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No.63312-1-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

YOUNG HI KO, individually, and as Personal Representative of the Estate of Hi Son Ko, and as Personal Representative of Hi Sun Ko in a survivorship claim and the Marital Community composed thereof, MICHAEL M. KO and

APPELLANTS'
REPLY BRIEF

Appellants,

Vs.

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.

Albert R. Johnson, Jr., WSBA #15136
Attorney for Appellants
Law Office of Albert R. Johnson, Jr.
14675 Interurban Avenue S., Ste. 105
Tukwila, WA 98168
Tel. 206.280.5291 Fax. 206.443.2795
Email: arj911@msn.com

TABLE OF AUTHORITIES

<u>Washington Table of Cases</u>	<u>Page No.</u>
Colbert v. Moomba Sports, Inc., 163 Wn.2d. 43, 49, 176 P.3d. 947 (2008).....	1,6,7,8
Del Guzzi Constr. v. Global Northwest LTD., 105 Wn.2d 878, 882, 719 P.2d 120 (1986).....	4
Gain v. Carroll Mill, 114 Wn.2d. 254, 265, 787 P.2d. 553 (1990).....	7
Hegel v. McMahon, 136 Wn.2d. 122, 125-26, 960 P.2d 424 (1998).....	3,5,7,8
Young v. Key Pharmaceutical Inc., 112 Wn.2d 216, 770 P.2d 182 (1989).....	4

TABLE OF CONTENTS FOR REPLY

TABLE OF AUTHORITIES	i
I. APPELLANTS' REPLY TO RESPONDENTS' RESPONSE And to Respondent Dealership's Motion for an Order Confirming the Trial Court's Order	1
A. The Ko Facts Differ Significantly From Those In <i>Colbert</i> As Should The Court's Judgment.	1
B. The Appellants Are Entitled To All Favorable And Reasonable Inferences From The Facts.	4
C. NIED's Elements Are Narrow and Restrict Claimants.	7
D. The Expert's Opinion Concerning Cause Of Death Must Be Interpreted Favorably for Appellants	8
II. CONCLUSION	9

I. **APPELLANTS' REPLY TO RESPONDENTS' RESPONSE
And to Respondent Dealership's Motion for an Order
Confirming the Trial Court's Order**

**A. The Ko Facts Significantly Differ From Those In *Colbert* As
Should The Court's Judgment.**

It is urged by Respondents that the facts in Ko and *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d. 43, 49,176 P.3d. 947 (2008) are so similar that the dismissal of the negligent infliction of emotional distress claim (hereafter, NIED) in *Colbert* must also be the result in Ko. The facts in each of these NIED claims are radically different. In *Colbert*, the facts measured against the tort elements warrant dismissal of the NIED claim. In Ko the facts meet the tort's criteria, necessitating a reversal of the trial court dismissal.

Specifically, Mr. Colbert received a detailed telephone call from the boat owner who had been with his daughter, seen her go over the side into the lake and not surface. That call did not come immediately after the accident, but many minutes thereafter. By the time Mr. Colbert arrived at the lake the scene had substantially changed. Search boats were on the water looking for his daughter. She was no where to be seen. The clear implication was that she had drowned. This was not a rescue operation

but a recovery. Three hours passed. Colbert was more than 100 yards away when a boat pulled his daughter's body from the lake. Mr. Colbert did not see his daughter go into the lake, see her struggle or hear any cries for help. It was a very sad event, but did not meet any of NIED's elements other than the close family relationship.

In juxtaposition, Mr. Ko's emotional distress began with an abbreviated cell call from his wife, aided by a police man, in which she said only that she had been in an accident. It was left to the police officer to explain where. It is unlikely the police officer speculated about Ms. Ko's injuries in that call. Mr. Ko was free to imagine the worse case scenario. He arrived within 6 minutes of that call. The colliding vehicles were still in the roadway to be observed. The car damage readily apparent from this "t-bone" collision. The Ko driver's airbag could be seen deployed. Mr. Ko walked passed all of this, and immediately to his wife. Mrs. Ko was in the process of being loaded by backboard into an ambulance. She was not stabilized and not receiving direct care for her injuries. Her husband was feet from her at the accident scene as she complained to him of severe chest pain. Mr. Ko could readily observe her wincing and her cries. Mr. Ko's emotional distress was evident in his statement to his wife, "Thank

you for not dying.”

The essence of NIED is the shock suffered by the claimant perceiving an especially horrendous event. Among other criteria, as here, that perception may be “ the cries of pain” of the loved one. *Hegel v. McMahon*, 136 Wn.2d. 122, 130, 960 P.2d 424 (1998). “The critical factor [of NIED] are the circumstances under which the observation is made,.... *Hegel*, 136 Wn.2d at 132. The purpose of this tort is providing a forum for claimants to receive justice and to hold responsible foreseeable tortfeasors who did not meet society’s laws.

Respondents subtly alter the facts in *Ko* to imply a more modest and changed scenario. There is the implication that Mr. Ko is well warned by the cell call when the opposite is true. That the scene is “substantially changed” alleging that Mrs. Ko is in an ambulance, stabilized and under care. The evidence refutes these allegations. She is not stabilized or receiving care for injuries. Respondents ignore the facts that her husband is within feet of his wife. Mr. Ko sees her in pain. He hears her complaints of severe chest pain. A full review of the evidence supports Appellants’ claim, that all elements of NIED are met.

B. The Appellants Are Entitled To All Favorable And Reasonable Inferences From The Facts.

The law of Summary Judgment on appeal is that the nonmoving party is entitled to all reasonable inferences to be drawn from the facts. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), citing *Del Guzzi Constr. Co. v. Global Northwest LTD*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). “The evidence and all reasonable inferences therefrom is considered in a light most favorable to the plaintiff, the nonmoving party. An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party.” *Del Guzzi*, 105 Wn2d at 882.

Here, the evidence when viewed in the light which is most favorable to appellant Kos and reasonable under the circumstances demonstrate a prima facie case to deny partial summary judgment.. Therefore, in a favorable light, the cell call was the beginning stressor in the emotional distress of Hi Sun Ko. That call left more questions and only served to

raise worries. Why did his wife not indicate her injuries? Why did she stop speaking abruptly? Was her breathing labored? Did she sound in pain? Suddenly, the police officer was telling him where to come to. The Ko call is distinguishable from the call Mr. Colbert received which came some time after his daughter had disappeared in the lake. The call itself suggested that she had most likely already drowned. at the accident scene.

In Ko, the accident scene was not substantially changed when Mr. Ko arrived minutes later. Significance must be placed upon the fact that Mrs. Ko was still at the scene and complaining directly to her husband of her pain. That Mrs. Ko was not in her car still, but had been moved by backboard some feet to an ambulance is a change of the accident scene, but one that is not significant when weighed against her husband's observations of her from a few feet away and, as stated in *Hegel*, "a recovery for 'foreseeable' intangible injuries caused by viewing a physically injured loved one shortly after a traumatic event." *Hegel*, 136 Wn.2d at 125-26.

All the parties in this appeal agree that certain key facts must be present to meet NIED elements. A review of the evidence establishes that these

elements are met. First, Mr. Ko and Mrs. Ko as husband and wife are the “loved ones” the law speaks of. Second, Mr. Ko comes to the scene within minutes. This is consistent with “shortly thereafter.” He observes the entire scene, but most importantly for this tort, he sees his wife in pain and telling him about her pain. She is there at the scene. The scene is substantially unchanged from the way it appeared moments after the collision. These are the critical elements, and each is supported by the factual record.

It is argued in supporting the dismissal that the presence of an ambulance and that she has been physically moved are sufficient facts to hold that the “shortly thereafter” criteria is not met. As *Colbert* ruled, it does not matter that emergency personnel are on the scene, if in fact the claimant observes the severity of injuries suffered by the loved one. *Colbert*, 163 Wn.2d at 49. Likewise, it should not matter that the loved one, here Mrs. Ko, is in the process of being loaded into an ambulance when her husband arrives. Importantly, she is still on the scene when she is observed by her husband along with the other circumstances of the collision.

C. NIED's Elements Are Narrow And Restrict Claimants.

The criteria of a NIED claim are narrow and restrictive on who can sue.

First, the NIED claimant must be a close relative of a person injured at an accident scene, not simply any relative. Second, the claiming relative must either witness the event or come upon the scene shortly after it occurred. Learning of the event entirely by telephone or through television do not meet the personal observation requirement. As a result of these elements, the claimant must suffer physical injury which reflects the emotional distress. Enunciated in *Hegel*, these criteria were reiterated without a single change in *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 49, 176 P.2d 947 (2008).

That a change in the caselaw will open the courts to a flood of litigants regarding this tort is an argument that has been made and rejected. There is absolutely no evidence to support this argument. It should be dismissed out-of-hand. See Justice Brachtenbach's dissent in *Gain v. Carroll Mill*, 114 Wn.2d. 254, 265, 787 P.2d. 553 (1990). There the dissent noted that a plaintiff with a legitimate claim of injury at the hands of another should not be denied justice because of an unsupported fear that the courts will suddenly be crowded with litigants.

Second, the NIED tort is so tight in its requirements that there are only a few people in the standing of “love and closeness” who would meet that element in this tort. By definition, more distant relatives without proof of closeness are automatically excluded. Also, the tort requires that the claiming person observe the accident and injuries to the loved one or come upon the scene shortly thereafter while the scene is not substantially changed and the injured loved one can still be observed in an injured state. Those criteria are only going to be met by a very few claimants. The fact is that in 11 years since *Hegel* was decided, the Supreme Court has had a decision in a NIED case one other time, *Colbert*.

D. The Expert’s Opinion Concerning Cause Of Death Must Be Interpreted Favorably for Appellants.

Dr. Thompson’s medical opinion is that Mr. Ko’s heart attack was brought about by seeing his wife at the accident. That is a reasonable light in which to view his declaratory statement favorable for the Ko Estate.. Did the accident scene play a part in Mr. Ko’s emotional distress, certainly. How do you separate the two? The reason for nonmovants receiving the benefit of facts in its favor where reasonable is the understanding that a Motion with the submission of supporting evidence

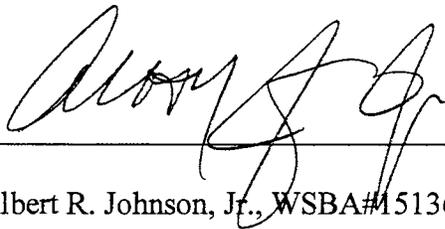
can not necessarily meet every interpretation of the facts by others. It cannot be as informative as trial testimony. Here, the trial court erred in inserting its opinion as to what Dr. Thompson meant in his statement for that of the finders of fact. Had there been no statement by Dr. Thompson then the court would have been justified in holding that not all the elements of the tort were met. However, where there is a cardiologist holding forth that “more probably than not” the accident suffered by Mrs. Ko caused her husband to suffer emotional distress which led to his heart attack, it is illogical to suggest that this is not a statement that his observations of his wife’s injuries were not the underlying cause of his death.

II. CONCLUSION

Where, as here, the Ko Estate seeks justice for the loss of a spouse and father who has died as a result of negligent infliction of emotional distress, it must not be forgotten that Washington has determined that foreseeable tortfeasors must be held responsible. The elements of NIED are narrow. There has been no flood of litigants into the courts with these claims. The argument here by Respondents is to make even narrow the

requirement of this tort by expanding the criteria to exclude from any claim those who receive even the most minimal of cell phone calls or where the injured loved one has been moved at the scene, but not left the scene. To further restrict this tort by imposing these interpretations would make it impossible for any claimant to seek justice.

Respectfully submitted this 28th day of August, 2009.

A handwritten signature in black ink, appearing to read "Albert R. Johnson, Jr.", is written over a horizontal line.

Albert R. Johnson, Jr., WSBA#15136

Attorney for Appellants

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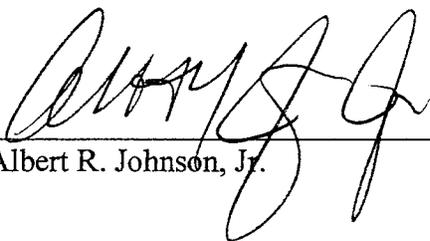
Respondents.

CERTIFICATE OF SERVICE

I, Albert R. Johnson, Jr., by my signature below do hereby certify that on August 28th, 2009, I personally served a true and correct original of the Appellants' Reply Brief on the Court of Appeals Division I and served true and correct copies of Appellants' Reply Brief on the following counsel of record: Nick Barrett, The Shim Law Firm, 1155 North 130th Street, Ste. 200, Seattle, WA 98133, David L. Hennings, Wilson Smith Cochran Dickerson, 1215 Fourth Avenue, Ste. 1700, Seattle, WA 98161-1007 and Tracy Antley-Olander, Law Office of William J.

O'Brien, 999 Third Avenue, Ste. 800, Seattle, WA 98104

Dated this 28th day of August, 2009


Albert R. Johnson, Jr.