

No. 33283-3-II

ORIGINAL

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

78833-2

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.

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A. INTRODUCTION

Jay Colbert arrived at the scene of his daughter Denise's drowning immediately after he and his wife were notified she was missing. He witnessed rescue workers pulling Denise's body out of the water by her arms and putting her into a boat. There was no substantial change in the condition of Denise's body from the time she drowned until the time Colbert observed her, nor was there a change in the location of the accident. A clinical psychologist who examined Colbert after Denise's drowning diagnosed him as suffering from extreme anxiety and depression manifested primarily in somatic signs and symptoms. The psychologist testified Colbert's presence at the scene of the drowning, in particular his observation of rescue workers pulling Denise's dead body out of the water, was causative of his emotional problems. Colbert satisfied the requirements of a cause of action for negligent infliction of emotional distress under Washington law.

In their brief, respondents Moomba Sports, Inc., United Marine Corp. of Tennessee, American Marine Corp., and Skier's Choice, Inc., (hereinafter "Skier's Choice") misstate the requirements of a cause of action for negligent infliction of emotional distress, arguing a plaintiff must arrive at the scene shortly after the accident and witness the victim

suffering some sort of physical trauma to state a cause of action. This is not the law in Washington.

Also, Skier's Choice argues Colbert was not diagnosed by a medical professional, when in fact the record contains testimony from a clinical psychologist diagnosing Colbert with serious depression and anxiety disorder and attributing these emotional disorders to Colbert's presence at the scene of the drowning and his witnessing Denise's dead body being lifted out of the water by her arms, loaded into a boat, carried to shore, put onto a stretcher, covered with a sheet, and driven away in an ambulance.

B. ARGUMENT IN REPLY

- (1) Skier's Choice's "Resume of Pleadings and Proceedings" and Statement of Facts Do Not Accurately Reflect the Facts of this Case.

A "resume of pleadings and proceedings" should consist, simply, of a summary of the pleadings and proceedings in the case. Skier's Choice's resume, however, begins with a discussion of the procedural history of the case, but then transforms into a statement of the facts, discussing the fact that Denise and her friends had been at a bar before arriving at Lake Tapps and going boating. This factual discussion not only has no place in a statement of procedural history, but is also an improper attempt, which Skier's Choice continues in the statement of

facts, to transform this matter into a run-of-the-mill case of an irresponsible youth who caused her own drowning by recklessly partying and drinking with her friends, when, in fact, it is a case of the negligent design and manufacture of a boat such that boaters using it in a foreseeable manner would be exposed, unbeknownst to them and without warning, to deadly carbon monoxide fumes.¹

Skier's Choice also distorts Colbert's response when he learned Denise was missing. Skier's Choice would have this Court believe that when he was notified Denise disappeared while swimming, Jay Colbert displayed no grief or, for that matter, any other emotion, and simply drove to a friend's house, without speaking to anyone involved in the rescue efforts, to dispassionately observe the rescue efforts from afar. On the contrary, the record reflects Colbert was grief-stricken and handled his grief and shock by withdrawing. The police chaplain, Arthur Sphar, testified he spoke to Colbert shortly after Colbert and his wife arrived at the dock and Colbert "was probably very much in grief and just – just was

¹ Skier's Choice's discussion of the procedural history is cluttered with other irrelevant facts. For instance, Skier's Choice identifies the specific drinks Denise allegedly consumed the night of her death and identifies the maximum capacity of the boat she was in. There is no relevance to these facts for purposes of this appeal. Nor is there any reason for the inclusion of Lindsay Lynam's testimony that, before Denise disappeared, she and Denise were laughing and talking and Denise did not struggle. Further, while Skier's Choice highlights the toxicology report's notation of a 0.12% blood alcohol level, they neglect to mention the report's notation of a 52% carbon monoxide saturation in Denise's blood. CP 50.

looking at the scene and seemed to be very much into himself, didn't interact with me hardly at all."² CP 451. Colbert's testimony further explains his emotional state:

A I pulled up in the cul-de-sac, and then I seen an officer's car there, and that – I don't know why, but I just felt that I didn't want to go down there. I – you know, I – I didn't want to confuse the situation or do anything to make it worse. Just kind of like from my – maybe it's my military background, but I know that if something is bad, that unless you're really prepared to help, you're not going to do any good being there. So I was afraid that if there were other people down there upset and stuff like that I might lose it and it might cause...

Q So you didn't get out of the car at that point?

A Yeah. I got out, and I seen an officer, and they were talking, calling in for more units. So then I got back in the car. And there was more units arriving. And then I drove over to a friend of mine's house that's about right here (indicating), and then I asked them if I could – Ed if I could – if I could use his dock.

CP 468. When asked what was going through his mind when he saw a boat undertake a search pattern, Colbert responded:

A I was just wondering, why are they looking there? Or – or, you know, was it a bad joke, you know? As a parent – you know, and then I thought, well, maybe we were forcing her to go back to Europe or, I don't know, maybe this was something they devised. I don't know. As a parent, you know, you look for an easy way out. And, you know, at that time I would have accepted anything.

² Chaplain Sphar's testimony also contradicts Skier's Choice's assertion Colbert talked to no one involved in the rescue efforts.

CP 468.

Skier's Choice's distortion of the facts and impersonalization of Denise's death continues in the statement of facts, where it again portrays Colbert's response to the news of Denise's disappearance as emotionless and practically disinterested. For example, Skier's Choice's description insinuates that after the Colberts received the telephone call about Denise's disappearance, they wasted valuable time arranging for a neighbor to watch their younger children and then drove to their friend's house with no interest in speaking to the rescue workers. There is no support for this. Mrs. Colbert, who answered the phone, told Kyle Swanson, the caller, the Colberts would be at the scene "immediately." CP 431. She estimated Swanson called her at 3:30. CP 443. The Colberts arranged for a neighbor to watch their children and arrived at the dock, which was five minutes away, at 3:45. CP 444, 467. Colbert's reasons for leaving the rescue scene and waiting on his friend's dock until Denise's body was found are explained above and show Jay Colbert was far from disinterested and without grief.

Also, Skier's Choice states the Colberts' friend's dock was 900 to 1,000 feet from Marc Jacobi's dock. (Jacobi owned the boat in which Denise was riding.) Presumably, the inclusion of this fact is to imply Colbert dispassionately chose to remain a significant distance away from

the rescue efforts. In fact, however, Denise's body was discovered only 100 yards from where Colbert was sitting on the dock. CP 469.³

(2) Skier's Choice Misstates Washington Law On Bystander Recovery for Negligent Infliction of Emotional Distress.

This Court can disregard Skier's Choice's discussion of *Cunningham v. Lockard*, 48 Wn. App. 38, 736 P.2d 305 (1987). The court in that case limited negligent infliction of emotional distress claims to a plaintiff who was present at the time the victim was imperiled by the defendant's negligence. The Washington Supreme Court rejected *Cunningham's* requirement that a person be present at the time of the accident in order to recover for negligent infliction of emotional distress and concluded a plaintiff must either be physically present at the scene of the accident or arrive shortly thereafter in order to recover. *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 261, 787 P.2d 553 (1990). Thus, under Washington law, "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." *Hegel v. McMahon*, 136 Wn.2d 122, 132, 960 P.2d 424 (1998). "The critical factors are the circumstances under which the

³ In addition to distorting the facts, Skier's Choice's statement of facts contains argument. See Br. of Resp'ts at 9 n.4: "Appellant's repeated reliance on such inaccurate statements undercuts his credibility on all statements." A statement of the case may not contain argument. RAP 10.3(a)(4), (b).

observation is made, and not any rigid adherence to the length of time that has passed since the accident.” *Id.*, 136 Wn.2d 132.⁴

The facts here fit squarely within the *Hegel* formulation. Colbert observed not just “an injured relative” but his dead daughter at the scene of her accidental drowning, after its occurrence and before any substantial change in her condition or the location of the accident.

Skier’s Choice incorrectly argues in order for a bystander to recover for negligent infliction of emotional distress, he or she must have “witnessed the victim’s suffering.” *See* Br. of Resp’ts at 18, 21, 22, 23, 24, 30. This is not an element of the tort under Washington law. Skier’s Choice found this language in the *Hegel* court’s discussion of *Gain*: “*Gain* did not further restrict liability by mandating that the plaintiff be present *at the time* of the accident, nor did it foreclose a cause of action for a plaintiff who arrives on the scene after the accident has occurred and witnesses the victim’s suffering. *Hegel*, 136 Wn.2d at 130 (emphasis by the Court). Nowhere in *Hegel* or in any other case does the Supreme Court hold that a requirement for recovery for negligent infliction of emotional distress is a plaintiff’s witnessing the victim’s suffering. Imposition of such a requirement would foreclose recovery in all cases

⁴ Thus, contrary to Skier’s Choice’s argument, whether Colbert arrived within minutes after Denise drowned is of minimal, if any, relevance.

where the victim was dead when the plaintiff arrived at the accident scene, an absurd result. The *Hegel* rule is intended to allow recovery to the class of claimants who are present at the scene “before the horror of the accident has abated.” *Hegel*, 136 Wn.2d at 132. Colbert falls within this class.

Skier’s Choice also argues another prerequisite to recovery for negligent infliction of emotional distress is that the victim suffered some type of physical trauma, such as a crushed body or bleeding. Again, this is not an element of the tort. Skier’s Choice found this language in the Wyoming case the *Hegel* court cited. It was intended to be but an example of the what a plaintiff might observe when coming upon the accident scene.⁵ The *Hegel* court did not limit bystander recovery for

⁵ The language in context of the entire passage is:

The essence of the tort is the shock caused by the perception of an especially horrendous event. It is more than the shock one suffers when he learns of the death or injury of a child, sibling, or parent over the phone, from a witness, or at the hospital. It is more than bad news. 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. Therefore, we hold that the plaintiff can recover if he observed the infliction of serious bodily harm or death, or if he observed the serious bodily harm or death shortly after its occurrence but without material change in the condition and location of the victim.

Gates v. Richardson, 719 P.2d 193, 199 (Wyo. 1986).

negligent infliction of emotional distress to cases where the victim suffered physical trauma.

In sum, contrary to Skier's Choice's assertions, there is neither a requirement that a plaintiff witness the victim's suffering nor a requirement that there be physical trauma such as a crushed body or bleeding for bystander recovery for negligent infliction of emotional distress. While the presence of these factors may very well support bystander recovery, their absence does not necessarily preclude recovery under Washington law because they are not elements of the tort. A family member may recover for negligent infliction of emotional distress if he or she observes an injured or dead relative at the scene of an accident after its occurrence and before there is a substantial change in the relative's condition or location. *Hegel*, 136 Wn.2d at 132. This is what happened here. Colbert observed his dead daughter being pulled by her arms out of the lake and into a boat after she drowned and before there was any substantial change in her condition or the location of the accident.⁶

(3) Skier's Choice Ignores the Evidence Establishing Colbert's Presence at the Scene of His Daughter's Drowning and Observation of the Recovery of Her Body Caused His Emotional Disorders.

⁶ Citing the quote from the Wyoming case set forth in the previous footnote, Skier's Choice argues the Colberts' receiving the phone call from Kyle Swanson about Denise's disappearance "is not the kind of news, the kind of shock, the tort requires." Br. of Resp'ts at 23. As is plainly evident from the record and Colbert's briefs, his claim for negligent infliction of emotional distress is not premised solely on the phone call.

To recover for negligent infliction of emotional distress, a plaintiff's emotional response must be corroborated by objective symptomology. *Hunsley v. Giard*, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976). To satisfy this requirement, "a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *Hegel*, 136 Wn.2d at 135. Nightmares, sleep disorders, intrusive memories, chronic depression, post traumatic stress disorder may satisfy this requirement. *Id.*

Skier's Choice makes the incredible assertion that the record lacks a medical diagnosis by a medical professional. Br. of Resp'ts at 27. To the contrary, the record contains both a declaration and deposition testimony of S. Erving Severtson, Ph.D., a licensed clinical psychologist who examined Colbert approximately two and a half months after Denise drowned.⁷ CP 472-74 (declaration); CP 485-500 (deposition testimony). During his examination of Colbert, Dr. Severtson administered the MMPI-2 test. The MMPI-2 is a diagnostic tool. CP 488. Colbert's score on the test combined with Dr. Severtson's interview of Colbert provided a sufficient basis for Dr. Severtson to diagnose Colbert's clinical status. CP 473. Dr. Severtson diagnosed Colbert as suffering "extreme anxiety and

depression manifested primarily in somatic signs and symptoms.” CP 473. Colbert’s anxiety and depression were also manifested in his dream images. CP 493. In his deposition, Dr. Severtson stated that, although he did not make a “DSM 4 diagnosis,” he did conclude that there were “diagnostic descriptions” of Colbert:

Q And did you make, for want of a better word, “psychological diagnosis” of Mr. Colbert?

A Not in the sense of a DSM 4 diagnosis, but there are diagnostic descriptions of him, which I believe are very valid and are supported by my evaluation data, and these have to do with a serious anxiety condition, a serious depression, the tendency to show his anxiety and his depression in physical signs and symptoms. So there are some diagnostic categories that are relevant, but I have not put a specific DSM 4 diagnosis –

Q And –

A The MMPI suggests, too, an anxiety disorder or somatoform disorder, neither of which in my mind would communicate as much as I would want to communicate, so I’ll use diagnostic categories, but I won’t use a specific label.

CP 488.

Contrary to Skier’s Choice’s argument, therefore, the record does contain a medical diagnosis of Colbert’s emotional disorders by a medical professional. Further, Skier’s Choice is wrong in asserting the record does

⁷ Because whether Dr. Severtson is an M.D. is irrelevant, Skier’s Choice’s comment that Dr. Severtson “does not appear to be an M.D.” is likewise irrelevant. Br. of Resp’ts at 26 n.7.

not show Colbert's emotional disorders were causally linked to his observation at the scene of Denise's drowning. *See Hegel*, 136 Wn.2d at 135 (A plaintiff must show "the causal link between the observation at the scene and the subsequent emotional distress."). Dr. Severtson testified Colbert's presence at the scene was causative of his severe anxiety and depression: "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 496.

Skier's Choice's contention that Dr. Severtson stated Colbert's psychological condition would be the same even if he had not seen Denise's dead body being pulled out of the lake is not supported by the record. Dr. Severtson testified, although Jay Colbert would have suffered anxiety and depression had he been at the lake and saw the rescue efforts but did not see them pull Denise's body out the lake, Colbert's actually seeing Denise's dead body being pulled by her arms out of the water and into the boat increased the severity of emotional disorders. CP 496. He also testified the images from the night of the drowning, including images of rescue workers recovering Denise's body from the water, "very definitely" contributed to Colbert's emotional disorders. CP 498-99; *see also* CP 500 ("[T]he anxiety in particular is significantly greater because he was there.").

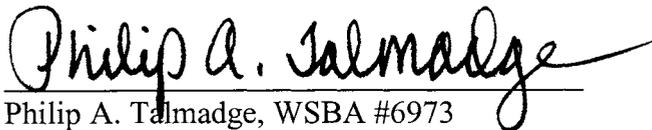
C. CONCLUSION

Jay Colbert stated a claim for negligent infliction of emotional distress based on the case law and the record here. Colbert observed the dead body of his daughter being pulled out the lake and loaded onto a boat before there had been any substantial change in her condition or the location. Colbert's emotional distress was corroborated by objective symptomology constituting diagnosable emotional disorders. These disorders have been shown to be causally linked to Colbert's presence at the scene of Denise's drowning and his observation of the recovery of her body.

This Court should reverse the summary judgment entered in favor of Skier's Choice and remand this case for trial of Colbert's claim for negligent infliction of emotional distress. Jay Colbert should be awarded his costs on appeal.

DATED this 24th day of October, 2005.

Respectfully submitted,

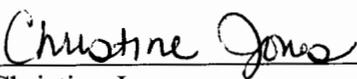


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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 25, 2005, at Tukwila, Washington.



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