaced.¹⁰

C. State Farm Concedes This is a Coverage Dispute, Not a Claim Dispute Over the Amount of Shaila's Claim.

Quoting from its UIM policy coverage provisions, and citing *McIllwain v. State Farm*, 133 Wn. App. 439, 136 P.3d 135 (2006) and *Dayton v. Farmers*, 124 Wn.2d 277, 876 P.2d 896 (1994), State Farm argues:

In Washington a UIM insured *is legally entitled to recover* and a UIM insurer required to pay *only to the extent that liability could be imposed against the underinsured motorist*. . . . The UIM insurer stands in the shoes of the insured motorist to the extent of the UIM policy limits and therefore *the UIM insurer is not compelled to pay when the same recovery could not have been obtained from the underinsured motorist*.¹¹

State Farm's above argument actually supports Shaila's position, which is that this case involves a coverage dispute over whether she is *legally entitled* to recover damages on her NIED claim against the at-fault, uninsured motorist. And the resolution of this dispute is an issue of law to be decided by the trial court; it in no way raises or involves the factual issue regarding the amount of her claim if the claim itself is covered.

This Court's decision in *McIllwain*, in analyzing the same language quoted above from a similar State Farm policy, makes this point clear. *See*

¹⁰ See Response Memorandum at 5 (emphasis added).

¹¹ See Respondent's Brief at 7-8, citing CP 13; *McIllwain*, 133 Wn. App. at 446; and *Dayton*, 124 Wn.2d at 281.

McIllwain, 133 Wn. App. at 439, 447, and 449 n. 3; *accord*, *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 244, 961 P.2d 350 (1998) (coverage eligibility turns on whether the insured demonstrates that the insured is legally entitled to recover); *Tribble v. Allstate Property and Cas. Ins. Co.*, 134 Wn. App. 163, 139 P.3d 373, 375 (2006) ("Coverage eligibility requires the insured to demonstrate that he or she is 'legally entitled to recover' in tort from the underinsured motorist. RCW 48.22.030(2).").

In other words, "coverage eligibility" and being "legally entitled to recover" mean the same thing.

This Court has also made clear that, "[t]he public policy favoring uninsured motorist coverage controls over the express terms of the contract." *First Nat'l Ins. Co. v. Perala*, 32 Wn. App. 527, 531, 648 P.2d 472 (1982), *review denied*, 98 Wn.2d 1002 (1982). The UIM coverage statute, RCW 48.22.030, thus "embodies a strong public policy to ensure the availability of a source of recovery for an innocent automobile accident victim when the responsible party does not possess adequate liability insurance." *Fisher*, 136 Wn.2d at 245.

Moreover, RCW 4.22.030's mandate favoring the insured on the issue of UIM coverage must be read into State Farm's insurance policy in determining whether this case involves a coverage dispute. *See Hartford Accident and Indemnity Co. v. Novak*, 83 Wn.2d 576, 581, 520 P.2d 1368

(1974) ("A valid statute becomes part of and should be read into the insurance policy".).

Accordingly, to the extent any ambiguity might arguably exist regarding whether this case involves a coverage or claim dispute under State Farm's policy language, any such ambiguity must be resolved in favor of Shaila and against State Farm, who drafted the adhesion insurance contract. *See Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 751, 320 P.3d 77 (Div. 3 2013) ("We resolve ambiguity in favor of the insured.")

In summary, State Farm's argument - that because Shaila cannot establish a claim for NIED against the at-fault uninsured motorist, this case does not involve a coverage dispute - is without merit. Obviously, if Shaila is barred, as a matter of law, from stating a bystander claim for NIED under *Colbert's* "unwittingly arrival" analysis, then the issue of damage is never reached. It is, therefore, clear that the parties' dispute is over coverage, not the amount of Shaila's claim.

State Farm's argument conflates the coverage and amount of damages issues; and, in doing so, it places the proverbial cart before the horse. The issue of fact involving the amount of damages is secondary; it does not arise until the trial court first decides the legal issue of whether coverage for the claim even exists. *See, e.g., Teague Motor Co., Inc. v. Federated Service Ins. Co.*, 73 Wn. App. 479, 482, 869 P.2d 1130 (Div. 3 1994) ("Interpretation of

an insurance policy is a question of law."); *Cle Elum Bowl, Inc. v. North Pac. Ins. Co., Inc.*, 96 Wn. App. 698, 702, 981 P.2d 872 (Div. 3 1999) ("Where, as here, no facts are in dispute, we review summary judgments regarding insurance coverage de novo.")

State Farm's attempt to distinguish *Matsyuk v. State Farm*, 173 Wn.2d 643, 272 P.3d 802 (2012) and *Dayton*, 124 Wn.2d 277, is also misplaced. State Farm incorrectly cites *Matsyuk* to stand for the proposition that an award of attorney's fees in a coverage dispute "does not apply when the insurer "contests other questions as, for example, *its liability in tort* or the amount of damages it should pay."¹²

The critical distinction here is that our case does not present a dispute over *State Farm's own "liability in tort"*, such as whether it has engaged in bad faith claims handling practices, where attorney's fees are not recoverable as part of the compensatory damages awarded against the insurer. *Id.* at 659-61. *Instead, Shaila is seeking to recover in tort against the at-fault motorist, not against State Farm.* This critical distinction is itself sufficient to dispense with State Farm's attempt to distinguish *Matsyuk*.

In addition, however, the above-quoted language relied upon by State Farm is non-binding dicta. "A statement is dicta when it is not necessary to

¹² See Respondent's Brief at 9 (quoting *Matsyuk*, 173 Wn.2d at 660 (emphasis added)).

the court's decision in a case." *Protect Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013). "Dicta is not binding authority." *Id.* The issue before the Court in *Matsyuk* was "to clarify the pro rata fee sharing rule", which is an equitable rule "based upon the common fund exception to the well-known 'American rule' on attorney fees, and it requires a personal injury protection (PIP) insurer to share pro rata in the attorney fees incurred by the injured person when the recovery benefits the PIP insurer." *Id.* at 647. In resolving the issue, the *Matsyuk* Court held:

We therefore reverse the Court of Appeals and hold that the pro rata fee sharing rule applies in this context. We further hold that Karen Weismann is entitled to *Olympic Steamship* fees on appeal and that Olga Matsyuk's bad faith claim against State Farm Fire and Casualty Company was improperly dismissed.

Id.

Furthermore, as the *Matsyuk* Court stated, the case before it, as with the case here, ***involved a coverage dispute, because the insured was required to sue its insurer to obtain the benefit of the insurance contract:***

The present case falls under the third category identified in *Olympic Steamship*, ***wherein an insured must file suit for damages to obtain the benefit of the insurance contract.*** In the absence of *Olympic Steamship* fees, Weismann would not be made whole because the coverage she is entitled to would be diminished by the attorney's fees she incurred to obtain it. Moreover, an insurer would have little economic incentive ***to provide coverage*** without a fight because the most the insurer would be required to pay if it lost the legal battle is what it should have paid in the first place. *See Colorado Structures*,

161 Wash.2d at 607, 167 P.3d 1125 ("Without the application of *Olympic Steamship* and awarding attorney fees in addition to [coverage], an insurer would have absolutely no incentive to refrain from litigation over even the most clear coverage provisions.") The situation here is this akin to the many cases where coverage was disputed and we found *Olympic Steamship* fees appropriate.

Matsyuk, 173 Wn.2d at 661-62 (emphasis added).

State Farm's reliance on *Dayton* is also misplaced. *Dayton* involved the issue of "whether an insured is entitled to attorney fees incurred in an UIM arbitration proceeding *to determine damages*." *Dayton*, 124 Wn.2d at 278 (italics added). The *Dayton* Court stated: "*Farmers did not dispute liability*. However, Dayton and Farmers were unable to agree *on the value of the UIM claim*." *Id.* at 279 (italics added). "*Coverage is not an issue*; Farmers accepted coverage. . . . Instead, this case presents a dispute over the value of the claim presented under the policy." *Id.* at 280 (italics added).

State Farm misconstrues *Dayton* by quoting a passage from the case ***addressing the issue of attorney fees in a UIM arbitration proceeding to determine damages***, and noting that the insurer stands in the shoes of the uninsured motorist to the extent of the insurer's UIM policy limits.¹³ *Dayton*, however, made clear that ***coverage disputes are not appropriate matters for***

¹³ See Respondent's Brief at 9-10.

arbitration, but must instead be resolved by a court through a lawsuit, which is exactly the purpose of Shaila's lawsuit here. *Id.* at 280-81.

And the issue of whether the insurer "stands in the shoes" of the underinsured or uninsured tortfeasor in an arbitration proceeding is of no consequence in determining whether a dispute between the insurer and its insured is over coverage, or whether it is over the amount of compensatory damages the insured is entitled to recover if coverage exists. *Id.* at 280; *see also*, *Novak*, 133 Wn.2d at 586 ("The authorities are uniform that the question of coverage is not an issue for arbitration, and we so hold."); *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wn. App. 438, 442, 72 P.3d 220 (2003) ("Coverage disputes include cases in which the extent of the benefit provided by insurance contract is at issue."); *Solnicka v. Safeco Ins. Co. of Illinois*, 93 Wn. App. 531, 534, 969 P.2d 124 (1999) ("[c]overage questions focus on such questions as whether there is a contractual duty to pay").

III. CONCLUSION

State Farm and Shaila both agree that *Colbert* **does not** create a bright line rule, pursuant to which any prior notice whatsoever of an accident automatically bars a bystander plaintiff's ability to legally recover NIED damages as a matter of law.¹⁴ Accordingly, Shaila submits that, under the

¹⁴ *See* Respondent's Brief at 7.

uncontroverted facts of this case, the trial court erred in denying her motion for summary judgment and granting State Farm's summary judgment motion.

Even if this Court disagrees, and finds that genuine issue of material fact exist to preclude summary judgment, Shaila is nonetheless entitled to recover her *Olympic Steamship* attorney's fees, both before the trial court and on appeal, because the fundamental nature of the parties' dispute is whether coverage exists for Shaila's NIED claim, not the amount of that claim.

DATED this 21st day of November, 2016.

Respectfully submitted,

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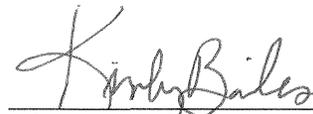
CERTIFICATE OF SERVICE

I certify that on the 21st day of November, 2016, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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