

IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON

DIVISION I

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
DAVID J. KO,

CASE NO. 63312-1-1

Appellants,

Vs.

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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BRIEF OF APPELLANTS

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. No. 206-280-5291
Fax No. 206-443-2795

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I. ASSIGNMENT OF ERROR

No. 1. The Superior Court erred in granting Defendants' Motion for Partial Summary Judgment, thus dismissing Plaintiffs'/Appellants' negligent infliction of emotional distress claims, as there existed genuine issues of material fact to be decided by a jury.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

No. 1. Do Washington Supreme Court decisions recognize that foreseeability within the tort of negligent infliction of emotional distress is for jury determination?

No. 2. Do the Supreme Court decisions from *Hunsley v. Giardi*, 87 Wn.2d 424, 553 P.2d 1096 (1976) through *Colbert v. Moomba Sports Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008) establish a bright line that requires that the entire experience of the event as perceived by the victim

claiming negligent infliction of emotional distress be considered?

No. 3. Do the most recent Supreme Court decisions on negligent infliction of emotional distress make clear that it is the entire event circumstances that must be considered in deciding the victim's claim and not merely individual factors within the event?

III. STATEMENT OF THE CASE

This was a severe two car, "t-bone collision", in which Mrs Young Hi Ko was injured. It happened shortly after 5 pm on December 20, 2004. Mrs. Ko was proceeding northbound on Highway 99 in Lynnwood. She was in the extreme right-hand lane.. (CP p. 178). She was driving in a right turn only lane. Suddenly, and unexpectedly, a pick-up truck, appeared in her lane perpendicular to the lane. This was a vehicle owned by Seaview Chevrolet, driven by Ticen Varney as part of a "test drive", with Seaview car salesman Omar Rubba in the front passenger seat. The pick-up truck was attempting to cross through 2 lanes of stopped traffic,

and then the right turn only lane, to enter a driveway leading to the Seaview Chevrolet dealership. (CP pp. 126-27).

Because the pick-up was unexpected, and close, Mrs. Ko had no opportunity to brake and struck the passenger side of the pick-up truck with the front end of her vehicle. She was traveling at 35 mph. (CP p. 126). The impact was heavy causing the driver's airbag to explode in Mrs. Ko's face and chest. (CP p. 127). Her vehicle's damage was called a total loss. Mrs. Ko has no memory of events occurring immediately following the impact until becoming aware of someone holding her head and telling her not to move while she remained in the driver's seat of her car. At that time a police officer standing by the car was asked by Mrs. Ko to call her husband. She indicated her business card in her wallet.. (CP p. 178). The police officer handed the cell phone to her when her husband answered. She said only "I told him I was in a car accident." (CP p. 128). She did not relay any information to her husband concerning her injuries or symptoms. (CP p.183). She did not advise her husband until she saw him at the accident scene that she "was in quite a lot of pain" (pp. 179-80). It most probable that the police officer on the scene advised Mr. Ko of the accident's location. It is unlikely that the police officer would have

speculated to Mr. Ko over the phone about his wife's medical condition.

Mr. Ko arrived at the accident site in 5-6 minutes (CP p.128).

According to Mrs. Ko following the accident impact, while at the scene and continuing through her time in the ER at Stevens Hospital, she was in "quite a bit of pain." in her chest, upper and low back, left shoulder and neck. (CP pp. 179-80). It was Mrs. Ko's recollection that Mr. Ko arrived on the scene just as she was placed inside the ambulance:

A: Paramedics transferred me into the ambulance.

Q: Was that before or after your husband came to the accident scene?

A: I was—I would say almost at the same time because when I got inside the ambulance when I arrived, my husband arrived immediately shortly after. (CP p. 180).

Mrs. Ko and her husband Hi Sun Ko spoke while she was being strapped into the ambulance. (CP pp.129-30).

Q: And did your husband come and talk to you in the ambulance?

A: He did. Yes, he did.

Q: And what do you recall being said by you or by your husband in that conversation?

A: I said that my chest was hurting so bad. My husband told me that he

was so glad that I did not die, despite such a huge accident. And he told me it was okay. And he told me—he thanked me for being okay.

Q: And how long did your husband spend with you talking with you at the accident scene?

A: It was during the time they were strapping me in. I would say about 7 or 8 minutes. (CP pp.128-30 and CP pp.180-81).

Mrs. Ko was taken by the ambulance to Stevens Hospital ER (CP p.130)..

Mr. Ko followed in his own car. Mr. Ko found his wife in the ER and waited with her. She indicated several times to him that she was in severe pain, particularly in her chest. After two hours in the ER Mr. Ko advised his wife that was going outside for some fresh air. Mr. Ko called his son Michael Ko to advise of the accident and request that his son rush up to the hospital. Mr. Ko also advised his son that he was experiencing a terrible pain in his stomach. (CP p. 118 and p.121).

Michael Ko came to Stevens Hospital. After locating his mother in the ER, he went searching for his father who had not returned. He located his father slumped in the driver's seat of his car, appearing asleep. When he tried to wake him he could not. Mr. Ko was rushed into the ER for

medical help. Shortly thereafter a doctor advised that Mr. Ko could not be revived and had died. (CP pp. 117-121).

Robert G. Thompson, MD, in his expert's report, attached to his declaration, based upon his review of Hi Sun Ko's medical records and review of the autopsy report and his professional training and experience as a cardiologist, (CP pp.131-138), that more probably than not Mr. Hi Sun Ko's heart attack was due to the emotional stress related entirely to his wife's car accident of 12/20/04 aggravating a pre-existing heart disease condition. (CP p.141).

PROCEDURE TO DATE

A Motion for Partial Summary Judgment was brought by Defendants/Respondents. Plaintiffs/Appellants responded in opposition to the Motion. The matter was argued before Judge George Appel of the Snohomish County Superior Court on March 13, 2009. The Motion for Partial Summary Judgment was granted, dismissing Plaintiffs' /Appellants' negligent infliction of emotional distress claims. A Motion to Reconsider the Ruling was brought by Plaintiffs/Appellants before the

Snohomish County Superior Court without oral argument for April 3, 2009. The Motion for Reconsideration was denied shortly thereafter. Plaintiffs/Appellants filed the present Notice of Appeal on April 9, 2009 that places this matter before the Court of Appeals, Division I.

IV. SUMMARY OF ARGUMENT

Washington's Supreme Court has held that close relatives have a claim for negligent infliction of emotional distress when they come upon the accident scene shortly after the event and before there has been a substantial change in the event's circumstances. Whether each of the elements of this tort have been proven is for a jury to decide once genuine issues have been shown to exist. Here, Hi Sun Ko met all of the elements of this tort, raising genuine issues on each material fact. The bright line of tort elements established in thirty years of Supreme Court decisions indicates that it is the totality of the circumstances surrounding the event causing injury that must be considered in assessing the victim's claim, not merely a single factor. Would a reasonable man, confronted with the same post-event situation as experienced by Mr. Ko have suffered emotional distress?

In light of these considerations, Appellants' brief suggests that the Superior Court's decision granting summary judgment finding no genuine issue of material fact should be reversed and Appellants' claim of negligent infliction of emotional distress reinstated with a direction to proceed to trial.

V. ARGUMENT

A. Washington law, and the law in many other jurisdictions, establishes that a person may recover for negligent infliction of emotional distress even when not present at the injury causing event, but arriving shortly thereafter.

i. It is for jury determination whether each of the legal elements have been proven factually.

A long line of cases in Washington have recognized, then expanded, who and when a claim for negligent infliction of emotional distress may be made. These cases with deliberate reasoning over the past thirty years have

expanded the grounds upon which a close relative, arriving on the event scene shortly thereafter and seeing the injured relative, may recover for emotional distress. Justice Brachtenbach speaking for a unanimous Court, stated in *Hunsley v. Giardi*, 87 Wn.2d 424, 553 P.2d 1096 (1976) that it is fair and just to impose liability upon a tortfeasor for the negligent infliction of emotional distress under certain circumstances. The *Hunsley* court stated that, while the plaintiff was not present at the time of the event (car crashing into her house), did not witness the event and was not directly injured, a jury must consider several factual issues in applying the law of negligent infliction of emotional distress:

[I]t is apparent that the defendant had a duty not to drive her automobile into the plaintiff's house. What was the foreseeable risk of the conduct? What was the threatened danger? Who would be foreseeably endangered by defendant's conduct? Was the plaintiff's reaction that of a reasonable person, normally constituted? These are questions of fact for the jury to resolve.

Id. At 436-437, 553 P.2d at 1103.

Defendants are under a duty to avoid negligent infliction of emotional distress, and whether the distress suffered was reasonable and foreseeable

are questions of fact for a jury to decide. *Hunsley*, 87 Wn.2d at 435-36, 553 P.2d at 1102. The Hunsley court rejected rigid mechanical rules and “numerous artificial boundaries”, holding that traditional tort rules for emotional distress are within the administration of the courts, *Hunsley*, 87 Wn.2d at 434, 553 P.2d at 1102.

Our experience tells us that mental distress is a fact of life. With adequate limitations, the courts can administer the adjudication of this tort just as it does the complex intricacies of products liability and medical malpractice.

Id. 87 Wn.2d at 435, 553 P.2d at 1103.

It is Appellants’ view in this matter on appeal that the Superior Court erred in finding no genuine issue of material fact and imposing its determination that Hi Sun Ko was not a foreseeable plaintiff as a matter of law. Rather his arrival at the accident scene shortly thereafter and before there was any material alteration of the attendant circumstances was reasonably to be expected. His observations of his wife at the scene and hearing her cries and complaints of pain, together with his observations of the severity of damage to the vehicles, including broken glass, bent metal and a deployed airbag would have elevated his anxiety and emotional distress. Combined

with his stomach pain and the heart attack a few hours later, all of this evidence meets the thresh-hold of creating genuine issues of material facts to place this matter before a jury.

ii. There is a bright line upon which a claim for negligent infliction of emotional distress exists.

Washington's Supreme Court in its *Hunsley* decision did what it has frequently done in other areas which is to recognize that victim's injured through the negligent conduct of others must have a claim vehicle through which justice can be obtained for their suffering and tortfeasors held responsible for their inappropriate conduct.. The unanimous *Hunsley* ruling held that the facts of each case need to be examined to determine duty, foreseeability and reasonableness of resulting injury.

Since *Hunsley*, the Supreme Court's decisions on negligent infliction of emotional distress have arrived at a bright line for determining foreseeability and reasonableness of the claim, and protect defendants from frivolous claims. The Court has expanded the bright line by making it more inclusive for immediate family members who are not present at the

event causing injury but who come upon the scene shortly thereafter. Specifically, that bright line requires the following: first, the victim be a close relative to the person injured in the event, *Hegel v. McMahon*, 136 Wn.2d 122 (1998), second, if not present at the event, the relative must arrive at the event scene shortly thereafter, *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990), third, the victim must see the relative injured or bleeding or hear the relative expressing complaints of pain, *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990), *Hegel v. McMahon*, 136 Wn.2d 122 (1998), fourth, the event's circumstances must be substantially unchanged from the original occurrence, *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008) and fifth, the victim must manifest a physical symptom of the emotional distress claimed, *Shoemaker v. St Joseph's Hosp. and Health Care Ctr.*, 56 Wn. App. 575, 784 P.2d 562 (1990), *Hunsley v. Giard*, 87 Wn. 2d 424, 425, 436, 553 P.2d 1096 (1976).

In this matter, each of the elements of negligent infliction of emotional distress has been met with sufficient evidence to raise legitimate issues as to these elements. First, Hi Sun Ko was the spouse of Mrs. Ko, thus a close relative. Second, he arrived at the scene shortly thereafter, within 5-6

minutes of the event occurring. Mr. Ko was at the scene before there was a material change to attendant circumstances. It was dark. Street lights and police strobes illuminated the scene. The cars that collided remained at the scene. Mr. Ko would have observed the damage to each vehicle. Mrs. Ko's car was undriveable from the scene. The impact severe enough to cause her airbag to explode in her face at impact. Mr. Ko arrived as his wife, still at the scene, and complaining of pain to him, was loaded into the ambulance. **Mr. Ko's upset was evident when speaking to his wife in the ambulance as he thanked her for not dying.** What Mr. Ko perceived, all of the circumstances attendant to the event, together with his heart attack symptoms two hours later in the hospital parking lot, establish a prima facie case for this tort to be decided by a jury, not the court.

B. Important in considering a claim for negligent infliction of emotional distress is the totality of the event experienced by the victim as it is this experience which a jury must measure against the common man standard to determine reasonableness of the injury claimed and foreseeability of the plaintiff as injured victim.

i. Thirty years of decisions on negligent infliction of emotional distress

has broadened the considerations of what is foreseeable.

Hunsley recognized the tort of negligent infliction of emotional distress.

Gain held that this tort applied to close relatives coming upon the event scene shortly thereafter.

A defendant has a duty to avoid the negligent infliction of emotional distress. However, 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.

Gain, 114 Wn.2d at 260-61.

Gain confirmed that a victim who witnesses the “gruesome aftermath” of an event shortly after it occurs and suffers emotional injury as a result, is entitled to bring a claim. Concerns of floods of litigation under this tort followed the *Hunsley* ruling. As expressed in *Cunningham v. Lockard*, 48 Wn.2d 38, 736 P.2d 1096 (1987) without an arbitrary boundary for claims nothing existed to limit those who could maintain this tort action. In his dissent, Justice Brachtenbach in *Gain* made clear that such a concern was without merit stating, in part, “ Certainly the appellate courts have seen no

proof of an explosive, ‘virtually unlimited liability’”. Justice Brachtenbach added:

I prefer to continue with a faith in trial courts and juries to dispense appropriate justice, rather than create an unjust artificial rule based upon some unsupported fear.

Gain, 114 Wn.2d at 265, 787 P.2d at 559.

This Court must abandon the rigid and artificial rules of an arbitrary approach as well. In *Hunsley*, more than thirty years ago, Justice Brachtenbach addressed the casting aside of absolutes in assessing this tort claim:

[T]he wisest approach is to return to traditional principles, theories and standards of tort law. Thus we test the plaintiff’s negligence claim against the established concepts of duty, breach, proximate cause and injury.

....

In the main, the reasons advanced by the Courts for denying recovery, i.e., lack of precedent, increased litigation, remoteness, and fear of fictitious and feigned claims, have now been generally discarded. (Citations omitted). The old rationales are simply no longer viable.

Hunsley, 87 Wn.2d at 434, 553 P.2d at 1102.

In *Gain*, the Court recognized that witnessing the aftermath of an accident in all its alarming detail was as significant for the victim as witnessing the event itself. The Court in *Hegel v. McMahon*, 136 Wn.2d 122, 127, 960 P.2d 424, 429 (1998) ruled that the essence of the tort “**is the perception of an especially horrendous event**. 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.” (Emphasis added). In explaining what “shortly thereafter” means, the *Hegel* court took note of Justice Brachtenbach’s dissent in *Gain*, 114 Wn.2d at 266, where he questioned whether “shortly thereafter” meant the arrival of a grieving father within 5 minutes of the accident but denied recovery to the same grieving father who arrived at the scene 20 minutes later? Attempting to add reasoning to “shortly thereafter” the *Hegel* court stated:

An appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone discovering that a relative has been severely injured.

Hegel, 136 Wn.2d at 128, 553 P.2d at 430. (Emphasis added).

From this reasoning, the *Hegel* court concluded that a family member may recover for emotional distress caused by observing an injured relative at the accident scene after its occurrence and before there is substantial change in the relative's condition or location.

Likewise, numerous cases from other jurisdictions have arrived at the same conclusion as *Gain* and *Hegel* regarding the foreseeability issue as faced in Washington and in the instant matter: *Nancy P. v. D'Amato*, 517 N.E. 2d 824 (MA 1988); *Croft v. Wicker*, 787 P.2d 789 (AK 1987) (allowing recovery to plaintiffs who observed the injured relative shortly after the event); *Tommy's Elbow Room v. Kavorkian*, 727 P.2d 1038 (AK 1986); *Gates v. Richardson*, 719 P.2d 193 (WY 1986) (plaintiff must either witness the accident or come upon the scene shortly thereafter while the injured victim is still there); *Ochoa v. Superior Court*, 703 P.2d 1 (CA 1985); *Waid v. Ford Motor Co.*, 484 A.2d 1152 (NH 1984)(allowing recovery where the tortfeasor could have easily foreseen his carelessness would cause emotional distress to others); *Neff v. Lasso*, 555 A.2d 1304 (PA 1989)(recovery for one arriving shortly after the event).

Hi Sun Ko arrived shortly after the event, believed to be within 5-6 minutes of receiving an abrupt telephone call from his wife. She had asked a police officer at her driver's window to call her husband. She was handed the phone by the officer saying to her husband only that she had been in an accident. The phone went back to the policeman who gave directions to Mr. Ko to the scene. How horrendous the collision; how serious the impact to the vehicles; and how severe were Mrs. Ko's injuries were questions left unanswered in the phone call, and thus, left to the anxiety of Mr. Ko. It is a situation in which the phone call is not a warning of the scene to come, but part of the anxiety and mental stress for Mr. Ko to experience for 5-6 minutes in his rush to the accident. What would he see? How injured was his wife if she could not talk on the phone? Those 5-6 minutes were not less stressful because of the call, but more emotional.

In *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008) the Court recognized from *Hegel* that the creation of arbitrary limitations which exclude some plaintiffs from raising an emotional distress claim are inappropriate limits without meaningful distinctions. *Hegel*, 136 Wn.2d at 130. The essence of this tort is what the mentally stressed victim heard and

saw when arriving at the scene and in specific reference to his injured relative. It is the witnessing of the aftermath of the accident in all of its alarming detail. As state in *Gates v. Richardson*, 719 P.2d 193, 199 (WY 1986):

The essence of the tort is the shock caused by the perception of an especially horrendous event....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.

(Emphasis added).

The *Colbert* Court, citing to *Hegel*, added to this tort that “shortly thereafter” meant that the victim claiming distress had to arrive shortly after the event and before there was a material change to attendant circumstances. *Colbert* defined a victim arriving before a material change as a plaintiff whose emotional distress results from the shock caused by the personal experience in the immediate aftermath of an especially horrendous event of **seeing the victim, the surrounding circumstance, and effects of the accident as it actually occurred.** *Colbert*, 163 Wn.2d at 57. (Emphasis added).

Adding further clarity, *Colbert* reasoned: “There must be an actual sensory experience of the pain and suffering of the victim—personal experience of the horror.” *Id.*, 163 Wn.2d at 57. What reflects better the high degree of emotional distress experienced by Mr. Ko upon seeing the scene and seeing and hearing his wife than his comment to her, “Thank you for not dying.”

The Supreme Court in *Hegel* and *Colbert* have asserted that it is not a single factor, “artificial limitation”, that should exclude Mr. Ko. Rather, for those relatives coming upon the scene shortly after the event, it is the totality of the circumstances of the event aftermath that creates the tort of negligent infliction of emotional distress. It is what Mr. Ko observed of the scene and the personal observation of his injured spouse strapped to a back board, being lifted into an ambulance and her complaints directly to him that her neck, back and chest were all extremely painful that must be judged by a jury. That is the foreseeability issue in this matter. Factors of Mrs. Ko being loaded into the ambulance or the abrupt cell phone call that alerted Mr. Ko to the accident are not an overall consideration of the circumstances of the entire event that the law requires. Consideration of these factors create argument and a genuine issues of

material facts which should deny summary judgment, placing the matter before a jury for determination. Single factors do not decide the issue of foreseeability.

C. The Report of Dr. Thompson Raised an Issue of Material Fact on Causation and Injuries.

The element of proximate cause of the emotional distress injury is a question of fact to be determined by a jury. In the instant matter, plaintiffs submitted a report from cardiologist Thompson in which he stated that Mr. Ko's heart attack was caused more probably than not by the emotional distress he experienced as a result of the accident and injuries his wife suffered. As reported by David Ko in his declaration his father stated to him in a phone call shortly before his death that he had severe stomach pain. The law developed in this tort requires that there be a physical manifestation of symptoms to demonstrate the emotional distress claimed. *Shoemaker v. St Joseph's Hosp. and Health Care Ctr.*, 56 Wn. App. 575, 784 P.2d 562 (1990). Certainly, the stomach pain symptom and the heart attack itself are physical manifestations of the severe emotional distress Mr. Ko was under due to the breach of duty of the defendants in causing

the accident.

It was urged by Defense counsel at oral argument in the Superior Court that perhaps Mr. Ko's heart attack was caused by his worry over his car damage or insurance coverage. At the very least Dr. Thompson's testimony raises a genuine issue of material fact on causation, especially when plaintiffs, as the non-moving party are entitled to all reasonable inferences in their favor that can be drawn from the report. The Motion should be reversed on this basis and summary judgment denied.

CONCLUSION

Hi Sun Ko suffered the most profound emotional injury, a heart attack that cost him his life, happening within an hour or two following his experiencing the aftermath of a two car collision involving his wife. The event aftermath he experienced included the entire collision scene, damage to his spouse's car and seeing her on a back board, complaining of pain in her neck, back and chest. These facts meet the bright line requirements of the tort of negligent infliction of emotional distress. These facts create genuine issues for a jury to determine whether the claim of injury and damage is fraudulent or trivial. It is already well decided in this tort that

close relatives are foreseeable plaintiffs and that tortfeasors owe them a duty of due care.

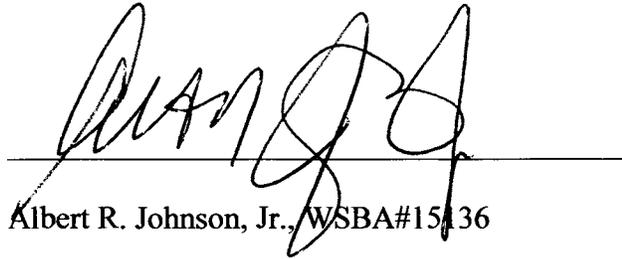
Washington's Supreme Court has through a series of cases over thirty years developed a bright line for plaintiffs making an injury claim under this tort for those close relatives who arrive at the event shortly after the accident. It is the totality of the post-event experience for the plaintiff that must be weighed in deciding the validity of the claim, not just a single factor.

-

Plaintiffs do not seek a change in the bright line by this Court, but only that the evidence put forward by Plaintiffs be examined and where genuine issues exist, reverse the grant of summary judgment and restore Plaintiffs' claim of negligent infliction of emotional distress.

Respectfully submitted this 29th day of June, 2009.

LAW OFFICE OF ALBERT R. JOHNSON, JR.

A handwritten signature in black ink, appearing to read "AR Johnson", is written over a horizontal line. The signature is stylized and cursive.

Albert R. Johnson, Jr., WSBA#15136

Attorney for Appellants

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Appellants,

CERTIFICATE OF
SERVICE

Vs.

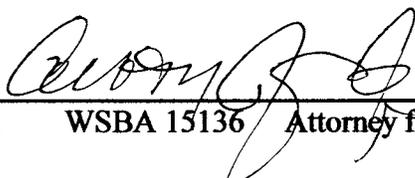
CHRISTIAN A. OLSON, TICEN VARNEY
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The undersigned, Albert R. Johnson, Jr., by his signature below, hereby certifies that the original Appellants' Brief in this matter was personally filed with the Court of Appeals on July 7, 2009, and that true and correct copies of the Appellants' Brief have been served by placing true and accurate copies of the Appellants' Brief in first class US Mail on July 7, 2009 to each counsel of record in this matter, who are:

Tracy Antley-Olander, Law Office of William J. O'Brien, 999 Third Avenue, Suite 805, Seattle, WA 98104; David Henning, Wilson Smith Cochran Dickerson, 1215 Fourth Avenue, Suite 1700, Seattle, WA 98161-1007 and Nick Barrett, The Shim Law Firm, 3434 130th Street, Ste 201, Seattle, WA 98134.


Albert R. Johnson, Jr., WSBA 15136 Attorney for Appellants