

No. 63312-1-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

YOUNG HI KO, individually, and as Personal Representative of the Estate of Hi Sun Ko, and as Personal Representative of Hi Sun Ko in a survivorship claim, and the marital community composed thereof, MICHAEL M. KO and DAVID J. KO,

Appellants,

v.

SEAVIEW CHEVROLET and its agent, CHRISTIAN A. OLSON, TICEN VARNEY and JANE DOE VARNEY, husband and wife and the marital community composed thereof, OMAR J. RUBBA and JANE DOE RUBBA, husband and wife, and the marital community composed thereof,

Respondents.

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COURT OF APPEALS
STATE OF WASHINGTON
FILED


**BRIEF OF RESPONDENTS TICEN VARNEY AND
JANE DOE VARNEY**

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I. INTRODUCTION

The subject of this lawsuit is a two-car motor vehicle accident. Plaintiffs/Appellants asserted claims arising from the tort of negligent infliction of emotional distress (NIED) based on the unfortunate death of Mr. Hi Sun Ko, who passed away from a heart attack later on the evening that his wife was involved in the subject car accident. CP 169-175. Mr. Ko was not present for the actual accident.

All the defendants moved for partial summary judgment on the NIED-related claims, which were dismissed by the trial court because the court found that the plaintiffs failed to meet the requisite criteria required to establish the judicially-created cause of action of NIED.

II. ASSIGNMENTS OF ERROR

The Superior Court correctly granted the Defendants' Motion for Partial Summary Judgment dismissing the appellants' negligent infliction of emotional distress claims as the appellants failed to establish the required elements of the tort as a matter of law and there are no genuine issues of material fact.

Mr. Ko was not present at the time of the subject accident and learned about after being called to the scene. He was aware of the accident prior to traveling to the scene rather than happening upon it. He arrived at the scene after it was changed and after his wife's condition and

location were changed where she was already removed from her vehicle and placed in an aid car. There is no evidence that his emotional distress was caused by seeing his wife's injuries, as opposed to distress over the damages to his car and failure to get his questions answered by the parties involved in the accident.

A. Issues Relating to Assignments of Error.

Assignment of Error Number 1: Washington law requires that the plaintiff meet certain elements to establish the tort of NIED.

Assignment of Error Number 2: Washington law is clear and there is no bright line rule requiring that "the entire experience of the event as perceived by the victim claiming NIED" be considered.

Assignment of Error Number 3: Washington law is clear and requires specific criteria to establish NIED and does not consider the "entire event circumstances."

III. STATEMENT OF THE CASE

A. Statement of the Case

On December 20, 2004, there was a collision between a pickup truck operated by Ticen Varney and a vehicle operated by Young Hi Ko. CP156. Young Hi Ko's husband, Hi Sun Ko, came to the accident scene after being called by his wife and the responding officer. CP 178-179. He arrived after Mrs. Ko had already been removed from her car and was

being treated by emergency personnel in an ambulance. CP 180. The plaintiffs previously conceded that Mrs. Ko was placed in the ambulance before Mr. Ko arrived at that scene. CP 143. Mrs. Ko was transported to the emergency room. CP 181. At that point, Mr. Ko went to the Seaview Chevrolet dealership where he engaged in heated exchanges with dealership personnel. CP 156. Mr. Ko finally went to see Mrs. Ko at the hospital where he briefly visited with her. CP 156. This occurred approximately one hour after the subject accident. CP 156. Mr. Ko then went out to his car in the hospital parking lot where he unfortunately suffered a heart attack and passed away. CP 156.

B. Procedural History

Defendant Seaview moved for partial summary judgment and Defendant Varney joined the motion, which was noted for March 13, 2009. CP 189-200. The Honorable George Appel granted the defendants' motion and dismissed all four NIED claims. CP 6-8. The plaintiffs moved for reconsideration and were opposed by all defendants. CP 38-46; CP 25-33; CP 17-24. The court denied plaintiffs' motion for reconsideration on April 7, 2009 and the present appeal was filed. CP 8-12; 4-5.

IV. SUMMARY OF ARGUMENT

Washington law clearly requires that certain elements be met in order to establish a cause of action for NIED. The plaintiffs failed to

come forward with evidence to meet the required elements. Therefore, their claims had to be dismissed as a matter of law.

V. ARGUMENT

A. Standard of Review

When reviewing an order for summary judgment, the appellate court engages in the same inquiry as the trial court. *Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A defendant moving for summary judgment can point out to the trial court that “the plaintiff lacks competent evidence to support an essential element of his or her case.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)). “If a defendant chooses the latter alternative, the requirement of setting forth specific facts does not apply. The reason for this result is that ‘a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.’” *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

B. Negligent Infliction of Emotional Distress

In Washington, negligent infliction of emotional distress is judicially created and limited, which was recently reiterated by the Supreme Court. *Colbert v. Moomba Sports, Inc.*, 163 Wash.2d 43, 49, 176 P.3d 497 (2008). It “allows a family member to a recovery for

‘foreseeable’ intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident.” *Id.* It is recognized “[W]here a plaintiff witnesses the victim’s injuries at the scene of an accident shortly after it occurs and before there is a material change in the attendant circumstances. *Id.* at 55. However, “A plaintiff cannot recover if he or she did not witness the accident and did not arrive shortly thereafter, meaning that he or she did not see the accident or the horrendous attendant circumstances such as bleeding or other symptoms of injury...all of which would constitute a continuation of the event.” *Id.*

In *Colbert*, a father received a phone call at 3:00 a.m. informing him that his daughter had disappeared from the back of a boat while on a lake and that a search was being performed. *Colbert*, at 46. Mr. Colbert first took his other children to a neighbor’s house and by the time he arrived at the scene he was able to see that multiple emergency vehicles and personnel were there, including a boat that he knew was searching for his daughter. *Id.* Unfortunately, he witnessed his daughter’s body being pulled from the water and placed onto a stretcher. *Id.*

Based on the aforementioned facts, Mr. Colbert argued that he was a foreseeable plaintiff and that foreseeability was a question for the jury. *Id.* at 56. However, the Court stated that “[T]he presence of the plaintiff at the scene or ‘shortly thereafter’ is a prerequisite to finding foreseeability

of mental suffering by the plaintiff.” *Id.*; citing *Gain v. Carroll Mill Co.*, 114 Wash.2d 254, 260,787 P.2d 553 (1990). The Court went on to say “If the plaintiff is not present at the time of the accident and does not arrive on the scene shortly thereafter, foreseeability is lacking *as a matter of law* and there is no question to send to the jury on the question of foreseeability.” *Id.* (*emphasis theirs*). In concluding that Mr. Colbert failed to establish a cause of action for negligent infliction of emotional distress, the Court noted that Mr. Colbert did not witness his daughter’s drowning or see her final moments. *Id.* The Court further noted that he did not arrive unwittingly and only came to the scene after being called about the accident and after many rescuers were already on scene searching. *Id.*

C. Issues Pertaining to Assignments of Error

Assignment of Error Number 1: Washington law requires that the plaintiff meet certain elements to establish the tort, otherwise foreseeability is not established as a matter of law.

The facts in the present case are on point with those in *Colbert* where the Supreme Court concluded that the plaintiff did not arrive within the meaning of “shortly thereafter” because by arriving after the accident and after emergency personnel were already searching for his daughter, he “did not observe his daughter at the scene of the accident after its

occurrence and before there were material changes in her condition, or the scene, or both.” *Colbert* at 57, 176 P.3d __. Although a relative need not arrive prior to emergency personnel in order to be a foreseeable plaintiff, the relative must arrive before there is a substantial change to the accident scene and location of the victim.

There is absolutely no dispute in this matter that Mrs. Ko was removed from her vehicle before Mr. Ko arrived at the accident scene. There is also no dispute that Mr. Ko did not unwittingly happen upon the scene as he spoke with his wife and with a responding officer on the phone. Therefore, he knew his wife was involved in a motor vehicle accident and knowingly traveled to the accident scene. Clearly, the facts in the case in hand are on point with those in *Colbert* and foreseeability is lacking as a matter of law.

Additionally, the plaintiffs have thus failed to proffer any medical opinion testimony concluding that Mr. Ko’s heart attack was actually brought on as a result of seeing his injured wife at the accident scene. As the Court noted during the defendants’ motion for partial summary judgment, Dr. Thompson’s opinion stated that there may have been a number of factors surrounding the accident that contributed to the cause of Mr. Ko’s heart attack, including seeing the property damage and experiencing frustration and concern over obtaining insurance information

from Mr. Varney and Seaview. Clearly, this fails to qualify as a claim for NIED where it is the plaintiffs' burden to put forth competent evidence establishing that Mr. Ko's heart attack was actually caused by witnessing Mrs. Ko's injuries at the accident scene. As such, there is no genuine issue of material fact raised by Dr. Thompson's original Declaration and the plaintiffs are requesting the Court to engage in speculation.

Assignment of Error Number 2: Washington law is clear and there is no bright line rule requiring that "the entire experience of the event as perceived by the victim claiming NIED" be considered.

The cases cited by the plaintiffs fail to establish a bright line rule requiring that the entire experience of the event be considered. Mr. Ko arrived at the accident scene only after it was materially altered. He knew of the accident before deciding to travel to the scene and did not "see the accident or the horrendous attendant circumstances..." *Colbert* at 55. Mrs. Ko was already in an ambulance being attended to by emergency personnel and Mr. Ko was able to speak with her confirming that her injuries were not life threatening. His concern over his wife's injuries is evident by the fact that his primary focus became confronting the defendants and demanding insurance information before even traveling to the hospital for his wife. Furthermore, the plaintiffs' only expert testimony fails to establish that Mr. Ko's witnessing his wife in the

ambulance at the accident scene was the sole and proximate cause of his heart attack hours later.

Assignment of Error Number 3: Washington law is clear and requires specific criteria to establish NIED and does not consider the "entire event circumstances."

As outlined above, the judicially created and very limited tort of NIED does not take into consideration the entire event circumstances, but rather focuses on a few specific criteria. The plaintiffs urge the Court to abandon "the rigid and artificial rules" outlined and affirmed by the Supreme Court in *Colbert*. In doing so, they fail to appreciate the breadth of their request in relation to the expansion of foreseeability. The plaintiffs are essentially arguing that anyone summoned to the accident scene involving a loved should be considered a foreseeable plaintiff whether or not they arrive knowingly rather than unwittingly. This is neither contemplated nor tenable under the tort of NIED as currently outlined under Washington law. The public policy considerations behind strictly limiting the judicially created tort are there for a reason and this Court should respectfully decline the plaintiffs' invitation to expand the tort based upon the facts as presented here.

VI. CONCLUSION

It is abundantly clear from a review of the available testimony and evidence that the plaintiffs have failed to put forth competent evidence in support of their claim for negligent infliction of emotional distress. Mr. Ko's unfortunate passing, however tragic, fails to fall within the criteria required for a cause of action for negligent infliction of emotional distress where he did not arrive at the accident scene unwittingly and only arrived after there was a substantial change in his wife's condition and location. This clearly fails to meet the requisite criteria for a claim of NIED as outlined by the Washington Supreme Court in *Colbert*. Therefore, Defendant Varney respectfully requests that the Court uphold the trial court's dismissal all of plaintiffs' NIED claims.

Respectfully submitted this 6th day of August, 2009.

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CERTIFICATE OF SERVICE

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The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and
competent to be a witness herein.

On the 7th day of August, 2009, I caused to be delivered a true and
correct copy of:

1. *Brief of Respondents Ticen Varney and Jane Doe Varney;*

and

2. *Certificate of Service*

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

DATED this 7th day of August, 2009.



Whitney L.C. Smith