

ORIGINAL

No. 33283-3-II

78833-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAY COLBERT, as Personal Representative of
the Estate of Denise Colbert; and for himself,

Appellant,

v.

UNITED MARINE CORPORATION OF
TENNESSEE, a Tennessee corporation;
AMERICAN MARINE, a Tennessee corporation;
SKIER'S CHOICE CORPORATION OF TENNESSEE,
an Oklahoma Corporation; and Marc Jacobi,

Respondents.

BRIEF OF APPELLANT COLBERT

William S. Bailey, WSBA #7307
Fury Bailey
710 Tenth Avenue East
PO Box 20397
Seattle, Washington 98102
(206) 726-6600

Philip A. Talmadge, WSBA #6973
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661

Attorneys for Appellant
Jay Colbert

FILED
COURT OF APPEALS
DIVISION II
05 AUG -5 PM 1:32
STATE OF WASHINGTON
BY  DEPUTY

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
A. INTRODUCTION	1
B. ASSIGNMENT OF ERROR	1
(1) <u>Assignment of Error</u>	1
(2) <u>Issue Pertaining to Assignment of Error</u>	1
C. STATEMENT OF THE CASE.....	2
D. SUMMARY OF ARGUMENT	11
E. ARGUMENT	12
(1) <u>Skier’s Choice Negligently Inflicted Physical Injury on Denise Colbert</u>	12
(2) <u>Washington Law on Negligent Infliction of Emotional Distress</u>	13
(a) <u>Proximity to Injury-Causing Event to Family Members or Loved Ones</u>	14
(b) <u>Objective Symptoms of Emotional Distress</u>	23
(3) <u>Jay Colbert Established a Prima Facie Claim of Negligent Infliction of Emotional Distress</u>	25
F. CONCLUSION.....	29
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Gain v. Carroll Mill Co., Inc.</i> , 114 Wn.2d 254, 787 P.2d 553 (1990).....	15-16, 25, 30
<i>Greene v. Young</i> , 113 Wn. App. 746, 54 P.3d 734 (2002).....	18, 20
<i>Hegel v. McMahon</i> , 136 Wn.2d 122, 960 P.2d 424 (1998).....	<i>passim</i>
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976).....	<i>passim</i>
<i>Mains Farm Homeowners Ass'n v. Worthington</i> , 121 Wn.2d 810, 854 P.2d 1072 (1993).....	12
<i>Trinh v. Allstate Ins. Co.</i> , 109 Wn. App. 927, 37 P.3d 1259, <i>review denied</i> , 147 Wn.2d 1003 (2002).....	24
<i>Wilson v. Steinback</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	12
 <u>Other Cases</u>	
<i>Beck v. State</i> , 837 P.2d 105 (Alaska 1992).....	22
<i>Ebarb v. Woodbridge Park Ass'n</i> , 210 Cal. Rptr. 751 (Cal. App. 1985).....	21
<i>Gabaldon v. Jay-Bi Prop. Mgmt., Inc.</i> , 925 P.2d 510 (N.M. 1996).....	21
<i>Landreth v. Reed</i> , 570 S.W.2d 486 (Tex. Civ. App. 1978).....	22
<i>Lejeune v. Rayne Branch Hosp.</i> , 556 So. 2d 559 (La. 1990).....	22
<i>Ruttley v. Lee</i> , 761 So. 2d 777 (La. App. 2000), <i>writ denied</i> , 768 So. 2d 1287 (La. 2000).....	22
<i>Tommy's Elbow Room, Inc. v. Kavorkian</i> , 727 P.2d 1038 (Alaska 1986).....	22
<i>Zuniga v. Housing Auth.</i> , 48 Cal. Rptr. 2d 353 (Cal. App. 1995).....	22
 <u>Rules and Regulations</u>	
CR 56(c).....	12

A. INTRODUCTION

Jay Colbert was physically present at Lake Tapps where his only daughter drowned, arriving immediately after she was reported missing. He witnessed hours of search and rescue efforts; he viewed the removal of his daughter's body from the water. He was diagnosed as suffering from clinical depression from observing these events. Jay Colbert satisfied the requirements of physical presence, temporal proximity and objective symptoms of emotional distress for the cause of action for negligent infliction of emotional distress under *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976) and *Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998).

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

1. The trial court erred in granting Skier's Choice's motion for partial summary judgment on negligent infliction of emotional distress.

(2) Issue Pertaining to Assignment of Error

Where a father was physically present at the scene of his only daughter's drowning, witnessing search and rescue efforts and the removal of his daughter's body from a lake, and he was diagnosed as suffering from clinical depression as a result, does the father state a cause of action

for negligent infliction of emotional distress against the tortfeasors who caused her death? (Assignment of Error Number 1).

C. STATEMENT OF THE CASE

Jay Colbert served in the United States Army from 1977 through 1984, and was stationed in Germany. CP 458-59. During that time, he met, fell in love with, and married Gudrun Linda Barbara Colbert, a German national. *Id.* They had one daughter, Denise Nadja Colbert. CP 459. After his honorable discharge from the Army, both spouses had cultural adaptation problems that resulted in a divorce, and he returned to the United States. *Id.* He later married his present wife, Kelly, living thereafter in Sumner, Pierce County, Washington. CP 441, 458.

From age five, Denise came from Germany to Washington State and stayed with the Colberts for the entire summer. CP 442, 461. Jay and Kelly Colbert had two children of their own. CP 458; Denise readily bonded with her father's new family. CP 462, 466. As a group, the Colbert family would go camping together and engage in outdoor activities during Denise's summer visits. *Id.*

Denise came to live with the Colberts on a full-time basis when she was 16, attending and graduating from Sumner High School. CP 442, 461. She was a gifted athlete; she represented her school at the state

gymnastics meet, and was a member of the school's track team, lettering in both sports. CP 461-62.

Denise considered whether to pursue higher education in the United States or in Germany; she ultimately chose to attend a prestigious international school of business in Germany. CP 443, 462-63.

Denise was set to fly to Germany to attend that school the morning of August 3, 2003. CP 467. Denise went out with her friends the night before, first having dinner at a Mexican restaurant in the Sumner area. *Id.* Jay Colbert was outside doing home maintenance that evening when she came over before she left; she gave him a hug and said goodbye. *Id.*

After dinner, Denise and a group of about ten friends had a party at Lake Tapps the evening of August 2. CP 436. Denise and some of the others had a few beers. *Id.* Denise went swimming in the lake from Marc Jacobi's boat. CP 437. Denise, Matt Holt, and Lindsay Lynham hung onto the rear ski platform of the boat at times. *Id.* At some point, "Denise disappeared beneath the surface of the water." CP 438.¹

Jay and Kelly Colbert were awakened from a sound sleep by a telephone call in the early morning hours of August 3, 2003. CP 430. Mrs. Colbert answered the phone around 3 a.m. CP 443. Denise's boyfriend, Kyle Swanson, was on the other end; he was quite upset and

Mrs. Colbert could not understand him at first. *Id.* Finally, she learned Denise had disappeared from the back of a boat and was missing; Kyle told the Colberts Denise “had fallen over” and the search for Denise was taking place on Lake Tapps. CP 444, 467.

The Colberts were upset by this phone call; Kelly testified:

I was extremely upset. I think I threw the phone to Jay and I ran down the hall. I screamed for her name and I went to her bedroom and she wasn't there.

Id. As Jay Colbert heard his wife beside him speak to Kyle, he became progressively more anxious. CP 431. He knew something was wrong; he, too, was scared and upset. CP 431.

The Colberts drove immediately to the lake, a five minute drive. CP 467. When the Colberts arrived at the scene, multiple emergency responders were present:

. . . just ambulances, police officers, fire department. It was pretty chaotic.

CP 444.

As Mr. Colbert looked out on the lake and saw the flashing lights from the search boats, he became even more frightened and upset. CP 431. The situation was overwhelming to him. *Id.* He had a friend, Ed Peterson, who lived on Lake Tapps, not far from the scene of this activity.

¹ Denise's death was caused by carbon monoxide from the boat's exhaust. CP 483.

CP 432, 444. Mr. Colbert went to Mr. Peterson's house and woke him up, explaining the emergency, and asking for permission to stand on his dock to observe the search operation. *Id.*; CP 468. Mr. Peterson readily agreed to let the Colberts use his dock for this purpose, doing whatever he could to comfort them. CP 444.

At this point, the Colberts still hoped Denise would be found alive. CP 432. Mr. Colbert did not want to believe anything had happened to his daughter, clinging to the notion her disappearance was a mistake, or maybe even a prank:

I didn't want to believe that she was out in that water. I couldn't imagine her drowning. It just didn't seem possible that she would just go under water and not come up. I kept saying to myself, "That's not my daughter. She's a strong swimmer."

Id.

Chaplain Arthur L. Spahr, a retired Christian minister who had been a police chaplain for approximately 27 years, was the police chaplain for the Sumner and Bonney Lake police departments, as well as the Pierce County sheriff's office. CP 450.² He was dispatched by radio to Lake Tapps sometime after 3 a.m. on August 3, 2003. *Id.* When he arrived, he saw the dive teams in the water, with a search going on. *Id.* A number of

² Chaplain Spahr was the director of the Chaplain Academy where they teach the "Ministry of Presence," "just being there" to comfort people afflicted by tragic events. CP 453.

young people had gathered at the scene, quite upset over Denise's disappearance. *Id.*

One of the police officers notified Spahr that Denise Colbert's father and stepmother were observing the operation at a nearby house. CP 450. Within 15 or 20 minutes after arriving, he went over to see the Colberts, describing their physical location as follows:

[I]t was a small inlet . . . [T]he dive scene, and ski boat and the friends were all near the entrance to the inlet on the right, and toward the end of the inlet on the left was another home and that's where they were. The home sat up above the water. There was a bank and there was a fairly large deck that was raised up above the water, I'm going to say eight or ten feet. And they were on that deck where they could look across the inlet and still be isolated, which seemed to be what they wanted.

CP 451.

Chaplain Spahr noted Kelly Colbert was wrapped up in a blanket and sitting down on the edge of the deck, watching the activity on Lake Tapps. *Id.* Jay Colbert was doing the same, standing nearby, very withdrawn. *Id.* He hardly responded to Spahr, who was attempting to convey information. *Id.* Chaplain Spahr did not tell Mr. Colbert his daughter was likely deceased. *Id.* Throughout the night, he did his best to comfort the Colberts giving them updates on what was happening. *Id.* He went back and forth between the center of police operations and the Peterson home, perhaps a five-minute drive. *Id.*

Eventually, another boat with brighter searchlights joined the rescue effort. CP 432. As the dawn broke, the search for Denise was still underway. *Id.* At some point after dawn, Mr. Colbert saw a buoy pop up to the surface of Lake Tapps. CP 433, 469.³ He could hear the dialogue going on between the rescue workers out on the lake and knew what the buoy meant – it was tied to Denise’s body. CP 433. At this time, Chaplain Spahr was at the dive site. CP 452. He then came to the Peterson dock, told the Colberts Denise’s body had been found, and stood by them while Denise’s body was taken out of the water. *Id.* Chaplain Spahr told the Colberts they would be taking Denise’s body out on another person’s property down the inlet. CP 433, 469. They watched the boat as it moved toward the place where this was to happen. CP 433.

From the Peterson dock, it was clear a body was being removed from the water. *Id.* The body was recovered about 100 yards from the Peterson dock. *Id.*; CP 469. The lighting conditions at this time were

³ It was not until he saw the buoy pop up and her body pulled onto the back of the boat that Colbert began to accept the idea Denise was dead:

- Q. At what point in the evening did it occur to you that you might have lost your daughter?
- A. When I seen them – when I seen them pop a buoy and pull her up to the back of the boat.

CP 469.

sufficient to permit them to view this activity from the Peterson's deck. CP 452.

Jay Colbert saw the search and rescue boats move around alongside the marker buoy. CP 433. He saw Denise's body pulled over the side of the boat by her arm. *Id.*; CP 469. He could also see the rescue workers moving Denise's body, once it was on the boat. CP 433. Colbert saw an ambulance down by the water. *Id.* The police brought out a stretcher. *Id.* He saw them put a sheet over Denise's body and take her away. *Id.* When asked at his deposition whether he was able to recognize the body as Denise, he answered that he could. CP 469.

The Colberts stayed at the Peterson residence for a while after Denise's body was recovered, for perhaps an hour or so. CP 433. Then a friend and neighbor gave them a ride home. *Id.*

From the time of these early morning hours on August 3, 2003, watching the search and rescue efforts, culminating in the discovery of Denise's body and realizing his only daughter was dead, Colbert has suffered emotionally:

I think that anything that happens to anybody like this, in some way or another will always stay with them.

Am I physically worse now than I was? Yes. You know, it's – it is what it is. It's just – it's really hard to – it's really hard to – you know, I'm not the type of person to sit up and say, you know, my back aches or my legs ache,

because I just – I feel depressed or something like that. I've never been a person that would associate depression with anything that I could feel or – or anxiety, and I've always been able to – I've seen – you know, I've seen a lot in my life, and I think I've done a pretty good job getting my family through it. But you cannot erase what happened that night. You can't medicate it. You can't do anything. It's there.

CP 470.

Dr. S. Erving Severtson, a clinical psychologist, examined Colbert on October 22, 2004. CP 472, 487. At the time of his clinical examination, Dr. Severtson also administered the MMPI-2 test, a reliable, objective psychological assessment instrument, to Colbert. CP 472-73, 491. During the course of his clinical interview, Colbert showed:

an extreme amount of emotion, manifested by tears and multiple visible signs of distress.

CP 473. In Dr. Severtson's clinical judgment, none of this was contrived or artificial – it was genuine. *Id.* Colbert's MMPI-2 was valid and showed extreme anxiety and depression, manifested primarily in somatic signs and symptoms. *Id.* Dr. Severtson concluded Colbert's witnessing of the police and fire recovery efforts for his daughter on Lake Tapps in the early morning hours of August 3, 2003 formed a highly significant component of the overall emotional distress Colbert experienced from his daughter's death. *Id.*

On the basis of reasonable psychological probability, Dr. Severtson opined Colbert's symptoms of clinical depression, anxiety and emotional distress were caused directly and/or markedly exacerbated by the death of his daughter and the traumatic witnessing of the search and recovery efforts which resulted in the locating of her dead body. CP 473, 488.

Jay Colbert filed the present action in the Pierce County Superior Court on December 2, 2003 in his own capacity, and as the personal representative of Denise's estate, against Marc Jacobi, the boat's owner, CP 316, 318-19, and the defendants United Marine Corporation of Tennessee, American Marine, and Skier's Choice Corporation of Tennessee (hereinafter "Skier's Choice"), contending they were negligent and were liable under RCW 7.72, Washington's Product Liability Act (WPLA). CP 317-18. He filed two amended complaints. CP 18-22, 315-20. The case was assigned to the Honorable Katherine Stolz. Colbert moved for partial summary judgment on liability, CP 23-226, which the trial court denied. CP 329-31. Skier's Choice subsequently moved for partial summary judgment as to the estate's ability to recover for breach of warranty and for Denise's pre-death pain and suffering, and Jay Colbert's ability to recover for negligent infliction of emotional distress. CP 366-85. The trial court granted the motion. CP 543-45. Colbert then moved

to dismiss the WPLA claims against Skier's Choice, CP 554-56, which the trial court granted. CP 557-58. This timely appeal followed. CP 546-53.

D. SUMMARY OF ARGUMENT

Skier's Choice negligently inflicted physical injury on Denise Colbert by designing and building a boat that produced carbon monoxide in a location where swimmers or skiers could be affected and by providing inadequate warnings to its users of the hazards of carbon monoxide poisoning. Denise Colbert was out on Lake Tapps in a ski boat the evening of August 2, 2003 with friends and others, alternately swimming and resting on the rear swim platform of the boat. Denise disappeared while swimming a relatively short distance from the boat. It was later learned she died of carbon monoxide poisoning.

Jay Colbert arrived at the lake shortly after his daughter's disappearance and was an eyewitness to police and fire search and rescue attempts on Denise's behalf in the early morning hours of August 3, 2003. Colbert was physically present at the scene for hours and witnessed the recovery of his daughter's body. Jay Colbert was diagnosed as suffering clinical depression and anxiety as a direct consequence of his daughter's death. Mr. Colbert meets the requirements of Washington law for a cause of action for negligent infliction of emotional distress against Skier's Choice.

E. ARGUMENT

The trial court resolved the key issue on negligent infliction of emotional distress on summary judgment. This Court reviews orders on summary judgment de novo. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993). Under CR 56(c), a court grants a motion for summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. With respect to the facts, this Court must consider the facts, and all inferences from them, in a light most favorable to Jay Colbert as the nonmoving party on Skier's Choice's motion for summary judgment. *Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

(1) Skier's Choice Negligently Inflicted Physical Injury on Denise Colbert

To establish a cause of action for negligent infliction of emotional distress, a plaintiff must first establish the defendant was, in fact, negligent. The *Hegel* court indicated such a cause of action involves "emotional trauma resulting from one person's observation or discovery of another's negligently inflicted physical injury." 136 Wn.2d at 126.

In this case, Jay Colbert asserted a claim against Skier's Choice for its fault in causing Denise Colbert's death because of the design and

manufacture of the ski boat in question and its failure to warn boat owners and users of the risk of exposure to carbon monoxide. CP 317-18. Colbert moved for partial summary judgment on liability recounting in detail how Skier's Choice conduct resulted in Denise's death. CP 23-35, 273-79. Carbon monoxide poisoning from boat use was a risk known in the medical community. CP 29, 191-93. Such poisoning was the subject of a NIOSH (National Institute for Occupational Safety and Health) report. CP 29, 195-217. The National Marine Manufacturers Association issued a bulletin on carbon monoxide poisoning. CP 281-82, 288-90. Similarly, the American Boat and Yacht Council issued an advisory on carbon monoxide poisoning. CP 282-83, 295-305, 308-10.

In connection with its summary judgment motion, Skier's Choice did not argue the negligence question as to Denise Colbert. CP 373-84, 535-41. Insofar as the Court is obliged to consider the facts, and the inferences from the facts, in a light most favorable to Jay Colbert as the nonmoving party, this Court should assume, for purposes of the trial court's order on summary judgment, that Skier's Choice negligently inflicted physical injury on Denise Colbert.⁴

(2) Washington Law on Negligent Infliction of Emotional Distress

⁴ Colbert was prepared to offer expert testimony in support of Skier's Choice's fault. CP 521-29.

Skier's Choice argued below that Jay Colbert was not entitled to recover because the tort of negligent infliction of emotional distress was inapplicable where the plaintiff arrives at the scene of a relative's drowning, CP 378-80, he did not witness any pain or suffering on Denise's part, CP 380-83, and he experienced no objective symptoms of emotional distress. CP 383-84. Skier's Choice misstated the facts of this case and Washington law on the tort of negligent infliction of emotional distress. Washington case law eschews a bright line test for the establishment of the tort.

(a) Proximity to Injury-Causing Event to Family Members or Loved Ones

In *Hunsley v. Giard, supra*, a unanimous Court concluded the plaintiff, who suffered the terror of having an automobile crash into the living space of her home, had a cause of action for negligent infliction of emotional distress, despite the lack of actual physical impact to her body. The Court reviewed past Washington cases allowing a recovery where there was a threat of an immediate physical invasion of the plaintiff's personal security. 87 Wn.2d at 433. The Court indicated foreseeability was an important limitation on the scope of the tort; only those who are foreseeably endangered by the tortious conduct could recover. *Id.* at 435-36. The Court concluded it was not necessary there be any actual physical

impact or physical invasion of the plaintiff's personal security for the plaintiff to have a cause of action:

We conclude that the plaintiff who suffers mental distress has a cause of action; that is to say, the defendant has a duty to avoid the negligent infliction of emotional distress. It is not necessary that there be any physical impact or the threat of an immediate physical invasion of the plaintiff's personal security. Our experience tells us that mental distress is a fact of life. With adequate limitations, the Court can administer the adjudication of this tort just as it does the complex intricacies of products liability and medical malpractice.

Id. at 435.

In setting forth the boundaries of the tort of negligent infliction of emotional harm, the Court focused on several factors. The emotional distress arising from the wrongful must be foreseeable. The Court expressly declined to:

draw an absolute boundary around the class of persons who peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to the event unless the Court can conclude as a matter of law that the reaction was unreasonable.

Id. at 436 (citations omitted). The mental and emotional suffering of the plaintiff must be those of a "normally constituted person" and must be manifested by objective symptomatology. *Id.* at 435-36.

Subsequent to *Hunsley*, the Court again addressed the tort of negligent infliction of emotional distress in *Gain v. Carroll Mill Co., Inc.*,

114 Wn.2d 254, 787 P.2d 553 (1990). There, the father and brother of a Washington State Trooper who was killed in a fatal accident sought damages from the defendant for the negligent infliction of emotional distress. The plaintiffs watched a television news broadcast of the fatal accident, and were able to confirm their family member was the victim. The *Gain* court denied recovery to the plaintiffs, concluding mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law. While recognizing a defendant has a duty to avoid the negligent infliction of emotional distress, the Court determined:

This duty does not extend to those plaintiffs who have a claim for mental distress caused by the negligent bodily injury of a family member, unless *they are physically present at the scene of the accident or arrive shortly thereafter.*

Id. at 261 (emphasis added).

In the Court's subsequent ruling in *Hegel v. McMahon, supra*, the Court emphasized the importance of "shortly thereafter," rejecting a bright line rule confining recovery to those who witnessed the injury-causing event:

The significance of the phrase "shortly thereafter" in *Gain* is the center of controversy in this case. The Court of Appeals below did not give effect to the "shortly thereafter" language. Instead, the court followed the lead of the Court of Appeals in *Cunningham* by holding that

only plaintiffs who are present at the accident scene and observe the injury-causing event may recover for emotional distress. *Hegel*, 85 Wash.App. at 112, 931 P.2d 181. In its analysis, the court noted that later decision have largely “ignored” our language in *Gain* that allows a cause of action to those who arrive shortly after an accident. *Hegel*, 85 Wash.App. at 110, 931 P.2d 181. The Court also referred to recent federal decision that characterized Washington law as requiring that a plaintiff personally witness the injury or death of a family member in order to recover for negligent infliction of emotional distress. *Hegel*, 85 Wash.App. at 112, 931 P.2d 181 (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 2407, 129 L.Ed.2d 427 (1994); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir. 1994)).

Contrary to the position of the Court of Appeals, *Gain* does not limit negligent infliction of emotional distress claims to those who actually witness the injury-causing event.

Hegel, 136 Wn.2d at 128-29.

In consolidated cases, the *Hegel* court held plaintiffs who saw injured family members suffering at the scene of an accident had a valid cause of action for the negligent infliction of emotional distress. In one of the cases, the son, parents, brother, and sister-in-law of Dale Hegel came upon an accident scene a few minutes after Hegel had been struck by a passing car while he was pouring gas into his car’s tank at the side of the road. His family found him lying in a ditch, bleeding. *Id.* at 124. In the other case, Jeremy Marzolf’s father came upon the nineteen year old about ten minutes after an accident in which Jeremy’s motorcycle had collided with a school bus. Jeremy was on the ground and conscious, but he had

lost a leg. *Id.* at 125. In both situations, the plaintiffs came upon the injured family member soon *after* the injury occurred, and did not actually witness the accident or the injury.

The Court articulated its rule regarding “shortly thereafter” as follows:

Connecticut and Wyoming have adopted a principled intermediate approach which limits the scope of liability, yet still allows recovery to those plaintiffs who witness their relative’s injuries at the scene of an accident. *These states recognize a cause of action where a plaintiff witnesses the victim’s injuries at the scene of an accident shortly after it occurs and before there is material change in the attendant circumstances. See Clohessy v. Bachelor, 237 Conn. 31, 675 A.2d 852 (1996); Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).* This rule addresses the concerns over limitless liability by allowing recovery only to the class of claimants who are 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*. *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 131-32 (emphasis added). The length of time elapsing since the accident is clearly a fact for the trier of fact to consider.

A case decided since *Hegel* clearly indicates a plaintiff may recover under the tort of negligent infliction of emotional distress without being present at the scene of a traumatic event. In *Greene v. Young*, 113 Wn. App. 746, 54 P.3d 734 (2002), a UIM coverage case, Greene arrived

at the aftermath of a carjacking in which his pregnant wife suffered two fractured ankles and his son was a participant. The Court of Appeals described the scene:

Mitchell Greene arrived at the scene a short time thereafter. He observed that there were fire trucks, ambulances, and police cars at the scene. He witnessed his wife lying on a stretcher with both of her legs in splints, and exhibiting extreme emotional distress. His son was screaming uncontrollably.

Id. at 749. The Court of Appeals held Greene was covered for his post-traumatic stress disorder arising out of the carjacking and his observation of his wife and child at the aftermath. Discussing *Hegel*, the court stated:

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. The court concluded 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.”

Here, Mitchell came upon the scene shortly after the incident concluded. He observed his injured wife at the scene, hysterically crying while being carried on a stretcher. He observed his son in a stranger’s arms, also crying and screaming uncontrollably. The location had not changed and there was little change in the condition of his wife.

Id. at 752.

This case resembles *Hegel* and *Greene* and is very different from the facts in *Gain*. Unlike the plaintiffs in that case, who saw the events on television, Jay Colbert arrived at Lake Tapps shortly after Denise's disappearance and was an eyewitness to the search, rescue, and recovery efforts for his daughter; he was physically present at Lake Tapps while rescue boats and divers crisscrossed the lake. Through all these hours, he never gave up hope his daughter, an excellent athlete and a strong swimmer, would be found alive. He was a participant in the trauma of the drowning death of his daughter.

Skier's Choice argued to the trial court a plaintiff in an action for negligent infliction of emotional distress "must see the victim suffering shortly after the accident." CP 378, 536-37. In effect, Skier's Choice tried to persuade the trial court the plaintiff must observe a bloody, gruesome scene to establish the tort. This is not the law in Washington.

The *Hegel* court specifically rejected a formulation of the rule requiring the plaintiff to be at the scene "*at the time* of the accident" (court's emphasis). 136 Wn.2d at 131. Instead, the Court held "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." *Id.* at

132. Jay Colbert was present at Lake Tapps, shortly after Denise's drowning, although he did not know for certain she had drowned. There was no substantial change in the scene.

Similarly, Skier's Choice argued to the trial court the tort cannot be available in drowning cases, citing several out of state authorities for this proposition. CP 378. Skier's Choice hoped to divert the trial court's attention from the elements of the tort in Washington articulated by the *Hegel* court.

The two principal cases cited by Skier's Choice below, *Ebarb v. Woodbridge Park Ass'n*, 210 Cal. Rptr. 751 (Cal. App. 1985) and *Gabaldon v. Jay-Bi Property Management, Inc.*, 925 P.2d 510 (N.M. 1996) come from jurisdictions requiring the plaintiff to actually witness the accident itself before a cause of action for negligent infliction of emotional distress is stated. The California Court of Appeals in *Ebarb* specifically declined "to allow recovery for the emotional distress suffered by a family member who witnesses the *result* or the *effects* of an accident and not the accident itself." (court's emphasis). 210 Cal. Rptr. at 752. The court stated the tort could not be proved if a relative arrived on the scene five to thirty minutes after the accident. *Id.* at 753. The New Mexico court limited recovery to a plaintiff who had a "contemporaneous sensory perception of the accident." 925 P.2d at 394.

Courts in many other jurisdictions have held a cause of action for negligent infliction of emotional distress is stated where the plaintiff arrives at the injury scene after the injury. *Ruttley v. Lee*, 761 So. 2d 777 (La. App. 2000), *writ denied*, 768 So. 2d 1287 (La. 2000) (mother arrived at traffic accident scene before daughter's body was removed from a car; she never saw daughter's body as car was covered with a canvas and police did not allow mother to go to the car); *Zuniga v. Housing Auth.*, 48 Cal. Rptr. 2d 353 (Cal. App. 1995) (plaintiff arrived at fire scene after fire department personnel, watching them attempt to rescue fire victims; his wife, three children, and grand mother-in-law died in the fire, but he saw body of one daughter carried out of building); *Beck v. State*, 837 P.2d 105 (Alaska 1992) (plaintiff was miles from car accident scene where daughter died and learned of accident from friends; she arrived at site and was not allowed to approach her daughter's wrecked car); *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990) (wife came into comatose husband's hospital room and discovered he had been bitten on face and leg by rats); *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986) (father went to accident scene and witnessed daughter's body being removed by paramedics from automobile); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978) (sister of infant who drowned in daycare pool stated cause of action).

Under Washington law, a plaintiff must be at the scene of an event causing injury or death to a family member or a loved one, or arrive shortly after the event before the effect of the event on the family member of loved one has changed. Jay Colbert meets this requirement.

(b) Objective Symptoms of Emotional Distress

Washington cases on the tort of negligent infliction of emotional distress have also required the plaintiff to have “objective symptoms” of such distress. The *Hunsley* court stated:

A further restriction on the issue of liability is the requirement that the mental and emotional suffering, to be compensable, must be manifested by objective symptomology. Admittedly there is some artificiality in drawing this line, but we do so in view of the facts of this case.

87 Wn.2d at 436. In *Hegel*, the Supreme Court refined what is required to meet the “objective symptoms” element, rejecting the contention that “objective symptomology requires some sort of physical manifestation of the emotional distress.” 136 Wn.2d at 133. Instead, the Court articulated the rule as follows:

We hold that to satisfy the objective symptomology requirement established in *Hunsley*, 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. Thus, contrary to the holding of the Court of Appeals in *Shoemaker*,

nightmares, 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.

In *Trinh v. Allstate Insurance Co.*, 109 Wn. App. 927, 37 P.3d 1259, *review denied*, 147 Wn.2d 1003 (2002), the Court of Appeals held an insured's post-traumatic stress disorder resulting from her observation of her friend's death when he was struck by a drunk driver at the side of the road while he was helping her change a tire was covered under her UIM coverage. The insured's symptoms met the requirement of "bodily injury" under the policy:

In the weeks following the accident, Trinh experienced frequent headaches and constantly felt sick to her stomach. She was unable to eat and vomited at least once a day. Over one year, she lost about 10 or 15 pounds. She also suffered hair loss, fragile fingernails, and skin breakouts. Her physical symptoms were accompanied by feelings of depression and anxiety, nightmares, insomnia, and chronic crying. She sought help from Dr. Hanan Berman, a clinical psychologist, about two weeks after the accident. Dr. Berman diagnosed Trinh with chronic PTSD "that was entirely and solely related to the September 26, 1996 accident on a far more probable than not basis."

Id. at 929. Thus, to satisfy this element of the cause of action a medical practitioner must diagnose the plaintiff's emotional distress as arising

from the injury to a family member or loved one. Jay Colbert meets this requirement.

(3) Jay Colbert Established a Prima Facie Claim of Negligent Infliction of Emotional Distress

Washington case law is clear on the elements of the cause of action for negligent infliction of emotional distress. The defendant must act in a negligent fashion resulting in a person's injury or death. The plaintiff must be physically present at the scene of an injury or death of a family member or loved one. The plaintiff need not witness the injury-causing event, but must be at the scene of the injury or death shortly after it occurred. The test for whether the plaintiff was present "shortly after" the injury or death is classically a question of fact for the jury. Washington does not follow a bright line temporal rule. The plaintiff's emotional distress must include medically diagnosable objective symptoms.

Using the *Hunsley/Gain/Hegel* analytical framework, Skier's Choice's negligent conduct in producing a defective product capable of releasing toxic quantities of carbon monoxide created the foreseeable risk of harm suffered here – death by drowning. Carbon monoxide is well understood by all automobile drivers to be a potential source of death or serious injury in an enclosed space such as a garage. As noted previously, carbon monoxide is also unreasonably dangerous in the open air when a

powerboat is in use. Denise Colbert received a lethal dose of this gas from the boat manufactured by Skier's Choice. CP 483. Skier's Choice knew carbon monoxide is a deadly substance:

Carbon monoxide, sometimes called a "silent killer," is a hazard that all boaters should be aware of. It is an odorless, colorless and tasteless gas that can overcome an individual in a matter of seconds . . . even a few breaths can be enough to kill you. Carbon monoxide can easily accumulate inside or outside your boat . . . The signs of carbon monoxide poisoning are easily overlooked . . .

CP 428.

Powerboats are meant to be used in the water and Skier's Choice designed its boat with a swim step at the rear, inviting users to gather at the very place where carbon monoxide accumulations from the engine exhaust are the highest. Denise Colbert's wrongful death from carbon monoxide poisoning was foreseeable, as was the negligent infliction of emotional harm to Jay Colbert of seeing her lifeless body in the water.

Moreover, Jay Colbert arrived at Lake Tapps shortly after Denise's disappearance and was present at the scene of his daughter's death. It was foreseeable a father would come to the scene when his only daughter was reported missing. Colbert's presence at the scene of his daughter's death was sufficiently "immediate" or "proximate" to satisfy the requirements of Washington case law. He arrived at the scene shortly after his daughter was reported as missing. Law enforcement detachments were still

arriving. There was only one boat out in the water when Colbert and his wife arrived, later to be joined by others. There is no question Colbert suffered the worst kind of emotional agony as he watched for hours from the shore, hoping his daughter would still be alive. The Colberts had a front row seat on Ed Peterson's dock to hours of search and rescue activity.

Given that Denise was an outstanding athlete with remarkable stamina and endurance, there was a rational basis for Colbert's hope she would be found alive. It was only when he saw the marker buoy pop up, followed by the sight of her body that he began to accept the reality of her death. Colbert is part of the limited class of claimants present at the scene "before the horror of the accident had abated." *Hegel*, 136 Wn.2d at 132.

Finally, Colbert proved the objective symptomology of emotional distress required by the Supreme Court in *Hunsley* and *Hegel*. Colbert was medically diagnosed as suffering from clinical depression. CP 488.⁵ Dr. Severtson administered the MMPI-2 test to Colbert, a reliable, objective psychological assessment instrument. Combining this with his

⁵ Dr. Severtson testified:

On the basis of reasonable psychological probability, I find that these conditions [somatic signs and symptoms evidence from conscious and dream images] were caused directly and/or marked exacerbated *by the death of his daughter and the traumatic witnessing of the search and recovery efforts* which resulted in the locating of her dead body.

CP 473 (emphasis added).

clinical interview, he concluded Colbert demonstrated extreme anxiety and depression, manifested primarily in somatic signs and symptoms. This was evident in both his conscious world during the day and his dreams at night. CP 473. Dr. Severtson recommended psychotherapy and medication as treatment for Colbert. CP 473-74.

Skier's Choice argued initially that Colbert did not have a medically diagnosable emotional disorder. CP 383-84. That contention failed in light of Dr. Severtson's testimony. Its argument then morphed into an assertion on reply that Colbert's symptoms were unconnected to the removal of Denise's body from the lake and instead related to his perception of the recovery effort. CP 538-40. This argument places too fine a point on the requirement of objective symptomology. Denise's drowning, the recovery effort, and the removal of her body from the water were intertwined. The events cannot be parsed in assessing Colbert's symptoms.

Dr. Severtson concluded Colbert's ongoing emotional distress was caused by the death of his daughter Denise *and* the witnessing of the search and rescue efforts:

Q. Do you believe that if Mr. Colbert had not seen his daughter's body being pulled onto the boat, that his psychological condition would be any different today?

A. . . . I think the anxiety is significantly more marked, and the consequences of that anxiety then are more marked, because he was there. I genuinely believe that.

CP 499. See also CP 502. Dr. Severtson further stated: "The fact that he was there for that extended period of time made him a very susceptible person to the anxiety, the profound anxiety of the moment, or of the hour."

Id. The doctor concluded Colbert's physical presence at the scene was critical: "Seeing it makes it worse. But you are there for a three-hour period, the buoy pops up, and the only thing missing is your actually seeing of that body. To see it, you know, I think would make it worse . . ."

Id.

Jay Colbert satisfied all of the elements of a cause of action for negligent infliction of emotional distress under the facts of this case.

F. CONCLUSION

The trial court erred in denying Colbert the opportunity to present his case for negligent infliction of emotional distress against Skier's Choice to the jury.

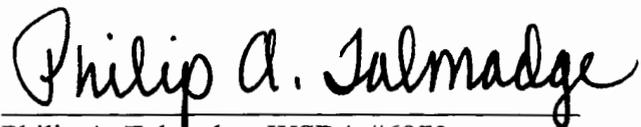
Skier's Choice was responsible for a powerboat that created the risk of carbon monoxide poisoning for swimmers like Denise Colbert. Denise died of carbon monoxide poisoning.

Jay Colbert arrived at Lake Tapps shortly after his only daughter was reported missing. He was not certain she was dead as she was an excellent swimmer. He was physically present at the scene as police and fire rescue workers searched for Denise. He remained there for hours, with a good view of what was going on. Colbert was in a profound state of emotional withdrawal, traumatized by his daughter's disappearance. He was present at the injury-causing event and has experienced objective symptoms of emotional distress since the event. Colbert met the test articulated by the Washington Supreme Court in *Hunsley/Gain/Hegel* for a cause of action for negligent infliction of emotional distress against Skier's Choice.

This Court should reverse the trial court's summary judgment and remand the case to the trial court for trial on the issue of negligent infliction of emotional distress. Costs on appeal should be awarded to Colbert.

DATED this 4th day of August, 2005.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Emmelyn Hart-Biberfeld, WSBA #28820
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661

William S. Bailey, WSBA #7307
Fury Bailey
710 Tenth Avenue East
PO Box 20397
Seattle, Washington 98102
(206) 726-6600
Attorneys for Appellant Jay Colbert

APPENDIX

FILED
DEPT. 2
IN OPEN COURT
APR 22 2005
Pierce County Clerk
By _____ DEPUTY

HONORABLE KATHERINE M. STOLZ

IN THE SUPERIOR COURT OF WASHINGTON STATE
FOR PIERCE COUNTY

JAY COLBERT, as Personal Representative of the Estate of DENISE COLBERT; and for himself
Plaintiff,
vs.
SKIER'S CHOICE CORPORATION OF TENNESSEE, a Tennessee Corporation
Defendant.

No. 03-2-13666-8

ORDER

~~[PROPOSED]~~

THIS MATTER having before the Court on the motion of defendants for partial summary judgment on breach of warranty, pre-death pain and suffering and negligent infliction of emotional distress claims and the Court having read the written submissions of counsel, with supporting documents, heard oral argument and now being fully advised in the premises, it is

COPY

1 ORDERED that defendant Skier's Choice's motion for
2 partial summary judgment on breach of warranty claims is:

3
4 GRANTED X DENIED _____

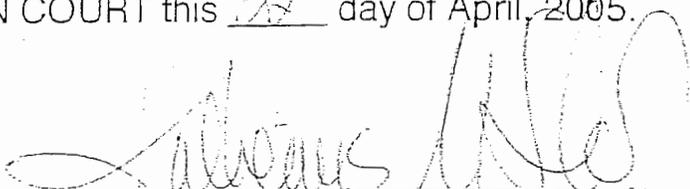
5 Pre-death pain and suffering is:

6
7 GRANTED X DENIED _____

8 Negligent infliction of emotional distress is:

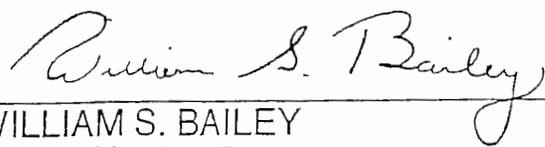
9
10 GRANTED X DENIED _____

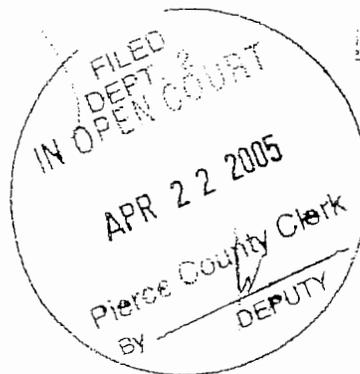
11
12 DONE IN OPEN COURT this 22nd day of April, 2005.

13
14
15 
16 HON. KATHERINE M. STOLZ
17 Judge of the Superior Court

18 Presented by:

19 FURY BAILEY

20
21 
22 WILLIAM S. BAILEY
23 WSBA No. 7307
24 Attorney for Plaintiff



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
26

Approved as to form:

MILLS MEYERS SWARTLING



RAYMOND S. WEBER
WSBA No. 18207
Attorney for Defendant Skier's Choice

STRITMATTER KESSLER

BRADLEY J. MOORE
WSBA No. 21802
Attorney for Defendant Jacobi

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
26

HONORABLE KATHERINE M. STOLZ

IN THE SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR THE COUNTY OF PIERCE

JAY COLBERT, as Personal
Representative of the Estate of
Denise Colbert; and for himself,

Plaintiffs,

v.

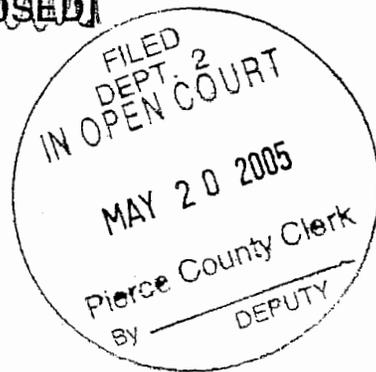
MOOMBA SPORTS, Inc., a
Tennessee corporation, UNITED
MARINE CORPORATION OF
TENNESSEE, a Tennessee
corporation, AMERICAN MARINE
CORPORATION, A Tennessee
Corporation, SKIER'S CHOICE,
INC., an Oklahoma corporation,
and MARC JACOBI,

Defendants.

NO. 03-2-13666-8

ORDER OF VOLUNTARY
DISMISSAL WITHOUT
PREJUDICE

[PROPOSED]



The Court has heard and considered the motion of the Estate of Denise Colbert for a voluntary dismissal without prejudice pursuant to Civil Rule 41(a)(1)(B). The Court finds that the plaintiff Estate has not yet rested at the conclusion of its opening case. Accordingly, it is

1 ORDERED that the plaintiff Estate's motion for a voluntary
2 dismissal without prejudice be, and is hereby, GRANTED.

3 The claims of the plaintiff Estate are dismissed without
4 prejudice.

5 This order has no effect upon the claims of Jay Colbert in his
6 individual capacity for negligent infliction of emotional distress which
7 were already the subject of this Court's order on defendants'
8 summary judgment motion.

9 * DATED this 20th day of May, 2005.

10
11
12 *Katherine M. Stolz*
13 HON. KATHERINE M. STOLZ
14 Judge of the Superior Court

15 Presented by:

16 FURY BAILEY

17 *[Signature]*
18 C. STEVEN FURY
19 WSBA No. 8896
20 Counsel for Plaintiffs

21
22
23
24
25
26
FILED
DEPT. 2
IN OPEN COURT
MAY 20 2005
Pierce County Clerk
BY *[Signature]* DEPUTY

Melba Meyers Swartz

Hayes Gori
WSBA No. 31788

Counsel for Defendants

21 Talmadge Law Group, PLLC

22
23
24 *Philip A. Talmadge*
25 PHILIP A. TALMADGE
26 WSBA No. 6973
Counsel for Plaintiffs

[Circular Stamp]

* Defendant is not to be liable for taxable costs
under CR 41(d) should a subsequent motion
be filed by Jay Colbert as PR of the
Estate of Denise Colbert is deferred.

FURY BAILEY

710 Tenth Avenue East
Seattle, WA 98102
(206) 726-6600 FAX: (206) 726-0288

DT RD

DECLARATION OF SERVICE

On said day below I delivered via U. S. Postal Service a true and accurate copy of the following document: Brief of Appellant Colbert, No. 33283-3-II, to the following:

Original filed by ABC Legal Messenger with:

Court of Appeals, Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

Bill Bailey
Fury Bailey
710 - 10th Avenue E
PO Box 20397
Seattle, WA 98102

Raymond S. Weber
Hayes Gori
Janna J. Annest
Mills Meyers Swartling
1000 2nd Avenue, Ste. 3000
Seattle, WA 98104

William R. Hickman
Reed McClure
Two Union Square
601 Union Street
Suite 1500
Seattle, WA 98101-1363

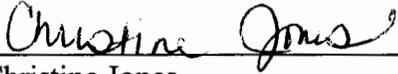
Bradley Moore
Stritmatter Kessler Whelan
200 Second Avenue West
Seattle, WA 98119-4204

Patrick Fowler
Snell & Wilmer
400 E. Van Buren St.
Phoenix, AZ 85004

FILED
COURT OF APPEALS
DIVISION II
05 AUG -5 PM 1:32
STATE OF WASHINGTON
BY _____
DEPUTY

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 5, 2005, at Tukwila, Washington.



Christine Jones
Talmadge Law Group PLLC