

78833-2

**FILED**  
JUL 14 2006  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

NO. 78833-2

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

**JAY COLBERT, as Personal Representative of  
the Estate of Denise Colbert; and for himself,**

**Petitioner,**

**vs.**

**MOOMBA SPORTS, INC., a Tennessee corporation;  
UNITED MARINE CORPORATION OF TENNESSEE, a Tennessee corporation;  
AMERICAN MARINE CORPORATION, a Tennessee corporation;  
SKIER'S CHOICE INC., an Oklahoma Corporation; and MARC JACOBI,**

**Respondents.**

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**APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
Honorable Katherine M. Stolz, Judge**

**RESPONDENTS MOOMBA SPORTS, UNITED MARINE, AMERICAN  
MARINE, AND SKIER'S CHOICE'S ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

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## **I. ESSENCE OF THE APPEAL**

Denise Colbert drowned in Lake Tapps. Her father, who was not present when she drowned, is pursuing a bystander emotional distress claim.

Because he was not present, because he did not see the accident, because he did not arrive “shortly thereafter,” and because he witnessed no suffering, the trial court dismissed his claim on summary judgment.

Because the trial court’s summary judgment of dismissal was consistent with Washington law, the Court of Appeals affirmed.

## **II. NATURE OF THE CASE**

At about 1:30 in the morning, Denise Colbert and nine others went for a boat ride. After an hour and a half in the water, Ms. Colbert and a friend were holding on to the rear of the boat as it headed toward shore.

Ms. Colbert and her friend decided to resume swimming. They let go of the boat and started swimming. They were laughing and talking. They were really close to the shore. “All of a sudden she was gone. We were just swimming, and then she went under. There wasn’t a struggle or anything.” (CP 265; Lynam Dep. p. 39)

Ms. Colbert’s father, the petitioner, was not at the lake. He was home in bed. He received a phone call informing him that his daughter had fallen overboard and was missing.

When he arrived at the lake, he saw the police cars, ambulances, and fire personnel involved in the search. About two hours later, Ms. Colbert's body was located. She was taken from the water and placed in an ambulance. She had drowned about three hours earlier.

Petitioner was not present when the accident occurred. Petitioner did not arrive "shortly thereafter." Petitioner witnessed no suffering. Accordingly, the trial court dismissed the claim. The Court of Appeals properly affirmed. Further review is not warranted.

### **III. RESTATEMENT OF ISSUES**

A. Should this Court accept review, where Petitioner has failed to demonstrate that any of the requirements of RAP 13.4(b) are satisfied?

B. Notwithstanding Petitioners' failure, should this Court accept review where:

1. The Court of Appeals decision does not conflict with a decision of this Court (RAP 13.4(b)(1));

2. The Court of Appeals decision does not conflict with another decision of the Court of Appeals (RAP 13.4(b)(2));

3. This case does not involve any significant question of law under the Constitution of either the State of Washington or the United States (RAP 13.4(b)(3)); and

4. This case does not involve an issue of substantial public interest that should be determined by this Court (RAP 13.4(b)(4))?

#### **IV. RESTATEMENT OF THE CASE**

##### **A. FACTS GIVING RISE TO THIS LAWSUIT.**

At about 1:30 a.m., Ms. Colbert and nine other individuals boarded Marc Jacobi's boat. (CP 233) Around 3:00 a.m., Ms. Colbert and her friend, Lindsay Lynam, were holding on to the rear of the boat.

Ms. Colbert and Ms. Lynam decided to resume swimming. (CP 263) They let go of the boat and started swimming. (CP 263-64) They swam for a minute or two. They were laughing and talking. (CP 265) They were really close to the shore. (CP 265) "All of a sudden she was gone. We were just swimming, and then she went under. There wasn't a struggle or anything." (CP 265; Lynam Dep. p. 39)

The owner of the boat, testified that Denise was lost at 3 a.m. or 3:30 a.m. (CP 99) He called 911 right away. (CP 97) The medical examiner's report states that the 911 call came in at 2:58 a.m. (CP 41) Mr. Jacobi was on the phone with 911 for the next 15 minutes. (CP 97) The rescue people arrived within 20 minutes. (CP 99) After Denise had gone under, everyone started looking for her. (CP 97) Kyle Swanson jumped in the water to try to find her. (CP 97)

Later, Kyle called Denise's father. (CP 100) He told him that Denise had fallen overboard (CP 357) and was missing (CP 73). The father went to a neighbor's house to arrange to have them watch his other children. (CP 351) He then drove to the lake, a trip he estimated at five minutes. (CP 358)

When the father arrived at the lake, police cars, ambulances, and the fire department were already there. (CP 359-60, 444) There were lights flashing from a boat on the lake. (CP 72, 351) He knew they were searching for his daughter. (CP 351) He could not imagine his daughter drowning. (CP 73) He did not want to believe she was in the water. (CP 73) He did not join the search group at Mr. Jacobi's dock. (CP 352)

Instead, he got in his car and drove to a friend's house. (CP 360) It was a five-minute drive. (CP 451) It was about 900-1,000 feet across the lake from Mr. Jacobi's dock. (CP 99) He arrived there at about 3:45 a.m. (CP 444) He watched the recovery effort from the friend's dock. (CP 352, 369)

At dawn, the divers were still searching for his daughter. (CP 352) At about 6:00 a.m. her body was located and recovered. (CP 41) The police chaplain informed petitioner that the divers had found his daughter and that she had drowned. (CP 74) He had a partial view of the rescue

workers taking his daughter from the water, and taking her to a waiting ambulance. (CP 353)

Denise had drowned about three hours earlier. (CP 99)

**B. PROCEDURAL HISTORY.<sup>1</sup>**

In December 2003, petitioner Jay Colbert filed this lawsuit. (CP 1-6) He sued as the personal representative of the estate of Denise Colbert and he sued for himself. (*Id.*)

He sued four corporations, alleging that each had some connection to the boat on which his daughter was a passenger on the night she drowned. Petitioner alleged negligence, strict product liability, and breach of warranty. (*Id.*)

Respondent Skier's Choice denied liability and set out affirmative defenses. (CP 7-10) Petitioner added a claim of negligent infliction of emotional distress ("NIED"). (CP 11-17, 18-22)

In November 2004, petitioner filed a motion for partial summary judgment (CP 23-35) with attachments (CP 36-226). He sought a ruling that the boat was not reasonably safe. (CP 23) Petitioner filed the medical examiner's report (CP 38-59), which indicated that at about 3:00 a.m., Ms.

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<sup>1</sup> A comprehensive resume of the pleadings and proceedings is found in Respondents' Court of Appeals Brief at pages 1-8.

Colbert went under water and did not surface. 911 was called. Her body was found at about 6:00 a.m. (CP 41)

The cause of death was “drowning.” “[E]thanol toxicity,” and “carbon monoxide” were noted as significant. (CP 44) The blood alcohol level was 0.12 g/100 ml. (CP 50)

The court denied the petitioner’s motion for partial summary judgment. (CP 329-31)

Respondent Skier’s Choice filed a motion for partial summary judgment. (CP 366-85) That motion pointed out that Mr. Colbert’s bystander emotional distress claim had to be dismissed because he was not present when the accident occurred, was not present “shortly after” the accident, and did not witness any suffering on the part of his daughter. (CP 366-67)

Petitioner’s counsel responded to the motion. (CP 401-24, 425-507) Counsel argued that there was a cause of action because “Mr. Colbert was physically present at the Lake Tapps scene where his daughter died, witnessing hours of search and rescue efforts, as well as the removal of his daughter’s body from the water.” (CP 403)

Skier’s Choice replied (CP 535-42), pointing out that no Washington case law supported the claim, that Mr. Colbert did not witness his daughter drowning, was told of the drowning by a third party, and only

saw his daughter's body for an instant from 100 yards away, three hours after she drowned.

It was pointed out that plaintiff's counsel had misconstrued the operative language of Washington case law. (CP 536) In Washington, while a bystander plaintiff need not be an actual witness to the accident, he must at least arrive on the scene of the accident shortly thereafter and witness the victim's suffering, experience the shock of seeing the victim shortly after the accident, or witness the victim's injuries. (CP 536)

At the conclusion of oral argument, Judge Katherine Stolz announced her decision (RP 14-15)<sup>2</sup>. She stated in pertinent part:

**THE COURT:** The way the law is worded right now Mr. Colbert is not covered for emotional distress. He was called, went there, already advised she'd gone off the boat into the water and must have known it was a high probability she would have drowned. Watched the recovery effort for three hours but did not witness any pain, suffering or the like. A parent is going to be devastated any time their child dies before they do. Whether it's heart

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<sup>2</sup> To assist the reader, we have set out Judge Stolz's succinct analysis in the Appendix.

attack, auto accident or a drowning accident.

But this case is outside is outside [sic] the parameters of the law as it is now.

The trial court signed the summary judgment order. (CP 543-45)  
Petitioner filed a Notice of Appeal. (CP 546-53)

On May 16, 2006, Division II published its opinion: *Colbert v. Moomba Sports, Inc*, \_\_\_ Wn. App. \_\_\_, 135 P.3d 485 (2006). The court held that while a NIED claimant need not witness the actual accident, the NIED claimant must arrive: a) soon enough after the accident 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. Mr. Colbert did not meet this criteria.

## V. ARGUMENT

Review is allowed only under the limited circumstances described in RAP 13.4(b). The Petition does mention RAP 13.4(b)(1). However, petitioner does not demonstrate that this case satisfies any of the requirements of RAP 13.4(b).

The Petition is based on three major points: 1) Petitioner was present at the scene when his daughter drowned; 2) His daughter died

from carbon monoxide poisoning; and 3) The opinion is in conflict with Washington case law.

All three are wrong: He wasn't; she didn't; it isn't. The Petition should be denied.

**A. WASHINGTON LAW ON BYSTANDER EMOTION DISTRESS CLAIMS.**

In the Court of Appeals, respondents traced the evolution of the NIED claim in Washington.<sup>3</sup> After first being recognized in 1976,<sup>4</sup> this Court did not review it again until 1990.<sup>5</sup> At that time, the *Gain* Court intimated that a relative who arrives at the scene of an accident shortly after the accident might have a bystander claim.

Eight years later, in *Hegel v. McMahon*, 136 Wn.2d 122, 128, 960 P.2d 424 (1998), this Court noted that “[t]he significance of the phrase ‘shortly thereafter’ in *Gain* is the center of the controversy in this case.” *Id.* at 128. The Court had accepted review of two cases. In one, *Marzolf*, a father came upon the accident scene within 10 minutes of the collision, before the aid crew arrived. He observed his son on the ground severely injured.

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<sup>3</sup> Brief of Respondents pages 14-20.

<sup>4</sup> *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976).

<sup>5</sup> *Gain v. Carroll Mill Co., Inc.*, 114 Wn.2d 254, 787 P.2d 553 (1990).

In the other case, *Hegel*, a son came upon his father who was lying in the ditch severely injured having been hit by a passing car.

Both cases had been dismissed in accordance with the general rule that bystander plaintiffs had to be at the scene when the accident occurred.

This Court first noted how the *Cunningham*<sup>6</sup> court had restricted the potentially unlimited liability situation of *Hunsley*. This very real specter of virtually unlimited liability required that the Court draw a definite boundary. *Cunningham* held that bystander claims should be limited to “claimants who were present at the time the victim was imperiled.” 136 Wn.2d at 127.

This Court then turned to the *Gain* opinion. Therein the Court had recognized that *Hunsley* was too broad as there must be an “outer limit to liability.” *Id.* at 127. It clearly articulated the need for a limit on liability (136 Wn.2d at 127):

We agree with the Court in *Cunningham*, that unless a reasonable limit on the scope of defendants’ liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one. As one court stated:

“It would surely be an unreasonable burden on all human activity if a defendant who has endangered one person were to be compelled to pay for the lacerated feelings

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<sup>6</sup> *Cunningham v. Lockard*, 48 Wn. App. 38, 736 P.2d 305 (1987).

of every other person disturbed by reason of it . . . .”

*Gain*, 114 Wash.2d at 260, 787 P.2d 553 (quoting *Budavari v. Barry*, 176 Cal.App.3d 849, 855, 222 Cal.Rptr. 446 (1986) (quoting *Scherr v. Hilton Hotels Corp.*, 168 Cal.App.3d 908, 214 Cal.Rptr. 393 (1985))).

The *Hegel* Court noted that, under *Gain*, a cause of action was possible for a bystander plaintiff “who arrives on the scene after the accident has occurred and witnesses the victim’s suffering.” 136 Wn.2d at 130.

It quoted from *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986), to illustrate its point:

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.

136 Wn.2d at 130.

The Court noted that the challenge was to create a rule that acknowledges “the shock of seeing a victim shortly after an accident” without creating liability to every relative who grieves for the victim. *Id.* at 131. The difficulty was to differentiate between the trauma suffered by the family member who views the accident or its aftermath and the grief of a family member upon learning that a relative has been injured or killed.

The Court identified Connecticut and Wyoming<sup>7</sup> as states which had adopted “a principled intermediate approach” which limits the scope of liability on the one hand, but allows recovery to bystander relatives “who witness their relative’s injuries at the scene of an accident . . . shortly after it occurs and before there is material change in” the circumstances. 136 Wn.2d at 131-32. Recovery is limited to those bystander relatives who are present at the scene of the accident before the horror of the accident has abated.

The Court went on to hold that a family member bystander might recover for distress caused by observing an injured relative at the scene of an accident before there is a substantial change in the relative’s condition.

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<sup>7</sup> *Clohessy v. Bachelor*, 237 Conn. 31, 52, 675 A.2d 852 (1996) (bystander emotional injury must be caused by “contemporaneous sensory perception of the event” that causes injury or “by viewing the victim immediately after” the event if no material change has occurred with respect to the victim’s location or condition). *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986):

**“[The shock] is more than the shock one suffers when he learns of the death or injury of a child . . . over the phone . . . . It is more than bad news.** The kind of shock the tort requires . . . may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words . . . .

. . . .  
The plaintiff must observe either the infliction of the fatal or harmful blow or observe the results of the blow after its occurrence without material change in the condition and location of the victim.

719 P.2d at 199, 201 (emphasis added).

*Biercevicz v. Liberty Mutual Ins. Co.*, 49 Conn. Supp. 175, 181, 865 A.2d 1267 (2004) (*Clohessy* recognized that limits had to be established in limiting the class of people who could sue for bystander distress).

The court held that these plaintiffs had a claim because they might have “witnessed their family members’ suffering” before there was a substantial change in the victim’s condition or location. 136 Wn.2d at 132.

Both the Hegels and Mr. Marzolf were present at the scene of the accident. The fact that both arrived in time to witness only the suffering, not the infliction of injury on their relatives, does not preclude their claims.

136 Wn.2d at 136.

**B. THE COURT OF APPEALS’ REJECTION OF PETITIONER’S BYSTANDER TORT CLAIM IS CONSISTENT WITH WASHINGTON LAW.**

Petitioner Colbert witnessed neither the suffering of nor the infliction of injury on his daughter. He does not come within the class of individuals who may maintain a bystander tort claim. The Court of Appeals was correct.

Our review of Washington case law on bystander tort claims reveals a thread running through all the discussions. It is the view that the court must keep a very tight rein on this tort as there exists the very real threat of unlimited liability. Public policy dictates that a reasonable limit on the scope of defendant’s liability must be imposed. In *Hunsley*, the Court imposed a foreseeability limit. But the *Cunningham* court discerned that even that was too broad. Because a foreseeability limit alone was contrary to public policy, the *Cunningham* court limited bystander tort claims to those made by relatives present at the time of the accident.

*Gain* applied that limitation to the facts of the case before it, noting that specific limitations had to be placed on the foreseeability standard. It agreed with *Cunningham* that a reasonable limit was required. But *Gain* also indicated that given a different set of facts, the class might include, in addition to those actually physically present at the scene of the accident, those who arrive “shortly thereafter.”

The phrase “shortly thereafter” was examined and explained in *Hegel*. In both parts of *Hegel*, the bystander relatives had come upon the injured relative and observed the severe injuries while the relative was still lying on the ground where the accident occurred. *Hegel* indicated that the bystander class could include those who arrive on the scene of the accident after the accident has occurred and who “witnesses the victim’s suffering.” 136 Wn.2d at 130. Petitioner did not witness his daughter’s suffering.

In explaining why the line would not be drawn at those physically present at the time of the accident, the Court mentioned the bystander witnessing a crushed body, the bleeding, the cries of pain, and the dying words. Petitioner experienced none of these.

The Court said the difficulty was to distinguish between the trauma suffered by the family member who sees the victim shortly after the accident, and the grief suffered by every relative who grieves for the victim. Petitioner experienced the grief of a father for the loss of a child.

He did not suffer the trauma of seeing the accident or the suffering of his daughter.

The *Hegel* Court endorsed a “principled intermediate approach” which kept a limit on liability but allowed recovery to the bystander relatives who witness injuries at the scene shortly after they occur. The *Gates* opinion from Wyoming cited in *Hegel* explains how it operates:

**[The shock] is more than the shock one suffers when he learns of the death or injury of a child . . . over the phone. . . .** It is more than bad news. The kind of shock the tort requires . . . may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words. . . .

*Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986) (emphasis added).

In the middle of the night, petitioner got the phone call every parent dreads. Your child disappeared in the lake. We can’t find her. It is bad news. It is devastating news. But it is not the kind of news, the kind of shock, the tort requires. In order to limit the tort, the courts require more immediacy. That immediacy is absent here.

*Hegel* said that a family member bystander might recover for the distress caused by observing an injured relative at the scene before there was a substantial change in condition. Petitioner did not observe his daughter until long after she had drowned. He did not witness his daughter suffering. He arrived after the police and fire units were already operating.

The opinion is consistent with Washington law.

**C. THE COURT OF APPEALS' REJECTION OF PETITIONER'S EMOTIONAL DISTRESS CLAIM IS CONSISTENT WITH WASHINGTON LAW.**

Petitioner confuses what injuries are recoverable in a bystander tort claim. Specifically, petitioner substitutes his experience in observing the recovery effort for the experience of observing the accident or the experience of observing suffering of his daughter. He makes this substitution because he did not observe the accident; he did not observe any suffering; he did not experience any of the indicia of immediacy identified by *Hegel* and *Gates*. Not having experienced any of these, the Court of Appeals correctly concluded that petitioner does not have a bystander tort claim.

This unique tort is based on a bystander plaintiff's immediate experience of the relative's suffering or death. The injury must be caused by his direct sensory perception of his loved one's suffering. Petitioner spends much time describing his emotional suffering. But what is missing is that the tort requires that this emotional suffering be triggered by observance of the relative's suffering. Petitioner did not observe any suffering because he was not there.

As Judge Stolz aptly observed: "A parent is going to be devastated any time their child dies before they do."

Petitioner was understandably devastated with the death of his child. But that emotional distress did not arise from witnessing “any pain, suffering or the like.” That distress is not compensable under Washington law.

In *Hegel* the Court cited *Gates*, which described the type of extreme distress which the tort requires:

**[The shock] is more than the shock one suffers when he learns of the death or injury of a child . . . over the phone. . . .** It is more than bad news. The kind of shock the tort requires . . . may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words. . . .

*Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986) (emphasis added).

Petitioner’s distress does not meet the requirements of *Hegel*, 136 Wn.2d at 135:

We hold that to satisfy the objective symptomology requirement established in *Hunsley*, a plaintiff’s emotional distress must be susceptible to **medical** diagnosis and proved through **medical** evidence.

(Emphasis added.)

In *Hegel*, the Court said that emotional symptoms of distress may be sufficient “if they can be diagnosed and proved through medical evidence.” 136 Wn.2d at 136.

The *Hegel* Court said (136 Wn.2d at 135 n.5) that it agreed with *Sorrells v. M.Y.B. Hospitality Ventures*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993):

“[P]laintiff must show an ‘emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, **or any other type of severe and disabling emotional or mental condition** which may be generally recognized and diagnosed by professionals trained to do so.’”

(Emphasis added.)

It is undisputed that petitioner’s witness is not a medical doctor (CP 486) and he did not make a DSM-IV diagnosis of petitioner. (CP 488) In short, no medical diagnosis by a medical professional was made.

To circumvent the failure of proof, petitioner misdirects attention to the stress of the recovery effort and the stress of witnessing the recovery of his daughter’s body from the water. Neither one, whether taken together or separately, satisfies the Washington requirements of a bystander tort claim. Petitioner’s expert stated that petitioner’s psychological condition would be the same, whether or not he had actually seen his daughter’s body taken from the lake (CP 496):

Q: [Hypothetically,] Mr. Colbert spends . . . three hours at Mr. Peterson’s house going through all the anxiety and fear, everything that’s part of the experience. He sees the buoy pop up, and the divers have located the body. He’s told by Chaplain Spar [sic] they’ve found her body. At that point he turns around. He does not see the body come onto the boat. Under those circumstances are we going to see anything different in his psychological profile today?

A: I don’t think so, because he would have had the whole three-hour period and . . . you may not see it in a

physical sense, but if you're a parent like Mr. Colbert is a parent, you will see it even though you don't see it.

Q: Right. The damage is done just from him being at the scene, regardless of whether he had seen the actual physical recovery?

A: Yeah. I think that's a small part of it, a very small part of it. You know, to see the actual physical recovery, if he did, is adding one more image, so to speak. But you can turn your back and you have a perfect image of what's happening, and you know your daughter, and you know the circumstance and the situation.

(Emphasis added.) Petitioner cannot demonstrate that seeing his daughter's body taken from the water—as distinguished from watching the recovery effort—was the proximate cause of his emotional disorders.

What caused petitioner's distress was not his personal sensory perception of his daughter's suffering. His distress was the normal distress of a parent who has lost a child. It was not the distress of a parent who has witnessed the death of a child or the suffering of a child. His distress is not compensable under Washington law.

**VI. CONCLUSION**

Discretionary review is reserved for those few cases that meet one or more of the criteria of RAP 13.4(b). This is not one of them.

Division II's opinion was based on the law set down by this Court. The petitioner father witnessed neither the suffering of nor the infliction of injury on his daughter. He may not maintain a bystander tort claim.

The Court of Appeals was correct. The petition should be denied.

DATED this 13<sup>th</sup> day of July, 2006.

**REED McCLURE**

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**Corporation**

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1 cited to be frank have slightly different tests than  
2 Washington does. Some states require you actually see  
3 the tortious act. In Washington it doesn't, clearly.  
4 But there is one case I would draw your attention to  
5 and it's New Mexico. Gavelton v. J. By. Property  
6 Management (phonetic spelling). It's a drowning  
7 case. This test is similar to Washington. You have  
8 to have sensory perception of the accident itself or  
9 its immediate aftermath. And, here was a drowning  
10 where the mother gets there -- hears about it, gets  
11 a call that the kid has drowned or near drowning,  
12 arrives at the scene, the medical personnel are already  
13 there, I think it was 20 minutes it took her to get  
14 there, and they said no negligent infliction of  
15 emotional distress under those circumstances. The  
16 closest one I could find to our case. Thank you.

17 THE COURT: All right. Well, one of the problems  
18 when you're sitting up here is that this case is about  
19 the death of a young girl and that is a tragic, tragic  
20 incident. The law requires that we act impartially  
21 setting our own emotions aside. I reviewed the cases  
22 that were cited in this matter and the crux of the  
23 emotional distress is that you have to be present  
24 within a short period of time to view the victim's  
25 suffering. That doesn't apply here. If I were to deny

1 the motion I would be extending this out to any  
2 parent who is called and told their child has been in  
3 an automobile accident and has been taken to a  
4 hospital. The child might have been rescued from a  
5 drowning incident but still alive but in a coma,  
6 they go to the hospital and you could then say they're  
7 having emotional distress because they had to sit and  
8 watch their child die within three hours or five hours  
9 or what have you. I'm not going to go there that far  
10 with the law. If the Court of Appeals on review  
11 wishes to extend or the Supreme Court wishes to extend  
12 it that will be their prerogative. The way the law  
13 is worded right now Mr. Colbert is not covered for  
14 emotional distress. He was called, went there,  
15 already advised she'd gone off the boat into the water  
16 and must have known it was a high probability she  
17 would have drowned. Watched the recovery effort for  
18 three hours but did not witness any pain, suffering or  
19 the like. A parent is going to be devastated any time  
20 their child dies before they do. Whether it's heart  
21 attack, auto accident or a drowning accident. But  
22 this case is outside is outside the parameters of the  
23 law as it is now. And, therefore, I'll grant the  
24 summary judgment motion.

25 MR. WEBER: Your Honor, my proposal is sitting on