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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN

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FILED
MAR 15 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

EDWARD J. BYLSMA

Plaintiff / Appellant,

v.

**BURGER KING CORPORATION, a Florida corporation;
and BURGER KING RESTAURANT #5259,
d/b/a KAIZEN RESTAURANTS, INC.,
an Oregon corporation,**

Defendants / Respondents

Washington Supreme Court No. 86912-0
U.S. Court of Appeals for the Ninth Circuit, No. 10-36125

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	2
A. Defendants ignore the first step of the Courts' analysis in both <i>Fisons</i> and <i>Hiltbruner</i> : courts must look first to the language of the statute to determine if it permits claims for emotional distress	2
1. <i>Fisons</i>	3
2. <i>Hiltbruner</i>	6
B. The Emotional Distress Suffered by Mr. Bylsma is a "Harm" under the WPLA.....	8
C. Washington Law Supports Mr. Bylsma's Claim for Emotional Distress Damages	10
1. There is a difference between first party and third party claims for emotional distress damages.....	11
2. <i>Colbert</i> is a bystander case that deals with policy concerns not present in this matter; nevertheless, even under the heightened foreseeability requirement of Washington's bystander cases the WPLA permits Mr. Bylsma's claims.....	15
3. Mr. Bylsma is not required to show that a "special relationship" existed between him and Defendants to bring a claim under the WPLA.....	17
III. CONCLUSION.....	19

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Anderson v. State Farm Ins. Co.</i> , 101 Wn.App. 323, 2 P.3d 1029 (2000), <i>review denied</i> , 142 Wn.2d 1017, 20 P.3d 945 (2001)	14, 17-19
<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001)	3, 14, 17-19
<i>Bishop v. State of Washington</i> , 77 Wn.App. 228, 889 P.2d 959 (1995)	13
<i>Colbert v. Moomba Sports Inc.</i> , 163 Wn.2d 43, 176 P.3d 497 (2008)	2, 10, 15-18
<i>Corrigal v. Ball and Dodd Funeral Home, Inc.</i> , 89 Wn.2d 959, 577 P.2d 580 (1978)	14, 16
<i>Cunningham v. Lockard</i> , 48 Wash.App. 38, 736 P.2d 305 (1987)	10, 12-15
<i>Davis v. Tacoma Ry. & Power Co.</i> , 35 Wash. 203, 77 P. 209 (1904)	11, 14
<i>Drake v. Smith</i> , 54 Wash.2d 57, 337 P.2d 1059 (1959)	14
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976)	10, 12
<i>Murphy v. Tacoma</i> , 60 Wn.2d 603, 374 P.2d 976 (1962)	9, 14
<i>Percival v. Gen. Elec. Co.</i> , 708 F.Supp.2d 1171 (W.D.Wash. 2010)	10, 13-15, 18
<i>Price v. State</i> , 114 Wash.App. 65, 57 P.3d 639 (2002)	17-19
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	1-6, 8
<i>White River Estates v. Hiltbruner</i> , 134 Wn.2d 761 (1998)	1-4, 6-8
<i>Wilson v. Northern Pac. R. Co.</i> , 5 Wash. 621, 32 P. 468 (1893)	8, 14
Statutes	
RCW 7.72.020	7
RCW 59.20.073	6
Other Authorities	
16 Wash. Prac., Tort Law and Practice § 5.7 (3d ed.)	13
Mobile Home Landlord-Tenant Act	6
Philip A. Talmadge, <i>Washington's Product Liability Act</i> , 5 SEATTLE U. L. REV. 1 (1981)	1, 3-5, 7-9, 16, 19

I. INTRODUCTION

In the Washington Product Liability Act, the Legislature declared that if a particular “damage” is recognized by the courts of Washington, that damage is a recoverable “harm” under the WPLA. Washington courts have repeatedly held that emotional damages—even emotional damages that do not arise from a plaintiff’s physical injury—are recoverable in Washington.

Defendants attempt to shrink the protective umbrella of the WPLA and avoid liability in this matter by misinterpreting several significant cases and imposing a rule and analysis that our courts never intended or established. First, Defendants argue that *Fisons* and *Hiltbruner* create a rule that emotional distress injuries are recoverable under a statute (like the WPLA) only if the statute requires intentional conduct to create liability. In fact, however, courts first seek guidance from the statute in question, and will require intentional conduct for emotional distress damages only when the statute is silent regarding damages and provides no guidance. In this case, the statute does provide guidance—the Legislature has told us to look at case law to see if courts have recognized the type of damages sought by the plaintiff.

Second, Defendants argue that there is no distinction between first party (direct) and third party (bystander) claims for emotional distress, but this ignores over a century of emotional distress jurisprudence. Washington courts have long recognized this distinction and the policy concerns behind it. Accordingly, Defendants' reliance upon *Colbert* to determine the outcome of this case is misplaced: *Colbert* is a third party case where the Court was concerned about causation and foreseeability issues not present here.

Finally, Defendants' attempt to graft a "special relationship" requirement onto first party emotional distress claims is unwarranted. A special relationship requirement is not found in case law, and would present an impermissibly ambiguous standard. Regardless, Plaintiff Ed Bylsma was a long-time, repeat customer of defendants and therefore had a special relationship with Defendants.

II. ARGUMENT

- A. Defendants ignore the first step of the Courts' analysis in both *Fisons* and *Hiltbruner*: courts must look first to the language of the statute to determine if it permits claims for emotional distress.**

Defendants misconstrue this Court's decisions in *Fisons* and *Hiltbruner* for a "rule" that emotional distress damages are only

available in a statutory action if the statute requires intentional conduct. See, e.g., Answering Brief, p. 4. Neither case had such a limited preclusive holding. On the contrary, courts must – and both of those Courts did – first seek guidance from the legislature’s chosen language of the statute to determine which damages are recoverable.¹ Courts will not look to or rely upon the level of fault required by a statute where the legislature has provided guidance regarding the recoverable damages.²

1. **Fisons**.³

Contrary to Defendants’ argument, *Fisons* does not hold that the WPLA rejects claims for emotional distress damages because the Act does not require intentional conduct. Instead, the *Fisons* Court held that a physician could not recover for emotional injuries arising out of a physical injury to his patient, a third party.

¹ See *Berger v. Sonneland*, 144 Wn.2d 91, 104-105, 26 P.3d 257 (2001) (permitting emotional distress damages where such damages were implied in statute).

² A more accurate general rule might be described as follows: “where the defendant’s duty is created solely by statute, and that statute is silent as to the availability of emotional distress damages, such damages will only be permitted in the absence of physical injury if the statute requires proof of an intentional tort.” But see *Price v. State*, 114 Wash.App. 65, 57 P.3d 639 (2002) (holding *Hiltbruner* does not control where statutory duty is created by mixture of common law and statute).

³ *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 317-18, 858 P.2d 1054 (1993).

To determine if the WPLA permitted the physician's claims for emotional distress damages, the Court proceeded with a two-step inquiry: 1) is the WPLA silent as to the availability of emotional distress damages, and, if so 2) does the Act require intentional conduct? *Fisons Corp.*, 122 Wn.2d at 317-318.

To determine if the WPLA is silent regarding emotional distress damages, the *Fisons Court* followed the guidance of the Act's definition of "harm" and looked to determine if Washington courts recognize such a third party claim for emotional distress injuries (i.e., a claim in the context of *Fisons*).⁴ The Court reviewed the line of cases that were most closely analogous to the physician's claims, namely, bystander NIED cases, and decided that this line of cases could not be extended to claims by physicians for injuries suffered by their patients. The Court concluded that the WPLA was therefore silent as to the physician's damages in this context.⁵

Only *after* resolving this initial inquiry did the *Fisons Court* look at whether the WPLA required intentional conduct. In this part

⁴ *Fisons*, 122 Wn.2d at 320 ("We must, therefore, look to Washington law to define 'harm' for purposes of the PLA... We can find guidance in the cases wherein damages for emotional harm are available to a plaintiff based upon injuries to a third person.").

⁵ *Id.*; see also *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765-766 (1998).

of its analysis, the Court concluded that because the WPLA did not require intentional conduct, Washington's intentional tort jurisprudence could not be used to support the physician's claims. Therefore, having ruled that 1) the WPLA was silent as to the physician's damages because prior case law excluded his claim; and 2) Washington's intentional tort jurisprudence could not be used bootstrap a claim into the WPLA because the Act did not require intentional conduct, the *Fisons* Court barred the physician's claims. Defendants in this case ignore the critical first step of this analysis.

Simply put, the *Fisons Court* never concluded that the WPLA does not permit emotional distress damages in the absence of physical injury; rather, it concluded that Washington case law—and therefore that particular limited application of Washington product liability law at issue in *Fisons*—does not support a physician's claim for emotional distress for injuries suffered by his patient. If, as Defendants suggest, the sole issue before the Court had been whether the WPLA required intentional conduct, then the Court wasted its effort reviewing Washington's bystander NIED cases.

2. **Hiltbruner.**

Defendants' reliance upon *Hiltbruner* is similarly misplaced: again, Defendants ignore the critical first step of the Court's analysis.

In *Hiltbruner*, the Court was asked to decide whether RCW 59.20.073, a provision of the Mobile Home Landlord-Tenant Act, permitted emotional distress damages. Like the court in *Fisons*, the *Hiltbruner Court* first reviewed the statutory language to see if it permitted emotional distress damages. *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765-766 (1998). Finding that RCW 59.20.073 was silent as to any damages – and that the MHLTA as a whole recognized only certain, defined economic damages – the Court moved on to the second step of its analysis: whether the statute required intentional conduct. The *Hiltbruner Court* concluded—at stage two—that because the MHLTA did not require intentional conduct, the plaintiff therefore could not use Washington's intentional tort jurisprudence to bring claims for emotional distress under the MHLTA. Again, the first step in the Court's analysis is critical because it determines the need to analyze the issue of intentional conduct.

Defendants' selective reading of these two cases improperly reduces the entire inquiry to a single question: what is "the level of the fault required by the applicable statute." Answering Brief, p. 5. Defendants' reading also ignores the need to discern the intent of the legislature. Moreover, it is not an accurate statement of the law. In fact, the *Hiltbruner* Court specifically declared that the availability of emotional distress damages following a statutory violation "will depend on the language of the particular statute at issue,"⁶ and if the statute is silent, then "emotional distress damages may be a remedy for a statutory violation only if the violation sounds in intentional tort."⁷

In our case, the WPLA says "'Harm' includes any damages recognized by the courts of this state." This leaves to the case law the decision of what constitutes a recoverable damage under the WPLA, and therefore this Court's analysis must start by analyzing cases to determine if they permit emotional distress damages in the absence of physical injury.

⁶ *Id.* at 765.

⁷ *Id.* at 766. It is worth noting that the defendant's duty in *Hiltbruner* was created wholly by statute, and that statute contemplated only economic damages. Here, the defendant's duty was created by common law and only modified by the WPLA. See RCW 7.72.020 (common law was only modified to the extent set forth in the WPLA); cf. *Price v. State*, 114 Wash.App. 65, 57 P.3d 639 (2002) (holding *Hiltbruner* does not control where statutory duty is created by mixture of common law and statute).

B. The Emotional Distress Suffered by Mr. Bylsma is a “Harm” under the WPLA.

Defendants mischaracterize Bylsma’s argument as one that suggests “emotional distress is universally considered to be ‘harm’ under the WPLA.” Answering Brief, p. 7. Bylsma does not argue the statute is that broad, and in fact readily concedes that emotional distress damages are not always available under the WPLA. *See, e.g., Fisons, supra.*⁸ Instead, courts must look to the language of the statute in order to determine if emotional distress damages were contemplated by the legislature in the context of the particular case at issue. *See, e.g., Fisons, Hiltbruner.*

Under the WPLA, the Legislature defined harm “as any damages recognized by the courts of this state.” Therefore, the question is whether Washington courts recognize claims for emotional distress where the plaintiff is directly and foreseeably harmed by the defendant’s negligence, but does not otherwise suffer a physical injury. Washington courts have permitted emotional injury claims for direct and foreseeable victims of another’s negligence since at least 1893. *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 P. 468 (1893). The Legislature was

⁸ Indeed, Mr. Bylsma has no qualms with the holding in *Fisons*.

certainly aware of this long-standing case law when it “declined to adopt the Model Uniform Product Liability Act’s strict definition of harm, particularly as to mental anguish or emotional harm not directly attendant upon personal physical injuries or illness.”⁹ Here, Mr. Bylsma was directly and foreseeably harmed by the defendants’ negligence. Therefore, Mr. Bylsma is in the class of complainants contemplated by the WPLA and his damages are recognized by Washington courts.

Defendants further argue that the evolution of Washington’s emotional distress jurisprudence has been driven by the level of fault. Answering Brief, p. 7. The case law demonstrates otherwise. For purposes of this appeal, Mr. Bylsma concedes that emotional distress claims face more restrictions when they arise from negligent, as opposed to intentional, conduct. However, as suggested above, the evolution of Washington’s emotional distress jurisprudence has been driven more by issues of causation and foreseeability than the intentionality of the offending conduct. See, e.g., *Murphy v. Tacoma*, 60 Wn.2d 603, 374 P.2d 976 (1962) (absent intentional conduct, emotional distress claims require actual or threatened invasion of person’s security); *Hunsley v.*

⁹ Philip A. Talmadge, *Washington's Product Liability Act*, 5 SEATTLE U. L. REV. 1, 21 at 10 FN 27 (1981) (*emphasis added*).

Giard, 87 Wn.2d 424, 553 P.2d 1096 (1976) (abrogating invasion of personal security rule and permitting emotional distress damages to bystanders “who are foreseeably endangered by the conduct”); *Cunningham v. Lockard*, 48 Wn.App. 38, 44, 736 P.2d 305 (1987) (mitigating concerns about “unlimited liability” by limiting class of NIED claimants to direct victims and family members present at the time of the negligent conduct); *Percival v. Gen. Elec. Co.*, 708 F.Supp.2d 1171, 1177 (W.D.Wash. 2010) (citing Washington courts are most concerned, in the bystander NIED context, that 1) mere foreseeability of emotional distress may not be adequate limit on liability and 2) courts must not draw arbitrary line that excludes plaintiffs without meaningful distinction).

C. Washington Law Supports Mr. Bylsma’s Claim for Emotional Distress Damages.

Defendants argue that 1) there is no logical distinction between first party and third party claims for emotional distress; 2) even if there was a distinction, this court’s decision in *Colbert* significantly restricts *Hunsley, et al*, and the availability of first party emotional distress claims; and 3) now such first party claims require the existence of a special relationship. These arguments are without merit: 1) Washington courts have long distinguished

between first and third party claims for emotional distress;
2) *Colbert* is a third party case wherein this Court wrestled with causation and foreseeability concerns not present in this case; and
3) there is no legal support, express or implied, for grafting a new, inherently ambiguous “special relationship” requirement onto Washington’s emotional distress jurisprudence.

1. There is a difference between first party and third party claims for emotional distress damages.

Curiously, Defendants argue that distinguishing between “direct” and “bystander” (or, first party and third party) claims for emotional distress is “logically unsupportable.” Answering Brief, p. 10. On the contrary, it is the distinction between these two very different claims that has fueled the evolution of Washington’s NIED jurisprudence.

Washington courts have long recognized the difference between first party and third party claims for emotional distress. For example, in *Davis Tacoma Ry. & Power Co.*, 35 Wash. 203, 77 P. 209 (1904), this Court held:

It is probably true that no court has allowed a recovery for mental suffering, even though it resulted in a bodily injury, where the defendant has been guilty of no wrongful act as against the person seeking the recovery. If, for example, a person passing along a public street should be forced to witness an injury

inflicted upon the person of another by the negligence of a third person, there could be no recovery by the first against the third, even though the shock caused by the horror of the sight produced such mental suffering as to materially affect the health of the first person. But when the mental suffering is the result of some wrongful act against the sufferer, even though there may be no actual physical injury, this court has held, and the courts generally hold, that such mental suffering may be taken into consideration in assessing the damages for the wrong. Furthermore, mental suffering on the part of the person wronged has always been held a proper subject for consideration in estimating damages in an action for slander or libel, and the principle which allows such damages in cases of that character applies with all its force to a case of this kind.

(*emphasis added*). In *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976), where this Court first held that a bystander could bring an independent action for the negligent infliction of emotional distress, the Court indicated that the cause of action belonged not only to the person who was directly imperiled by the defendant's negligence but also to persons who were concerned with the well being of the imperiled person. *Hunsley v. Giard*, 87 Wn.2d 424, 435-36, 553 P.2d 1096. Similarly, in *Cunningham v. Lockard*, 48 Wn.App. 38, 44-45, 736 P.2d 305 (1987), the court held:

Because the tort of outrage limits the plaintiff class and involves conduct of greater severity than that required for the negligent infliction of emotional distress, we conclude that policy considerations dictate that the legal liability of defendants who

negligently inflict emotional distress must be limited to plaintiffs who are actually placed in peril by the defendant's negligent conduct and to family members present at the time who fear for the one imperiled. Additionally, the objective manifestation of physical symptoms must be present.

(emphasis added); see also *Bishop v. State of Washington*, 77 Wn.App. 228, 233 FN 4, 889 P.2d 959 (1995) (distinguishing first party and third party claims for emotional distress); 16 Wash. Prac., Tort Law and Practice § 5.7 and § 5.8 (3d ed.).¹⁰

That the seeming vast majority of emotional distress cases involve third party claims makes sense: these are the claims where the courts are forced to draw some sort of boundary regarding who can recover. See, e.g., *Cunningham*, 48 Wn.App. at 44; *Percival*, 708 F.Supp.2d at 1175.

Courts recognize, however, that this boundary for third parties cannot be arbitrary:

When determining who is permitted to bring a negligent infliction of emotional distress claim, the Supreme Court has focused on who was likely to suffer the shock caused by perceiving a horrendous event, not on a particular bright-line category.

¹⁰ Contrary to defendant's characterization, Plaintiff respectfully submits that *Washington Practice* may not be so readily dismissed as some "law review article." Answering brief, p. 10.

Percival, 708 F.Supp.2d at 1176-1173 (*internal citations omitted*). Because the general tort principle of foreseeability does not provide a sufficient boundary in third party cases, courts have limited third party claims to family members who are present or arrive shortly after the incident. *E.g.*, *Percival*, 708 F.Supp.2d at 1176-1177 (summarizing the evolution of bystander claims). Conversely, the foreseeability and legal causation concerns posed by third party claims are not present in first party claims, and courts readily permit such claims for emotional distress damages, even in the absence of physical injury.¹¹

Legal causation involves a determination of “whether liability should attach given cause in fact and is a question of law for the court based on policy considerations as to how far the consequences of the defendant’s act should go.” *Cunningham*, 48 Wn. App. at 44. Here, Mr. Bylsma seeks to take the consequences of the defendants’ conduct no further than the direct and foreseeable harm they negligently inflicted upon him.

¹¹ *E.g.*, *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621, 627, 32 P. 468 (1893); *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 77 P. 209 (1904); *Drake v. Smith*, 54 Wash.2d 57, 337 P.2d 1059 (1959); *Corrigal v. Ball and Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 577 P.2d 580 (1978); *Anderson v. State Farm Ins. Co.*, 101 Wn.App. 323, 2 P.3d 1029 (2000), review denied, 142 Wn.2d 1017, 20 P.3d 945 (2001); *Berger v. Sonnenland*, 144 Wn.2d 91, 26 P.3d 257 (2001); *Price v. State*, 114 Wash.App. 65, 57 P.3d 639 (2002); cf. *Murphy v. Tacoma*, 60 Wn.2d 603, 374 P.2d 976 (1962).

2. Colbert is a bystander case that deals with policy concerns not present in this matter; nevertheless, even under the heightened foreseeability requirement of Washington's bystander cases the WPLA permits Mr. Bylsma's claims.

Defendants argue that *Colbert*¹² severely restricts causes of action for NIED, and thus undermines Mr. Bylsma's claims. In *Colbert*, this Court had to address whether the state's bystander NIED cases could be extended to a father for the drowning death of his daughter where the father was not present at the time of the accident. As the court in *Percival* explained, Washington courts have evolved heightened standards of foreseeability in bystander cases to avoid opening the flood gate of "virtually unlimited liability."¹³ Recognizing such policy concerns, the *Colbert Court* held that the father's late arrival at the scene and fore-knowledge of the accident precluded recovery under Washington's bystander cases.

Colbert is distinguishable. *Colbert* is a bystander case and therefore the foreseeability and causation challenges confronted by that Court do not apply here. In our case, there is no danger of

¹² *Colbert v. Moomba Sports Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008).

¹³ *Percival v. Gen. Elec. Co.*, 708 F.Supp.2d 1171 (W.D.Wash. 2010); see also *Cunningham v. Lockard*, 48 Wash.App. 38, 44, 736 P.2d 305 (1987).

unlimited liability or of expanding the WPLA beyond the class of claimants contemplated by the Act.

Defendants' argument that *Colbert* undermines *Corrigal's*¹⁴ applicability to this case is also without merit. In *Corrigal*, this Court held that a mother who touched her son's ashes after mistaking those ashes for packaging material had a claim for emotional distress damages against the funeral home, even though she was not physically injured. Although the *Colbert* Court raised questions about how its decision affects *Corrigal*, it also acknowledged that *Corrigal* involved a direct action for NIED and therefore presented different issues.¹⁵

Regardless, even if the *Corrigal* Court had applied *Colbert's* heightened foreseeability standard, it would have arrived at the same result: the emotional distress the mother in *Corrigal* felt was the direct and foreseeable result of the defendants' conduct, and there would have been no concern about exposing defendants to unlimited liability. The same is true if we apply *Colbert* to our case.

¹⁴ *Corrigal v. Ball and Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 577 P.2d 580 (1978).

¹⁵ *Colbert*, 163 Wn.2d at 59, FN3 ("But in *Corrigal* the plaintiff was physically present and actually felt her son's remains as a result of the funeral home's negligence.").

3. Mr. Bylsma is not required to show that a "special relationship" existed between him and Defendants to bring a claim under the WPLA.

Defendants suggest that *Colbert's* heightened standards restrict non-bystander (*i.e.*, first party) NIED claims to those cases involving "some type of prior special relationship between the parties." Answering Brief, p. 12. As an initial matter, this argument tacitly accepts the distinction between first party and third party claims for emotional distress damages. More fundamentally, the "prior relationship" requirement is an artifice that is neither expressly (or impliedly) stated in any case, nor consistent with the rationale used by the *Colbert* Court. *Colbert*, 163 Wn.2d at 57 ("[I]f *Colbert* was not present at the time of the accident and did not arrive shortly thereafter...he was not a foreseeable plaintiff as a matter of law.").

Defendants craft this new requirement in an effort to distinguish the *Anderson*, *Price*, and *Berger* cases supporting Plaintiff.¹⁶ In each of these cases, the court permitted the plaintiff to bring a claim for emotional distress damages, in the absence of physical injury, where the defendant's negligence violated a

¹⁶ Tellingly, Defendants ignore the long list of cases cited by Plaintiffs where courts permitted emotional distress damages in the absence of physical injuries. See Opening Brief, pp. 13-16.

statutory obligation.¹⁷ *Anderson* involved an insurer-insured relationship;¹⁸ *Price* involved a prospective parents-adoption agency relationship;¹⁹ and *Berger* involved a patient-physician relationship.²⁰ Although, these cases involved parties that had some type of relationship, there is nothing to suggest the relationship was material to the outcome regarding the availability of emotional distress damages. Instead of recognizing that in each of these cases the plaintiff was the direct and foreseeable victim of the defendants' negligence (a limiting factor which addresses the concerns voiced in *Hegel, Colbert, Percival, et al*), Defendants focus on the inherently intangible nature of the party relationships. Grafting such an ambiguous requirement onto Washington's NIED jurisprudence provides no real guidance as to who may bring such a claim.

¹⁷ See Plaintiff's Opening Brief, p. 17-18.

¹⁸ *Anderson v. State Farm Ins. Co.*, 101 Wn.App. 323, 2 P.3d 1029 (2000), review denied, 142 Wn.2d 1017, 20 P.3d 945 (2001) (emotional distress damages permitted where insurer negligently failed to advise plaintiff about her UIM coverage).

¹⁹ *Price v. State*, 114 Wash.App. 65, 57 P.3d 639 (2002) (emotional distress damages permitted where DSHS negligently failed to disclose adoption information).

²⁰ *Berger v. Sonnenland*, 144 Wn.2d 91, 94, 26 P.3d 257 (2001) (emotional distress damages permitted where physician violated medical malpractice act by negligently disclosing medical records to a third party).

Moreover, there is no material way to distinguish the scope of Mr. Bylsma's relationship with Defendants from the relationships described in *Anderson, Price, and Berger*. The record indicates that Mr. Bylsma worked the swing shift and regularly ate his 1:00 a.m. "lunches" at Defendants' restaurant because they were the only establishment open that late at night. ER 66. It would be arbitrary to find that the ongoing, trust-based relationship between a food service provider and its regular customers is, as a matter of law, less "special" than the relationships discussed in those cases.

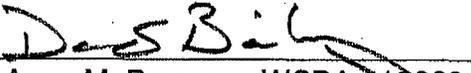
III. CONCLUSION

Defendants attempt to avoid liability in this matter based on a misunderstanding and misapplication of decades of Washington emotional distress jurisprudence. Plaintiff Ed Bylsma was a direct purchaser of the defective product at issue—the contaminated food—and was therefore a foreseeable plaintiff. The limitations on the recoverability of emotional injuries imposed by courts result from efforts to draw a line that prevents infinite and unforeseeable liability in bystander cases, which are not applicable in this case. In drafting the WPLA, the Legislature intended "harm" to be inclusive and broad, as evidence by its decision to reject the limitations in the Uniform Product Liability Act. Accordingly, emotional harm is

recoverable in situations like this even when a plaintiff was not physically injured by the product at issue.

RESPECTFULLY SUBMITTED this 15th day of March, 2012.

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The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below true and correct copies of APPELLANT'S OPENING BRIEF on the following individuals:

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Dated this 15th day of March, 2012, at Seattle, Washington.



Nori Skretta

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Bylsma v. Burger King Corporation
No. 86912-0

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Appellant's Reply Brief

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