

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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STATE OF WASHINGTON
[Signature]

BRIEF OF RESPONDENTS SEAVIEW CHEVROLET, CHRISTIAN OLSON,
AND OMAR AND JANE DOE RUBBA

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I. INTRODUCTION

The subject of this lawsuit is a two-car motor vehicle accident. Plaintiffs/Appellants made four claims related to the tort of negligent infliction of emotional distress (NIED). CP 169-175. The NIED claims were based on the unfortunate death of Mr. Hi Sun Ko after his wife's motor vehicle accident. Mr. Ko was not present for the accident.

All the defendants moved for partial summary judgment on the NIED-related claims. The NIED causes of action were rightly dismissed on summary judgment by the trial court because plaintiffs did not meet a single one of the criteria required to establish this judicially-created cause of action.

II. ASSIGNMENTS OF ERROR

The Superior Court correctly dismissed the appellants' negligent infliction of emotional distress claims. The appellants failed to establish the required elements of the tort. Mr. Ko was called to the scene rather than happening upon it. He arrived upon the scene after it was changed and after his wife was 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.

1. Washington law requires that the plaintiff meet certain elements to establish the tort, otherwise foreseeability is not established.
2. Washington decisional law does not consider "the entire experience of the event as perceived by the victim" to determine whether NIED is established, only specific criteria that must be met that were not met in this case.
3. Washington decisional law does not consider the "entire event circumstances" to establish NIED in Washington, only specific criteria.

III. STATEMENT OF THE CASE

This case concerns a two-car accident on SR 99 between a car driven by plaintiff Mrs. Young Hi Ko and a car driven by defendant Ticen Varney. He was on a test drive of a car owned by defendant Seaview Chevrolet. Seaview Chevrolet is owned by defendant Christian Olson. Defendant Omar Rubba was the sales person in the car with Mr. Varney. This brief is presented on behalf of all defendants except Ticen Varney, who is represented by separate counsel. For purposes on this respondent brief, these answering defendants will be referred to as "the dealership."

Also for purposes of this brief, the plaintiffs/appellants will be referred to as "Ko."

A. Statement of the Case

The dealership agrees with Ko that cars driven by Mrs. Ko and Mr. Varney collided in front of the dealership. The police arrived a few minutes later. CP 186. After the police arrived, Mrs. Ko had the officer call her husband on her cell phone. CP 178-79. Mrs. Ko told her husband she had been in an automobile accident. CP 179.

Mr. Ko arrived as the paramedics were treating his wife, about 6 minutes later. CP 179. This was 10 to 20 minutes after the accident. CP 188. First Mr. Ko looked at the damage to his car. CP 186. His wife had already been taken out of her car and placed in the aid car in preparation for transport to the Emergency Room. CP 180.

Mrs. Ko was transported to the Emergency Room. CP 181. However, Mr. Ko stayed at the dealership for 10-20 minutes after the ambulance left. CP 186. He demanded to talk with the other driver (Varney), but was told Varney had already given a statement to the police and was too shaken up to speak with Mr. Ko. CP 186. He demanded information about insurance and was told Varney had given that

information to the police. CP 186. He was also told the dealership insurance information would be available to him the next day. CP 188. Two salesmen suggested to him that he follow the ambulance to the hospital to be with his wife first, but he ignored them. CP 186; CP 188. Finally, about 10-20 minutes after the ambulance left, Mr. Ko left the dealership. CP 186. Mrs. Ko does not know how long it was before her husband arrived at the hospital. CP 182.

About three hours after the accident, which occurred shortly after 5:00 p.m. (CP 178), Mr. Ko apparently called his son and told him to hurry to Stevens Hospital because Mrs. Ko had been in a car accident. CP 120. His son arrived and saw his mother. Mrs. Ko was about to be released from the hospital, so her son went in search of his father. He found Mr. Ko in the parking lot in his car, slumped to the side, deceased. CP 120.

The Ko family filed a lawsuit with five causes of action. Four concerned claims for NIED for Mr. Ko's death following a heart attack in the hospital parking lot. The fifth cause of action was for Mrs. Ko's accident-related soft tissue injuries. CP 169-175.

After the defendants filed a motion for partial summary judgment to dismiss all the NIED claims, Ko obtained a Declaration from a cardiologist, Dr. Robert G. Thompson. CP 131-141. The doctor opined

in his Declaration that stress caused by his wife's auto accident aggravated Mr. Ko's underlying heart disease, leading to a heart attack. CP 132. In his Cardiologist Record Review, Dr. Thompson stated that Mr. Ko was called to the hospital after his wife's motor vehicle accident. Mr. Ko saw the damaged car in the parking lot. Then he went to the emergency room and stayed with his wife. CP 139. Dr. Thompson said that "the stressful events surrounding his wife's accident" triggered Mr. Ko's heart disease to manifest as a heart attack. CP 141. Dr. Thompson did NOT opine that Mr. Ko's distress was caused by the horror of seeing his wife's injuries at the scene, but rather by the "stressful events surrounding his wife's accident." CP 141.

B. Procedural History

The dealership and Ticen Varney moved for partial summary judgment on March 13, 2009. CP 189-200; CP 155-163. The Honorable George F. B. Appel granted summary judgment and dismissed the four Ko claims relating to negligent infliction of emotional distress. CP 6-8. Ko moved at the same time to strike two defense declarations, that of Han Song and Kyu Yoo. CP 150-154. The dealership resisted that motion. CP 92-99. The motion to strike was denied at oral argument.

Ko moved for reconsideration. CP 38-46. The defendants opposed the motion. CP 25-33; CP 17-24. The court denied the motion for reconsideration on April 7, 2009. CP 8-12. This appeal followed. CP 4-5.

IV. SUMMARY OF ARGUMENT

The Ko NIED claims were properly dismissed on summary judgment. Washington decisional law requires that certain elements be present to establish this cause of action. Ko failed to come forward with evidence to establish the required elements. As a matter of law the claims had to be dismissed.

V. ARGUMENT

A. Standard of Review

When reviewing a summary judgment order, 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 is entitled to summary judgment when the plaintiff fails to come forward with evidence supporting each of the elements of the claim. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The defendant can meet its initial burden of proof on a motion for summary

judgment by pointing out that the plaintiff lacks evidence to support its claim. *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 21, 851 P.2d 689, *review denied*, 122 Wn.2d 1010 (1993). The burden of proof then shifts to the plaintiff to set forth evidence of the sort admissible at trial to prove each and every element of the claim. *Ernst Home Center, Inc. v. United Food and Commercial Workers Int'l Union*, 77 Wn. App. 33, 40, 888 P.2d 1196 (1995). Failure of proof on any one essential element is fatal to the entire claim. *Young*, 112 Wn.2d at 225.

A party may not use speculation or conjecture to defeat a summary judgment motion. *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). Likewise broad generalizations and vague conclusions cannot defeat a motion for summary judgment on a negligence claim. *Ruff v. King County*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995). The non-moving party must produce competent testimony setting forth specific facts, not general conclusions. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

B. The Required Elements of NIED

The tort of negligent infliction of emotional distress is a "limited, judicially created cause of action that allows a family member a recovery for 'foreseeable' intangible injuries caused by viewing a physically injured

loved one shortly after a traumatic accident." *Hegel v. McMahon*, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998). Washington decisional law on NIED has evolved over the years, but the basic elements of the tort are unchanged. Originally, the relative had to be physically present at the time and personally experience the horrific event involving a loved one. *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1968). In that seminal case, a car crashed into a home. The wife suffered emotional distress believing either that she herself was going to be injured, or that her husband in another room had been injured. It was foreseeable that a car crashing into a home might cause the occupants emotional distress.

Subsequent cases have clarified the scope of the tort. A 1990 Supreme Court case held that the "mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law." *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 260, 787 P.2d 553 (1990). In *Gain*, relatives of a state trooper learned about his death in a car accident while watching the evening news. The Court dismissed the claim because it was unforeseeable as a matter of law that relatives who were not present at the scene would suffer the kind of mental distress required to establish the tort of negligent infliction of emotional distress. *Id.* at 261.

A later decision allowed recovery even when the relative was not present for the horrific event, but only so long as the relative happened on the scene "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 *Hegel* case was a consolidation of two separate lawsuits raising the same issue on appeal. In *Hegel*, relatives happened upon their relative shortly after he had been knocked into a ditch by a hit and run driver. The relative was bleeding from his nose, ears, and mouth. The consolidated case involved a father who came upon the scene of his son's motorcycle crash and saw his son lying mangled and dying. The Court reasoned that relatives should be able to recover when they come upon the scene before the horror of the accident has abated, even if they were not present for the event itself. *Id.*

The two scenarios in *Hegel* involved relatives who happened on the scene before the circumstances of the scene had changed and *before any substantial change in their loved one's condition or location* (emphasis added). The courts further clarified and reaffirmed this requirement in a 2006 case, *Colbert v. Moomba Sports, Inc., et al.*, 132 Wn. App. 916, 135 P.3d 485 (2006).

In *Colbert*, a father received a telephone call that his daughter had been in a boating accident. He arrived on the scene about ten minutes after being notified of the accident and watched authorities dredge the lake, finally locating her body three hours later. He sued various defendants for negligent infliction of emotional distress. The trial court dismissed the claim on summary judgment and the Court of Appeals affirmed. The Court of Appeals reasoned that a relative must arrive "(a) soon enough to observe the accident's immediate aftermath and the accident's effect on the victim, and (b) before third-parties, such as rescuers and paramedics, have substantially altered the accident scene or the victim's location or condition." *Colbert*, 132 Wn. App. at 931.

The *Colbert* appellate court determined there had been a substantial change in the accident aftermath. Even though Colbert arrived on the scene in about ten minutes, he did not see or hear his daughter drown. He never saw the accident scene or his daughter's body substantially unaltered by third-party involvement. Rather, he saw rescue workers pull his daughter's body from the lake. *Id.* at 934-35.

Further, Colbert was called to the scene, rather than "unwittingly" happening upon it as did the *Hegel* relatives. Thus, he was alerted to the potential of injury before he arrived. He did not experience the immediate

shock of seeing his daughter drowning at the scene. *Id.*, at 935-36. That immediate shock of seeing an unaltered accident scene is the foundation of the tort, because it is foreseeable that close relatives would experience emotional distress from seeing their loved one in an unaltered accident condition.

The appellate court denied Colbert's claim for negligent infliction of emotional distress on yet another ground. The relative's objective symptoms must be caused by the shock of seeing the victim in the throes of the accident, rather than caused by the grief suffered by anyone upon discovering that a loved one has been severely injured. *Id.*, at 932. The court specifically affirmed that the shock of seeing rescue efforts conducted in an ambulance or hospital is not compensable because those are life experiences everyone may expect to endure. *Id.* Colbert could not demonstrate that his shock was due to seeing his daughter's body after the drowning, as opposed to the shock of hearing of her death, or seeing her body taken away by ambulance.

The Supreme Court accepted review of the *Colbert* case and affirmed the dismissal by the two lower courts. *Colbert v. Moomba Sports, Inc. et al.*, 163 Wn.2d 43, 176 P.3d 497 (2008). The Supreme Court reaffirmed that the scope of the tort permits recovery only when the

emotional distress results from "the shock caused by the personal experience in the immediate aftermath of an especially horrendous event of seeing the victim, surrounding circumstances, and effect of the accident *as it actually occurred.*" (emphasis added) *Colbert* at 176 P.3d 503.

The *Colbert* Supreme Court cited with approval the fact patterns in *Hegel*. Following the *Hegel* definition of "shortly thereafter," *Colbert* was not a foreseeable plaintiff as a matter of law because at no time did he witness the continuation of the horrific events. He did not experience firsthand the victim's injuries or suffering. *Colbert*, 176 P.3d at 505. The Court did say that a relative need not arrive before rescue personnel. However, those rescue personnel cannot have disturbed the attendant circumstances. *Colbert* arrived to witness the rescue efforts, not the continuing horror of the accident itself. *Id.* at 506-07.

The Supreme Court affirmed that a relative called to the scene rather than happening upon the scene cannot maintain a cause of action for negligent infliction of emotional distress. The kind of shock required for the tort to apply is not established by first receiving a telephone call about the accident before coming to the scene. "It is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene." *Id.* at 505-06.

Thus, Washington case law has consistently held fast to several criteria to establish NIED. The relative must happen on the scene, not be alerted to the accident by a prior communication. The relative must experience the "immediate aftermath" of the accident, before it is disturbed by rescue personnel. The emotional distress must be caused by witnessing the loved one's agony, not by other factors such as grief over the loved one's injury or stress over the events surrounding the accident.

C. Issue Pertaining to Assignment of Error No. 1: There Can Be No Jury Question When the Required Elements of the Claim Have Not Been Established

The Supreme Court rejected the argument that foreseeability is always an issue of fact for the jury. *Colbert v. Moomba Sports, Inc. at al.*, 163 Wn.2d 43, 176 P.3d 497, 504 (2008). As a matter of law there is no foreseeability issue and thus no question to send to the jury when the elements of the tort are not met. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Because this tort is a judicially-created limited cause of action, the elements are more strictly construed.

In the present case, Mr. Ko received a telephone call from his wife telling him she was in an accident. He then went to the accident scene.

Thus, the requirement that the loved one happen on the scene without prior notification is not met. *Colbert*, 176 P.3d at 505-06.

Mr. Ko arrived after his wife has been removed from her car, stabilized, and placed in the ambulance for transport to the Emergency Room. The scene had been materially changed, as had the scene in *Colbert*. The *Colbert* appellate court specifically noted that the shock of seeing rescue efforts conducted in an ambulance are not compensable under a NIED claim. *Colbert*, 132 Wn. App. at 932. The facts in the present case are in stark contrast to the situations described in *Hegel*. Those relatives happened on the scene before the scene was altered, unlike the present case.

When the defendant puts the plaintiff to his proof by way of a summary judgment motion, the plaintiff is obligated to come forward with evidence to support each and every element of the claim. *Young v. Key Pharmaceuticals*, 112 Wn.2d at 225. Ko failed to meet her burden of establishing that the case falls within the NIED standards. Having failed to establish the required elements of the tort, there is no jury question.

In addition to not meeting the foreseeability element of the tort, the NIED claims were properly dismissed because Ko failed to establish that Mr. Ko's heart attack was proximately caused by the shock of seeing his

wife's injuries at the accident scene, as opposed to stress from other circumstances.

Uncontradicted evidence from eyewitnesses established that Mr. Ko was upset and angry about other aspects of the accident, including damages to his car and frustration because he could not get answers to all his questions about the accident facts and insurance. According to witnesses, upon arrival, Mr. Ko first examined his damaged car. Only later did he speak with his wife in the ambulance. Rather than accompanying her to the hospital, he spent up to 20 minutes haranguing the dealership about insurance and demands to speak with the other driver and his passenger, even when people suggested that he go attend to his wife first. CP 186; CP 188. Only after arguing with witnesses Song and Yoo—among others—did Mr. Ko depart for the hospital to check on his wife's condition. Even after he arrived at the hospital he did not remain with his wife, but instead went outside to sit in his car, where he had a heart attack and expired.

In response to the eyewitness testimony, Ko offered the opinions of Dr. Thompson, who reviewed records and wrote a report for the plaintiffs. However, even Dr. Thompson said only that the stressful events *surrounding Mr. Ko's wife's accident*—including damage to his car—

were sufficient to trigger a heart attack. Dr. Thompson did not specifically state that the heart attack was caused by Mr. Ko's shock over his wife's injuries as he saw them at an unchanged accident scene. The trial court declined to find that the Thompson declaration was legally sufficient to establish a claim for NIED.

Ko can produce nothing more than speculation to link Mr. Ko's heart attack to a claim of negligent infliction of emotional distress. A party may not use speculation to defeat a motion for summary judgment. *Marshall v. Bally's Pac-West, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). "If there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." *Id.*

D. Issue Pertaining to Assignment of Error No. 2: If There is a Bright Line for NIED Established By Our Courts, This Case Is On the Wrong Side of It

Mr. Ko did not arrive on the scene before it was materially changed. His wife was already in the ambulance attended by emergency personnel. Mr. Ko knew about the accident before he arrived. He did

not experience the shock of coming upon the scene while the full horror of the aftermath was still unfolding. *Colbert*, 176 P.3d at 503. Ko's expert failed to support Ko's claim that the shock of Mrs. Ko's injuries was the sole cause of Mr. Ko's stress-related heart attack. Ko fails to meet the criteria set out by Washington decisional law.

E. Issue Pertaining to Assignment of Error No. 3: The "Entire Experience of the Event" is Not the Standard To Establish NIED

Cobbling together various non-elements of NIED do not supplant the strict requirements of the tort. For purposes of establishing the required tort elements, it does not matter that Mr. Ko thanked his wife for not dying (when she was already in the ambulance), or that he observed the damaged cars, or that the airbag had deployed, or that he arrived within a few minutes of being called, or even that he suffered a fatal heart attack three hours later.

This is not the fact pattern that should persuade the Court to "abandon the rigid and artificial rules of an arbitrary approach," as Ko urges on page 15 of the appellate brief. The facts in this case are not even close to meeting the required elements. Justice Brachtenbach could not persuade his fellow justices to abandon the arbitrary boundaries in the Gain case for the same reason that the Court should refuse to cast aside the

required elements in this case. *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 265, 787 P.2d 553 (1990).

The *Hegel* court noted this same concern about limitless liability. Yet it also acknowledged that some relatives who were not present at the time of the accident but happened upon a horrific scene involving a loved one should be able to recover for NIED. The concern was addressed by establishing a rule that recovery would be limited to claimants "who are present at the scene before the horror of the accident has abated." *Hegel*, 136 Wn.2d at 132.

Allowing Ko to proceed with the NIED claim will indeed open the floodgates for NIED claims for every close relative of a loved one. The facts in the present case are radically different from those in *Hegel*. Mr. Ko was informed by his wife about the accident beforehand; that was the reason he went to the accident scene. He did not, like the *Hegel* relatives, happen upon the scene unawares. Mrs. Ko was no longer enmeshed in the immediate horror of the automobile accident. She was safely inside an ambulance being cared for by professionals. Again, this is a radical departure from the *Hegel* scenarios. The Ko expert cardiologist did not state that Mr. Ko's heart attack was triggered by the horror of seeing his wife in the throes of the accident, but only that he was stressed by the

events surrounding the accident, including damage to the car. The *Colbert* courts squarely address this issue by requiring that the emotional distress be caused specifically by the horror of observing the loved one during the unfolding of the accident. Whether or not Washington courts further refine the NIED elements at some later date, this case is clearly not the fact pattern that should spur a change in clear decisional law.

Ko's string citations to the case law of other jurisdictions are not persuasive. Washington has its own body of settled case law. The public policies behind Washington's analysis of NIED should not be disturbed, especially for a case like this one that does not remotely approach the required elements to establish the tort.

VI. CONCLUSION

The immediate shock of seeing an unaltered accident scene is the foundation of the NIED tort. The Supreme Court recently reaffirmed that the scope of the tort permits recovery only when the emotional distress results from "the shock caused by the personal experience in the immediate aftermath of an especially horrendous event of seeing the victim, surrounding circumstances, and effect of the accident *as it actually occurred.*" (emphasis added) *Colbert*, 176 P.3d at 503.

Mr. Ko was called to the scene; he was alerted before arrival that his wife had been in an automobile accident. He arrived after she was placed in an ambulance. Eyewitnesses report that Mr. Ko was also upset by the damage to his car and his inability to get immediate answers about how the accident occurred or insurance information. Ko's own expert failed to establish that Mr. Ko's subsequent heart attack was caused by stress over seeing his wife in the immediate aftermath of the horrific event, as opposed to being upset over other aspects of the accident.

Mr. Ko's death was tragic, but the Ko claims must be dismissed by the Court because the elements of the cause of action cannot be established. As a matter of law, the required elements are lacking in this case and there is no question to send to the jury.

The dealership respectfully asks the Court to uphold the trial court's dismissal of the NIED claims, leaving for trial only the issue of negligence by any defendant as to Mrs. Ko for her own accident-related injuries.

Respectfully submitted this 31st day of July, 2009.


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Olson, and Rubba

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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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 31st day of July, 2009, I caused to be delivered a true and correct copy of:

1. *Brief of Respondents Seaview Chevrolet, Christian Olson, And Omar And Jane Doe Rubba;* and

2. *Certificate of Service.*

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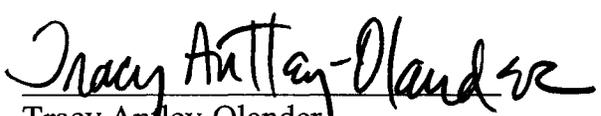
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of July, 2009.


Tracy Antley-Olander