

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.

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 BRIEF OF AMICUS WSTLA

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APPENDIX A

Smith v. Toney, 862 N.E.2d 656 (Ind. 2007)

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I. INTRODUCTION

Under the guise of a dispassionate analytical approach, the folks at WSTLA present a jumbled view of Washington law all for the purpose of securing for its members the Holy Grail of unlimited liability. While Washington citizens today can feel moderately secure with policy limits of 100/300, WSTLA envisions a world of 100M/300M policy limits to cover the emotional distress claims of the relatives not just on site, not just shortly thereafter, but at the hospital, at the viewing, at the rosary, at the funeral and at the interment. And why should it stop there? WSTLA would approve an emotional claim for every relative who looks through the family album?

WSTLA seeks not just liability forever, but unlimited liability. Fortunately for Washington citizens what WSTLA wants has been expressly eschewed by this Court.

II. WSTLA'S THESIS IS IN CONFLICT WITH WASHINGTON PUBLIC POLICY AND LAW

While saying that it is arguing that the Court of Appeals strayed from "this Court's carefully balanced approach," WSTLA is actually arguing that this Court should remove all judicial limitation on the tort of bystander NIED (negligent infliction of emotional distress). (Amicus Brief 5) This path has been expressly rejected by most American courts, and in particular by this Court.

Rather than paraphrase the words, let us read the exact words this Court has used to describe why and how the bystander tort must be judicially limited. These are the words that WSTLA wants this Court to withdraw.

From *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 257-61, 787 P.2d 553 (1990):

The tort of negligent infliction of emotional distress was recognized in Washington in *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976). . . . We reexamined the then general rule of no liability for mental distress where the defendant's actions were negligent and there was no impact to the plaintiff. . . .

The issue presented here is whether a plaintiff need be *physically present at the scene of the accident* before he has a claim for mental distress caused by the negligent bodily injury of a family member. In other words, does a defendant's duty to avoid the negligent infliction of mental distress extend to plaintiffs not present at the scene of the accident? . . . In *Schurk v. Christensen*, 80 Wn.2d 652, 497 P.2d 937 (1972), . . . we quoted and applied the language of the leading case, *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72, 29 A.L.R.3d 1316 (1968), which had recognized the tort of negligent infliction of mental distress:

In determining . . . whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) **Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. . . .**

. . . .

The foreseeability analysis suggested by the *Dillon* court . . . is similar to the type of analysis we

adopted in *Hunsley*. Thus . . . *Schurk* . . . is supportive of the position that plaintiffs must be present at the scene of the accident before they can pursue a claim for negligent infliction of mental distress. *Schurk* also recognizes that an outer limit of liability exists in this tort.

Likewise, *Hunsley* recognized that the tort of negligent infliction of mental distress is not without limits

. . . The mental distress suffered by plaintiffs not present at the scene of the accident is more akin to the anguish that any person feels after being informed of death or injury to a loved one. 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 of every other person disturbed by reason of it”

We conclude that mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law. We reach this conclusion after balancing the

interest of the injured party to compensation against the view that a negligent act should have some end to its legal consequences.

Other jurisdictions facing the issue raised by this case and which have adopted the foreseeability analysis comport with our holding. **These cases require plaintiffs to either witness the injury-causing event or see the victim immediately after the accident.**

....

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. Mental distress where the plaintiffs are not present at the scene of the accident and/or arrive shortly thereafter is unforeseeable as a matter of law.

(Italics in original; some emphasis omitted; boldface added; citations omitted.)

From *Hegel v. McMahon*, 136 Wn.2d 122, 127-28, 130-32, 136, 960 P.2d 424 (1998):

Cunningham held that negligent infliction of emotional distress claims should be limited to claimants who were present at the time the victim was imperiled by the defendant's negligence.

... In *Gain*, we recognized that *Hunsley's* foreseeability approach might allow for an overly expansive allocation of fault, and **acknowledged the need for an outer limit to liability** . . .

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 . .

..

....

Gain, 114 Wn.2d at 260.¹

¹ See also Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1526 (1985) ("Foreseeability proves too much Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm."); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 553, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994) ("If one takes a broad enough view, all consequences of a negligent act, no matter how far removed in time or space, may be foreseen. Conditioning liability on foreseeability, therefore, is hardly a condition at all.").

. . . [T]he court balanced the interest in compensating the injured party against the view that a negligent act should have some end to its legal consequences

. . . Prior to *Gain*, negligent infliction of emotional distress claims were limited only by general tort principles. ***Gain* narrowed the cause of action by requiring a plaintiff to be present at the accident scene in order to recover.** *Gain* did not further restrict liability by mandating that the plaintiff be present *at the time* of the accident, nor did it foreclose a cause of action for a plaintiff who arrives on the scene after the accident has occurred and witnesses the victim's suffering. Furthermore, *Gain* cited as comports with its holding several jurisdictions that allow recovery when the plaintiff arrives shortly after the accident

. . . The emotional trauma caused by seeing a loved one injured at an accident scene stems not merely from witnessing the transition from health to injury, but also from witnessing the aftermath of an accident in all its alarming detail. The Wyoming Supreme Court explained in *Gates v. Richardson*, 719 P.2d at 199:

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.

. . . . **The challenge is to create a rule that acknowledges the shock of seeing a victim shortly after an accident, without extending a defendant's liability to every relative who grieves for the victim** An appropriate rule . . . should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured.

Other jurisdictions have developed a wide spectrum of rules to define liability for negligent infliction of emotional distress Connecticut and Wyoming have adopted a principled intermediate approach which limits the scope of liability, yet still allows recovery to those plaintiffs who witness their relative's injuries at the scene of an accident. These states recognize a cause of action where a plaintiff witnesses the victim's injuries at the scene of an accident shortly after it occurs and before there is material change in the attendant circumstances. **This rule addresses the concerns over limitless liability by allowing recovery only to the class of claimants who are present at the scene before the horror of the accident has abated**

We adopt this approach and hold that a family member may recover for emotional distress caused by observing an injured relative at the scene of an accident after its occurrence **and before there is**

substantial change in the relative's condition or location. . . .

. . . .

It is not necessary for a bystander to be present at the time of the injury-causing event in order to state a claim for negligent infliction of emotional distress. A family member may recover for emotional distress if he or she arrives at the scene **shortly after the accident before substantial change has occurred in the victim's condition or location.**

(Italics in original; boldface added; footnote omitted; citations omitted.)

As this review demonstrates with stunning clarity, the Court of Appeals did not stray from "this Court's carefully balanced approach." Rather, it is WSTLA which desires to remove the judicial brakes, to destroy the balance, and to eviscerate the Court's "carefully balanced approach." As this Court has said over and over and over again: Unless the Court imposes a reasonable limit on the scope of defendants' liability, 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. This is the public policy of the State of Washington. This is the public policy against which WSTLA rails.

The Court of Appeals identified a host of facts which, when considered in light of this Court's words in *Gain* and *Hegel*, left the Court with no choice but to conclude that the plaintiff petitioner does not have a claim.

1. Plaintiff/petitioner was not at the scene either to witness his daughter's drowning or soon enough thereafter to witness the final seconds of her disappearance.

2. He arrived at the scene at least 10 to 15 minutes after receiving the phone call informing him that his daughter had fallen into the lake and was missing.

3. When plaintiff arrived, his daughter was not visible.

4. When plaintiff arrived, the rescuers were already present and searching the lake.

5. What plaintiff witnessed for several hours was the activity of the workers searching the lake.

6. Plaintiff was informed by a third party that his daughter was dead and that they would be recovering her body.

7. Plaintiff was over 100 yards away when his daughter's body was taken from the lake. She was wrapped in a blanket and taken to an ambulance.

8. The recovery scene which plaintiff viewed was substantially changed in time and place from the accident scene where his daughter had drowned three hours before.

A bystander claim exists for a relative who is present at the time of the accident, or who arrives at the accident scene shortly thereafter. Plaintiff/petitioner satisfied neither requirement. The Court of Appeals correctly affirmed the dismissal of the bystander claim.

III. THE QUESTION OF “SHORTLY THEREAFTER” IS A QUESTION OF LAW, NOT A QUESTION OF FACT

Last month the Indiana Supreme Court was presented with certified questions from a federal court. They sought to define with some particularity the judicial limits on a bystander claim. *Smith v. Toney*, 862 N.E.2d 656 (Ind. 2007).¹

The first question arose because the claimant was a fiancée of the decedent, rather than a relative. The second question arose from the fact the decedent died in a car/truck collision at 4 a.m., while the claimant fiancée drove by the accident scene at about 6 a.m. (Did this constitute coming upon the scene of the accident “soon after death”?) In seeking the answer to these questions, the court examined case law from 13 states, including Washington and Indiana.

Before answering the questions, the court had to first decide whether these questions were questions of law, questions

¹ A copy of the opinion is in the Appendix.

of fact, or mixed questions. The court concluded that the relationship requirement and the proximity requirement were not issues of fact, they were issues of law. 862 N.E.2d at 660.

In resolving the relationship question, the court cited opinions from seven states, including Washington, noting that there were at least three major policy reasons for limiting bystander claims to relatives (862 N.E.2d at 660-61):

Cases have cited three major policy reasons in rejecting claims for bystander recovery of negligent infliction of emotional distress by unmarried cohabitants or engaged persons: (1) promoting the strong state interest in the marriage relationship; (2) preventing an unreasonable burden on the courts; and (3) limiting the number of persons to whom a negligent defendant owes a duty of care.

In response to the argument that the Court was being arbitrary in limiting claims to relatives, the Court pointed out that all torts have by their nature some element of arbitrariness (862 N.E.2d at 662):

Drawing bright line rules is especially important for claims of emotional distress because there is virtually no limit to the number of potential claimants. Smith is correct in contending that

limiting “bystander” recovery to spouses is somewhat arbitrary. But “a certain degree of arbitrariness is necessary in setting the outer limits of tort liability in general and in setting the outer limits of liability in the field of emotional distress in particular.”

Turning then to the proximity requirement, the Indiana Court noted that Washington was one of several jurisdictions which did allow recovery by a bystander relative who observed an injured relative at the scene of the accident after its occurrence and before there was a substantial change in the relative’s condition or location. (862 N.E.2d at 662 n.3.)

The Court concluded (862 N.E.2d at 663):

[W]e think the requirement of bystander recovery is both temporal—at or immediately following the incident—and also circumstantial. The scene viewed by the claimant must be essentially as it was at the time of the incident, the victim must be in essentially same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene.

IV. CONCLUSION

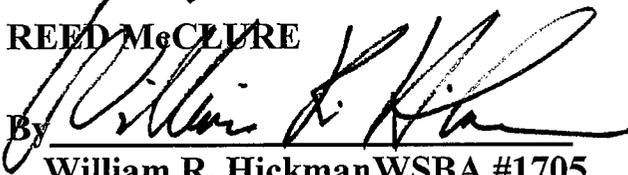
What WSTLA wants is the removal of this Court's limitations on the tort of bystander NIED. While it pays lip service to the "Court's carefully balanced approach", its true goal is to have the judicial decision made by the jury. However, as we saw in *Smith*, such questions as the proximity requirement are issues of law not fact.

Moreover, as this Court and the majority of courts around the country have recognized this court created tort is unique in having limits imposed by public policy.

Judge Stolz was correct. Division Two was correct. Plaintiff Colbert presents a claim which does not satisfy the requirements of a bystander tort claim in Washington.

DATED this 30th day of April, 2007.

REED McCLURE

By 

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C

Smith v. Toney
Ind., 2007.Supreme Court of Indiana.
Amy SMITH, Appellant (Plaintiff below),

v.

James M. TONEY and John Christner Trucking
Co., Inc., Appellees (Defendants below).
No. 94S00-0602-CQ-48.

March 13, 2007.

Background: Fiancee of motorist who was killed in car accident brought suit against defendant driver and driver's employer, seeking recovery for negligent infliction of emotional distress under bystander theory. Upon removal, the United States District Court for the Southern District of Indiana denied defendants' motions for summary judgment without prejudice, and certified questions to Supreme Court.

Holdings: The Supreme Court, Boehm, J., held that:

- (1) issues whether fiancee's relationship with motorist was analogous to that of spouse and whether fiancee's proximity to accident was matter of time alone or also of circumstances were questions of law;
- (2) fiancee's relationship to motorist was not analogous to spouse; and
- (3) proximity requirement that plaintiff come on scene soon after death of loved one was matter of both time and circumstances.

Certified questions answered.

Sullivan, J., filed opinion concurring in result in which Rucker, J., joined.

West Headnotes

[1] Damages 115 ⇨ 208(6)

115 Damages

115X Proceedings for Assessment

115k208 Questions for Jury

115k208(6) k. Mental Suffering and Emotional Distress. Most Cited Cases

Issues of whether fiancee's relationship with motorist killed in automobile accident was analogous to that of spouse and whether requirement that fiancee came on scene of accident "soon after death" was matter of time alone or circumstances, as required to recover against defendant driver and driver's employer for negligent infliction of emotional distress under theory of bystander recovery, were questions of law.

[2] Damages 115 ⇨ 57.27

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.26 Injury or Threat to Another; Bystanders

115k57.27 k. In General. Most Cited Cases

A bystander may establish "direct involvement" with an accident, as required to recover for negligent infliction of emotional distress on a bystander theory by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise

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tortious conduct.

[3] Damages 115 ↪57.27

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.26 Injury or Threat to Another; Bystanders

115k57.27 k. In General. Most Cited Cases

A court should consider three factors which are relevant to measuring the authenticity of the claim and the limits of liability for emotional harm resulting from a defendant's negligence in determining on the basis of public policy whether to preclude liability for bystander recovery for negligent infliction of emotional distress: (1) the severity of the victim's injury, (2) the relationship of the plaintiff to the victim, and (3) circumstances surrounding the plaintiff's discovery of the victim's injury.

[4] Damages 115 ↪208(6)

115 Damages

115X Proceedings for Assessment

115k208 Questions for Jury

115k208(6) k. Mental Suffering and Emotional Distress. Most Cited Cases

The factors to consider in determining whether to allow a plaintiff to recover for negligent infliction of emotional distress on a bystander theory are issues of law for a court to resolve.

[5] Damages 115 ↪57.29

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.26 Injury or Threat to Another;

Bystanders

115k57.29 k. Other Particular Cases. Most Cited Cases

Fiancee' of motorist killed in car accident was not in relationship "analogous" to spouse, as required for fiancee to recover under bystander against defendant driver and driver's employer for negligent infliction of emotional distress.

[6] Damages 115 ↪57.27

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.26 Injury or Threat to Another; Bystanders

115k57.27 k. In General. Most Cited Cases

Requirement that plaintiff seeking recovery for negligent infliction of emotional distress on bystander theory came on scene soon after death of loved one was not matter of time alone, but also involved consideration of circumstances, such as whether the scene was in essentially the same condition immediately following accident, whether victim was in essentially same condition as immediately following accident, and whether plaintiff was informed of incident before coming onto scene.

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Michael B. Langford, Lynne D. Lidke, Indianapolis, IN, Attorneys for Appellee.

Donald B. Kite, Sr., Carmel, IN, James D. Johnson, Evansville, IN, Attorneys for Amicus Curiae Defense Trial Counsel of Indiana.

On Certified Question

BOEHM, Justice.

Indiana law allows a claim for negligent infliction of emotional distress under some limited circumstances even if the plaintiff has suffered no physical injury or impact as a result of the

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defendant's negligence. We hold today that although a spouse may assert such a claim of negligent infliction of emotional distress a fiancée may not. We also hold that such a claim requires that the plaintiff have learned of the incident by having witnessed the injury or the immediate gruesome aftermath.

Facts and Procedural History

The United States District Court for the Southern District of Indiana has certified to this Court the following questions:

1. Under the test elaborated in *Groves v. Taylor* for bringing a bystander claim of negligent infliction of emotional distress, are the temporal and relationship determinations regarding whether a plaintiff "actually witnessed or came on the scene soon after the death of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling" issues of law or fact, or are they mixed questions of law and fact?
2. If an issue of law, is a fiancée an "analogous" relationship as used in *Groves* and is "soon after the death of a loved one" a matter of time alone or also of circumstances?

The following facts are derived from the depositions and other evidence submitted to the federal court on the defendants' *658 motion for summary judgment. On the evening of June 6, 2003, Eli Welch and his fiancée Amy Smith fell asleep watching television at the Smith home. At approximately 3:30 am, Smith awoke, woke up Welch, and told him he needed to go home. Welch left, telling Smith that he would call her when he reached his house, and Smith fell back to sleep. As Welch was driving westbound on Interstate 70 toward Plainfield, Indiana, his car collided with a tractor-trailer operated by James Toney on behalf of John Christner Trucking Company. An emergency response team was dispatched to the scene of the accident at 3:53 am. Welch was declared a fatality at 4:05 am. According to the deposition of the captain of the response team, Welch's body was extricated from his vehicle between 5:50 and 5:55 am and immediately placed in a body bag. The

body bag was then moved to the coroner's vehicle. The response team left the scene of the accident between 6:06 and 6:08 am.

Sometime around 5:30 am, Smith awoke and realized that Welch had not called her. She called Welch's home and cell phone and received no response. Smith left her parents' house at approximately 6:00 am, drove the route Welch normally took to his house, and came upon the scene of the accident. She remembers seeing Welch's "smashed up" vehicle and police officers standing by. She slowed her car as she drove by the scene, but she did not stop or speak to anyone. Smith called Welch's sister's house at 6:14 am and spoke with Welch's brother-in-law. Smith testified that the call was immediately placed after she came upon the accident scene. Smith has no present recollection of seeing any part of Welch's body when she came upon the scene of the accident. She testified that Welch's brother-in-law told her that during their phone conversation she told him that she saw Welch's hand. Smith drove from the scene to Welch's sister house, where she learned of Welch's death before 7:07 am.

On April 22, 2004, Smith sued Toney and John Christner Trucking in Marion Superior Court, alleging severe emotional trauma and distress from the death of her fiancé. After the case was removed to the Southern District of Indiana on the basis of diversity jurisdiction, Toney and John Christner Trucking filed an answer asserting that Smith failed to state a claim upon which relief could be granted under *Groves v. Taylor*, 729 N.E.2d 569 (Ind.2000). Both defendants moved in federal court for summary judgment, arguing that as a matter of law Smith could not bring a bystander claim for negligent infliction of emotional distress under *Groves* because Smith's relationship with Welch was not "analogous" to that of a spouse and Smith did not come upon the scene of the accident "soon after the death." The district court denied the motion for summary judgment without prejudice and certified the above questions to this Court.

I. Temporal and Relationship Determinations Under *Groves*

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[1] The test announced in *Groves* for bystander recovery for negligent infliction of emotional distress sets requirements of relationship between the parties and proximity of the plaintiff to the scene. We have not addressed whether these are questions of law or fact or mixed questions of law and fact. For the reasons given below, we conclude that both the relationship and proximity requirements under *Groves* are issues of law.

For over a century, Indiana law allowed damages for negligent infliction of emotional distress only when the distress was accompanied by and resulted from a physical injury caused by an impact to the person seeking recovery. *659 *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind.1991) (citing *N.Y., Chicago & St. Louis R.R. Co. v. Henderson*, 237 Ind. 456, 477, 146 N.E.2d 531, 543 (1957); *Boston v. Chesapeake & Ohio Ry. Co.*, 223 Ind. 425, 428-29, 61 N.E.2d 326, 327 (1945); *Indianapolis St. Ry. Co. v. Ray*, 167 Ind. 236, 245-46, 78 N.E. 978, 980 (1906)). This requirement of both impact and physical injury is known as the traditional “impact rule.” See, e.g., *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind.2000); *Lachenman v. Stice*, 838 N.E.2d 451, 457 (Ind.Ct.App.2005), *trans. denied*, 855 N.E.2d 1008 (Ind.2006).

[2] Since 1991, this Court has allowed recovery for negligent infliction of emotional distress under some circumstances where the traditional “impact rule” is not satisfied. *Shuamber*, 579 N.E.2d at 456; see also *Groves*, 729 N.E.2d at 573. In *Shuamber*, we adopted a “modified impact rule” that required impact but not necessarily physical injury:

[w]hen ... a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, ... such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.

579 N.E.2d at 456. In *Groves*, we allowed bystander recovery of damages for negligent infliction of emotional distress based on “direct

involvement” with the accident: a bystander may ... establish “direct involvement” by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant’s negligent or otherwise tortious [sic] conduct.

729 N.E.2d at 573. This has been referred to as the “bystander” or “relative bystander” rule. E.g., *Lachenman*, 838 N.E.2d at 458.

Groves followed *Bowen v. Lumbermens Mutual Casualty Co.*, 183 Wis.2d 627, 517 N.W.2d 432 (1994) in adopting this test. 729 N.E.2d at 572. In *Bowen*, the Wisconsin Supreme Court held that the plaintiff’s complaint had set forth the requirements for recovery damages for negligent infliction of emotional distress, namely, negligent conduct, causation, and injury. 517 N.W.2d at 443. The court then noted that it did not necessarily follow that the claim must be allowed to go forward. *Id.* “A court may decide, as a matter of law, that considerations of public policy require dismissal of the claim.” *Id.* The *Bowen* court pointed out that public policy considerations were “an aspect of legal cause” and that the “application of public policy considerations is a function *solely* of the court.” *Id.* (emphasis added).

[3] *Bowen* explained that recovery for negligent infliction of emotional distress raised two concerns: “(1) establishing authenticity of the claim and (2) ensuring fairness of the financial burden placed upon a defendant whose conduct was negligent.” *Id.* The court set forth the public policy considerations that underlie these concerns:

(1) whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would *660 place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; [and] (6) whether allowance of recovery would enter a field that has no sensible or

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just stopping point.

Id. at 444. *Bowen* took the view that a court should consider three factors in determining on the basis of public policy whether to preclude liability for bystander recovery for negligent infliction of emotional distress. These were the severity of the victim's injury, the relationship of the plaintiff to the victim, and circumstances surrounding the plaintiff's discovery of the victim's injury. As *Bowen* explained, "[t]hese factors relate to the underlying principles of the tort; they are relevant to measuring the authenticity of the claim and the limits of liability for emotional harm resulting from a defendant's negligence." *Id.* at 445-46. We think this approach is consistent with the basic concerns that have historically limited recovery for negligent infliction of emotional distress.

[4] We agree with *Bowen* that these factors present issues of law. *Id.* at 443-46. Rules of law are designed to promote consistency and predictability. See generally *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 941 (Ind.2005). In *Groves*, we noted that the three criteria from *Bowen* "provide a ... basis for distinguishing legitimate claims of emotional distress from the mere spurious." *Groves*, 729 N.E.2d at 572. These criteria are derived from the public policy considerations that underlie and define a claim for negligent infliction of emotional distress. They therefore are issues of law for a court to resolve.

II. Applying *Groves*

We now turn to the questions of (1) whether a fiancé is an "analogous" relationship as that term is used in *Groves* and (2) whether "soon after the death of a loved one" is a matter of time alone or also of circumstances.

A. "Analogous to a Spouse"

[5] The certified question asks whether a fiancée qualifies as a relationship that is analogous to a spouse under Indiana's "bystander" rule announced in *Groves*. This Court has not considered the "

analogous to a spouse" language under *Groves*. Smith urges us to follow courts that have allowed recovery for bystander negligent infliction of emotional distress by those who are engaged to be married. *E.g.*, *Graves v. Estabrook*, 149 N.H. 202, 818 A.2d 1255 (2003); *Dunphy v. Gregor*, 136 N.J. 99, 642 A.2d 372 (1994). For the reasons explained below, we decline to do so and hold that a fiancée is not "analogous to a spouse" under *Groves*.

Most courts that have considered this issue have disallowed bystander recovery for negligent infliction of emotional distress by persons engaged to be married or involved in cohabiting^{FN1} but unmarried relationships.^{FN2} Cases have cited three major *661 policy reasons in rejecting claims for bystander recovery of negligent infliction of emotional distress by unmarried cohabitants or engaged persons: (1) promoting the strong state interest in the marriage relationship; (2) preventing an unreasonable burden on the courts; and (3) limiting the number of persons to whom a negligent defendant owes a duty of care. *E.g.*, *Elden v. Sheldon*, 46 Cal.3d 267, 250 Cal.Rptr. 254, 758 P.2d 582, 586-88 (1988). We agree with that result, if not all the rationales offered to support it.

FN1. We do not suggest that Welch and Smith were cohabiting partners. We mention cohabiting relationships because several jurisdictions have considered bystander claims on those facts, and we find their analyses on the subject equally applicable to engaged persons living separately.

FN2. *E.g.*, *Lindsey v. Visitac, Inc.*, 804 F.Supp. 1340 (W.D.Wash.1992) (applying Washington law and denying recovery to fiancée); *Sollars v. City of Albuquerque*, 794 F.Supp. 360 (D.N.M.1992) (denying recovery to unmarried cohabiting partner); *Elden v. Sheldon*, 46 Cal.3d 267, 250 Cal.Rptr. 254, 758 P.2d 582 (1988) (same); *Biercevicz v. Liberty Mut. Ins. Co.*, 49 Conn.Supp. 175, 865 A.2d 1267 (2004) (denying recovery to fiancé); *Cambareri*

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v. *Glock, Inc.*, No. CV94 0136659, 1994 WL 240453 (1994) (unpublished opinion) (same); *Grotts v. Zahner*, 115 Nev. 339, 989 P.2d 415 (1999) (denying recovery to fiancée). Although not specifically confronting whether engaged persons or unmarried cohabiting partners can recover for bystander negligent infliction of emotional distress, statements from many cases indicate that recovery would be denied for engaged persons or unmarried cohabiting partners. *E.g.*, *Nugent v. Bauermeister*, 195 Mich.App. 158, 489 N.W.2d 148, 150 (1992) (“[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person only if the plaintiff is an immediate member of the victim’s family.”); *Trombetta v. Conkling*, 82 N.Y.2d 549, 605 N.Y.S.2d 678, 626 N.E.2d 653, 654 (1993) (“Recovery of damages by bystanders for the negligent infliction of emotional distress should be limited only to the immediate family.” (citation omitted)).

First, marriage affords a bright line and is often adopted by the legislature in defining permissible tort recovery. Indiana’s wrongful death statute does not permit a fiancé to recover for the death of his betrothed no matter how grievous the injury. *Manczunski v. Frye*, 689 N.E.2d 473 (Ind.Ct.App.1997) (evaluating the effective wrongful death statute at the time, Indiana Code section 34-1-1-2, now Indiana Code section 34-23-1-1 (2004)), *trans. denied*. Spouses are the only non-blood relatives who inherit by way of intestate succession. I.C. § 29-1-2-1. Cohabiting partners without subsequent marriage, regardless of whether they are engaged at the time, are not presumed to intend to share rights to property in the absence of an express contract or a viable equitable theory. *Bright v. Kuehl*, 650 N.E.2d 311, 315 (Ind.Ct.App.1995). Spousal privilege is limited to those who maintain a legally recognized marriage, and we have expressly refused to extend the spousal privilege to engaged couples. *Holt v. State*, 481 N.E.2d 1324, 1326 (Ind.1985). And, of course,

marriage imposes a legal duty of support as well as privileges. Drawing a bright-line distinction in the context of bystander recovery for negligent infliction of emotional distress between spouses and engaged couples recognizes these different legal duties and responsibilities.

Second, drawing the line at marriage for “bystander” claims of negligent infliction of emotional distress avoids the need to explore the intimate details of a relationship that a claimant asserts is “analogous” to marriage. Engagement is not always easily and credibly established, and even if it is, it can be questioned or revoked without any formal process. We acknowledge that engaged persons may feel as much emotional trauma from witnessing the injury of their partner as would a spouse. But there are many arrangements that could be claimed to be engagements, or their equivalents. Courts would be forced to evaluate and rank a variety of personal relationships even though the quality of those relationships would turn on factors not readily knowable. *Dunphy*, 642 A.2d at 384 (Garibaldi, J., dissenting); *Biercevicz v. Liberty Mut. Ins. Co.*, 49 Conn.Supp. 175, 865 A.2d 1267, 1271 (Conn.Super.Ct.2004). Moreover, defendants would be at a serious disadvantage because the only person in a position to know the true intimate details of the relationship will be *662 the surviving claimant asserting the “bystander” claim. *Dunphy*, 642 A.2d at 383.

Third, and equally important, limiting defendants’ liability to spouses addresses the need to limit the array of persons to whom a negligent defendant is potentially liable.

[I]f recovery [for mental distress] is to be permitted, there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends. And obviously the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater here than before.

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Elden, 250 Cal.Rptr. 254, 758 P.2d at 588 (alterations in original) (quoting Prosser, Law of Torts (3d ed.1964) § 55, at 353-54). Drawing bright line rules is especially important for claims of emotional distress because there is virtually no limit to the number of potential claimants. Smith is correct in contending that limiting “bystander” recovery to spouses is somewhat arbitrary. But “a certain degree of arbitrariness is necessary in setting the outer limits of tort liability in general and in setting the outer limits of liability in the field of emotional distress in particular.” *Dunphy*, 642 A.2d at 381 (Garibaldi, J., dissenting). For these reasons, we recently rejected abandoning the impact rule for emotional distress damages, noting “the potential for a flood of trivial suits,” “the possibility of fraudulent claims that are difficult for judges and juries to detect,” and the result of “unlimited and unpredictable liability.” *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 997 (Ind.2006).

B. “Soon After the Death of a Loved One”

[6] The issue presented is whether the proximity determination from *Groves*-whether a plaintiff “came on the scene soon after the death of a loved one”-is a matter of time alone or also of circumstances. This Court has yet to expound on this requirement under *Groves*. For the reasons explained below, we conclude that the proximity requirement under *Groves* is both a matter of time and circumstances.

As stated earlier, *Groves* essentially followed *Bowen* in adopting a “relative bystander” rule for negligent infliction of emotional distress. *Bowen* expressed the limitations as permitting recovery only by claimants who witnessed the accident or experienced the “gruesome aftermath” of the accident “minutes” after the accident occurred with the victim at the scene. 517 N.W.2d at 445. *Bowen* explained that drawing a line was necessary because witnessing such an incident was “distinct” from learning of a victim's death or injury indirectly. FN3 *Id.* Subsequent cases discussing*663 this *Bowen* requirement noted that emotional trauma arising from learning of a loved one's death through indirect means could be devastating but also

observed that every person could be expected at some point to learn of the death or serious injury of a loved one through indirect means. “Bystander” claims are not meant to compensate every emotional trauma. Rather they are limited to those that arise from the shock of experiencing the traumatic event. *Finnegan ex. rel. Skoglund v. Wis. Patients Comp. Fund*, 263 Wis.2d 574, 666 N.W.2d 797, 805 (2003); *Rosin v. Fort Howard Corp.*, 222 Wis.2d 365, 588 N.W.2d 58, 61-62 (Wis.Ct.App.1998). These cases pointed out that this temporal requirement guaranteed the genuineness of the claim and assured that recovery would not unreasonably burden the defendant-the two major public policy concerns of “bystander” claims set forth in *Bowen*. *Finnegan*, 666 N.W.2d at 802-03; *Rosin*, 588 N.W.2d at 61. In *Groves* the facts were such that one who arrived “soon” after the accident necessarily viewed “the gruesome aftermath.” But we think the requirement of bystander recovery is both temporal-at or immediately following the incident-and also circumstantial. The scene viewed by the claimant must be essentially as it was at the time of the incident, the victim must be in essentially the same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene.

FN3. Many other jurisdictions have a similar requirement for their “bystander” claims of negligent infliction of emotional distress. *E.g.*, *Beck v. State, Dept. of Transp. & Pub. Facilities*, 837 P.2d 105, 110 (Alaska 1992) (finding that a plaintiff is allowed to assert a claim for negligent infliction of emotional distress where “the plaintiff experiences shock as the result of a sudden sensory observation of a loved one's serious injuries during an uninterrupted flow of events following ‘closely on the heels of the accident’ ”); *Hegel v. McMahan*, 136 Wash.2d 122, 960 P.2d 424, 429 (1998) (finding that a plaintiff “may recover for emotional distress caused by observing an injured relative at the scene of an accident after its occurrence and before there is substantial

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change in the relative's condition or location"); *Contreras ex rel. Contreras v. Carbon County Sch. Dist. No. 2*, 843 P.2d 589, 594 (Wyo.1992) (allowing plaintiff to recover assert "bystander" claim if plaintiff "observes the injury shortly after it occurs without material change in the attendant circumstances"). Other jurisdictions are less lenient and allow recovery only if the claimant contemporaneously observed the traumatic event. *E.g., Thing v. LaChusa*, 48 Cal.3d 644, 257 Cal.Rptr. 865, 771 P.2d 814, 830 (1989).

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Conclusion

In summary, we find that (1) the temporal and relationship determinations under *Groves* are questions of law; (2) a fiancée is not "analogous to a spouse" under *Groves*; and (3) "soon after the death of a loved one" is a matter of both time and circumstances.

SHEPARD, C.J., and DICKSON, J., concur.

SULLIVAN, J., concurs in result with separate opinion in which RUCKER, J., concurs. SULLIVAN, Justice, concurring in result.

I agree that Eli Welch, the plaintiff Amy Smith's fiancé, was not in a "relationship to the plaintiff analogous to a spouse" and therefore is not entitled to recover under our *Groves v. Taylor* precedent.

As a couple engaged to be married, their relationship had not been legally established by license or ceremony nor was it one of long duration marked by the financial interdependence, intimacy, and other characteristics of the spousal relationship. The majority opinion makes clear that Welch and Smith were not involved in a cohabiting but unmarried relationship. As such, its comments with respect to relationships other than the fiancé-fiancée relationship at issue here are unnecessary to the decision in this case and therefore not precedential.

RUCKER, J., concurs.

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