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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 345921

SHAILA HAYNES,

Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY, et al.

Respondents.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves State Farm's denial of Shaila Haynes' claim for negligent infliction of emotional distress ("NIED") resulting from witnessing her husband's fatal injuries after his motorcycle was forced off I-90 by a hit-and-run motorist. Shaila asserts this is a coverage dispute, and that State Farm has denied coverage for her NIED claim under State Farm's applicable uninsured motorist ("UIM") policy provisions. State Farm, by contrast, asserts it has not denied coverage; instead, State Farm contends this case involves a claim dispute over the amount of damages Shaila is entitled to receive for her NIED claim, not whether coverage itself exists.

Critical to the disposition of this case is whether Shaila can state a claim for NIED in light of the following two Washington State Supreme Court cases, which must be reconciled with each other in deciding this case: *Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1988) and *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008). Shaila's position is that, when *Hegel* and *Colbert* are read together and harmonized, doing so makes clear that she has stated a claim for NIED, even though she learned of the accident, but not the nature and extent of her husband's injuries, approximately ten to fifteen minutes before arriving at the accident scene.

On the other hand, State Farm interprets *Colbert* as creating a bright-line rule, whereby any advance notice of an accident involving a family

member, constitutes a *per se* bar to a claim for NIED, regardless of how short the advance notice may be. In granting State Farm's motion for summary judgment, and in denying Shaila's corresponding motions for summary adjudication, the trial court accepted State Farm's position.

Shaila requests that this Court reverse the trial court's decision regarding the parties' summary judgment motions, pursuant to which the trial court ordered: Shaila's "Amended Complaint against State Farm is dismissed with prejudice as a matter of law. State Farm owes no further UIM payment to [Shaila] arising out of the September 10, 2012 accident. The parties are to pay their own costs and attorney fees." CP at 365, 368-69.¹

II. ASSIGNMENTS OF ERROR

1. The trial court erred in implicitly finding that this case does not involve a coverage dispute over whether Shaila's NIED claim is covered under State Farm's applicable UIM policy provisions, but instead involves a claim dispute over the amount owed to Shaila on her NIED claim; thus, Shaila cannot recover her costs, including reasonable attorney's fees.

¹ "State Farm's Amended Motion for Summary Judgment [stated] that it owes no UIM payment to [Shaila] on her [NIED] claim and that State Farm has not denied that coverage exists for [Shaila's] NIED claim." CP at 365. Shaila's "Motion for Partial Summary Judgment [stated] that her Complaint involves a 'coverage dispute' and if she prevails on the coverage dispute that she is entitled to recover her costs including reasonable attorney fees." CP at 366. And Shaila's "Motion for Summary Judgment in her favor [stated] that she has a claim for NIED." CP at 366.

2. The trial court erred in implicitly finding that Shaila cannot state a claim for NIED as a matter of law.

3. Based upon the above implicit findings, the trial court erred in holding that State Farm owes no UIM payment to Shaila on her NIED claim, thus dismissing the claim with prejudice as a matter of law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does this case involve a coverage dispute under State Farm's applicable UIM policy provisions, as opposed to a claimed dispute over the amount of damages Shaila should be awarded on her UIM claim? (Assignment of Error Nos. 1-2.)

2. If this case does involve a coverage dispute, did State Farm deny coverage for Shaila's NIED claim, thus entitling her to recover her costs, including reasonable attorney's fees, under *Olympic Steamship*? (Assignment of Error Nos. 1-2.)

3. Does the Washington Supreme Court's *Colbert* decision create a bright-line rule whereby any advance notice of an accident involving a family member, regardless of how short in time that prior notice might be before the plaintiff arrives at the accident scene, operate as a complete bar to a claim for NIED? (Assignment of Error No. 3.)

4. Or should the *Colbert* and *Hegel* decisions be harmonized so that no such bright-line rule exists, thus making each case fact-specific as to

whether prior notice of an accident involving a family member bars an NIED claim? (Assignment of Error Nos. 2-3.)

5. If Issue No. 4 is answered in the affirmative, given the fact that Shaila arrived at the accident scene within 10-15 minutes after receiving notice of the accident, but before there had been a substantial change in her fatally injured husband's condition or location, can reasonable minds reach but one conclusion from these uncontroverted facts, which is: Shaila has a claim for NIED as a matter of law? (Assignment of Error Nos. 2-3.)

6. Or, are there genuine issues of material fact regarding whether Shaila has a claim for NIED, thus precluding the entry of summary judgment for either party? (Assignment of Error Nos. 2-3.)

IV. STATEMENT OF THE CASE

Both parties agree that, on September 10, 2012, Shaila's husband, Randy Haynes, was grievously injured, and later died, when the motorcycle he was driving was forced off the I-90 freeway west of Ellensburg, in Kittitas County, by an unknown hit-and-run motorist who fled the scene.² Shaila was with her friend, Nicole Crossett, when Nicole received a telephone call from Jennifer Fordham informing Nicole of the accident, but not the nature and

² See Shaila's amended complaint at 2, ¶3.1 (CP at 135); State Farm's answer thereto at 2, ¶6 (CP at 140).

extent of Randy's injuries. CP at 187-88, 191 (Crossett deposition transcript); CP at 46, 49, and 53 (Shaila's deposition transcript). CP at 180 (Fordham deposition transcript.)³

Immediately after receiving the call, with Nicole driving her truck, she and Shaila raced to the accident scene, where they arrived approximately 10 to 15 minutes after the accident occurred. CP at 46, 180, 188. Neither Shaila nor Nicole knew what to expect before arriving at the accident scene. *See* Shaila's deposition transcript, at CP at 46, 49, 53 (correction sheet); Crossett deposition transcript, CP at 191. Upon their arrival, Shaila discovered her grievously injured husband lying in the median between the westbound and eastbound lanes of I-90. CP at 47, 180, 189, 314.⁴

Jennifer Fordham, who made the call to Nicole Crossett informing her of the accident, was with Randy from the time of the accident until Shaila and Nicole arrived at the scene. CP at 179-182. Ms. Fordham testified that she and two men scooped some dirt away from Randy's face to help him breathe; however, there had been no change in Randy's physical condition or location

³ For the Court's convenience, Ms. Crossett's, Shaila's, and Ms. Fordham's deposition transcripts are attached at **Appendices 1, 2** and **3**, respectively, hereto.

⁴ Shaila's correction sheet to her deposition transcript, at page 56 thereof (CP at 53), corrected her answer at page 37, line 10 of her transcript (CP 49), making it clear that she had no knowledge of the severity of the accident when her friend, Nicole, received the telephone call informing Nicole of the accident. This is consistent with the remainder of Sheila's testimony at pages 37-38 of her deposition transcript (CP at 49).

between the time of the accident and Shaila's arrival at the scene. CP at 179-182, 184. Ms. Fordham's testimony is corroborated in the report of the Medic One emergency responders. CP at 311, 314.⁵

Although there are some slight, immaterial discrepancies between the deposition testimonies of Shaila, Jennifer and Nicole regarding Randy's clothing, and what the ambulance personnel were doing when Shaila arrived, it is uncontroverted that Randy had not been moved from the location where he was lying when the accident occurred and when Shaila arrived at the scene. CP at 47-48 (Shaila's dep. tr.) CP at 180-184 (Ms. Fordham's dep. tr.) and CP at 189, 195 (Ms. Crossett's dep. tr.). Such minor discrepancies are certainly understandable, given the horrific circumstances of the event, and the fact that State Farm's counsel did not depose Shaila until April 13, 2015, over 2½ years after the event; and Jennifer and Nicole until April 25, 2016, almost four years after the event. *See* CP at 44, 177, and 186.

In any event, the uncontroverted material facts are that Shaila arrived at the scene approximately 10 to 15 minutes after the accident occurred (CP at 46, 180, 188); that Randy was still lying in the median between the westbound and eastbound lanes of I-90, in the same location where he was immediately after the accident and when the ambulance personnel and Shaila

⁵ The relevant Medic One records are attached at **Appendix 4** hereto.

arrived at the scene; (CP at 47, 180-82, 184, 189); and Randy's physical condition had not changed between the time of the accident and when Shaila arrived at the scene (CP at 47, 52, 180-82, 184, 189, 314.) Ms. Fordham, who was at Randy's side the entire time, and who thus had time to gather her wits during the 10-15 minutes it took Shaila and the emergency responders to arrive at the scene, was crystal clear in her testimony that Randy's physical condition and location never changed from the time of the accident until Shaila's arrival at the scene. CP at 179-184.

As a result of observing Randy's grave and fatal injuries, Shaila suffered objective symptomology of emotional distress, as confirmed by her physician, Dr. Blau, as well as by Shaila's deposition testimony and that of her long-time friend, Nicole Crossett. CP at 50-52, 191, 195, 320-22.⁶ Before her husband's fatal accident, Shaila had never before sought mental or psychological counseling of any kind. CP at 45.

At the time of the accident, the motorcycle driven by Shaila's husband contained UIM coverage of \$50,000 per person, with a \$100,000 aggregate policy limit. CP at 63. Thus, Shaila has \$50,000 of UIM coverage available for her NIED claim, since "bodily injury" under State Farm's policy includes emotional distress. CP at 341-42; *see also, Green v. Young*, 113 Wn. App.

⁶ Dr. Blau's records are attached at **Appendix 5** hereto.

746, 751-52, 54 P.3d 734 (2002) ("bodily injury" under a UIM policy includes "emotional distress coupled with physical manifestations").

However, in the words of State Farm's own counsel: "It is State Farm's position that Ms. Haynes is not legally entitled to recover compensatory damages for negligent infliction of emotional distress from the owner or driver of the uninsured motor vehicle and therefore denies her claim for payment of the \$50,000.00 liability limits." CP at 204.⁷

V. SUMMARY OF ARGUMENT

The paramount issue governing the outcome of this appeal is whether, in light of the *Hegel* and *Colbert* decisions, Shaila can state a claim for NIED against the at-fault hit-and-run motorist. The holding in *Hegel*, which was reaffirmed in *Colbert*, is "that a family member may recover for emotional distress caused by observing an injured relative at the scene of the accident after its occurrence *and before there is substantial change in the relative's condition or location.*" *Hegel*, 136 Wn.2d at 132 (emphasis and underscoring added); *Colbert*, 163 Wn.2d at 58.

The *Colbert* Court could have decided the case before it based on *Hegel's* holding alone. Instead, the Court made the following statements, which were not necessary to its disposition of the case, and are thus non-

⁷ The letter containing State Farm's counsel's quote is attached at **Appendix 6** hereto.

binding dicta:

That a bystander plaintiff must arrive on the scene unwittingly [i.e., without prior knowledge of the accident] in order to maintain a cause of action for negligent infliction of emotional distress is the logical extension of our case law. . . . 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. . . . We [therefore] 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 59-60 (emphasis added).

Even if the above language is not dicta, the emphasized portions should make clear that the issue of whether a plaintiff arrives at the scene "unwittingly" is but one factor to be considered in determining whether a claim for NIED can be maintained. State Farm, however, incorrectly interprets *Colbert* to stand for the following proposition: Whether a plaintiff arrives at the scene "unwittingly" is now a new and separate element of the tort of NIED; further, under this new element, *any* prior notice of the accident, even if such notice occurs a mere 30 seconds before the plaintiff arrives at the scene, operates as a complete bar to a claim for NIED.

It is Shaila's position, however, that when read together and harmonized, *Hegel* and *Colbert* stand for the proposition that there is no bright-line rule that operates, as a matter of law, to cut-off a claim for NIED

whenever a plaintiff has any prior knowledge of an accident involving a family member. Instead, the critical inquiry is whether the plaintiff's emotional distress was proximately caused by what he or she actually experienced upon seeing his or her critically injured family member at the accident scene, as opposed to the emotional distress that any person would naturally experience upon learning of the event after the fact, but without having actually seen the injured family member at the scene of the accident, before there had been a substantial change in his or her condition or location.

Thus, *Colbert* at most supplements the holding in *Hegel*, by making clear that, at some point, the lapse of time between when a plaintiff first learns of the accident, and when he or she actually arrives at the accident scene, becomes so attenuated that, for proximate cause purposes, the ability to state a claim for NIED must be cut off. Applying this analysis to the facts here leads to the conclusion that the trial court should have granted Shaila's summary judgment motion, and found, as a matter of law, that she has a claim for NIED against the at-fault, uninsured motorist.

Shaila arrived at the accident scene within 10-15 minutes after it occurred, before there had been a substantial change in either her fatally injured husband's condition or location, and with no prior knowledge of the nature or extent of her husband's injuries before she arrived; therefore, because Shaila suffered objective symptomology of emotional distress from

what she observed at the accident scene, reasonable minds can reach but one conclusion from these uncontroverted facts: Shaila has met each element necessary to establish a claim for NIED. Those elements are "duty, breach, proximate cause, damage, and `objective symptomology'". *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 505, 325 P.3d 193 (2014).

If this Court agrees that Shaila has a claim for NIED, then it naturally follows that her claim is covered under State Farm's UIM policy provisions, thus entitling her to receive up to the \$50,000 per claimant UIM policy limits. And this in turn means that Shaila is also entitled to recover her costs, including reasonable attorney's fees, under *Olympic Steamship*, which have been incurred during the trial court proceedings and on appeal.

VI. ARGUMENT

A. The Standard of Review.

Because this appeal arises from the trial court's orders on summary judgment, the standard of review is de novo. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013).

B. The Law Governing Summary Judgment Motions.

"The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). "Summary judgments

shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Id.*

"A material fact is one upon which the outcome of the litigation depends." *Id.* "In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue." *Id.* "The court, in ruling on a motion for summary judgment, is permitted to pierce the formal allegations of facts in pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues." *Id.*

"One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned." *Id.* "In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach different conclusions, the motion should be denied." *Id.*

"When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of

credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present, the motion should be denied." *Id.* at 200. ***However, even if some facts are in dispute, where there are no material facts at issue under a legal principle that disposes of the controversy, summary judgment is proper.*** *Hackler v. Hackler*, 37 Wn. App. 791, 794, 683 P.2d 241 (1984); *accord*, *Clemmons v. Fidler*, 58 Wn. App. 32, 34, 791 P.2d 257 (1990), *review denied*, 115 Wn.2d 1019 (1990).

Thus, in ruling on a summary judgment motion: "All reasonable inferences must be drawn in favor of the nonmoving party upon summary judgment. Unreasonable inferences that would contradict those raised by evidence of undisputed accuracy need not be so drawn." *Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 61 P.3d 1184 (2002). Moreover, "***when reasonable minds could reach but 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) (emphasis added), (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

C. The *Hegel* and *Colbert* Decisions Explained.

1. The Key Facts in *Hegel*.

Dale Hegel, who had pulled over to the side of the road, was struck by

a passing car, which knocked him into a ditch. *Hegel*, 136 Wn.2d at 124. Dale's son and parents, who were driving along the same road, came upon the scene of the accident, where they discovered him lying in the ditch, severely injured. *Id.* A few minutes later, Dale's brother and sister-in-law came upon the scene and also observed him in the ditch. *Id.*

"The Hegel family members who came upon the accident scene sued the driver on their own behalf for negligent infliction of emotional distress. They alleged that the sight of Dale Hegel's injured body in the ditch put them in a state of fear and panic and that they continued to suffer from anxiety and shock." *Id.* The trial court dismissed the case on summary judgment. *Id.* at 125. The Court of Appeals affirmed the summary judgment, holding "that a plaintiff must actually witness the injury causing accident in order to state a cause of action for negligent infliction of emotional distress." *Id.*

In a related case, "Jeremy Marzolf was killed when his motorcycle collided with a school bus. Jeremy's father, Barton Marzolf, happened upon the scene *within 10 minutes* of the collision, before emergency crews arrived." *Id.* (emphasis added). Mr. Marzolf saw his fatally injured son, who was still conscious, lying on the ground. *Id.* Based upon the Court of Appeals' just-issued decision in *Hegel v. McMahon*, 85 Wn. App. 106, 931 P.2d 181 (1997), the trial court dismissed Mr. Marzolf's claim for emotional distress. *Id.*

The Washington Supreme Court consolidated both cases, for which it had granted petitions for discretionary review. *Hegel*, 136 Wn.2d at 125.

2. **The Hegel Court's Decision.**

The *Hegel* Court framed the issue on review as follows: "The parties ask us to decide whether plaintiffs must actually be at the scene at the time of the accident, and what is necessary to sufficiently allege objective symptoms of their distress." *Hegel*, 136 Wn.2d at 126. Regarding the first issue - whether a plaintiff must actually be at the scene at the time of the accident to state a claim for NIED - the *Hegel* Court, after discussing several cases refusing to place a temporal limitation on a claim for NIED, held:

We adopt this approach and hold that a family member may recover for emotional distress caused by observing an injured relative at the scene of an accident *after* its occurrence and *before* there is ***substantial change in the relative's condition or location***. Applying this rule to the facts of these cases, we conclude that it was improper for the lower courts to dismiss the Plaintiffs' claims for negligent infliction of emotional distress. Because Plaintiffs in both cases were present at the scene, and may have witnessed their family members suffering before there was a ***substantial change*** in the victim's condition or location, their mental distress was not unforeseeable as a matter of law.

Id. at 132 (emphasis and underscoring added).

In reaching its holding, the *Hegel* Court explained:

A bright line rule that limits recovery for emotional distress to those who witnessed the accident is attractive in its simplicity. However, it ***draws an arbitrary line that serves to exclude plaintiffs without meaningful distinction***. The

emotional trauma caused by seeing a loved one injured at an accident scene stems not merely from witnessing the transition from health to injury, but also from witnessing the aftermath of an accident in all its alarming detail.

Id. at 130 (emphasis added).

The *Hegel* Court then quoted with approval the following language from the Wyoming Supreme Court:

The essence of the tort is the shock caused by the perception of an especially horrendous event. . . . ***The kind of shock the tort requires is 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 ***which are really a continuation of the event.*** The immediate aftermath may be more shocking than the actual impact.

Id. at 130 (emphasis added) (quoting *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986)).

Addressing the concept of legal causation, the *Hegel* Court explained:

[A]lthough we must reject artificial lines that serve only to restrict the number of plaintiffs, not every act that causes harm results in legal liability. . . . The challenge is to create a rule that acknowledges the shock of seeing a victim shortly after an accident, without extending a defendant's liability to every relative who grieves for the victim ***An appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured.***

Id. at 131 (emphasis added).⁸

Reconciling the rule announced in its holding - "that a family member may recover for emotional distress caused by observing an injured relative at the scene of an accident after its occurrence and before there is substantial change in the relative's condition or location" - with the policy considerations underlying legal causation, the *Hegel* Court stated:

This rule addresses the concerns over limitless liability by allowing recovery only to the class of claimants who were present at the scene ***before the horror of the accident has abated***. It dispenses with the arbitrary requirement that a plaintiff actually witness the accident, yet preserves the limitation on liability established in *Gain* [*v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990)]. ***The critical factors are the circumstances under which the observation is made, and not any rigid adherence to the length of time that has passed since the accident.***

Id. at 132 (emphasis added).

Turning to the second issue before it - "what is necessary to sufficiently allege objective symptoms of [NIED]" (*id.* at 126) - the *Hegel* Court held:

⁸ "Washington law recognizes two elements to proximate cause: Cause in fact and legal causation." *Hartley*, 103 Wn.2d at 777-78. "Cause in fact refers to the 'but for' consequences of an act - the physical connection between an act and an injury." *Id.* at 778. "Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Id.* at 779. The legal causation element is the proximate cause issue that is of concern here.

We hold that to satisfy the objective symptomology requirement . . . a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical evidence. This approach calls for objective evidence regarding the severity of the distress, and the causal link between the observation at the scene and the subsequent emotional reaction . . . [N]ightmares, sleep disorders, intrusive memories, fear, and anger may be sufficient. However, in order for these symptoms to satisfy the objective symptomology requirement, they must constitute a diagnosable emotional disorder.

Id. at 135.

Summarizing its decision, the *Hegel* Court stated:

It is not necessary for a bystander to be present at the time of the injury-causing event in order to state a claim for negligent infliction of emotional distress. 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.

Id. at 136.

3. The Key Facts in *Colbert*.

Jay Colbert's daughter, Denise, drowned after she inhaled carbon monoxide fumes while hanging on to a motorboat as it was moving. *Colbert*, 163 Wn.2d at 45. At about 1:30 a.m. on August 3, 2003, Denise and others had gone for a boat ride on Lake Tapps, at which time Denise and a friend were in the water holding onto the swimmer's platform, at the rear of the boat, as it headed towards shore. *Id.* at 46. "After an hour and a half in the water,

they decided to go swimming and, as her friend stated, "[a]ll of the sudden [Denise] was gone. We were just swimming, and then she went under. There wasn't a struggle or anything." *Id.*

After Denise's boyfriend, Kyle, and others searched for Denise, a call was made to 911 at 2:58 a.m. *Id.* At approximately 3 a.m., Kyle called Denise's parents and "told them that Denise had disappeared from the back of a boat at Lake Tapps and a search was taking place for her." *Id.*

After receiving the call from Kyle, Mr. Colbert took his other children to a neighbor's house and then drove to the lake, which was about five minutes from the Colbert home. *Id.* "When he arrived, police cars, ambulances, and the fire department were at the scene. Mr. Colbert saw lights flashing from a boat on the water and knew the search for his daughter was underway." *Id.*

Mr. Colbert then drove to a friend's house on the lake, "and watched the rescue operation from the friend's dock." *Id.* "Sometime after 6 a.m., the rescuers found Denise's body. A police chaplain, who had been traveling back and forth between the rescue site and the dock to update Mr. Colbert about the search, then relayed to Mr. Colbert the fact that his daughter's body had been found. *Id.* "About 10 minutes later Mr. Colbert saw a buoy pop to the lake's surface. Because he could hear the dialogue from the rescue workers on the lake he knew what this meant - it was tied to Denise's body."

Id. at 46-47.

"Mr. Colbert watched rescue boats move alongside the buoy. He saw Denise's body pulled over to the side of the boat by her arm." *Id.* at 47. He "averred that he could see rescue workers move Denise's body once it was on the boat from about 100 yards away on the dock from which he watched." *Id.* He also "saw an ambulance by the water, watched the police bring a stretcher, put a sheet over Denise's body, and take her away." *Id.* Denise "had died about three hours before her body was recovered from the water". *Id.*

4. **The Colbert Court's Decision.**

The *Colbert* Court began its analysis with the following statement: "The tort of negligent infliction of emotional distress is a limited, judicially created cause of action that allows a family member to recover for 'foreseeable' intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident." *Colbert*, 163 Wn.2d at 49 (quoting *Hegel*, 136 Wn.2d at 125-26; *Gain*, 114 Wn.2d at 261). After discussing the evolution of the tort of NIED, the *Colbert* Court reaffirmed each of the above-cited factors articulated in *Hegel* regarding a claim for NIED, as well as *Hegel's* holding. *Id.* at 53-58.

The *Colbert* Court then applied the *Hegel* factors and holding to the facts before it in denying Mr. Colbert's NIED claim:

When Mr. Colbert arrived the accident had already occurred - he did not observe his daughter's suffering or her condition while she was drowning. Although he may have arrived within a chronologically short time of her death, at no time did he personally experience conditions that can said to be a continuation of "*an especially horrendous event*" involving conditions analogous to seeing a "*crushed body [or] bleeding*" or hearing "*cries of pain, . . . [or] dying words.*" . . . [H]e simply did not experience conditions that are comparable to actually witnessing a loved one's accidental death or serious injuries. Accordingly, the Court of Appeals did not err in holding that Mr. Colbert was not a foreseeable plaintiff as a matter of law.

Id. at 57-58 (quoting *Hegel*, 136 Wn.2d at 130) (quoting *Gates*, 719 P.2d at 199) (italics added by the *Colbert* Court) (underscoring added).

In short, the *Colbert* Court needed to do nothing more than apply the *Hegel* factors in deciding the case before it. Nonetheless, in a 5-4 decision, the Court proceeded to address Mr. Colbert's misplaced argument, "that the Court of Appeals erroneously imposed a requirement that the plaintiff arrive 'unwittingly' at the accident scene." *Id.* at 59. In doing so, the Court made the following statement, which, as will later be explained, has muddied the waters regarding the tort of NIED: "That a bystander plaintiff must arrive on 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." *Id.*

It is this nebulous language - "must arrive on the scene *unwittingly*" - upon which State Farm relied to support summary judgment dismissal of Shaila's NIED claim. *See, e.g.*, CP at 215-19; *see also*, CP at 368-69.

Relying on this language, State Farm contends that any prior notice whatsoever of the accident, creates a bright-line rule that automatically bars a plaintiff's ability to maintain a claim for NIED as a matter of law.

State Farm's position, however, is not supported by *Colbert*. When the case is read in its entire context, and in light of the Court's prior decision in *Hegel*, it becomes clear that *Colbert* did not expand the tort of NIED to include, as a necessary element of the tort, a new requirement that the plaintiff arrive at the scene of an accident with no prior knowledge of its occurrence. To the contrary, the *Colbert* Court's discussion regarding arriving at the accident scene "unwittingly" is merely dicta which, at most, adds another non-dispositive factor for the trial court's consideration in making the policy determination of whether legal causation exists in a given case.

D. *Colbert* Did Not Add a New Element to The Tort of NIED; Thus, *Colbert* and *Hegel* Are Easily Reconciled.

1. Overview.

Initially, it is important to bear in mind that both *Hegel* and *Colbert* made clear that, whether a claim for NIED can be sustained involves a fact-specific inquiry, which turns upon unique circumstances of each case. As the *Colbert* Court itself stated: "*Depending upon the facts of the case*, the presence of emergency personnel does not necessarily foreclose a plaintiff's

observations of "an injured relative at the scene of an accident *after its occurrence and before there is substantial change in the relative's condition or location.*" *Colbert*, 163 Wn.2d at 61-62 (emphasis added) (quoting *Hegel*, 136 Wn.2d at 132).

A second key point to bear in mind, which relates directly to the preceding point, is that *Hegel* and *Colbert* both expressly rejected the notion that any artificial or bright-line rules should apply in deciding whether a claim for NIED can be maintained. *Hegel*, 136 Wn.2d at 130 ("A bright line rule that limits recovery for emotional distress to those who witness the accident . . . draws an arbitrary line that serves to exclude plaintiffs without meaningful distinction."); *Colbert*, 163 Wn.2d at 54 (quoting with approval the same language from *Hegel*).

Moreover, both *Hegel* and *Colbert* made clear that a claim for NIED should not turn on any fixed temporal rule. *Hegel*, 136 Wn.2d at 131. ("An appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured."); *Colbert*, 163 Wn.2d at 54 (again quoting with approval the same language from *Hegel*).

Finally, both *Hegel* and *Colbert* concluded that the key consideration in applying the above principles is whether the plaintiff arrives at the accident

scene "shortly thereafter", and "that it was improper for the lower courts to dismiss the plaintiffs' claims for negligent infliction of emotional distress where they were present at the scenes of the accidents and may have witnessed their family members' suffering before there was a substantial change in the victim's conditions or locations." *Colbert*, 163 Wn.2d at 56-57 (citing the holding in *Hegel*, 136 Wn.2d at 132). In such instances, "the plaintiffs' mental distress was not unforeseeable as a matter of law." *Id.*⁹

Given the above, to interpret *Colbert* as introducing a new element into the tort of NIED - that a plaintiff must arrive at the accident scene "unwittingly", *with no prior knowledge of the accident* - undermines the principal holding in *Colbert*, as well as the holding in *Hegel*, upon which the *Colbert* Court heavily relied in reaching its decision. Indeed, the *Colbert* Court held, at the conclusion of the case:

⁹ For purposes of our case, it is worth noting that, under the facts in *Colbert* (where Mr. Colbert arrived at the scene of his daughter's drowning after a much longer period of time had lapsed than when Shaila arrived at the scene of her husband's accident), the Court found that Mr. Colbert may have met the arriving at the scene "shortly thereafter" requirement for purposes of legal causation. Indeed, it was because Mr. Colbert did not observe his daughter before her condition and location had substantially changed, not because he arrived at the scene too late, that the Court held he could not state a claim for NIED. In the Court's own words: "Although [Mr. Colbert] may have arrived within a chronologically short time of her death, at no time did he personally experience conditions that can be said to be a continuation of ``an *especially horrendous event*'' involving conditions analogous to seeing a ``*crushed body [or] bleeding*'' or hearing ``cries of pain, . . . [or] dying words.``" *Colbert*, 163 Wn.2d at 57 (italics original); (underscoring added) (quoting *Hegel*, 136 Wn.2d at 130) (quoting *Gates*, 719 P.2d at 199).

The trial court properly granted summary judgment dismissing Mr. Colbert's claim for [NIED] because he cannot meet the requirements that he was either present at the scene at the time of the accident or 'shortly thereafter' as we have defined the 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.

Colbert, 163 Wn.2d at 63.

In short, once the *Colbert* Court held that "the Court of Appeals did not err in holding that Mr. Colbert was not a foreseeable plaintiff as a matter of law", because "he simply did not experience conditions that are comparable to actually witnessing a loved one's accidental death or serious injury" (*id.* at 57-58), it had no need to proceed any further to dispose of the case based upon the facts before it.

Accordingly, because the *Colbert* Court's subsequent discussion of whether a plaintiff arrives "'unwittingly' at the accident scene" (*id.* at 59) was not necessary to its holding, the Court's statements on this subject should be viewed as dicta and thus not binding precedent. *State v. Raleigh*, 157 Wn. App. 728, 735, 238 P.3d 1211 (2010) (language that is not part of the holding of a case is non-binding dicta).

2. At Most, *Colbert* Stands For The Proposition That The Issue of Whether a Plaintiff Arrives at The Scene "Unwittingly" is But One Factor to Consider in Determining Whether the Element of Legal Causation Has Been Met.

Harmonizing the *Colbert* Court's own analysis with its holding, and

reconciling the *Colbert* and *Hegel* decisions, can be readily accomplished by interpreting *Colbert's* arrival at the scene "unwittingly" analysis to stand simply for the proposition that, whether a plaintiff arrives at the scene "unwittingly" ***is but one, non-dispositive factor to consider*** in determining whether the element of legal causation has been met for purposes of stating a claim of NIED. The following language from *Colbert* fully supports this interpretation: "Whether the plaintiff arrived at 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 upon the emotional trauma that results from experiencing another person's negligently inflicted physical injury." *Colbert*, 163 Wn.2d at 60 (emphasis added).

Again, the *Colbert* Court made this statement *long after* it had already held "that Mr. Colbert was not a foreseeable plaintiff as a matter of law", because, "[a]lthough he may have arrived in a chronologically short time of [his daughter's] death, at no time did he personally experience" or observe his daughter's drowning or death; nor did he actually see her body until about three hours after her death, and *after* there had been a substantial change in both her condition and location. *Colbert*, 163 Wn.2d at 46-47, 57-58.

Accordingly, the Court did not need to address Mr. Colbert's argument, "that the Court of Appeals erroneously imposed a requirement that

the plaintiff arrive 'unwittingly' at the accident scene" (*id.* at 59); thus, the Court's statements responding to this argument are, again, non-binding dicta. *Raleigh*, 157 Wn. App. at 735. And even if they were not, the *Colbert* Court noted that the Court of Appeals itself framed the issue of whether a plaintiff arrives at the accident scene "unwittingly" in terms of being only one factor to consider, not an element of the tort of NIED itself: "The Court of Appeals listed this *as a circumstance* showing that Colbert failed to establish a duty of care on the part of [defendant]". *Id.* at 59 (emphasis added).

In short, the tort of NIED does not include, as a separate element of the claim, that a plaintiff arrive at the accident scene "unwittingly". *Kumar*, 180 Wn.2d at 505 ("A plaintiff may recover for negligent infliction of emotional distress if she proves duty, breach, proximate cause, damage, and 'objective symptomology'").¹⁰

E. Under the Unique Facts and Circumstances Presented Here, Shaila's Motion for Summary Judgment Should Have Been Granted, Thus Finding That She Has a Claim for NIED as a Matter of Law.

This analysis must begin by restating the holding in *Hegel*, which was reaffirmed in *Colbert*: We "hold that a family member may recover for

¹⁰ Unfortunately, *Colbert's* discussion of what constitutes arriving at the scene "unwittingly" raises more questions than it answers. Because further discussion of this issue should not be necessary to decide this appeal, further discussion of the questions left hanging by the *Colbert* Court is found at **Appendix 7** hereto, and made part of this brief, in case the Court believes these questions should be raised and addressed.

emotional distress caused by observing an injured relative at the scene of an accident after its occurrence and before there is substantial change in the relative's condition or location." *Hegel*, 136 Wn.2d at 132 (emphasis and underscoring added); *Colbert*, 163 Wn.2d at 58, 63. The word "or", when inserted between two other words (in this case "location" and "condition") is significant. Neither *Hegel* nor *Colbert* defined the use of the word "or" within the context of the above-quoted holding; therefore, recourse to a standard dictionary's definition of the word is appropriate. *Audit & Adjustment Co. v. Earl*, 165 Wn. App. 497, 503, 267 P.3d 441 (2011) ("If a term is undefined, we will use a standard dictionary definition to find the term's plain and ordinary meaning.").

The Merriam-Webster Dictionary (Eleventh Ed.) defines the term "or" as being "used as a function word to indicate an alternative"; *accord*, Black's Law Dictionary (Fifth Ed.) ("or" is "[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things."). Accordingly, in order to maintain her claim for NIED, Shaila had to arrive at the accident scene before there had been a "substantial change" in *either* her husband's "condition or location." *Hegel*, 136 Wn.2d at 132; *Colbert*, 163 Wn.2d at 58 (emphasis and underscoring added). And she did.

Shaila arrived at the accident scene "shortly after its occurrence (within 10-15 minutes). CP at 46, 180, 188. And it is uncontroverted that

her husband's physical condition had not changed between the time of the accident and Shaila's arrival at the scene. CP at 47, 52, 180-82, 184, 189, 314. It is also uncontroverted that there had been no material change in her husband's location before Shaila arrived at the scene. CP at 47, 180-82, 184, 189. It is further uncontroverted that Shaila suffered "objective symptomology" of emotional distress as the result of observing the horrific aftermath of the accident, including her husband's ultimately fatal injuries. CP at 50-52, 191, 195, 320-22.

Shaila has, therefore, stated a claim for NIED as a matter of law, because reasonable minds can reach no other conclusion from the uncontroverted facts in this case. *See Ruff*, 125 Wn.2d at 704 ("when reasonable minds can reach but one conclusion, questions of fact may be determined as a matter of law"); *Bordynoski v. Bergner*, 97 Wn.2d 335, 340, 644 P.2d 1173 (1982) (although the question of proximate cause is usually for the jury, "when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion [then] it may be a question of law for the court").

Accordingly, summary judgment should have been granted in Shaila's favor on the issue of whether she has stated a claim for NIED. The only way to avoid this conclusion would be (1) if the Court finds that arriving at the

scene of the accident "unwittingly" is an essential element of the tort of NIED, which Shaila failed to establish; or (2) if the Court finds that genuine issues of material fact exist, in which case the trial court erred in deciding this case on summary judgment. *See, e.g., Balise*, 62 Wn.2d at 199 (summary judgment must be denied, and a trial "is absolutely necessary where there is a genuine issue as to any material fact").

F. This Case Presents a Coverage Dispute in Which State Farm Has Denied Coverage of Shaila's NIED Claim; it is Not a Claim Dispute Over the Amount of Shaila's Claim.

For UIM coverage purposes, when an accident is caused by a vehicle driven by an unknown hit-and-run motorist (also known as a "phantom" vehicle), UIM coverage is triggered under a policy providing such coverage, which is the case here. *See* RCW 48.22.030(1), (8); *see also, Dixie Ins. Co. v. Mello*, 75 Wn. App. 328, 335, 877 P.2d 740 (1994); and State Farm's relevant UIM policy provisions (CP at 341-42). Thus, the gravamen of this case is whether Shaila has a covered claim under State Farm's UIM coverage provisions; it is not a dispute over the amount of her claim if coverage is found to exist. Indeed, by definition, the issue of coverage must first be addressed before the issue of the amount of the claim even arises; and the

latter issue is not before this Court, because it does not yet exist.¹¹

1. The Language of State Farm's UIM Coverage Provisions Establishes That This Dispute is Over Coverage For Shaila's NIED Claim, Not the Amount of The Claim.

State Farm's UIM coverage plainly states that, if State Farm and its insured do not agree that "*the insured* [is] legally entitled to recover compensatory damages from the owner or driver of the *underinsured motor vehicle*", then the insured must "file a lawsuit" against "(a) [State Farm] and (b) . . . the owner or driver of the *underinsured motor vehicle*". CP at 342. Because Shaila and State Farm could not agree on whether she is "legally entitled to recover compensatory damages [from the UIM motorist]", Shaila filed suit in compliance with the above policy language. CP at 134-38.

This case, therefore, involves a suit to determine whether Shaila is "legally entitled to recover compensatory damages", which is inherently a coverage dispute, not a dispute over the amount of Shaila's damages. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 244, 961 P.2d 350 (1998) (to establish coverage, the insured must show that he or she is legally entitled to recover

¹¹ Indeed, the parties never addressed the issue of the amount, or value, of Shaila's NIED claim during the trial court proceedings. Moreover, under the facts of this case, reasonable minds can reach but one conclusion regarding the value of Shaila's UIM claim if it is covered under State Farm's policy: She is entitled to receive the full \$50,000 policy limit to compensate for her emotional distress. For State Farm to contend otherwise would not be done in good faith.

damages from the UIM motorist). This point is driven home by State Farm's attorney's letter denying coverage for Shaila's NIED claim:

It is State Farm's position that Ms. Haynes *is not legally entitled to recover compensatory damages* for negligent infliction of emotional distress from the owner or driver of the underinsured motor vehicle *and therefore denies her claim* for payment of the \$50,000 liability limits. Further, based upon the information to date, *even if it is subsequently established that Ms. Haynes is legally entitled to recover* on her UIM claim for NEID [sic] compensatory damages, *there is no agreement as to the amount of damages she is legally entitled to recover.*

CP at 204-05 (*see* Appendix 6 hereto); *see also*, State Farm's Opposition to [Shaila's] Motion for Partial Summary Judgment, where State Farm concedes:

In answering Shaila's complaint, "State Farm admitted that the remaining \$50,000 of UIM coverage under [Shaila's] State Farm insurance policy is available to compensate [Shaila] for her NIED damages *if [Shaila] proves she is legally entitled to recover such damages* from the phantom underinsured motorist." CP at 102 (emphasis and underscoring added).¹²

It is obvious from the above-emphasized language that State Farm denied Shaila's NIED claim because she "is not legally entitled to recover" on the claim (i.e., there is no coverage). Indeed, State Farm's attorney drew a

¹² "A statement of fact made by a party in his pleadings is an admission the fact exists as such and is admissible against him in favor of his adversary." *Nielson v. Vashon School Dist.*, 87 Wn.2d 955, 958, 558 P.2d 167 (1976); *see also*, *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) (if an attorney is authorized to appear on behalf of a client, that attorney's acts are binding on the client).

clear distinction between an initial coverage dispute and a later dispute over the amount of damages once coverage is found to exist, as follows: "even if it is subsequently established that Ms. Haynes is legally entitled to recover on her UIM claim . . . there is no agreement as to the amount of damages she is legally entitled to recover." CP at 205 (*see* Appendix 6 hereto).

In short, by stating Shaila "is not legally entitled to recover", State Farm must concede that this is first and foremost a coverage dispute. The controlling law firmly establishes this point. When an insured must sue her own insurer to obtain *a legal determination* that she is entitled to receive the benefits of the policy, it is a *coverage dispute*. *Matsyuk v. State Farm Fire & Casualty Co.*, 173 Wn.2d 643, 659-60, 272 P.3d 802 (2012). And this is precisely what Shaila's amended complaint seeks to do. CP at 134-38.

2. The Words "Legally Entitled to Recover" and "Coverage Exists" Are Synonymous.

"Coverage eligibility depends upon the insured's demonstrating that he or she 'is legally entitled to recover' in tort from the underinsured motorist." *Fisher*, 136 Wn.2d at 244 (underscoring added); *accord, 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) (UIM "coverage is provided . . . for the protection of

persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles"; *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 an insurance contract is at issue . . . as opposed to factual questions about the extent of the insured's damages") (internal quotations and citations omitted).

In other words, "coverage eligibility" and being "legally entitled to recover" are synonymous. Moreover, as is the case here, "when an insured must bring suit against its own insurer to obtain a legal determination interpreting the meaning *or application* of an insurance policy, it is a coverage dispute." *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 606, 167 P.3d 1125 (2007) (emphasis added). "This case *would be* in the nature of a claims dispute if [State Farm] had agreed to pay under the [policy], but had a factual dispute with [Shaila] as to the amount of the payment." *Id.* (italics original).

Here, State Farm's own counsel admits this case involves a dispute over whether Shaila is "legally entitled" to recover under State Farm's UIM policy provisions, and not a dispute over the amount of her claim, CP at 204-205. This admission is binding on State Farm. *See, e.g., State v. Fanger*, 34 Wn. App. 635, 637-38, 663 P.2d 120 (1983); *Fite v. Lee*, 11 Wn. App. 21, 28,

521 P.2d 964 (1974) (an attorney is the agent of the client).

3. Additional Language From State Farm's Policy Establishes That This is A Coverage Dispute, as This Court Previously Found in its *McIllwain* Decision.

State Farm's UIM coverage also states:

Deciding Fault and Amount

1. a. The *insured* and *we* must agree to the answers to the following two questions:
 - (1) Is the *insured* legally entitled to recover compensatory damages from the owner or driver of the *underinsured motor vehicle*?
 - (2) If the answer to 1.a.(1) above is yes, then what is the amount of compensatory damages that the *insured* is legally entitled to recover from the owner or driver of the *underinsured motor vehicle*?¹³

The first question to be decided from the above-quoted provision - "Is [Shaila] legally entitled to recover compensatory damages from the [UIM motorist]?" - is precisely the question presented here. And, as the above-cited cases make clear, the question involves one of coverage, not the amount of the compensatory damages, which is addressed in the second question from the above-quoted UIM policy provision. It is also a matter of common sense

¹³ See **Appendix 1** hereto (emphasis original) (underscoring added).

that determining the amount of compensatory damages does not even come into play until a determination is first made as to whether the claim itself is covered; that is, whether the insured is "legally entitled to recover compensatory damages."

Analyzing the same language from a similar State Farm policy, this Court made clear that *the first step of the above analysis presents a coverage issue*. *McIllwain v. State Farm*, 133 Wn. App. 439, 136 P.3d 135 (2006): "The critical issue here is whether Ms. McIllwain is legally entitled to collect damages." *Id.* at 444. This Court then confirmed that, although the insured must establish fault on the part of the underinsured motorist, this is still a coverage issue: "A UIM policy *only provides coverage* to its insured for injuries caused by an at-fault underinsured motorist." *Id.* at 447 (emphasis added). This Court further noted that the language, "legally entitled to recover," means that insurance coverage exists only when bodily injuries have been caused by a negligent uninsured motorist. *Id.* at 449, n. 3.

To accept State Farm's argument - that Shaila has "a covered claim", but that she is not "legally entitled to recover" compensatory damages for that claim - is tantamount to State Farm saying to Shaila: "Your UIM claim is covered; however, we have determined that the value of your claim is \$00.00." This argument is untenable on its face.

G. Because This is a Coverage Dispute, Shaila is Entitled to Recover Her Costs, Including Her Reasonable Attorney's Fees, Both Before the Trial Court and on Appeal.

The Supreme Court's *Matsyuk* decision is dispositive on this issue: "Under *Olympic Steamship*, '[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.'" *Matsyuk*, 173 Wn.2d at 658 (quoting *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 54, 811 P.3d 673 (1991)). "[W]hen an insurer unsuccessfully contests coverage, it has placed its interests above the insured. Our decision in *Olympic Steamship* remedies this inequity by requiring that the insured be made whole." *Id.* at 660 (quoting *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 39-40, 904 P.2d 731 (1995)).

Accordingly, if Shaila prevails against State Farm on the coverage issue, she is entitled to recover her costs, including her reasonable attorney's fees in the underlying trial court proceedings. And she is likewise entitled to recover such costs and fees on appeal. *See* RAP 18.1(a); *Olympic Steamship*, 117 Wn.2d at 53.

VII. CONCLUSION

The trial court's summary judgment orders should be reversed; and this Court should find (1) that Shaila has stated a claim for NIED as matter of law, based upon the uncontroverted material facts in the record, (2) that

this case involves a coverage dispute, pursuant to which Shaila's claim is covered under State Farm's applicable UIM coverage provisions, and (3) that the only remaining issue to be resolved at the trial court level is *the amount* of Shaila's UIM claim. In addition, Shaila should be awarded her costs, including reasonable attorney's fees, which have been incurred both before the trial court and on appeal.

DATED this 16th day of September, 2016.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By: 
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Attorney for Appellant
Shaila Haynes

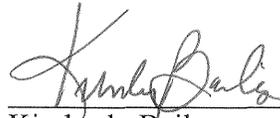
CERTIFICATE OF SERVICE

I certify that on the 16th day of September, 2016, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

Attorneys for Respondents:

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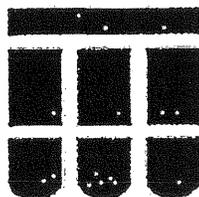


Kimberly Bailes

APPENDIX 1

In The Matter Of:
Hayes
vs.
State Farm, et al.

**Deposition of
Nicole Crossett
April 25, 2016**



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 21
 22 ALSO PRESENT:
 23
 24 Ms. Shaila Haynes
 25

Page 4

1 BE IT REMEMBERED that on Monday,
 2 April 25, 2016, at 2:37 p.m., at 201 West 7th
 3 Avenue, Ellensburg, Washington, the deposition of
 4 NICOLE CROSSETT was taken before C. Kay Romine,
 5 Registered Professional Reporter. The following
 6 proceedings took place:
 7
 8 NICOLE CROSSETT, being first duly sworn to
 9 tell the truth, the whole
 10 truth and nothing but the
 11 truth, testified as follows:
 12
 13 EXAMINATION
 14 BY MR. NICHOLSON:
 15 Q. Good afternoon. Can you give us your complete name
 16 and current residence address?
 17 A. Nicole Celia Crossett. And I just moved up to Roslyn,
 18 so I don't know the street address.
 19 Q. Oh. Where did you live --
 20 A. Before it was at Red Horse Diner, a house right out
 21 back, on 1514 West University Way, Ellensburg,
 22 Washington.
 23 Q. When you say "out back," is it right next to the Red
 24 Horse Diner?
 25 A. Uh-huh. It's right, like, 10 feet. There is a deck

Page 3

1 I N D E X
 2 Re: HAYNES v. STATE FARM
 3 NO. 15-2-00264-6
 4 April 25, 2016
 5
 6
 7 T E S T I M O N Y
 8 NICOLE CROSSETT PAGE NO.
 9 Examination by Mr. Nicholson 4
 10 Further 34
 11 Examination by Mr. Cronin 21
 12 Further 37
 13
 14
 15
 16
 17 E X H I B I T S
 18 (None)
 19
 20
 21
 22
 23
 24
 25

Page 5

1 touching.
 2 Q. And how long did you live --
 3 A. There?
 4 Q. Yeah.
 5 A. From '96 till most recent. I had an apartment for a
 6 year in college. But basically 20 years.
 7 Q. You were living at the Red Horse Diner --
 8 A. There's two houses --
 9 Q. -- location?
 10 A. -- on the property. So I have been on that property
 11 basically for 20 years.
 12 Q. Let me complete my question before you start to
 13 answer.
 14 A. Okay.
 15 Q. And then pause for a second. And then I'll try to do
 16 the same with your answer.
 17 A. All right.
 18 Q. Okay. So you were living at the Red Horse Diner
 19 location in September of 2012?
 20 A. Yes.
 21 Q. And we're here today to talk about an accident that
 22 occurred on September 10th of 2012 involving Randy
 23 Haynes. And do you recall the events of that day?
 24 A. Yes.
 25 Q. How did you first learn that Randy Haynes had been



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1 involved in an accident?
 2 A. When Jennifer Fordham called my cell phone.
 3 Q. Do you recall about what time that happened?
 4 A. Nope. In the afternoon.
 5 Q. Do you recall approximately when in the afternoon you
 6 received the call from Jennifer Fordham?
 7 A. No. Probably maybe around 1:00 or 2:00. I'm not
 8 sure.
 9 Q. Was anyone with you when you received the call from
 10 Jennifer Fordham informing you of the accident?
 11 A. Shaila Haynes.
 12 Q. Was anybody else present?
 13 A. No.
 14 Q. Tell me what you recall regarding what Jennifer and
 15 you said to each other during the phone call where
 16 Jennifer informed you of the accident.
 17 A. She said "Randy went down." I asked if he was alive.
 18 She said "Yes." I asked if anyone called 9-1-1. She
 19 said "Yes." I asked where they were at. And she
 20 wasn't sure on the exact location. She just said it
 21 was before Cle Elum.
 22 Q. Do you recall anything else being said between you and
 23 Jennifer during that telephone conversation?
 24 A. Not that I recall.
 25 Q. Did you speak at all with Shaila Haynes while you were

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1 on the phone with Jennifer?
 2 A. Not that I recall, no.
 3 Q. Did Shaila speak with you while you were on the phone
 4 with Jennifer?
 5 A. I don't know. She was staring at me. I don't know if
 6 she said anything.
 7 Q. Did Jennifer actually inform you of the severity of
 8 the accident during your phone call with her?
 9 A. No.
 10 Q. How long did your phone call with Jennifer last,
 11 approximately?
 12 A. I'd say 10 to 15 seconds. As long as it took to say
 13 about four sentences.
 14 Q. Tell me what happened immediately after you hung up
 15 the phone with Jennifer during that call when she
 16 informed you of the accident.
 17 A. I grabbed my truck keys and told Shaila Randy went
 18 down and we had to get there and I wasn't sure exactly
 19 where it was at. We got in the truck and we left.
 20 Q. Do you recall saying anything else to Shaila between
 21 the time your phone call with Jennifer ended and the
 22 time you got into the truck?
 23 A. No. I just -- she heard what I said to Jennifer. So
 24 I imagine I repeated what was on -- what I spoke to
 25 Jennifer about.

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1 Q. I don't want you to imagine or guess.
 2 A. Okay.
 3 Q. Just tell me what you specifically --
 4 A. Okay. I don't know. I don't remember anything
 5 specifically. I remember just grabbing our stuff and
 6 running to the car.
 7 Q. Let's talk a little bit about the drive from the Red
 8 Horse location to the scene of the accident. How long
 9 did it take you to arrive at the scene of the accident
 10 from the time you got off the phone with Jennifer?
 11 A. I'd say less than 15 minutes.
 12 Q. Who was driving?
 13 A. I was driving.
 14 Q. Were you passing cars along the way?
 15 A. Yes.
 16 Q. Any idea of how fast you were driving?
 17 A. Probably close to 90 miles an hour.
 18 Q. Do you recall any discussions with Shaila Haynes while
 19 you were driving from the Red Horse location to the
 20 accident scene?
 21 A. Not anything specific. I'm sure we talked but I --
 22 there was a lot going through your mind so, no, I
 23 don't remember anything that was said.
 24 Q. Between the time you left your house and the time you
 25 arrived at the accident scene, did you or Shaila

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1 receive any phone calls or other information informing
 2 you of the severity of the accident?
 3 A. No.
 4 Q. During your drive from the Red Horse location to the
 5 accident scene, did either you or Jennifer receive
 6 information regarding the nature or extent of Randy's
 7 injuries?
 8 A. No.
 9 Q. Did either of you receive any phone calls while you
 10 were driving to the accident scene?
 11 A. No.
 12 Q. Did you have any idea of what to expect when you got,
 13 to the accident scene?
 14 A. No.
 15 Q. Let's now kind of discuss the accident scene itself.
 16 Do you recall who was at the scene of the accident
 17 when you and Shaila first arrived there?
 18 A. There was one ambulance, a State Patrolman had pulled
 19 in just ahead of me, and the two girls that were on
 20 the bikes, Shaila and I.
 21 Q. And the two girls who were on the bikes would be --?
 22 A. Jennifer and Kathleen.
 23 Q. Jennifer --?
 24 A. Fordham.
 25 Q. And Kathleen's last name?



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1 A. Keater, I think. I'm not really sure. I think it's
 2 Keater.
 3 Q. Any idea of how to spell Keater?
 4 A. K-E-A-T-E-R. I don't know.
 5 Q. Do you recall where you parked when you arrived at the
 6 scene of the accident?
 7 A. Just westbound, straddling the line and into the
 8 median ahead of the bikes, which was the ambulance and
 9 the bikes and then us.
 10 Q. So you were west of the ambulance?
 11 A. Yes. West of the bikes and the ambulance.
 12 Q. And from what you're describing, it sounds like you
 13 were in the fast lane, on the shoulder of the fast
 14 lane --
 15 A. Uh-huh.
 16 Q. -- next to the median where you parked; is that
 17 correct?
 18 A. Yes.
 19 Q. Tell me what happened next after you parked and got
 20 out of the car.
 21 A. We just got out of the car and ran towards where Randy
 22 was laying in the median.
 23 Q. Was that both you and Shaila who ran down there?
 24 A. Yeah. Yes. Yes.
 25 Q. Can you describe, as best of your recollection,

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1 Shaila's emotional state upon seeing Randy?
 2 A. She was just -- I mean, we were all in shock. She was
 3 upset and frantic. I mean, the bike's destroyed and
 4 he's laying there with paramedics around him, so it
 5 was pretty traumatic.
 6 Q. Do you recall anything else specifically?
 7 A. She just grabbed his hand and was trying to talk to
 8 him and --
 9 Q. But in terms of Shaila's actual emotional state as you
 10 observed it when she saw Randy other than what you've
 11 described.
 12 A. Being upset. I don't know. It was kind of blurry. I
 13 mean, there was, like, so much going on and I had my
 14 own emotions. And I wasn't -- you know, I was more
 15 concerned about Randy than observing Shaila.
 16 Q. Can you describe Randy's condition when you first
 17 observed him? Where was he?
 18 A. As I recall, he was laying, I believe, on his back.
 19 And they had his clothes cut off of him from the waist
 20 up. I believe they were putting the neck brace on
 21 once we had gotten there. It wasn't on, I don't
 22 believe, when we first got there. And the paramedics
 23 were just working on him up top and Jennifer was
 24 holding his feet and I had his leg and had my hand on
 25 her.

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1 Q. Her being --
 2 A. Jennifer. And Shaila was up on the other side,
 3 holding his hand, and trying to get a response out of
 4 him.
 5 Q. Now, was Randy breathing at all?
 6 A. It was very labored breathing.
 7 Q. Was he talking or making any sounds?
 8 A. No.
 9 Q. Was he moving at all?
 10 A. No.
 11 Q. Do you recall whether he was on a stretcher or
 12 backboard when you first arrived?
 13 A. I can't recall. I know he was on a backboard at one
 14 point, but I don't know if he was when we first got
 15 there or not. Everything was happening so fast.
 16 Q. Are you sure that he was on his back when you first
 17 arrived or is that something that simply happened
 18 while you were there?
 19 A. I -- I don't -- I don't know if he -- I honestly don't
 20 even recall. I just remember him laying there. I
 21 don't remember if he was on his stomach and they
 22 rolled him over when we were there or if he was just
 23 laying on his back already when we got there. There
 24 was a lot of commotion and things going on and --
 25 Q. How long was it between the time that you arrived at

Page 13

1 the accident scene with Shaila and when Randy was
 2 loaded into the ambulance?
 3 A. I honestly have no idea. I mean, I would think it
 4 would only be 15 to 20 minutes. But when, like, we're
 5 in shock and so much stuff is going on that it could
 6 have been longer. It could have only been like -- I
 7 don't know. It felt like 15 to 20 minutes, but I
 8 don't know. It might have been longer or shorter.
 9 Q. During the time you were at the accident scene, from
 10 the time you first arrived until Randy was loaded into
 11 the ambulance, do you recall speaking with anybody?
 12 A. When we were at the scene? Sorry. Can you repeat
 13 that? When we were at the scene?
 14 Q. Yeah. From the time you arrived at the scene until
 15 Randy was loaded in the ambulance, do you recall
 16 speaking with anybody during that time?
 17 A. Yeah. I mean, I remember speaking to the state
 18 trooper, but I'm pretty sure I spoke to Jennifer and
 19 Shaila and everybody, but I recall speaking to the
 20 state trooper. Originally he asked me what had
 21 happened because I -- he thought I was one of the
 22 bikes when it happened. And then I had him talk to
 23 Jennifer to find out what happened when the accident
 24 occurred.
 25 But I asked him if they were going to take Randy



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1 to the Ellensburg Hospital or down to Yakima. And
 2 that's when he told me they called in for medivac. So
 3 that was kind of -- I didn't think it was that serious
 4 until the ambulance, they called in the medivac.
 5 Q. You indicated you might have spoken with Jennifer or
 6 Kathleen or Shaila. Do you have any specific
 7 recollection of any conversation with either of them?
 8 A. No. I can only imagine what we talked about, but I
 9 don't recall. I mean, I remember we walked up to
 10 check out where the bike had landed, where the tire
 11 tracks came down. I mean, we looked at the whole
 12 scene, and I know we all talked, but I don't recall a
 13 specific thing we said.
 14 Q. Do you recall if you talked with any of the ambulance
 15 personnel?
 16 A. No. I never spoke to them. They told us to get back.
 17 And that was the only thing that was said between us.
 18 Q. Do you recall approximately how long you spent next to
 19 Randy before the ambulance personnel told you to move
 20 back?
 21 A. Not long. Not long, because they had, like, two or
 22 three of them around him. Obviously, there's not that
 23 much space. So I'd say just a couple minutes before
 24 they told us all to get away from him so they could
 25 work.

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1 Q. What happened after Randy was loaded into the
 2 ambulance?
 3 A. We sat there for a while because we were leaving to go
 4 to Harborview. The State Patrolman told us, they told
 5 Shaila and I, that Shaila could ride in the ambulance
 6 to the ball field where the helicopter takes off and
 7 picks them up but she's not allowed to ride in the
 8 helicopter. So he told us or advised us to take off
 9 right now and get to Harborview as quickly as we could
 10 so we would be there when the helicopter landed.
 11 Q. Did you do that?
 12 A. Yes.
 13 Q. Was the ambulance still at the scene when you left for
 14 Harborview?
 15 A. Yes.
 16 Q. Do you recall about how long it took you to drive to
 17 Harborview?
 18 A. I'd say an hour. Maybe a little longer. I'm not --
 19 we were speeding. I wasn't doing 90, but we sped all
 20 the way there.
 21 Q. Tell us what happened once you got to Harborview.
 22 A. We were getting checked in. They gave us a little
 23 room. I believe it was just Shaila and I there for a
 24 little while. Then a relative of Randy's came in the
 25 room who worked at the hospital that enters the

Page 16

1 patient information stuff. So she came in. A social
 2 worker came in. And Randy's -- one of Randy's sisters
 3 arrived. I think she might have been with the mother
 4 or the mother came shortly after. I can't remember if
 5 they were together or not.
 6 The social worker assured us that he would be
 7 just fine, he was at Harborview and they were the
 8 best, and that they always -- it would all be good.
 9 And I thought maybe he knew. We didn't know his
 10 condition, like, so I didn't -- I was pretty hopeful.
 11 And then the other sister arrived. No, she
 12 didn't. Just the one sister was there when we got the
 13 news. The doctor came in and said that he didn't make
 14 it and they did everything that they could. And that
 15 was devastating. That was pretty shocking. We didn't
 16 -- we were -- when she came in, we thought she was
 17 going to say, like, Shaila could go in to visit him,
 18 you know, or they're trying to get him stable or
 19 something. So we -- I don't think we saw it coming at
 20 all. I didn't.
 21 And then shortly -- and then she went into the
 22 details about what took place in the ambulance ride
 23 and the hospital -- or in the medivac. She said they
 24 had, like, lost him a couple times, I believe, in the
 25 airplane -- or the helicopter and the ambulance. And

Page 17

1 then when they got there they cut his chest open and
 2 she was massaging his heart. And there was nothing
 3 more they could do.
 4 Q. Do you recall any of your conversation -- I'm sorry.
 5 A. No, I know. I didn't think I would cry.
 6 Q. Do you want to take a break?
 7 A. No. I'm fine.
 8 Q. Are you sure? Just --
 9 MR. CRONIN: Water?
 10 A. Gosh. It's, like, I could talk about it and then
 11 it's, like, man. Okay. Sorry.
 12 Q. That's okay. Just let me know if you want to take
 13 some time.
 14 A. No. I'm good.
 15 Q. Okay. Do you recall anything specific that you and
 16 Shaila discussed while you were driving from the
 17 accident scene to Harborview?
 18 A. Not really. It was pretty blurry.
 19 She forgot her phone at the house because we ran
 20 out of my house so fast. So we were on my phone
 21 trying to call Randy's mother and sisters. And I
 22 didn't even have half of their numbers. So it was
 23 mostly spent trying to reach family members to get to
 24 the hospital.
 25 Q. Other than what you just mentioned, do you recall



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1 anything specific that you talked about?

2 A. No. I mean, we just -- no. I mean, we were just

3 worried about Randy and didn't know what was going to

4 happen.

5 Q. When you got the unfortunate news while at Harborview,

6 do you recall -- or when you got that news, do you

7 recall about what time that was?

8 A. No. I don't know if I ever even looked at a clock

9 that whole day. I mean, I imagine -- I don't know.

10 It was probably, like, 5:00 o'clock, but I have no

11 idea.

12 Q. Let's talk a little bit about your relationship with

13 Shaila. How long have you known her?

14 A. Since 2008.

15 Q. And how well do you know her?

16 A. Very well.

17 Q. Have you been friends since 2008?

18 A. Yes. So we've done a lot of motorcycle rides

19 together, all our vacations together, bike trips,

20 holidays and stuff with her family, my family.

21 Q. Before Randy's accident, how would you describe

22 Shaila's emotional makeup? What I mean by that is she

23 a strong person --

24 A. Yes.

25 Q. -- emotionally, a weak, fragile person, or something

Page 19

1 between?

2 A. No. I think she's a strong, independent person.

3 People have described her as being intimidating, so I

4 don't think she is weak or fragile.

5 Q. Is that also your opinion of her?

6 A. Yes. Yes. She's very strong and independent.

7 Q. Based upon your knowledge of Shaila and her emotional

8 makeup, do you believe that she suffered any emotional

9 trauma or distress from seeing her husband lying in

10 the road when you guys arrived at the accident scene?

11 A. Yes.

12 Q. And can you tell me why you believe that?

13 A. I can -- I don't know. I -- I think I was, like, it's

14 affected me emotionally and I wasn't married to him

15 for 20 years, so I know it's affected her. I don't

16 know. Talks and stuff. I just know it's affected

17 her.

18 Q. If I were to ask you, if I did, and I apologize, but

19 describe her emotional state when she first saw Randy

20 at the accident scene.

21 A. It was just, I don't know, chaotic and she was a wreck

22 and --

23 Q. I'm talking about Shaila's emotional state as you

24 observed it.

25 A. Yes. She was just upset and -- I don't know. I don't

Page 20

1 know. I don't know if I watched her in-depth like I

2 was paying attention to Randy. So we were all crying.

3 We were -- I don't know.

4 Q. Have you noticed a change in her emotional affect

5 since the accident?

6 A. Yeah. I mean, I don't know. It's just -- I know

7 right after that night she had to go do a phone call

8 for donating organs, and that was really traumatic

9 too. But I don't know. She's just different. Like

10 he was her rock. And I don't know.

11 Q. Based upon your knowledge of Shaila and how her

12 emotional makeup was at the time of the accident, do

13 you believe what she saw at the scene when she

14 observed her husband was the source of her emotional

15 distress at that time?

16 MR. CRONIN: Object. Lack of foundation. Go

17 ahead and answer.

18 Q. Okay. Let me back up.

19 You saw Shaila at the time she saw Randy lying in

20 the median, right?

21 A. Uh-huh.

22 Q. Say --

23 A. Yes.

24 Q. Okay. And again did she appear to be upset to you?

25 A. Yes.

Page 21

1 Q. Did she appear to be in shock to you?

2 A. Yes.

3 Q. Did she appear to be emotionally shaken up?

4 A. Yes. Very.

5 Q. Do you believe that Shaila's emotional condition, as

6 you've just described it, was a result of seeing Randy

7 lying there in the median?

8 A. Yes.

9 Q. Do you believe that there were any other factors

10 unique to Shaila's emotional makeup that would have

11 caused her to react to what she saw or made it worse?

12 A. No.

13 Q. Do you believe that the phone call that you received

14 from Jennifer, informing you and Shaila of the

15 accident, helped prepare or buffer Shaila for what she

16 saw when she arrived at the accident scene?

17 A. No, I don't think so.

18 Q. Did she have any idea what to expect when you arrived

19 at the accident scene?

20 A. No.

21 MR. NICHOLSON: I have no other questions.

22

23 EXAMINATION

24 BY MR. CRONIN:

25 Q. I'm Steve Cronin. I represent State Farm in this



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1 lawsuit. And, as I mentioned before we began, I
 2 actually had a three-way telephone conversation with
 3 you and Mr. Nicholson just about a year ago. Do you
 4 remember that?
 5 A. Yes.
 6 Q. And when I first had called you you were at work; is
 7 that right?
 8 A. I believe so.
 9 Q. Is that the Red Horse?
 10 A. Yeah.
 11 Q. All right. How long did you work there?
 12 A. Since I was 15.
 13 Q. What is your date of birth?
 14 A. 10-24-85.
 15 Q. Help me with the math. How old are you now?
 16 A. 30.
 17 Q. How did you meet Shaila?
 18 A. At a mutual friend's place in Coulee City.
 19 Q. And when you met Shaila was she married at that time?
 20 A. Yes.
 21 Q. And did you meet Randy then?
 22 A. Yes.
 23 Q. And I heard you mention then, after you met, you did
 24 motorcycle rides.
 25 A. Uh-huh.

Page 23

1 Q. Yes?
 2 A. Yes.
 3 Q. When you went on these motorcycle rides, did Shaila
 4 ride her own motorcycle?
 5 A. She rode on back with Randy.
 6 Q. Since you've known Shaila, has she ever driven the
 7 motorcycle herself as opposed to riding with someone?
 8 A. Yes.
 9 Q. When was the first time you were with Shaila when she
 10 actually rode or drove a motorcycle?
 11 A. I'm not sure. Maybe 2014.
 12 Q. Was that after Randy's accident?
 13 A. Yeah. Two years after or so. She started riding on
 14 back with me after Randy's accident.
 15 Q. When she started riding on the back of your
 16 motorcycle. To your knowledge, did she have a
 17 motorcycle endorsement?
 18 A. No.
 19 Q. No? Okay. So at some point after Randy's accident
 20 she got a motorcycle endorsement and started driving
 21 motorcycles herself?
 22 A. Yes.
 23 Q. How many times since Shaila's gotten her motorcycle
 24 endorsement have you been with her when she's driven
 25 the motorcycle?

Page 24

1 A. I'd have to guess, but maybe 20 times.
 2 Q. And when you first met Randy and Shaila, did they
 3 reside over in the south Seattle area?
 4 A. Yes.
 5 Q. And you resided here in Ellensburg?
 6 A. Yes.
 7 Q. So from 2008 till the accident in 2012, four years,
 8 approximately how often would you see Randy and
 9 Shaila?
 10 A. Almost every weekend.
 11 Q. Really?
 12 A. Uh-huh.
 13 Q. Given the distance between your locations?
 14 A. Uh-huh.
 15 Q. What was the reason for the get-togethers?
 16 A. Because everybody I rode with lived in Maple Valley.
 17 I didn't know anyone that lived here that rode a
 18 motorcycle. And I had just bought my bike in 2008.
 19 So I would ride over on Fridays and come back on
 20 Sundays.
 21 Q. How many months out of the year did you, between 2008
 22 and 2012, ride motorcycles with the Maple Valley
 23 group?
 24 A. From May to October, I'd say three weekends a month.
 25 Q. Fair enough. And what about the months of October

Page 25

1 through April, when you weren't riding motorcycles,
 2 how often would you see Shaila and Randy?
 3 A. Probably still two to three weekends. They'd come
 4 here. We'd go fishing and stuff or go see bands.
 5 We'd go over there. We'd hang out with everybody we
 6 rode with. We just wouldn't be on bikes in snow but
 7 we would still do stuff together.
 8 Q. And when you received the telephone call from
 9 Jennifer, how close was Shaila next to you?
 10 A. It was a few feet. And I believe I said "Jen's
 11 calling." And so we were nervous because we were,
 12 like, they shouldn't be calling yet. And so she came
 13 up close to me. So when I was on the phone she was
 14 right in my face.
 15 Q. And you've just gestured with your hand about 1 or
 16 2 feet?
 17 A. Yeah.
 18 Q. And, to your knowledge, given that 1 or 2 feet from
 19 you where Shaila was standing, was Jennifer speaking
 20 loud enough or did you have the phone away from your
 21 ear like someone standing that close would hear
 22 Jennifer through the phone?
 23 A. She might have been able to. I didn't have it on
 24 speakerphone. I mean, I had it to my ear and she
 25 could hear what I was saying. So I assume if I said



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1 'he' then she would know who I was talking about,
 2 but --
 3 Q. All right. So what was Shaila's reaction while you're
 4 still on the phone receiving the news from Jennifer?
 5 A. She just had big eyes. And I think -- I don't know.
 6 I don't want to guess.
 7 Q. Did Shaila say anything while you were still on the
 8 phone with Jennifer?
 9 A. I can't be for sure. I think she said "Randy," like
 10 trying to find out what we were talking about, but I
 11 can't be certain. I mean --
 12 Q. All right. So let's next move to when you were done
 13 with the phone call with Jennifer. What was done
 14 immediately after that?
 15 A. Well, I know for certain we grabbed the car keys, she
 16 grabbed her purse, and we left. I imagine, but I
 17 can't imagine, so I'm sure I said what I just said on
 18 the phone to Shaila, but I don't know. I can't
 19 imagine I didn't say anything and we just got in the
 20 car and left but --
 21 Q. Right.
 22 A. -- I don't know.
 23 Q. What was Shaila's state when you start going from your
 24 house to the vehicle?
 25 A. Just panicked.

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1 Q. You could tell she knew it was Randy --
 2 A. Yeah.
 3 Q. -- who was --
 4 A. I told her it was Randy. I don't know what I said,
 5 but, I -- I mean, I think I said "Randy went down. We
 6 got to go. They called 9-1-1." But she heard what I
 7 was saying to Jennifer. So when I said "Where are you
 8 at? Did you call 9-1-1? Is he breathing or is he
 9 alive?" she's going to hear that. So she knows who
 10 I'm talking about.
 11 Q. And you said car keys. Were you driving a car or
 12 truck?
 13 A. My truck.
 14 Q. Pickup?
 15 A. Yeah.
 16 Q. And Shaila was in the front passenger seat while you
 17 were driving?
 18 A. Uh-huh.
 19 Q. Yes?
 20 A. Yes.
 21 Q. Did Shaila express to you, you know, her feelings from
 22 the time you got into your pickup until the time you
 23 arrived at the scene?
 24 A. Yes, but I can't recall exactly. I mean, we were just
 25 panicked and we didn't know what to expect or, like,

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1 worried. I mean, he's on a motorcycle and he wrecks.
 2 You don't know how bad it is. So it's just we're just
 3 trying to get there as fast as we can.
 4 Q. Did Shaila express to you that she was scared?
 5 A. Yeah.
 6 Q. Did Shaila express to you that she did not have a good
 7 feeling?
 8 A. Probably, but I don't -- I don't recall exactly what
 9 we said, but I'm sure we were, like, running all the
 10 options through our head just like, oh, my God, what --
 11 Q. Right. Was there some discussion that because of you
 12 were informed by Jennifer that Randy was involved in a
 13 motorcycle accident while riding on Interstate 90, a
 14 freeway that was potentially bad?
 15 A. Well, I don't know how you said the first part of
 16 that. Did -- I mean, I can imagine it's bad, but we
 17 don't -- we didn't know anything. I didn't -- all I
 18 knew is that he was alive and they called 9-1-1. So
 19 everything else is left up to our imagination.
 20 Q. But isn't it true, though, that Shaila expressed to
 21 you that she didn't have a good feeling while she was
 22 riding with you in the pickup truck to the scene?
 23 A. I don't recall. She -- this is, like, four years ago
 24 and, like, super fast. So she probably said it, but I
 25 don't recall an exact -- anything that we talked about

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1 up there. Just, like, we were just freaked out and
 2 trying to get there. But I'm sure we discussed or
 3 said stuff. I don't know. Ten minutes of driving.
 4 MR. NICHOLSON: I'm going to move to strike the
 5 last portion of the statement as calling for -- as
 6 being based on speculation.
 7 Q. (By Mr. Cronin) Well, you were with Shaila in your
 8 pickup truck from the time you left your home until
 9 the time you got to Randy's accident site, correct?
 10 A. Yes.
 11 Q. And during that time, I mean, wasn't Shaila visibly
 12 shaken up knowing that you were driving to the scene
 13 on the freeway where her husband had been in an
 14 accident?
 15 A. Yeah, she was visibly shaken up.
 16 Q. And did you have any discussions at all with Shaila
 17 from the time you left your house until the time you
 18 arrived at the accident scene?
 19 A. Yes, but I don't recall what was said.
 20 Q. Were those discussions focused on the accident?
 21 A. Yes.
 22 Q. Was there any discussions regarding how a motorcyclist
 23 on a freeway could be injured more than, say, a person
 24 riding in a pickup truck?
 25 A. No. I was trying to make it -- I wasn't going to make



PATIENT NARRATIVE:	
<p>S: M992 dispatched to an unconscious/unresponsive 51 y.o. male involved in a motorcycle accident lying in the median of WB I-90 located at MP 88. Kiticom also radioed and reported the patient was breathing. Upon M992 arrival, two acquaintances of the patient who were riding with him, stated they found him unconscious and unresponsive immediately after the accident and he had remained so. They also estimated his speed at approximately 55 MPH. Since patient was unconscious upon EMS arrival, he was unable to provide any information including events and/or medical history.</p>	
<p>Allergies: NKDA. Medications: Unknown. Pertinent Medical History: Unknown.</p>	
<p>O: Upon M992 arrival, a 51 y.o. male was found in the center median of WB I-90 at MP 88. The patient was laying prone perpendicular to the road near the left shoulder with his head facing the WB lanes. Both arms were at his side and his face was pressed against the soil in an oval depression on a hard packed dirt surface. The patient was wearing a leather jacket, denim pants, and a half helmet with the chin strap still attached; a large motorcycle was located a short distance away (the helmet had significant damage). The patient was unconscious, but he did respond once with a moan when his name was called. However, after that initial response he failed to react to any stimuli, GCS 4 to 3. The pulses were thready and fast; the skin was warm, dry and pink. HEENT: the pupils were dilated and fixed, tissue surrounding the face/orbits appeared swollen and blood was observed in the mouth. Initially breath sounds were auscultated equally bilaterally, but when ventilating the patient became more difficult breath sounds were re auscultated and sounds on the right side of the chest were diminished. After the chest was decompressed with a 14 ga needle, breath sounds were again auscultated on both sides of the chest, although the chest did appear to rise asymmetrically. The neck, back, abdomen, pelvis, and extremities did not have any obvious deformities or injury. The first EKG rhythm was sinus tachycardia; after intubation the rate slowed to NSR before progressing to pulse-less VF, which was electrically converted back to sinus tachycardia.</p>	
<p>A: Traumatic injury to the head and chest from a blunt force impact at high velocity from motorcycle accident.</p>	
<p>P: Initial assessment (patient was unconscious/unresponsive; breathing was shallow and slow) > radioed Kiticom and requested Airlift NW be dispatched > repositioned patient head slightly to insure airway > cut patient upper clothing and helmet strap > removed helmet > rolled patient on to backboard while maintaining C-spine > assessed breathing (apneic at 5-6 BPM) > cleared dirt and gravel from patient mouth and inserted OPA > assisted breathing with BVM and O2 @ 15 LPM > C-collar > radioed Kiticom and requested additional EMS responders and selected De Vere Airfield as LZ > immobilized patient to backboard > moved patient to stretcher > moved patient to medic unit > vitals > EKG > IV 16 ga right AC, one liter bag running open > intubated patient with 7.5 ET tube (patient did not have an intact gag response) 24 cm to teeth > confirmed tube with direct visualization, mist in tube, breath sounds, negative epigastric sounds, digital and waveform capnography > continued O2 at 15 LPM and adjusted ventilation rate to maintain EtCO2 at 35 mmHg > 2nd IV left AC 18 ga, saline lock > one liter bag NS (unable to get IV line to flow, possible non-viable left IV) > transported patient to LZ and rendezvous with Airlift > upon arrival at De Vere Airfield the EKG rhythm became irregular and rapidly progressed to pulse-less VF just as flight crew arrived at medic unit > initiated CPR and then defibrillated at 200 J > immediately followed with 2 additional minutes of CPR > flight crew administered 1 mg of 1/10,000 Epinephrine IV > flight crew decompressed right chest with 14 ga needle, ROSC with pulses and blood pressure > flight crew prepared patient for transport > flight crew administered one additional dose of 1 mg of 1/10,000 Epinephrine IV because of diminished pulses > delivered a total of 900 ml of NS during call > assisted crew move patient from medic unit to helicopter > transferred patient care to Airlift NW flight crew.</p>	
<p>Review Requested: No</p>	

BILLING INFO	
Odometer Ending	Transport Mileage
10.2	10.2

COMPLAINT	
Chief Complaint Narrative	Patient was unconscious/unresponsive
Complaint Anatomic Location	Head
Primary Symptom	Change in responsiveness
Providers Primary Impression	Traumatic injury

TRAUMA			
Mechanism Of Injury	Blunt	Cause Of Injury	Motorcycle Accident

CARDIAC		
Cardiac Arrest	Yes, After EMS Arrival	Cardiac Arrest Etiology
Resuscitation Attempted	Initiated Chest Compressions, Attempted Defibrillation, Attempted Ventilation	
Arrest Witnessed By	Witnessed by Healthcare Provider	
VEHICLE INJURY		
Use Of Occupant Safety Equipment	Helmet Worn, Protective Clothing	
DESTINATION		
Incident Patient Disposition	Treated, Transferred Care	
EMS PERSONNEL	ID	ROLE
Chrisman, Steve	9912	Primary Patient Caregiver
Hadden, Lee	9903	0
McIntyre, Rickie	9911	Secondary Patient Caregiver
Stewart, Kim	9904	0
Williams, Beth	9905	Driver



Rainier Office
 2920 South Meridian, Suite 100
 Puyallup, WA 98373
 Phone: 253-841-4296 Fax: 841-2435

Patient: Shaila L Haynes
DOB: Aug 21, 1963
Date: Aug 24, 2012

Location: NWMS Rainier Site
Attending Physician: Sibel Blau, M.D
Note Type: Patient Note

Impression:

This is a 48 year old, post-menopausal woman with bilateral breast cancers with somewhat different biology of the tumors. Right sided tumor shows intermediate risk score on Oncotype Dx. Given the size and stage of the disease, she probably still doesn't have too high risk for recurrence, however, despite the fact that the LN status has no meaning surgically, combined with these biological features, I would recommend a short course of 4-6 cycles of TC followed by radiation and endocrine therapy with AIs upfront.

She wants to think about this. We had a long discussions in how more aggressive biology tumors act with higher risk of systemic recurrence due to their metastatic capability. I also reviewed the side effects of TC including muscle, joint aches and neuropathy being the longer term side effects in some patients. However, most patients tolerate the regimen well and side effects dissipate over time. We reviewed the side effects of AIs briefly as well.

Plan:

She will let me know if she desires to proceed with chemotherapy in 1-2 weeks. She will need a port placement if she wants one.

Dexa scan and lipid profile before starting AIs.

Chemo teaching if she pursues chemotherapy by Sheri Wages.

RTC with me in 3-4 weeks.

Radiation oncology consultation.

Chief Complaint:

Breast cancer.

HPI:

48 year old post-menopausal woman with no major medical problems noticed some swelling in the right breast. She was seen by her doctor at Valley Medical Center and was treated with antibiotics in 5/2012. It resolved with antibiotics, but a mammogram on 5/11/2012 showed bilateral abnormalities.

She had stereotactic right breast biopsy on 6/1/2012 that showed invasive ductal carcinoma, ER 92% positive, PR negative, HER 2 negative (1+), no ALI, associated with DCIS. She also underwent core needle biopsy in the left breast at 2 o'clock position that revealed Invasive ductal carcinoma, ER 98%, PR 58% positive, HER2 negative (0), no ALI, no DCIS.

She had bilateral lumpectomies and SLN biopsies. Right side showed a 0.6 cm tumor with additional benign lesions and one lymph node that had small clusters of tumor cells. The left side showed a 0.9 cm, low grade tumor with no positive LNs. Right: T1bN0iM0, left T1b,N0,M0, both stage 1.

Oncotype DX in the right sided tumor, score 24, 16% risk in 10 years.

Past Medical History:



Rainier Office
 2920 South Meridian, Suite 100
 Puyallup, WA 98373
 Phone: 253-841-4296 Fax: 841-2435

Patient: Shaifa L Haynes
DOB: Aug 21, 1963
Date: Dec 07, 2012

Location: NWMS Rainier Site
Attending Physician: Sibel Blau, M.D
Note Type: Patient Note

Impression:

1. This is a 48 year old, post-menopausal woman with bilateral breast cancers with somewhat different biology of the tumors. Right sided tumor shows intermediate risk score on Oncotype Dx. The patient decided not to proceed with chemotherapy. She is recommended AI's versus Tamoxifen. Due to her risk factors, I would recommend AI's, but discussed the higher risk of osteopenia, MI and stroke on these medications.

On Femara, start date: 9/28/2012.
 Radiation end date: 12/3/2012.

2. Hyperglycemia: needs work up for DM.
3. Hyperlipidemia: might have a problem due to abnormal labs in the past.
4. HTN: controlled on HZTZ and lisinopril, however possible SE to lisinopril
5. Vit D deficiency: On replacement with good results, MVI with D.
6. Depression: cancer treatment and sudden death of husband in September
7. Chest pain: normal EKG today

Plan:

Continue Femara.
 DEXA scan 10/2013.
 PCP to follow up HTN, hyperglycemia, hyperlipidemia work up.
 D/C lisinopril: change to Triam/HCTZ 37.5/25 1/2 QD. Follow up on BP in 10 days with me, Dr Blau to her PCP
 TSH, sed rate, cbc today
 Continue Vit D., add magnesium lactate 250 mg.
 Discussed the importance of self care, exercise, diet, etc. Discussed started SSRI. May be helpful, although patient not sure she wants "another pill". Will follow up on this within a few weeks.
 Encourage to stop smoking.
 RTC with Dr Blau in 3 months for breast CA.

Chief Complaint:

Breast cancer.

Interval history: Has been waking up feeling shaky, arms heavy during day, not feeling like herself.

HPI:

48 year old post-menopausal woman with no major medical problems noticed some swelling in the right breast. She was seen by her doctor at Valley Medical Center and was treated with antibiotics in 5/2012. It resolved with antibiotics, but a mammogram on 5/11/2012 showed bilateral abnormalities.

She had stereotactic right breast biopsy on 6/1/2012 that showed invasive ductal carcinoma, ER 92% positive, PR negative, HER 2 negative (1+), no ALI, associated with DCIS. She also underwent core needle biopsy in the left breast

APPENDIX 5



NWMS NORTHWEST MEDICAL SPECIALTIES, PLLC

Infections Limited, P.S.

Hematology Oncology Northwest, P.C.

Rainier Hematology-Oncology, P.C.

March 3, 2015
RE: Shalla Haynes
DOB: 08/21/63

To Whom It May Concern,

I am the attending physician for Shalla Haynes, who is a patient at Rainier Hematology-Oncology. I am writing this letter on the patient's behalf as requested.

Shalla was diagnosed with invasive ductal carcinoma (breast cancer) in May 2012. Shortly after being diagnosed, Shalla's husband was killed. Sadly, Shalla then had to go through surgery, followed by radiation and aggressive systemic therapy without her beloved husband to help her through this difficult time. Due to Shalla's new diagnosis of breast cancer and then almost immediate loss of her husband, the patient has suffered profound emotional, as well as physical, distress. She has suffered from hypertension (HTN) which I believe is, at least in part, related to the stress and trauma of her situation. She has also suffered from severe situational depression and anxiety for which I encouraged her to start antidepressants. Shalla was reluctant to start antidepressants, as she was concerned about taking too many medications. She began seeing a mental health therapist for the depression and situational anxiety and I have encouraged the patient to continue to do so.

It is my sincere belief that Shalla has suffered immense mental and physical distress due to her diagnosis and the loss of her husband.

Thank you for your assistance and understanding in this difficult medical situation. If you have any questions or concerns, please contact our office at (253) 841-4296.

Sincerely,

Sibel B. Jau, MD
Attending Physician

RE: Shaila L. Haynes

11/05/2013

Initial intake appointment with client. Client's husband Randy passed away in a motorcycle accident in which he was ran off the road. Client is asking for grief and loss counseling at this time to deal with the loss of her husband.

11/12/2013

Client is participating in a charity blanket event this weekend for motorcycle club as a way to deal with grief and loss in a healthy manner. Client sees the value in giving back to the motorcycle community. Some mutual friends of she and Randy may be at the event and she will share stories and memories of Randy with them in order to process her emotions.

11/19/2013

Client wants to keep the same holiday traditions that she and her husband shared. She will spend time with mutual friends in Seattle. Client discusses her relationships with her husband's family members and feels the loss of Randy's father "Bud" and expresses regret that she did not reach out to "Susie" when "Bud" passed away. Randy was very close with his sister "Susie".

11/26/2013

Client's car battery died on today's date. Normally she would call her husband Randy to assist her with car troubles but she had to come up with a solution on her own. Client is reminded of her loss and all the ways she depended upon her husband. Client is trying to learn how to be on her own and is working on having a sense of accomplishment with little day to day tasks in order to get through each day.

12/3/2013

Client will spend time with friends and family over the holiday season so that she is not alone during this difficult time.

12/10/2013

Client spent the weekend going through items in the house that belonged to her husband Randy and trying to decide which items to keep and which items she might donate to the motorcycle club or possibly some of Randy's friends or family members.

1/07/2014

Client mentions the idea of making a blanket out of Harley Davidson t-shirts and some of Randy's t-shirts as a memorial to him. Client is trying to keep herself busy with work as a way to cope with her sadness. She is aware how important it is to keep in social contact with family and friends so that she does not have too much time alone at home.

APPENDIX 6

Mullin, Cronin, Casey & Blair, P.S.

THIRD FLOOR
JOCKEY CLUB BUILDING
N. 115 WASHINGTON
SPOKANE, WASHINGTON 99201
(509) 455-7999

RONALD K. MULLIN (RETIRED)
TIMOTHY P. CRONIN
STEVEN M. CRONIN*
C. MARK CASEY
JACKE L. BLAIR
DANIEL S. CRONIN

FAX(509) 455-8327

* ADMITTED IN WASHINGTON
AND IDAHO

May 7, 2015

Douglas W. Nicholson
LATHROP, WINBAUER, HARRELL,
SLOTHOWER & DENISON LLP
PO Box 1088
Ellensburg WA 98926

RECEIVED

MAY 11 2015

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON L.L.P.

Re: Haynes v. State Farm
Claim No. 47-12G0-982

Dear Doug:

I am writing in response to your letter of April 30, 2015. I assume that you found, as I did, that there is more than one decision in the *Coleman v. Am. Commerce Ins.* case found on Westlaw. The decision I referenced in my prior letter was the one issued September 14, 2010, a copy of which is enclosed. I am also enclosing a copy of the Ninth Circuit Court of Appeals decision submitted December 9, 2011 which states in the second to last paragraph that the insured's alleged injuries for negligent infliction of emotional distress were not foreseeable as a matter of law and that the trial court properly granted summary judgment in favor of American Commerce in its September 14, 2010 order. In this regard the *Coleman* NIED decisions follow the rationale in *Colbert v. Moomba*, 163 Wn.2d 43 (2007), relied upon by State Farm, that a cause of action for NIED is limited to those who suffer emotional trauma from the shock caused by personally experiencing the immediate aftermath of an especially horrendous event rather than the emotional distress one experiences at the scene after already learning of the accident before coming to the scene. *Id.* at 60.

It is State Farm's position that Ms. Haynes is not legally entitled to recover compensatory damages for negligent infliction of emotional distress from the owner or driver of the underinsured motor vehicle and therefore denies her claim for payment of the \$50,000 liability limits. Further, based upon the information to

Douglas W. Nicholson

May 7, 2015

Page 2

date, even if it is subsequently established that Ms. Haynes is legally entitled to recover on her UIM claim for NEID compensatory damages, there is no agreement as to the amount of damages she is legally entitled to recover.

Very truly yours,

MULLIN, CRONIN, CASEY & BLAIR, P.S.



Steven M. Cronin

SMC:cht

cc w/enclosures: Dan Jacquot

APPENDIX 7

SUPPLEMENTAL ANALYSIS OF *COLBERT'S* DISCUSSION
REGARDING A PLAINTIFF ARRIVING AT THE ACCIDENT
SCENE "UNWITTINGLY"

Although the *Colbert* Court's statements regarding whether a plaintiff arrives at the scene "unwittingly" were not necessary to the Court's holding in that case, and are thus non-binding dicta, for the reasons discussed in Appellant's Opening Brief on appeal, they are being further addressed here in the event this Court concludes that these statements are not dicta, or that they are otherwise relevant to the disposition of this case.

The analysis here must begin by raising and answering the following question: What did the *Colbert* Court mean when it stated "[t]hat a bystander plaintiff must arrive on the scene unwittingly"?

Apart from stating that arriving "unwittingly is a factor to consider in the proximate cause analysis, the Court's discussion fails to provide a definitive answer to the question presented. Following a Pennsylvania state court decision, the *Colbert* Court explained that "where the close relative is not present at the scene of the accident, but instead learns of the accident from a third party, the close relative's prior *knowledge of the injury to the victim serves as a buffer* against the full impact of observing the accident scene." *Colbert*, 163 Wn.2d at 59-60 (emphasis and underscoring added) (citing *Mazzagatti v. Everingham*, 512 Pa. 266, 279-80, 516 A.2d 672 (1986)). The *Colbert* Court went on to explain:

By contrast, the relative who contemporaneously observes the tortious conduct has no time span in which to brace his or her emotional system. . . . [T]he critical element for

establishing such liability is the contemporaneous observance of the injury to the close relative. Where, as here, the plaintiff has no contemporaneous sensory perception of the injury, the emotional distress results more from the particular emotional makeup of the plaintiff rather than from the nature of defendant's actions.

Id. (citing *Mazzagatti*, 512 Pa. at 279-80).

The above-quoted passages from *Colbert* leave unanswered at least three critical questions. First: Does arriving at the scene "unwittingly" mean that the plaintiff must have prior knowledge of both the accident itself and the injuries to the victim, or will prior knowledge of the accident alone suffice? Second: Does any prior knowledge of the accident or injury, regardless of how short that prior knowledge might be, operate as a complete bar to a claim for NIED? Third: Or, can a family member with prior knowledge of the accident, who arrives at the scene shortly thereafter, and before there has been a substantial change in either the victim's condition or location, and who suffers objective symptomology of emotional distress from what he or she observes at the accident scene, maintain a cause of action for NIED?

Although these questions are left unanswered, the *Colbert* Court's discussion of the rationale underlying the "unwittingly" arrival at the scene factor strongly suggests that prior knowledge of the accident, standing alone, will not automatically bar a claim for NIED. Indeed, the above-quoted language from *Colbert* should lead to the conclusion that the outcome must turn on two related factors: (1) the length of time that elapsed between when a family member first learns of the accident and

when he or she arrives at the scene; and (2) whether the family member in fact suffered objective symptomology of emotional distress from what he or she observed at the accident scene, as opposed to the type of emotional distress any family member would normally be expected to suffer upon learning of the death or injury of a loved one without having actually observed the horrific aftermath of the accident. *Colbert*, 163 Wn.2d at 59-60; *see also*, *Hegel*, 136 Wn.2d at 130-31. In other words, as stated in *Colbert*, does "the close relative's prior knowledge . . . serve[] as a buffer against ***the full impact*** of observing the accident scene"? *Colbert* at 59-60 (emphasis added).

In summary, to internally harmonize the *Colbert* decision, and to reconcile it with *Hegel*, and assuming the language - arrive at the scene "unwittingly" - in *Colbert* is not mere dicta, the issue of whether prior knowledge of an accident operates to bar a claim for NIED should turn on the specific facts of each case, and not on any rigid, bright-line temporal rule. *See, e.g.*, *Colbert*, 163 Wn.2d at 54; *Hegel*, 136 Wn.2d at 130-31.

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1 her emotions get worse, so no, I'm not going to be,
 2 like, it's on the freeway, so he's probably not --
 3 like, I'm "It will be okay. It will be okay."
 4 Q. So what was she saying to you responding it's going to
 5 be okay?
 6 A. I don't know what we were talking about. I can only
 7 imagine, like, what I would say on the way there, like
 8 everything will be okay. But I don't recall. This is
 9 10 minutes four years ago. It's a panicked thing. I
 10 don't know exactly what we each said.
 11 Q. And Shaila was panicked as were you?
 12 A. Yeah.
 13 Q. When you pulled up, driving your pickup truck to the
 14 accident scene, were there any vehicles parked in that
 15 area?
 16 A. I believe -- I believe there was someone on the right
 17 side that pulled over. But as far as on the left
 18 side, I believe it was just the ambulance, the two
 19 motorcycles, and me. But I think the stater actually
 20 parked right there. I can't remember. But I know it
 21 was the ambulance and then the bikes and me. But I
 22 don't know if the State Patrolman parked behind the
 23 ambulance or in front of the motorcycles. I think
 24 that was it on the left side.
 25 Q. And were the ambulance attendants attending to Randy

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1 when you got there?
 2 A. I believe so.
 3 Q. Did you know any of the State Patrol persons who were
 4 at the scene?
 5 A. Yes.
 6 Q. How did you know them?
 7 A. From the restaurant where I work.
 8 Q. Do State Patrolmen go in there to eat?
 9 A. Uh-huh.
 10 Q. Did you identify any of those State Patrolmen who were
 11 at the scene as being restaurant customers?
 12 A. Yeah. The one that came up to me -- I don't know the
 13 name, but he came up to me and asked what had
 14 happened. Because I had a bandana on, he assumed I
 15 was on a bike. And I recognized him from the
 16 restaurant.
 17 Q. Did he recognize you, to your knowledge?
 18 A. I think so, but I -- I mean, I don't think he knew my
 19 name, but I think he just knew me from the restaurant.
 20 Q. Did you yourself get any information as to how the
 21 accident occurred while you were at the scene?
 22 A. No.
 23 Q. Did you speak to Jennifer while you were at the scene?
 24 A. Yes.
 25 Q. And Kathleen was also there?

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1 A. Yes.
 2 Q. Those were the two motorcyclists with Randy when the
 3 accident occurred?
 4 A. Yes.
 5 Q. Did either of those two convey to you how Randy's
 6 accident occurred?
 7 A. No. The first I heard of that was from the State
 8 Patrolman on the phone once we were over there.
 9 Q. And when you and Shaila were driving from the scene of
 10 the accident to Seattle to the hospital, did you learn
 11 whether or not Shaila had learned how the accident
 12 happened?
 13 A. No. I imagine she would have told me if she knew
 14 anything else.
 15 Q. Yeah.
 16 A. So I don't think she knew anything of how it went
 17 down.
 18 We -- personally, I thought he had just lost
 19 control in the median. I didn't know anything else.
 20 I had no reason to think anything else.
 21 Q. At some point, did you speak to Jennifer as to how the
 22 accident occurred?
 23 A. I don't believe I spoke to Jennifer after we left that
 24 day. I don't think I spoke to her later that day. I
 25 don't recall.

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1 Q. I'm just wondering if, after you left the scene up
 2 until the present time, has Jennifer ever told you
 3 what she saw in regards to how the accident happened?
 4 A. Yeah. We have had discussions. Just I thought you
 5 are pertaining to that day.
 6 Q. I was at first.
 7 A. Okay.
 8 Q. Okay. And the answer you said was no?
 9 A. No.
 10 Q. But since then, when you've seen her socially --
 11 A. Yes.
 12 Q. -- or for whatever occasion, she's discussed it with
 13 you?
 14 A. Yes.
 15 Q. And what did she tell you as to how it occurred?
 16 A. Honestly, I -- I feel like the details get smeared
 17 around because I don't -- like, we've discussed it,
 18 I've discussed it with Kathleen and Jennifer and the
 19 State Patrol, and so it's all roughly the same but,
 20 like, little details change, and so I don't exactly
 21 know exactly what Jennifer's recollection of it was.
 22 Q. Did you have that type of conversation with Kathleen
 23 as to how the accident happened?
 24 A. I believe so.
 25 Q. Did you know Kathleen before the day of the accident?



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1 A. Yes.
 2 Q. Did you know Jennifer before the day of the accident?
 3 A. Yes.
 4 Q. Were they members of the Maple Valley riders?
 5 A. Yeah. We were all kind of in the same friends, like,
 6 we all were mutual friends, but they were new riders.
 7 Q. Was Randy wearing his motorcycle helmet when you
 8 arrived at the scene?
 9 A. I don't believe so.
 10 Q. And could you tell that his clothing on the upper half
 11 of his body had been cut off before you got there?
 12 A. I believe so. I know it was off when we were there,
 13 but I -- I don't remember if they did it when we were
 14 coming up to him or if it was already off when we got
 15 there.
 16 MR. CRONIN: Thank you. That's all the questions
 17 I have.
 18 THE WITNESS: Okay. Thank you.
 19
 20 FURTHER EXAMINATION
 21 BY MR. NICHOLSON:
 22 Q. On the day of the accident, before you arrived at the
 23 scene, had anybody informed you how fast Randy was
 24 going at the time of the accident?
 25 A. Not that I recall.

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1 Q. If I understood your testimony to Mr. Cronin, you had
 2 no knowledge of the facts surrounding the accident
 3 before you got to the scene?
 4 A. No.
 5 Q. Is that correct?
 6 A. No.
 7 Q. Let rephrase it.
 8 A. Okay.
 9 Q. It's my understanding that from what I just heard you
 10 testify that you had no idea of how the accident
 11 occurred, including how fast Randy was going at the
 12 time of the accident, before you arrived at the scene;
 13 is that fair?
 14 A. Yes. That's correct. I did not have any knowledge.
 15 Q. Is it also fair to say that you had no idea what to
 16 expect when you got to the scene?
 17 A. Yes.
 18 Q. And correct me if I'm misstating your testimony, but I
 19 thought when I was asking questions about when you and
 20 Shaila saw Randy after arriving at the scene that --
 21 did you describe it as being in shock when you saw
 22 him?
 23 A. Yes.
 24 Q. Was your observation, as you saw Shaila, immediately
 25 after she saw Randy lying in the median after the

Page 36

1 accident, she was in a state of shock?
 2 A. Yes.
 3 Q. Was she in a state of shock before she got to the
 4 accident?
 5 A. Most likely. I mean, she was very upset, but we just
 6 didn't know.
 7 Q. Well, there's a difference between -- do you think
 8 there's a difference between upset and being in a
 9 state of shock?
 10 A. Yes. I mean, I don't know. She was upset the whole
 11 time. And I think when we saw it -- I don't -- I had
 12 all these emotions going on too, so I don't -- I mean,
 13 she was upset the whole time, but I can't --
 14 Q. Did your emotions become more of a state of shock --
 15 A. Yes.
 16 Q. -- or more --
 17 A. When I saw him.
 18 Q. -- heightened in terms of panic or shock once you saw
 19 Randy as opposed to when you were driving?
 20 A. Yes. I think it was way more panicked once I saw him.
 21 Q. Do you believe the same was true with Shaila based
 22 upon your observations of her?
 23 A. Yes.
 24 Q. She was worse off mentally once she saw Randy than on
 25 the way to the accident?

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1 A. Yes.
 2 MR. NICHOLSON: Okay. No other questions.
 3
 4 FURTHER EXAMINATION
 5 BY MR. CRONIN:
 6 Q. While Shaila was at the scene, was she near Randy?
 7 A. Yes.
 8 Q. And was she speaking to Randy?
 9 A. Yes.
 10 Q. And could you hear her --
 11 A. Yes.
 12 Q. -- speak to Randy?
 13 A. Yes, but I don't even know what she said.
 14 Q. Did you observe her attempting to see if she could get
 15 Randy to respond to her?
 16 A. Yes. That's what she was doing, and holding his hand.
 17 Q. And did you hear Randy say anything in response to her
 18 words to him?
 19 A. No.
 20 Q. And how long was she alongside Randy, attempting to
 21 get him to communicate?
 22 A. Probably just a few minutes.
 23 Q. And then he was removed from the scene?
 24 A. We were kicked away from him.
 25 Q. And when you were moved away from him, but while Randy



APPENDIX 2

Page 1	Page 3
<p style="text-align: center;">EXAMINATION UNDER OATH</p> <hr/> <p>SHAILA HAYNES,) Insured,) vs.) STATE FARM MUTUAL AUTOMOBILE) INSURANCE COMPANY,) Insurer.)</p> <hr/> <p style="text-align: center;">EXAMINATION UNDER OATH OF</p> <p style="text-align: center;">SHAILA HAYNES</p> <hr/> <p>TAKEN ON: Monday, April 13, 2015</p> <p>TAKEN AT: Lathrop, Winbauer, Harrel, Slothower, Denison 201 W 7th Avenue Ellensburg, Washington</p> <p>REPORTED BY: NOREEN MATTIMOE, RPR, CCR CCR NO. 1926</p>	<p style="text-align: center;">INDEX</p> <p>IN RE: HAYNES and STATE FARM EXAMINATION UNDER OATH APRIL 13, 2015</p> <p style="text-align: center;">TESTIMONY</p> <p>SHAILA HAYNES PAGE NUMBER</p> <p>Examination by Mr. Cronin 4</p> <p style="text-align: center;">EXHIBITS</p> <p style="text-align: center;">NONE</p>
Page 2	Page 4
<p>1 APPEARANCES</p> <p>2</p> <p>3 FOR THE INSURED:</p> <p>4</p> <p>5 DOUGLAS W. NICHOLSON</p> <p>6 LATHROP WINBAUER HARREL SLOTHOWER & DENISON</p> <p>7 Attorneys at Law</p> <p>8 201 W 7th Avenue</p> <p>9 Ellensburg, Washington 98926</p> <p>10 509.962.6916</p> <p>11 dnicholson@lwhsd.com</p> <p>12</p> <p>13 FOR THE INSURER:</p> <p>14 STEVE CRONIN</p> <p>15 MULLIN, CRONIN, CASEY & BAIR, P.S.</p> <p>16 Attorneys at Law</p> <p>17 N 115 Washington</p> <p>18 Spokane, Washington 99201</p> <p>19 509.455.7999</p> <p>20 stevecronin@mcclaw.com</p> <p>21</p> <p>22 ALSO PRESENT:</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 BE IT REMEMBERED that on Monday, April 13,</p> <p>2 2015, at 11:00 a.m., at Lathrop, Winbauer, Harrel,</p> <p>3 Slothower, Denison, 201 W 7th Avenue, Ellensburg,</p> <p>4 Washington, the testimony of SHAILA HAYNES was taken</p> <p>5 before Noreen Mattimoe, Registered Professional</p> <p>6 Reporter and Notary Public. The following proceedings</p> <p>7 took place:</p> <p>8</p> <p>9 SHAILA HAYNES, being first duly sworn to</p> <p>10 tell the truth, the whole</p> <p>11 truth and nothing but the</p> <p>12 truth, testified as</p> <p>13 follows:</p> <p>14</p> <p>15 MR. NICHOLSON: Steve, let me just start.</p> <p>16 It's really important, to keep the record, that</p> <p>17 you speak as audibly as you can so the court reporter</p> <p>18 can hear you. Kind of give affirmative answers rather</p> <p>19 than nodding your head or shaking your head or saying</p> <p>20 "uh-huh" or "huh-uh."</p> <p>21 THE WITNESS: Okay. Yes.</p> <p>22 MR. NICHOLSON: Because it's being written</p> <p>23 and we want a clear record.</p> <p>24 THE WITNESS: Okay.</p> <p>25</p>

Page 5

EXAMINATION

1

2

3 BY MR. CRONIN:

4 Q. Good morning, ma'am. My name is Steve Cronin. I

5 represent State Farm Mutual Automobile Insurance

6 Company on a claim you've made for negligent infliction

7 of emotional distress arising out of the unfortunate

8 death of your husband, Randall Haynes.

9 A. Yes.

10 Q. First of all, let me convey my condolences to you,

11 myself, and on behalf of State Farm.

12 A. Thank you.

13 Q. I need to ask you some questions in regards to your

14 claim of negligent infliction of emotional distress.

15 I'm not trying to cause any pain, you know,

16 emotionally, or in any way, I'm just trying to ask some

17 questions pertinent to that claim.

18 If, at any time, you want to take a break,

19 please let me know and we will do so.

20 A. Okay.

21 Q. I don't expect to be too long, but we'll just try and

22 get through it the best we can.

23 If you don't understand a question I'm asking,

24 please let me know and I'll try and rephrase it. Is

25 that understood?

Page 6

1 A. Yes.

2 Q. This is an examination under oath. The court reporter

3 has sworn you under oath. Even though we're in your

4 attorney's law office, his conference room, it's akin

5 to testifying under oath in a courtroom. Do you

6 understand that?

7 A. Yes.

8 Q. In other words, subject to the penalty of perjury.

9 A. Yes.

10 Q. All right. Let me have you, please, state your full

11 name for the record.

12 A. Shaila Haynes.

13 Q. What is your address?

14 A. 15768 118th Avenue SE, Renton, Washington, 98058.

15 Q. How long have you lived there?

16 A. 25 years.

17 Q. What is your date of birth?

18 A. 8-21-63.

19 Q. Are you presently employed?

20 A. Yes.

21 Q. Where?

22 A. Pacific Alaska Freightways.

23 Q. How long have you been employed there?

24 A. 16 years.

25 Q. What is your present title?

Page 7

1 A. Logistics supervisor.

2 Q. How many days per week do you normally work?

3 A. Five.

4 Q. What days of the week is that?

5 A. Monday through Friday.

6 Q. What are your hours?

7 A. 7:30 to 5:00.

8 Q. I understand you were married to Randall Haynes; is

9 that correct?

10 A. Correct.

11 Q. Have you ever been married to anyone else?

12 A. No.

13 Q. When were you and Mr. Haynes married?

14 A. November 4th of 19 -- I may get this wrong -- 87. I

15 may be wrong on the year.

16 Q. Do you have any children?

17 A. No.

18 Q. At the time of the accident, was Mr. Haynes employed?

19 A. Yes.

20 Q. Where?

21 A. Surface Art.

22 Q. What is that?

23 A. It's a tile company.

24 Q. What was his position?

25 A. Warehouse manager.

Page 8

1 Q. How long had he worked there?

2 A. A little over a year.

3 Q. At any time during your marriage to Randall Haynes,

4 were you separated from him?

5 A. No.

6 Q. At any time during your marriage to Mr. Haynes, did you

7 have any marriage counseling?

8 A. No.

9 Q. Prior to the accident, had you had any counseling --

10 psychological or psychiatric or social worker

11 counseling -- at all?

12 A. No.

13 Q. How was Mr. Haynes' general health immediately before

14 this accident?

15 A. He was in good health.

16 Q. How was your health immediately before in the months

17 leading up to it?

18 A. I was diagnosed with bilateral breast cancer.

19 Q. When?

20 A. In May.

21 Q. Of the same year of the accident?

22 A. Yes.

23 Q. So the accident occurred on September 10, 2012; is that

24 correct?

25 A. Correct.

1 Q. Okay. Do you still plan to continue to drive
 2 motorcycles?
 3 A. As I'm comfortable with it.
 4 Q. Are there scenarios that you are not comfortable with
 5 it?
 6 A. Yes.
 7 Q. What are the scenarios?
 8 A. Major highways, travel in groups, in high traffic
 9 areas.
 10 Q. When you go on these trips with your friends, do you
 11 start out driving your motorcycle from your home?
 12 A. Yes.
 13 Q. Do you have to go, for instance, on any arterials near
 14 your home to get to these roads you refer to?
 15 A. No.
 16 Q. Is your home located in a more populated versus rural
 17 area of Renton?
 18 A. It's a rural area.
 19 Q. So tell me what you did when you arrived in Ellensburg
 20 from Electric City, other than unloading the equipment
 21 from the motor home to the Pathfinder.
 22 A. Sat in my friend Nicole's house and watched TV.
 23 Q. What approximate time was it when you were doing that?
 24 A. Approximately 3:30ish.
 25 Q. How long does it take to get from Nicole's home in

1 A. She was standing in the kitchen, right next to me.
 2 Q. What happened after you said, "What happened?"
 3 A. Nicole said, "We have to go."
 4 Q. Nicole said that to you?
 5 A. She said that to me. "We have to go right now."
 6 Q. Did she say why you had to go?
 7 A. She said, "There's been an accident. Randy went down
 8 on his motorcycle."
 9 Q. Other than the information that Randy went down on his
 10 motorcycle, was there any information as to the status
 11 of Randy?
 12 A. No.
 13 Q. Did Jennifer state where the location of the accident
 14 was?
 15 A. She said near Indian John hill.
 16 Q. Did Jennifer give any specifics of the accident during
 17 that telephone conversation?
 18 A. I don't know. I wasn't on the line with her, so I
 19 don't know.
 20 Q. You mentioned earlier that you were able to overhear,
 21 however, Nicole say, "Oh my God," or something to that
 22 effect.
 23 Did you overhear Nicole say anything else on
 24 the telephone?
 25 A. Just, "Oh my God, Randy's gone down. He's been in an

1 Ellensburg to your home in Renton?
 2 A. About an hour and 45.
 3 Q. Was anyone with you and Nicole at that point?
 4 A. No.
 5 Q. So at some point did you learn of the accident?
 6 A. Yes.
 7 Q. What time, approximately, was it when you learned of
 8 the accident?
 9 A. Approximately 4:15.
 10 Q. How did you learn of the accident?
 11 A. Nicole received a phone call displayed as "Jennifer
 12 Fordham" on her phone.
 13 Q. Was it Jennifer on the line?
 14 A. Yes.
 15 Q. Were you present when Nicole took the phone call?
 16 A. Yes....
 17 Q. Describe for me what was said, to your knowledge, and
 18 what was going on at the point Nicole received the
 19 phone call from Jennifer.
 20 A. I was overhearing her -- Nicole -- say, "Oh my God. Oh
 21 my God."
 22 And I yelled out, "What happened?"
 23 And she said, "There's been an accident."
 24 Q. Was Nicole's phone on speaker or was it just something
 25 you could overhear?

1 accident."
 2 Q. So did you then leave with Nicole from her home?
 3 A. Immediately.
 4 Q. In whose vehicle?
 5 A. In Nicole's truck.
 6 Q. Who was driving?
 7 A. Nicole was driving.
 8 Q. How long does it take -- or did it take on that
 9 particular date -- to get from Nicole's home to
 10 Interstate 90?
 11 A. Two minutes. She's right off the freeway.
 12 Q. When she reached the freeway, did she begin driving
 13 westbound on Interstate 90?
 14 A. Yes.
 15 Q. How long did it take to arrive at the scene?
 16 A. Maybe 10, 15 minutes, it seemed like.
 17 Q. Just tell me what happened from the point that you, in
 18 Nicole's vehicle, reached the scene.
 19 A. We were going as fast as we could to the scene, not
 20 knowing exactly where it was. I don't even know how
 21 fast we were going. I know we were passing cars.
 22 We looked behind us and there was a state
 23 patrol with his lights on, and we thought we were being
 24 pulled over, and so we got over into the -- she pulled
 25 over into the right-hand lane, and realized that the

Page 29

1 state patrol was going past us. So we figured that he
 2 was probably going to the scene, so we ended up
 3 following him.
 4 Q. Was that the case?
 5 A. Yes, it was.
 6 Q. Where did Nicole park her vehicle when you got to the
 7 scene?
 8 A. On the left side of the freeway, in front of the
 9 ambulance that was already there.
 10 Q. Okay. And when you say the left side of the freeway,
 11 did she go into the median or just on to the inside
 12 shoulder?
 13 A. Inside shoulder.
 14 Q. Were there any other police officials or medical
 15 personnel at the scene when you arrived, other than the
 16 ambulance?
 17 A. There was the ambulance and one other state patrol at
 18 the scene.
 19 Q. Where was the state patrol vehicle that was already
 20 there located?
 21 A. Parked behind the ambulance.
 22 Q. Was that on that inside left shoulder?
 23 A. Yes.
 24 Q. Were there ambulance attendants at the scene?
 25 A. Yes, they were attending to Randy.

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1 Q. Where was Randy located when you arrived?
 2 A. He was laying on the side of the median on the
 3 stretcher.
 4 Q. Was that the stretcher that was used to put him into
 5 the ambulance?
 6 A. It was the backboard that they had put him on.
 7 Q. Where was his motorcycle in relation to where he was on
 8 the backboard?
 9 A. The motorcycle was here (gesturing), crumbled up in
 10 pieces and in parts, strewn all over, and he was
 11 further on down from the motorcycle.
 12 Q. And what you just described was in the median between
 13 the westbound and eastbound lanes?
 14 A. Yes. It's gravel all through there.
 15 Q. So when you arrived, Nicole parks behind the state
 16 patrolman, who was parked behind the ambulance; is that
 17 correct?
 18 A. No. She was in front of the ambulance.
 19 Q. All right. What did you do when she parked her
 20 vehicle?
 21 A. I immediately got out of the car and ran to Randy.
 22 Q. Then what?
 23 A. Knelt down beside him and tried to talk to him and hold
 24 his hand. I tried to get him to respond.
 25 Q. Did he respond?

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1 A. No.
 2 Q. Were the ambulance attendants doing anything,
 3 medically, as assistance?
 4 A. They were trying to get air into him.
 5 Q. Did they have --
 6 A. He had a neck brace on and he was strapped to the
 7 backboard. His head was strapped to the backboard.
 8 Q. So you attempted to get him to respond, "him" being
 9 Randy. He did not respond.
 10 What happened next?
 11 A. I just sat there, and my friend, Nicole, asked the
 12 medics where they were taking him. She said, "Are you
 13 taking him to Yakima?"
 14 They said, "No, we're taking him to
 15 Harborview." He said, "You need to get in your car and
 16 go right now."
 17 Q. When you were kneeling down, attempting to get Randy to
 18 respond, did any other medical personnel, other than
 19 those ambulance attendants, arrive?
 20 A. No. Not that I'm aware of, anyway. My focus was on
 21 him.
 22 Q. Did you notice any injuries to Randy?
 23 A. His head. He had head injuries and he had blood.
 24 Q. Was he wearing a helmet?
 25 A. Yes.

Page 32

1 Q. Was he still wearing the helmet when you arrived?
 2 A. No. No, there was no helmet. A boot was missing, his
 3 gloves were off, his heavy leather gloves. His jeans
 4 were ripped, and they had cut off his leather jacket
 5 and cut through all of his clothing to get to his
 6 chest.
 7 Q. How long after you arrived to where Randy was did he
 8 stay in the location where you first saw him?
 9 A. Approximately ten minutes.
 10 Q. To your observation, did his condition change in any
 11 way?
 12 A. I am not aware because I was rushed -- I was pushed
 13 away so that they could get him in the ambulance
 14 because it was time critical. They needed to get him
 15 out of there.
 16 Q. How long was it that you were actually, as you say,
 17 kneeling down next to him before he was moved?
 18 A. Five, six, seven minutes or something.
 19 Q. Was anyone else, other than the ambulance attendants,
 20 near by you during that time?
 21 A. The emergency people were attending to Randy.
 22 Q. The ambulance attendants?
 23 A. Yes.
 24 Q. Any other persons around, immediately, while you were
 25 kneeling next to Randy?

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1 A. Nicole was there, and Jennifer and Kathleen were all
 2 there at the scene.
 3 Q. Do I understand it correctly, during that five to
 4 six minutes you remained knelt down next to Randy
 5 before he was moved?
 6 A. Yes.
 7 And I asked if I could go in the ambulance, and
 8 they told me I could if I wanted to, but it was just a
 9 short ride down to the airstrip where the helicopter
 10 was going to land. They thought it best that we just
 11 get on the road.
 12 Q. Did you ask whether or not you could ride in the
 13 helicopter?
 14 A. I did. They said no.
 15 Q. Did you do what they suggested; in other words, start
 16 driving to the hospital?
 17 A. Yes.
 18 Q. Did you leave the scene before Randy was moved from
 19 that spot in the median where you had been kneeling
 20 next to him?
 21 A. No.
 22 Q. So you're kneeling next to him for approximately five
 23 to six minutes; is that correct?
 24 A. Uh-huh.
 25 Q. During that time, were you attempting to get him to

Page 34

1 speak or respond?
 2 A. I was calling his name, yes.
 3 Q. At any point did you get any response?
 4 A. No.
 5 Q. To your knowledge, he was alive at that point?
 6 A. I don't know.
 7 Q. Okay. Did the medical attendants say anything as to
 8 whether or not he was at that point?
 9 A. To myself? No.
 10 Q. Were you aware, from any source, as to whether or not
 11 he was alive while you were there at the scene?
 12 A. Nobody said anything to me, no.
 13 Q. Could you see whether or not his chest was breathing?
 14 There were indications that he was breathing through
 15 movement of his chest, or any other body responses?
 16 A. Because I know my husband so well, and I've been with
 17 him so many years and we just know each other, I just
 18 had a gut feeling that he wasn't alive.
 19 Q. But no one -- well, let me ask it this way: Did the
 20 ambulance attendants provide you with any reports as to
 21 his status while you were at the scene?
 22 A. No.
 23 Q. Did you let them know that you were his wife?
 24 A. They knew, yes.
 25 Q. Did you speak with any of the state patrolmen at the

Page 35

1 scene?
 2 A. I was standing there when Nicole was speaking to them.
 3 Q. Okay.
 4 A. Asking where they were taking him.
 5 Q. To your knowledge, were you identified to the state
 6 patrolmen by anyone that you were Randy's wife?
 7 A. Yes.
 8 Q. Who advised them of that?
 9 A. Nicole and Jennifer and Kathleen; all of them.
 10 Q. At any point, did the state patrolmen speak with you at
 11 the scene? While you were still at the scene?
 12 A. I don't -- I'm not positive.
 13 Q. Okay.
 14 A. I think the conversation was with Nicole because I was
 15 too distraught.
 16 Q. Did you speak to either Jennifer or Nicole while at the
 17 scene?
 18 A. Nicole, yes.
 19 Q. Excuse me. I meant to say Jennifer or Kathleen.
 20 A. No.
 21 Q. Did you get any information from anyone, while you were
 22 at the scene, as to how the accident occurred?
 23 A. It wasn't until we got in the car that I kind of got
 24 information from Nicole.
 25 Q. What information did you get?

Page 36

1 A. That they were being road-raged, I guess, if you will,
 2 by two vans. That there was a white -- a white
 3 cargo -- or excuse me, a passenger-type van that was
 4 traveling in traffic with them, trying to cut in front
 5 of them and, you know, trying to pass them at some
 6 point. And then there was a secondary van, which was a
 7 small Euro-type minivan, that were -- they were trying
 8 to -- trying to get in front of them to pass them in
 9 traffic.
 10 They were -- I think -- were traveling right
 11 before the accident in the left lane, and this van at
 12 some point had cut in front of Randy and he had to veer
 13 off into the median to avoid them hitting him.
 14 Q. Did you ever speak to Jennifer or Kathleen directly in
 15 regards to any further facts of the accident?
 16 A. Afterwards, yes.
 17 Q. Did they tell you anything differently than what you've
 18 just reported to me?
 19 A. No.
 20 Q. Were they injured in any way?
 21 A. No. Our main focus was to get to Harborview.
 22 Q. Did you get any sense, when Nicole received the phone
 23 call while the two of you were still at her home, as to
 24 Randy's condition?
 25 A. Other than my own personal feeling that I knew it was

Page 37

1 bad?

2 Q. Why did you feel it was bad?

3 A. Because my husband is an excellent rider.

4 Q. And you had mentioned earlier that when Jennifer called

5 you could hear her say, "Oh my God, there's been an

6 accident."

7 A. Nicole saying, "Oh my God, there's been an accident."

8 Q. Oh, okay. Did you have the impression as to the

9 severity of the accident at that point?

10 A. At that point, yes.

11 Q. How did you get the impression?

12 A. Because my husband was an excellent motorcycle rider.

13 Q. Okay.

14 A. And just the sheer fact that he crashed.

15 Q. Did Nicole relay any information to you as to the

16 severity of the crash?

17 A. We didn't know until we got to the crash how -- even

18 the severity of it at that time, other than the state

19 patrol telling us we needed to get to Harborview.

20 Q. And based upon this impression, you had -- for the

21 reasons you stated -- were you, as you drove from the

22 point you left Nicole's to the point you got to the

23 scene of the accident, expecting something bad?

24 A. I honestly didn't know. And I was so -- I was trying

25 to get ahold of family. I had left my phone, I left my

Page 38

1 purse -- everything at Nicole's house when we left, so

2 I didn't have my phone to call any family members to

3 let anybody know what had happened.

4 So I was -- I didn't know anything. I didn't

5 know anything, even if we did get ahold of them, to say

6 what had happened. I didn't know --

7 Q. Did you --

8 A. -- the severity of it.

9 Q. Did Nicole have a telephone with her from the drive

10 from her home to the scene?

11 A. Yes, she had her cell phone.

12 Q. Did you use her cell phone to attempt to get ahold of

13 relatives?

14 A. She was attempting.

15 Q. Okay. While she was driving?

16 A. Yes.

17 Q. Okay. Did she have any success in getting ahold of

18 anyone?

19 A. Yes.

20 Q. Who?

21 A. Randy's mother, Marylin, M-A-R-Y-L-I-N, Shay, S-H-A-Y.

22 Q. What was relayed to Marylin?

23 A. That Randy's been in an accident and they needed to get

24 to Harborview now.

25 Q. Where was Nicole when she got ahold of Marylin?

Page 39

1 A. We were on I-90, heading westbound

2 Q. Before you got to the scene?

3 A. No. Afterwards.

4 Q. Oh. Afterwards? Okay. After you're leaving the

5 scene?

6 A. Yes.

7 Q. Were there any attempts to call anyone from the point

8 Nicole received the telephone call at her home until

9 the point you got to the scene?

10 A. No.

11 Q. Was Randy making any sounds while you were with him at

12 the scene?

13 A. No.

14 Q. Were there any movements of any type by him?

15 A. After they were trying to get the air in, they took

16 that off and there was some blood or saliva coming out

17 of his mouth, and I don't know if he was, like, maybe

18 gurgling or -- I don't think he was trying to talk, but

19 then it just -- they just needed to get him out of

20 there, and they basically told me I needed to clear the

21 area so they could get him in the ambulance.

22 Q. Did you see him make any movements with any parts of

23 his body?

24 A. No. I've -- no.

25 Q. Did you ask the attendants if he was alive?

Page 40

1 A. No.

2 Q. How long did it take to drive from the scene to

3 Harborview?

4 A. Approximately 45 minutes.

5 Q. Did Nicole drive the whole way?

6 A. Yes.

7 Q. Did you, yourself, speak to anyone, with the use of

8 Nicole's phone, from the scene to the hospital?

9 A. Randy's mother.

10 Q. What was the substance of the conversation?

11 A. She was hysterical and just wanted to know how he was,

12 and I told her I didn't know.

13 Q. What did you do when you arrived at Harborview?

14 A. We immediately parked and went to the emergency

15 entrance.

16 Q. Then what?

17 A. We were met by the emergency room -- I guess the person

18 that checks people in.

19 Q. (Nods head.)

20 A. Who happened to be Randy's cousin.

21 Q. Was an employee there?

22 A. Yes.

23 Q. What's that person's name?

24 A. Jennifer -- I'm sorry. Kathleen. Kathleen Cassels,

25 C-A-S-S-E-L-S.

1 Q. Was she already aware of Randy's accident?
 2 A. She was aware because she had his driver's license to
 3 check him in.
 4 Q. Did she give you any information?
 5 A. No.
 6 Q. Okay. So you see Kathleen, and then what do you do?
 7 A. She takes us to a private room and we sit and wait.
 8 She's sitting there with us, just holding my hand and
 9 hugging me.
 10 Q. Did you see Randy after you arrived at the emergency
 11 room?
 12 A. No, I didn't see Randy since him laying on the side of
 13 the road.
 14 Q. How long were you in this private room?
 15 A. Maybe 20 minutes, a half-hour.
 16 Q. What happened at that point?
 17 A. Family members were showing up and we were all just
 18 praying and waiting.
 19 Q. How long did you wait?
 20 A. For maybe a half an hour before they came in and sat
 21 down in front of me. And she looked so positive when
 22 she sat down in front of me, I thought everything was
 23 okay. Then she told me he didn't make it.
 24 Q. Do you know who that individual was?
 25 A. I don't.

1 A. Ginny, G-I-N-N-Y, Miller, M-I-L-L-E-R.
 2 Q. How did you learn about her?
 3 A. Just went through my network of health providers.
 4 Q. There's a note in the record that your attorney
 5 provided dated November 5, 2013. Is that consistent
 6 with the first appointment you had with her?
 7 A. Yes. Yes.
 8 Q. When was the last time you saw her?
 9 A. I believe it was January.
 10 Q. Let me state for the record, you first saw her
 11 November 5, 2013, and then you just testified you last
 12 saw her in January. January of what year?
 13 A. I believe 2014.
 14 Q. I have a note, January 7, 2014.
 15 To your knowledge, did you receive any
 16 counseling from Ms. Miller after that date?
 17 A. No.
 18 Q. Have you received any counseling from anyone --
 19 professionally -- other than Ms. Miller?
 20 A. No.
 21 I didn't feel she was right for -- I don't
 22 think that she was the right person for me.
 23 Q. Why?
 24 A. Her qualifications, possibly, but then I've never been
 25 to see a counselor either.

1 Q. Were you provided any information as to when, in
 2 relation to the time Randy left the scene till the time
 3 you were advised of his death, that he actually did
 4 pass away?
 5 A. I was told they lost him two times in the helicopter
 6 and once -- well, the final time in the hospital.
 7 Q. Was there a funeral service?
 8 A. There was a celebration of life.
 9 Q. When was that held?
 10 A. The end of September.
 11 Q. Where was it held?
 12 A. At a friend's house.
 13 Q. Did you miss any time from work?
 14 A. Yes.
 15 Q. How much?
 16 A. About four weeks.
 17 Q. Did you seek any type of counseling?
 18 A. Not immediately.
 19 Q. When did you first seek any counseling?
 20 A. Professional counseling was in November, I believe.
 21 Q. Did you have any nonprofessional counseling before
 22 then?
 23 A. Family and friends were with me all the time, 24/7.
 24 Q. When you first saw a professional counselor, who was
 25 it?

1 I just -- I didn't -- I didn't know that it was
 2 helping me, either.
 3 Q. Why did you seek the professional counseling?
 4 A. Because I had been dealing with everything since; going
 5 through all the holidays and birthdays and Christmas
 6 and everything, and trying to keep my job, and I just
 7 mentally broke down and felt I needed to see somebody.
 8 I wasn't able to do this on my own.
 9 Q. Were you having problems getting through the holidays
 10 without Randy?
 11 A. Absolutely, yes.
 12 Q. In other words, it was your loss of him that was making
 13 it difficult?
 14 A. Yes.
 15 Q. Okay. Were you ever prescribed any type of medication
 16 for any of the issues you were having due to Randy's
 17 death?
 18 A. I was prescribed medication for hypertension, high
 19 blood pressure.
 20 Q. Had you ever been prescribed that medication before the
 21 accident?
 22 A. No.
 23 Q. Who prescribed it?
 24 A. Dr. Blau.
 25 Q. How do you spell that?

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1 A. Every-day living without my husband, and having to deal
 2 with everything
 3 Q. When do you take this medication? Is it something you
 4 take before bed?
 5 A. Yeah. Yeah. "Yes." I'm sorry.
 6 Q. Do you take it during the day, at all?
 7 A. I take all of my medications in the evening.
 8 Q. Which are the medications that you take?
 9 A. Vitamins, and my -- I don't have a list of the actual
 10 names, but I'm on a high blood pressure.
 11 Q. Do you have to take any medications in regards to the
 12 cancer?
 13 A. Yes.
 14 Q. Since being prescribed the Wellbutrin, how often do you
 15 take it?
 16 A. Once a day.
 17 Q. In the evening?
 18 A. All my pills I take in the evening, yes.
 19 Q. Do you have any plans to see any other counselor or
 20 mental health professional?
 21 A. Not right now. But as I'm dealing with things that
 22 come up that I have never had to deal with before, such
 23 as finances and managing everything on my own,
 24 possibly.
 25 Q. Let me ask it this way: Do you have any appointments

Page 50

1 scheduled?
 2 A. No.
 3 Q. When you met with the counselor, how long,
 4 approximately, would a session last?
 5 A. An hour.
 6 Q. What was discussed during the sessions?
 7 A. Mentally, how I was feeling and how I was dealing and
 8 coping with things.
 9 Q. Okay.
 10 A. My daily life.
 11 Q. Were those difficulties that you were discussing
 12 related to the loss of Randy?
 13 A. Yes.
 14 Q. Did those discussions involve your cancer situation?
 15 A. No. No. It was because of Randy. My cancer was
 16 nothing.
 17 Q. Okay.
 18 A. That was not any concern. It was how was I going to
 19 deal with this on a regular basis without my husband
 20 being there.
 21 Q. Okay.
 22 A. Having to deal with everything, day in and day out, you
 23 know, from not being there when I get home, him not
 24 there to fix everything of mine, you know, pay the
 25 bills -- just dealing with every-day life.

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1 Q. Without him.
 2 A. Yeah.
 3 Q. Did you ever have any troubles sleeping?
 4 A. Oh, yeah. Yes.
 5 Q. What troubles did you have sleeping?
 6 A. I just -- having to deal with his loss. And the vision
 7 of him laying on the side of the road, me constantly
 8 seeing that in my head.
 9 Q. Did you ever talk to the counselor about that vision?
 10 A. Oh, yes. Yes.
 11 Q. What was the counselor's response?
 12 A. Her? She mainly listened and took notes of things.
 13 Just how things were going to, you know, be
 14 impacted in my life with Randy and I always doing
 15 things together. She wanted to know, you know, what I
 16 thought I could do to try and get beyond that, you
 17 know; being with friends and doing things, doing
 18 charity events, or just focusing on myself, maybe,
 19 doing exercises.
 20 Just how I could, you know, move beyond that.
 21 That's what her conversations were.
 22 Q. And I just want to make sure I'm clear with the -- that
 23 the days of these records are clear.
 24 The first time you saw the counselor, Miss
 25 Miller, was November 5, 2013. That would be a year and

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1 two months after the accident; would that be correct?
 2 A. That's correct.
 3 Q. That was the first counselor you saw?
 4 A. Professionally, yes. Yes.
 5 Q. Okay.
 6 A. Yeah.
 7 Q. You mentioned you were off work for four weeks. Were
 8 those the four weeks immediately after the accident?
 9 A. Yes.
 10 Q. Then when you returned to work, did you work your
 11 regular hours?
 12 A. Yes, until I started treatment.
 13 Q. By "treatment," do you mean for the cancer?
 14 A. For the cancer, yes.
 15 Q. Within the first year, before you saw the counselor,
 16 were you, over time, able to sleep better?
 17 A. I would say no, but I -- at my job I am a supervisor,
 18 so I had to do the best that I could at being there,
 19 performing my responsibilities as a supervisor, but I
 20 wasn't always there. I had emotional times when I just
 21 couldn't do it.
 22 Q. Who do you supervise?
 23 A. (No response.)
 24 Q. Not names, but what types of positions do you
 25 supervise?

1 A. Inside sales.

2 Q. Do you distinguish, in any way, your difficulties in

3 that first year between, you know, what you saw at the

4 accident scene versus dealing with your day-to-day life

5 without Randy?

6 A. Can you repeat the question?

7 Q. Yeah.

8 In the first year following the accident,

9 before you received any treatment, what was your main

10 difficulties; were they dealing with your day-to-day

11 activities without Randy or dealing with what you

12 witnessed at the scene?

13 A. It was everything. Seeing him at the scene, dealing

14 with my depression and anxiety of how am I going to --

15 now I'm the sole bread winner of the family and I

16 didn't know how I was going to do it because he always

17 managed all of that.

18 So I was just anxious a lot, and depressed, and

19 it was just -- I took it day by day.

20 Q. What types of -- oh, let me ask it this way: Who

21 handled the family finances? Paying the bills?

22 A. Randy.

23 Q. Is that something, then, you did after the accident?

24 A. Yes.

25 Q. I mean, have you failed to handle the family finances

1 Q. -- if it was on?

2 A. Yes.

3 Q. Did his helmet have a windshield?

4 A. No.

5 Q. Were there any cuts to his nose, mouth, that was not

6 covered by the helmet?

7 A. He had glasses on, and there were -- there was blood on

8 his glasses, and it was probably from this area up

9 here. (Indicating.)

10 Q. Were his glasses on at the time you saw him?

11 A. Not at the time I saw him.

12 Q. What type of glasses did he have on?

13 A. Just sunglasses. Ray-Bans.

14 Q. Did you learn from anyone whether or not there had been

15 any change in Randy's condition from immediately after

16 the accident occurred until the time you arrived?

17 A. No.

18 Q. Thank you. That's all the questions I have.

19 MR. CRONIN: This transcript will be

20 ordered by me. You'll have the opportunity to review

21 it for corrections, so feel free to do that.

22 THE WITNESS: Okay.

23 MR. CRONIN: Thank you.

24 (SIGNATURE RESERVED.)

25 (PROCEEDINGS CONCLUDED AT 12:10 P.M.)

1 to the point where it caused any problem?

2 A. No. I had help in the beginning, though, from Nicole.

3 Q. Did you live in the same house at the time of the

4 accident that you do now?

5 A. Yes.

6 Q. All right. To your knowledge, from any information you

7 may have gotten from anyone at the scene, had Randy

8 been moved, at all, from where he landed to where he

9 was when you saw him on the stretcher?

10 A. I was told they moved him to get him on the stretcher,

11 yes.

12 Q. Who told you?

13 A. Nicole, by way of Jennifer. I was told he landed on

14 his face.

15 Q. Did he have any markings on his face?

16 A. He had scrapes and blood up on his head.

17 Q. What part of his head?

18 A. It was on the left side of his head.

19 Q. Was his helmet, to your knowledge, damaged?

20 A. There were scrapes on both sides of the helmet, and on

21 the top.

22 Q. And when you pointed to where you saw some abrasions on

23 Randy's head, would that have been an area under the

24 helmet --

25 A. Yes.

1 IN RE: HAYNES VS STATE FARM

2 WITNESS: SHAILA HAYNES

3 DEPOSITION DATE: APRIL 13, 2015

4 CORRECTION SHEET

5 PLEASE MAKE ALL CORRECTIONS, CHANGES OR CLARIFICATIONS TO

6 YOUR TESTIMONY ON THIS SHEET, NOT IN THE TRANSCRIPT ITSELF.

7 IF THERE ARE NO CHANGES, WRITE "NONE" ACROSS THE PAGE.

8 PLEASE SIGN THIS SHEET AND RETURN WITHIN 30 DAYS TO

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10 98837, FOR FILING WITH THE ORIGINAL TRANSCRIPT.

11 PAGE / LINE CORRECTION

12 _____

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20 _____

21 _____

22 _____

23 _____

24 Deponent Name: _____

25 Dated: _____

APPENDIX 3

In The Matter Of:

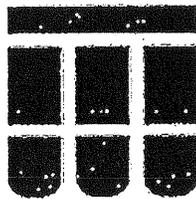
Hayes

vs.

State Farm, et al.

**Deposition of
Jennifer Fordham**

April 25, 2016



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<p>1 APPEARANCES: 2 FOR THE PLAINTIFF: 3 MR. DOUGLAS W. NICHOLSON 4 Lathrop, Winbauer, Harrel, Slothower & Denison, LLP 5 Attorneys at Law 6 201 West 7th Avenue 7 P.O. Box 1088 8 Ellensburg, WA 98926 9 dnicholson@lwhsd.com 10 kbailes@lwhsd.com 11 12 FOR THE DEFENDANTS: 13 MR. STEVEN M. CRONIN 14 Mullin, Cronin, Casey & Blair, PS 15 Attorneys at Law 16 North 115 Washington 17 Third Floor 18 Spokane, WA 99201 19 stevecronin@mcclaw.com 20 carol@mcclaw.com 21 22 ALSO PRESENT: 23 24 Ms. Shaila Haynes 25</p>	<p>Page 2</p>	<p>1 BE IT REMEMBERED that on Monday, 2 April 25, 2016, at 1:27 p.m., at 201 West 7th 3 Avenue, Ellensburg, Washington, the deposition of 4 JENNIFER A. FORDHAM was taken before C. Kay 5 Romine, Registered Professional Reporter. The 6 following proceedings took place: 7 8 JENNIFER A. FORDHAM, being first duly sworn to 9 tell the truth, the whole 10 truth and nothing but the 11 truth, testified as follows: 12 13 EXAMINATION 14 BY MR. NICHOLSON: 15 Q. Good afternoon. I am Doug Nicholson and I represent 16 Shaila Haynes. And could you give us your complete 17 legal name and spell it, please? 18 A. Jennifer Ann Fordham. J-E-N-N-I-F-E-R, A-N-N, 19 F-O-R-D-H-A-M. 20 Q. And what is your current residential address? 21 A. That I don't know. I just moved. 22 Q. Where do you live? 23 A. Maple Valley. 24 Q. And -- 25 A. On Witte Road.</p>	<p>Page 4</p>
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 3</p>	<p>1 Q. Sorry? 2 A. On Witte Road. 3 Q. Can you spell that? 4 A. W-I-T-T-E. 5 Q. And where did you live before that? Your address. 6 A. Oh. I don't know that address either, but it was 7 Maple Valley. 8 Q. Okay. 9 A. And I don't know the street. I lived with a roommate. 10 Q. And do you have a different mailing address? 11 A. I do. 12 Q. Okay. What's your mailing address? 13 A. 20108 southeast 185th Place, Renton, Washington, 14 98058. 15 Q. And we're here today to talk about an accident of 16 September 10, 2012, involving Randy Haynes. Do you 17 recall that? 18 A. Yes. 19 Q. Do you recall where the accident occurred? 20 A. Indian John Hill Road or Indian John Hill. 21 Q. Was it on a freeway or the side road or -- 22 A. It was on I-90, heading westbound. 23 Q. And do you recall the approximate time of day that the 24 accident occurred? 25 A. Afternoon.</p>	<p>Page 5</p>
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 3</p>	<p>1 INDEX 2 Re: HAYNES v. STATE FARM 3 NO. 15-2-00264-6 4 April 25, 2016 5 6 7 TESTIMONY 8 JENNIFER A. FORDHAM PAGE NO. 9 Examination by Mr. Nicholson 4 10 Further 34, 37 11 Examination by Mr. Cronin 19 12 Further 36 13 14 EXHIBITS 15 Exhibit No. 1, Sketch of accident scene 24 16 Exhibit No. 2, Excerpt of testimony of 17 Shaila Haynes, pages 53 - 56 31 18 19 Exhibit No. 3, Excerpt of testimony of 20 Shaila Haynes, pages 25 - 40 32 21 22 23 24 25</p>	<p>Page 5</p>
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Page 6

1 Q. Anything more specific than that that you recall?

2 A. Mid-afternoon.

3 Q. But you don't know what specific time?

4 A. I do not.

5 Q. When was the last time that you had seen Shaila Haynes

6 before the accident?

7 A. It was at Red Horse Diner.

8 Q. And is that here in Ellensburg?

9 A. Correct.

10 Q. And that's the diner right before you get to the

11 Interstate 90 exits?

12 A. Yes.

13 Q. On the west side of Ellensburg?

14 A. Yes.

15 Q. Take us through what took place from the time you last

16 saw Shaila until the accident happened, beginning with

17 seeing Shaila.

18 A. We departed the diner, Randy and myself and Kathleen.

19 We stopped at a gas station that was just right before

20 you enter I-90. And Kathleen was having spark-plug

21 issues. And so Randy wanted to take a look at it.

22 And he switched out a spark plug for her. And then

23 we --

24 Q. I'm going to interrupt you just for a moment.

25 A. Okay.

Page 7

1 Q. Randy would be Randy Haynes?

2 A. Correct.

3 Q. And then can you give us the last names of the other

4 two?

5 A. Well, it was just one other one.

6 Q. Okay. That was?

7 A. Kathleen.

8 Q. Last name?

9 A. Keator. Keator.

10 Q. Could you spell that?

11 A. I think it's K-E-A-T-O-R. I'm -- I'm not 100 percent

12 sure.

13 Q. All right. Go ahead and continue from the gas

14 station. What happened then?

15 A. So then we entered I-90 heading west. And it was high

16 winds, a lot of traffic. As we were heading west on

17 I-90, I noticed a van that was driving aggressively

18 behind Kathleen, tailgating her. And you could tell

19 that he wanted to get over. We were in the fast lane.

20 You could tell that the guy in the van wanted to get

21 over into the slow lane to pass us, which eventually

22 he did, and he entered that lane. And then he came

23 speeding up to the side of Randy and I. And he

24 couldn't go any further because there was a semi in

25 the slow lane blocking him from going any faster. So

Page 8

1 at that point he started to get over into the fast

2 lane where Randy was. And Randy was pretty much at

3 the window looking at him going "What are you doing?"

4 And Randy backed off, allowed the van to enter the

5 fast lane in front of him.

6 And we started going down the highway west. And

7 the van started -- he would speed up and then he would

8 slow down and then he would speed up and then he would

9 slow down.

10 At then at one point, I saw the van slam on his

11 brakes. And I could see smoke like he -- I don't know

12 what you call that, but you could tell that the brakes

13 were smoking from slamming on them so hard.

14 And at that point, the van was veering like he

15 was going to go into the center median, which he

16 didn't. And Randy, to avoid hitting the back of the

17 van, ended up entering the median.

18 At this point the van corrected itself and

19 continued going on I-90 west. And Randy was riding

20 next to him in the center median. And then the van

21 proceeded to go. And then pretty soon it was me

22 riding next to Randy in the center median.

23 And then I just saw this explosion. Looked like

24 bike parts. I didn't see Randy at all until I put my

25 hazards and I pulled over in the little lane, you

Page 9

1 know, by the -- the center median. And as I was

2 dismounting my bike, I looked ahead and saw the van

3 was pulled over as well. And then, as I took my

4 helmet off, the van entered the highway again and

5 proceeded to go.

6 And at that point, I went down to Randy. And

7 then Kathleen showed up and two other witnesses showed

8 up as well.

9 Q. Let me back up again a little bit. Right before Randy

10 left -- I think you said he was in the fast lane when

11 he left and went into the median?

12 A. Correct.

13 Q. Who was immediately behind him?

14 A. I was.

15 Q. And then was Kathleen behind you?

16 A. Yes.

17 Q. And you said there were two witnesses or people who

18 showed up.

19 A. (Witness nods head.)

20 Q. Were they people that had pulled over in their cars,

21 or what do you know about them?

22 A. People that had just seen the accident and pulled over

23 in their vehicles.

24 Q. And do you recall who they were or if they were men,

25 women, or --



Page 10

1 A. It was two men.
 2 Q. Where did Randy end up immediately after the accident
 3 occurred?
 4 A. Well, he was in the median, facedown.
 5 Q. When you say 'the median,' are you talking --
 6 A. The center median where the grass that separates the
 7 east and westbound.
 8 Q. Between the east and westbound I-90 lanes?
 9 A. Correct.
 10 Q. And describe how he was in the median, how he was
 11 lying there.
 12 A. He was laying facedown with his head towards the --
 13 the I-90.
 14 Q. After getting off your motorcycle, after you pulled it
 15 over, following the accident, what did you do next?
 16 A. I walked down to where Randy was.
 17 Q. Could you tell whether he was breathing?
 18 A. I could tell he was breathing and he was making sounds
 19 like he was having a hard time breathing.
 20 Q. Was he moving at all?
 21 A. No.
 22 Q. Did you try talking to him?
 23 A. Yes.
 24 Q. Was he able to respond to what you were saying?
 25 A. Not that I remember, no.

Page 11

1 Q. Did anybody call 9-1-1?
 2 A. I didn't. I don't know if anybody else did.
 3 Q. Did you call anybody?
 4 A. I did. I called Nicole.
 5 Q. That's Nicole Crossett?
 6 A. Correct.
 7 Q. And approximately how long after the accident did you
 8 call Nicole?
 9 A. I don't remember. Maybe approximately three minutes.
 10 Q. And did you speak with her?
 11 A. I did.
 12 Q. Tell me what you recall being said between you and
 13 Nicole.
 14 A. I said, "Hi, Nicole. This is Jen. Randy went down on
 15 his motorcycle. He's been in an accident." She said
 16 "How bad?" I said "Bad." And then she asked where
 17 the location was. And I told her just past the rest
 18 stop because at the time I didn't know it was called
 19 Indian John Hill. And then we hung up.
 20 Q. Do you recall saying anything else during that
 21 conversation?
 22 A. I did say "You need to get here now."
 23 Q. Do you recall anything other than that?
 24 A. No.
 25 Q. Do you recall whether Nicole said anything to Shaila

Page 12

1 while you were on the phone with Nicole?
 2 A. I don't -- I don't recall that.
 3 Q. Could you hear Shaila say anything while you were on
 4 the phone with Nicole?
 5 A. No.
 6 Q. Did you inform Nicole of the severity of the accident?
 7 A. No. Just in the fact that I thought that it was bad.
 8 Q. Did you say anything to Nicole regarding the nature
 9 and extent of Randy's injuries?
 10 A. No.
 11 Q. From the time the accident occurred, how long was
 12 it -- strike that. Did an ambulance arrive at the
 13 scene of the accident?
 14 A. Approximately maybe 10, 15 minutes.
 15 Q. So an ambulance did arrive at the scene?
 16 A. Yes.
 17 Q. And it was approximately 10 or 15 minutes after?
 18 A. Correct.
 19 Q. Had Randy's condition or location changed between the
 20 time of the accident and when the ambulance first
 21 arrived?
 22 A. As far as condition, I don't know. Location, no.
 23 Q. And when I talked about condition, had he improved,
 24 gotten worse, was he pretty much the same?
 25 A. The same.

Page 13

1 Q. The same as at the time of the accident?
 2 A. Correct.
 3 Q. He was about the same at the time of the accident as
 4 he was when the ambulance arrived?
 5 A. Correct.
 6 Q. How much time elapsed between when you spoke with
 7 Nicole on the phone, telling her about the accident,
 8 and when she arrived at the scene of the accident?
 9 A. About the same as the ambulance, 10 to 15 minutes, I
 10 would say.
 11 Q. And was Shaila with her?
 12 A. Yes.
 13 Q. Did a State Patrolman arrive at the accident scene?
 14 A. They did.
 15 Q. Was that before or after the ambulance, to your
 16 recollection?
 17 A. I don't remember.
 18 Q. Was there a significant lapse in time between when the
 19 ambulance and the State Patrolmen arrived?
 20 A. I don't remember.
 21 Q. Did it seem like they arrived pretty close in time
 22 together?
 23 A. I don't even remember them arriving there.
 24 Q. The State Patrol?
 25 A. Correct.



Page 14

1 Q. When was the first time you saw Shaila when she
 2 arrived at the scene of the accident? Where was she?
 3 A. That I remember?
 4 Q. Yeah.
 5 A. Because I was down with Randy. And so I -- to my
 6 recollection, it was when she approached Randy.
 7 Q. Who else was there at the time when you were with
 8 Randy and Shaila arrived at the scene where Randy was?
 9 A. There were EMTs and Nicole and Kathleen, and I believe
 10 the two gentlemen that stopped were there, but I -- I
 11 don't remember that.
 12 Q. Now, what were the ambulance personnel or the EMTs
 13 doing with Randy, if anything, at the time Shaila
 14 arrived where Randy was?
 15 A. They were, like, immobilizing him, stabilizing him.
 16 Q. What position was he in at that time?
 17 A. I don't really remember.
 18 Q. Was he still on his stomach or on his --
 19 A. I don't remember.
 20 Q. Do you remember whether Randy was placed on a
 21 stretcher or a backboard?
 22 A. It was a backboard because I helped the EMTs.
 23 Q. Was that before or after Shaila arrived at the scene?
 24 A. It was after.
 25 Q. Do you remember whether the ambulance personnel or

Page 16

1 talking to the EMTs or ambulance personnel at the
 2 time?
 3 A. I know I talked to them, but I don't remember what was
 4 said.
 5 Q. How long do you believe it was, to the best of your
 6 recollection, between the time the ambulance first
 7 arrived at the scene and when Randy was placed in the
 8 ambulance?
 9 A. I don't remember. Potentially maybe 5, 10 minutes.
 10 Q. Kind of just give me a summary of what happened from
 11 the time Shaila arrived and was -- was she kneeling
 12 next to Randy or standing or --
 13 A. Kneeling.
 14 Q. Okay. From the point Shaila first knelt down beside
 15 Randy. What I understand you saying, the EMTs then
 16 put him on a stretcher or a backboard?
 17 A. Backboard, yeah.
 18 Q. From that point, tell me what happened, or how he got
 19 put on the backboard.
 20 A. Well, she was by his side and I was down at his feet.
 21 Q. "She" being --?
 22 A. Shaila.
 23 Q. Okay.
 24 A. And the EMTs wanted to put him on the backboard. And
 25 so I helped assist them with his feet.

Page 15

1 EMTs removed or cut off any of Randy's clothing?
 2 A. I do remember them cutting off his clothing.
 3 Q. Was that before or after Shaila arrived at the scene?
 4 A. After.
 5 Q. Do you know whether they did anything to immobilize
 6 Randy's head, such as a neck brace, or anything like
 7 that?
 8 A. There was a neck brace, yeah.
 9 Q. Was that put on before or after Shaila arrived at the
 10 scene?
 11 A. After.
 12 Q. What did Shaila do that you recall after she arrived
 13 where Randy was?
 14 A. She went right down to him and was holding his hand
 15 and talking to him.
 16 Q. How close were you to Shaila at that time?
 17 A. I didn't know her. I mean, we had just spent --
 18 Q. I'm talking physical distance.
 19 A. Oh. Oh, distance? Well, I was at Randy's feet and
 20 she was up at, like, say, his shoulders.
 21 Q. Was Randy responding at all at that time?
 22 A. Not that I'm aware of.
 23 Q. Was he still breathing?
 24 A. I don't know.
 25 Q. Do you recall anything that the -- do you recall

Page 17

1 And then at that point, I don't -- I don't know
 2 what happened after that point.
 3 Q. Did they strap him onto the backboard?
 4 A. Yeah.
 5 Q. Did they have to roll him over onto the backboard?
 6 A. I don't remember that.
 7 Q. And so from the time that he is strapped onto the
 8 backboard what was the next thing that happened with
 9 Randy?
 10 A. I believe they put him in the back of the ambulance.
 11 Q. And were you there when the ambulance left?
 12 A. Yes.
 13 Q. Do you know where the ambulance was headed?
 14 A. Easton.
 15 Q. Do you know why it was headed to Easton?
 16 A. So he was going to be airlifted.
 17 Q. Airlifted to where?
 18 A. Harborview.
 19 Q. Harborview in Seattle?
 20 A. Correct.
 21 Q. Do you know what Shaila did after Randy was loaded
 22 into the ambulance?
 23 A. I don't. I don't remember.
 24 Q. Do you know what Nicole did after Randy was put in the
 25 ambulance?



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1 something that struck out that the van was kind of
 2 being aggressive with you in that lane?
 3 A. No.
 4 Q. You described it as an explosion. And I can picture
 5 that somewhat. But if you could just tell me how --
 6 and just so I'm clear, when you say "explosion," are
 7 you talking about the accident when Randy went down?
 8 A. Correct.
 9 Q. And just, if you could tell me, how he went down. Did
 10 he go left or right, forward, over the handlebars?
 11 A. I didn't even see that. I couldn't see what he did.
 12 I just saw it was dirt and looked like bike parts.
 13 Q. And did you travel then, because you were going the
 14 speed you were, further down the road when that
 15 occurred?
 16 A. No. At that point, I put on my hazards and then
 17 entered the shoulder next to the median.
 18 Q. Where was Randy in reference to you when you were on
 19 the left shoulder?
 20 A. I happened to stop just probably, as far as distance
 21 ahead of him, probably 5 feet.
 22 Q. And where was the majority of his motorcycle in
 23 reference to Randy at that point?
 24 A. That's hard to say. Maybe 10 feet from him.
 25 Q. Was it behind him?

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1 A. Yes.
 2 Q. And did I hear you say when he came to a rest he was
 3 lying facedown?
 4 A. Correct.
 5 Q. Did he have his helmet on when he came to a rest?
 6 A. Yes.
 7 Q. When you stopped, when was the next time you noticed
 8 Kathleen?
 9 A. I don't remember.
 10 Q. Did she stop at the accident scene?
 11 A. She did.
 12 Q. Who was the first person to get to Randy?
 13 A. I was.
 14 Q. Who was the second?
 15 A. I don't remember.
 16 Q. Was any type of first aid rendered to Randy before the
 17 ambulance attendants arrived?
 18 A. No.
 19 Q. You mentioned there was two other men.
 20 A. Correct.
 21 Q. And they stopped at Randy's location?
 22 A. Yes.
 23 Q. What did they do?
 24 A. They -- we were all kind of around him. We dug dirt
 25 out underneath, because his mouth was up against the

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1 dirt, and so we dug that out so he could breath a
 2 little bit better. The two men were debating back and
 3 forth about flipping him over.
 4 Q. Did the two men flip Randy over?
 5 A. No.
 6 Q. What was the first type of emergency response to
 7 arrive?
 8 A. The ambulance.
 9 Q. Did a State Patrol officer arrive?
 10 A. I saw them there at one point, but I don't know when
 11 they arrived.
 12 Q. Did you remain alongside Randy from the time you first
 13 went down to him after the accident occurred until the
 14 ambulance attendants arrived?
 15 A. I did until I got up. I stood up to call Nicole.
 16 Q. How far away from Randy were you when you called
 17 Nicole?
 18 A. Probably 5 feet.
 19 Q. So you remained within 5 feet of Randy until the
 20 ambulance attendants arrived; is that right?
 21 A. Yes.
 22 Q. So other than the two men and Kathleen, were there any
 23 other persons there before the ambulance attendants
 24 arrived at Randy's location?
 25 A. I don't really remember when Shaila and Nicole got

Page 29

1 there. I want to say it was probably around the same
 2 time the ambulance had gotten there. And as far as
 3 anybody else, I -- I don't know.
 4 Q. Did you remain nearby and observe what the ambulance
 5 attendants were doing once they arrived?
 6 A. I did for a short period when I helped them place
 7 Randy on the backboard. After that I don't -- I don't
 8 remember.
 9 Q. How many ambulance attendants were there?
 10 A. I don't know.
 11 Q. Did Randy's helmet remain on him until the ambulance
 12 attendants arrived?
 13 A. Yes.
 14 Q. Let me ask it this way: Did any persons who were
 15 there near Randy, before the ambulance attendants
 16 arrived, take off any items of Randy's clothing?
 17 A. No.
 18 Q. Did you know Nicole before this trip?
 19 A. I did about as well as I knew Randy and Shaila.
 20 Q. Had you been to Nicole's house on the day of the
 21 accident?
 22 A. Yes.
 23 Q. Does Nicole work at the restaurant you mentioned?
 24 A. She does.
 25 Q. So when you returned from the festival the day of the



Page 30

1 accident, where did you first stop in Ellensburg?
 2 A. At the Red Horse Diner.
 3 Q. And then did you go to Nicole's house that day?
 4 A. No. She -- her house was actually on the property of
 5 the restaurant.
 6 Q. I didn't know that. Sorry.
 7 A. That's okay.
 8 Q. So, just so I'm clear and the record's clear, were you
 9 at Nicole's house or the actual restaurant?
 10 A. It's pretty much all together.
 11 Q. Was Nicole working at the time you saw her when you
 12 got back from the festival?
 13 A. No.
 14 Q. So were the five of you just socializing for a while
 15 there?
 16 A. No. Nicole and Shaila were unpacking Shaila and
 17 Randy's trailer from the festival.
 18 Q. What were you doing while they were doing that?
 19 A. Kind of talking to them. And then we got ready to
 20 leave.
 21 Q. Have you reviewed anything in preparation for your
 22 deposition today?
 23 A. No.
 24 Q. Have you looked at any documents pertaining to the
 25 case?

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1 A. No.
 2 Q. We'll have your diagram that you kindly drew for me
 3 marked as Exhibit No. 1 to your deposition.
 4 Let me show you portions of Shaila Haynes's
 5 recorded testimony, pages 53 to 56. And I've
 6 highlighted and want to direct your attention to page
 7 54, line 6 through 14. Do you see that in the yellow
 8 highlight?
 9 A. Uh-huh.
 10 Q. And I want to read that and just ask you a question
 11 after I do so.
 12 This is a question to Ms. Haynes. "To your
 13 knowledge, from any information you may have gotten
 14 from anyone at the scene, had Randy been moved, at
 15 all, from where he landed to where he was when you
 16 first saw him on the stretcher?"
 17 That was the question.
 18 And the answer by Ms. Haynes was "I was told they
 19 moved him to get him on the stretcher, yes."
 20 "Who told you?"
 21 "Nicole, by way of Jennifer. I was told he
 22 landed on his face."
 23 Do you see where she stated that she was told
 24 that they had moved him to get him on the stretcher?
 25 A. Yeah, I see that.

Page 32

1 Q. Does that refresh your recollection as to whether or
 2 not Ms. Haynes was present at the time Randy was
 3 placed on the stretcher?
 4 A. No.
 5 Q. Did you observe the ambulance attendants remove any
 6 articles of clothing from Randy? Off of him.
 7 A. I don't remember that part. I remember them cutting
 8 his clothes, but I don't remember the clothing being
 9 removed.
 10 Q. Who was present, to your knowledge, when the ambulance
 11 attendants cut Randy's clothing?
 12 A. Shaila was beside him and I was there at his feet. I
 13 don't remember who else was there. The EMTs, of
 14 course.
 15 Q. Let me show you another portion of Ms. Haynes's
 16 deposition transcript. We'll mark this as Exhibit 3.
 17 And if you would, please, go to page 29 of the
 18 deposition transcript.
 19 A. Thank you.
 20 Q. And down to line 24. The question was, "Were there
 21 ambulance attendants at the scene?"
 22 Answer: "Yes, they were attending to Randy."
 23 And then continuing on page 30.
 24 Question: "Where was Randy located when you
 25 arrived?"

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1 Answer: "He was laying on the side of the median
 2 on the stretcher."
 3 Does that refresh your recollection as to whether
 4 Ms. Haynes was there after Randy had already been
 5 placed on the stretcher?
 6 A. No.
 7 Q. Do you disagree with Ms. Haynes's testimony which I
 8 just read to you?
 9 A. No, because I -- I don't know.
 10 Q. You don't have a clear recollection?
 11 A. No.
 12 Q. Fair enough. And similarly let me just show you page
 13 32, line 1 through 6.
 14 Question: "Was he" -- meaning Randy -- "still
 15 wearing the helmet when you arrived?"
 16 Answer: "No. No, there was no helmet. A boot
 17 was missing, his gloves were off, his heavy leather
 18 gloves. His jeans were ripped, and they had cut off
 19 his leather jacket and cut through all of his clothing
 20 to get to his chest."
 21 Do you have any reason to disagree that that had
 22 all occurred before Ms. Haynes arrived, as she
 23 testified?
 24 A. No.
 25 Q. Have you provided any statements which you've signed?



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1 A. No. Well, the police statement at the scene.
 2 Q. Did you give a handwritten statement?
 3 A. I did.
 4 Q. Do you have a copy of that?
 5 A. I do not did.
 6 Q. Did you describe the accident in your statement
 7 similar to what you've testified today as far as that
 8 van action?
 9 A. Yes.
 10 MR. CRONIN: Thank you. Those are all the
 11 questions I have.
 12 THE WITNESS: You're welcome. Thank you.
 13
 14 FURTHER EXAMINATION
 15 BY MR. NICHOLSON:
 16 Q. I've got a couple of followup questions.
 17 Let's go to page 29 of Shaila's written statement
 18 that Mr. Cronin just went over with you, and he
 19 referred to lines 24 and 25, and where it is stated,
 20 Question: "Were the ambulance attendants at the
 21 scene?"
 22 And then the answer: "Yes, they were attending
 23 to Randy."
 24 And you stated, in response to Mr. Cronin's
 25 question, if I recall correctly, and tell me if I

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1 misinterpreted that, but I thought you said to him you
 2 had no reason to disagree with what Shaila said
 3 regarding the ambulance attendants attending to Randy
 4 when he arrived -- when she arrived. Do you recall
 5 that?
 6 A. I do recall the question.
 7 Q. Yeah.
 8 A. Uh-huh.
 9 Q. Do you understand that it's possible for two people to
 10 have two different recollections of the same event?
 11 A. Yes.
 12 Q. In your mind, are you confident in your testimony that
 13 you gave to me that Shaila was present before Randy
 14 was placed on the stretcher or backboard?
 15 A. That is my recollection, yeah, that she was there as I
 16 was helping them get on the backboard.
 17 Q. And between the time that the accident happened and
 18 Randy wound up lying in the median between the east
 19 and westbound lanes of I-90, had his location or
 20 physical condition changed in any substantial way
 21 between the time of the accident and when Shaila
 22 arrived?
 23 A. As far as location? No, because I remember her being
 24 there when we were flipping him over on the backboard.
 25 Q. Okay.

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1 A. And that was the first time that I remember the
 2 location changing.
 3 Q. And as far as Randy's physical condition in terms of
 4 his breathing, his responsiveness or lack of
 5 responsiveness, that kind of thing, had that remained
 6 substantially the same between the time of the
 7 accident and when Shaila arrived?
 8 A. Yes, to my knowledge.
 9 Q. So you say you have no reason to disagree with what
 10 Shaila testified to or stated. Are you referring to
 11 you have no reason to disagree with what Shaila's
 12 memory is?
 13 A. Correct.
 14 Q. Is it fair to say her memory is inconsistent with
 15 yours?
 16 A. Correct.
 17 MR. NICHOLSON: Okay. No other questions.
 18
 19 FURTHER EXAMINATION
 20 BY MR. CRONIN:
 21 Q. You know, when you called Nicole -- and I can
 22 understand it was pretty frantic; is that correct?
 23 A. Correct.
 24 Q. All right. What was Nicole's response that you
 25 received on the other end of the phone after you gave

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1 her the news as to why you were calling?
 2 A. Shock, and that she was -- they were on their way
 3 then.
 4 Q. Had she asked you how bad it was or how -- how bad it
 5 was?
 6 A. I don't -- I don't remember if she asked me or if I
 7 just said "You need to get here. It's bad."
 8 Q. And did she ask anything about the facts of the
 9 accident?
 10 A. No.
 11 Q. Okay.
 12 A. Not that I remember.
 13 Q. You had given, then, the strong impression it was bad
 14 and they needed to get there in a hurry?
 15 A. That I remember, yes.
 16 MR. CRONIN: Thank you, that's all I have.
 17
 18 FURTHER EXAMINATION
 19 BY MR. NICHOLSON:
 20 Q. And again, when you used the word "bad," you were not
 21 mentioning anything specific, just you said the
 22 accident was bad?
 23 A. Correct.
 24 MR. NICHOLSON: No other questions for me.
 25 MR. CRONIN: Nothing further.



APPENDIX 4



MEDIC ONE
UPPER KITTITAS COUNTY
The MT&E Unit Incident for all 911 calls received, collected
in line 4288 in 2015 Medic One, Our Elum, WA 98922

**Kittitas County Hospital
District #2**
Station: 99

Location: I-90 WB MP 88 Cle Elum WA 98922	Incident Type: 300 - Rescue, EMS incident, other
Lat/Long: N 47° 11' 43.43" W 120° 56' 21.3"	EMSID: 19H02 Incident #: 2012-791 Exposure ID: 4926484 Incident Date: 09/10/2012
Incident Location Type: Street or Highway	

Report Completed by:	Chrisman, Steve	ID: 9912	Date: 09/11/2012
Report Reviewed by:	Not Reviewed		
Report Printed by:	Scherer, Geoff	ID:	Date: 6/6/2016 Time: 12:49

Type of Service Requested:	911 Response (Scene)	Mass Casualty Incident	No	Complaint Reported By Dispatch:	Traffic Accident
Aid Given or Received:			Primary action taken:		-
Total # of apparatus on call:		1	Total # of personnel on call:		5

APPARATUS	
Unit	992
Type:	ALS unit
Use:	EMS
Response Mode:	Lights and Sirens
# of People	2
Injury Or Onset	- / - / - - : - : -
Alarm	09 / 10 / 2012 16:13:37
Dispatched	09 / 10 / 2012 16:16:31
Enroute	09 / 10 / 2012 16:18:36
Arrived	09 / 10 / 2012 16:25:02
Cancelled	- / - / - - : - : -
Cleared Scene	09 / 10 / 2012 16:53:19
At Destination	09 / 10 / 2012 16:59:04
Cleared Destination	09 / 10 / 2012 17:18:56
In Quarters	- / - / - - : - : -
In Service	09 / 10 / 2012 17:38:26

CUSTOM FIELDS FORM	
HIPAA/Consent to Bill	Not Applicable- No medical info obtained
Troponin cartridge used?	No
ALS Evaluation of patient performed by:	Steve Chrisman, EMT-P
Receiving physician	Other
CQI parameters	Patient airlifted
Was ANY CPR performed (bystander and/or EMS)?	Yes