

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 SUPPLEMENTAL BRIEF

REED McCLURE
By William R. Hickman
Miry Kim
Attorneys for Respondents

Address:

Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
07 APR -6 AM 7:53
BY RONALD R. CARPENTER
CLERK

TABLE OF CONTENTS

	Page
I. THE ISSUE.....	1
II. THE FACTS.....	1
III. THE PROCEDURE.....	3
IV. ARGUMENT.....	7
A. AMERICAN COURTS CONTINUE TO LIMIT THE SCOPE OF BYSTANDER NIED CLAIMS.....	7
B. PUBLIC POLICY IN WASHINGTON LIMITS A “BYSTANDER” CLAIM TO A FAMILY MEMBER WHO IS PRESENT AT THE TIME OF THE ACCIDENT, OR WHO ARRIVES “SHORTLY THEREAFTER,” I.E., BEFORE SUBSTANTIAL CHANGE HAS OCCURRED IN THE VICTIM’S CONDITION OR LOCATION.....	10
V. CONCLUSION	18
 APPENDIX A	
Court’s Oral Ruling (RP 14-15)	
 APPENDIX B	
<i>Gregory v. Town of Plainville, 2006 WL 2675830</i>	
(Conn. 2006)	

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Colbert v. Moomba Sports, Inc.</i> , 132 Wn. App. 916, 135 P.3d 485 (2006).....	5, 6, 7
<i>Cunningham v. Lockard</i> , 48 Wn. App. 38, 736 P.2d 305 (1987).....	11, 14, 15
<i>Gain v. Carroll Mill Co., Inc.</i> , 114 Wn.2d 254, 787 P.2d 553 (1990).....	10, 12, 15
<i>Hegel v. McMahon</i> , 136 Wn.2d 122, 960 P.2d 424 (1998).....	7, 10, 11, 12, 13, 14, 15, 16
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976)	10, 12, 14
<i>Timson v. Pierce Count Fire Dist. No. 15</i> , 136 Wn. App. 376, 149 P.2d 427 (2006).....	7, 8

Other Jurisdictions

<i>Biercevicz v. Libery Mutual Ins. Co.</i> , 49 Conn. Supp. 175, 865 A.2d 1267 (2004).....	13
<i>Brannan v. Northwest Permanente</i> , 2006 W.L. 2841793 (W.D.Wash. 2006).....	8
<i>Clohessy v. Bachelor</i> , 237 Conn. 31, 675 A.2d 852 (1996)	13
<i>Gates v. Richardson</i> , 719 P.2d 193 (Wyo. 1986)	12, 13, 16
<i>Gregory v. Town of Plainville</i> , 2006 WL 2675830 (Conn. 2006).....	9
<i>Smith v. Toney</i> , 862 N.E.2d 656 (Ind. 2007).....	9, 10

Rules and Regulations

Conn. Practice Book, 2007, § 67-9	9
---	---

060240.000040/152939

I. THE ISSUE

The court's website states the following to be the issue:

Whether a plaintiff has a cause of action for negligent infliction of emotional distress after seeing his daughter's body being recovered from a lake some three hours after she drowned.¹

II. THE FACTS²

At about 1:30 a.m., Ms. Denise 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) "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)

Mr. Jacobi 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) Rescue personnel arrived within 20 minutes. (CP 99) After Ms. Colbert

¹ Steven Goff, *Supreme Court Issues*, http://www.courts.wa.gov/appellate_trial_courts/supreme/issues (last modified Mar. 21, 2007)

² A more comprehensive review of the facts may be found in respondents' "Statement of the Facts" at pp. 9-11 of Respondents' Court of Appeals Brief.

had gone under, everyone started looking for her. (CP 97) Kyle Swanson jumped in the water to try to find her. (CP 97)

Later, Mr. Swanson called Ms. Colbert's father, the plaintiff petitioner. (CP 100) He told him that Ms. Colbert 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) Lights were flashing from a boat on the lake. (CP 72, 351) He knew they were searching for his daughter. (CP 351) 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 about 6:00 a.m. her body was located and recovered. (CP 41) The police chaplain informed plaintiff/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)

Ms. Colbert had drowned about three hours earlier. (CP 99)

III. THE PROCEDURE³

In December 2003, plaintiff/petitioner Jay Colbert filed this lawsuit. (CP 1-6) 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. Plaintiff/petitioner alleged negligence, strict product liability, and breach of warranty. (*Id.*) Plaintiff/petitioner later added a claim of negligent infliction of emotional distress (“NIED”). (CP 11-17, 18-22)

Respondent Skier’s Choice filed a motion for partial summary judgment. (CP 366-85) The 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)

Plaintiff/petitioner’s counsel responded to the motion. (CP 401-24,

³ A comprehensive resume of pleadings and proceeding can be found in Respondents’ Court of Appeals Brief at pp. 1-8.

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 or she 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)⁴. She stated in pertinent part:

⁴ To assist the reader, we have set out Judge Stolz’s succinct analysis in the Appendix.

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 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 dismissed the bystander distress claim. (CP 543-45)
Plaintiff/petitioner appealed. (CP 546-53)

On May 16, 2006, Division II published its opinion: *Colbert v. Moomba Sports, Inc*, 132 Wn. App. 916, 135 P.3d 485 (2006). The court held that, as a matter of law, the "undisputed facts" do not meet the

“shortly thereafter” requirement of a Washington bystander distress claim⁵

(132 Wn. App. at ¶ 21-23):

First, . . . Colbert was not at the scene either to witness Denise’s drowning or soon enough thereafter to witness the final seconds of her disappearance under the lake’s surface. Instead, he arrived at the accident scene at least 10 to 15 minutes after learning that his daughter has fallen off a boat and disappeared into the lake.

Second, not only was Denise not visible anywhere when Colbert arrived at the lake, but also he arrived only *after* many rescuers were already present and searching for his missing daughter.

Third, before ever laying eyes on his daughter, or her body, Colbert primarily witnessed these rescue workers’ futile attempts off shore for several hours.

Fourth, by the time Colbert saw the rescuers stop the search, a chaplain had told him that his daughter was dead and that they were recovering her body.

Fifth, when the rescuers pulled her body from the lake onto the boat, she was a football field away, or about 100 yards, from Colbert’s vantage point on the dock, her features were not visible, and the rescuers immediately covered her body in a blanket.

Sixth, when the rescuers brought her body to shore and loaded it onto an ambulance, she was still wrapped in the blanket, her face not visible to Colbert.

⁵ It must not be overlooked that the Court of Appeals affirmed the summary judgment on the independent ground that the father could not, as a matter of law, satisfy the “distress-causation element” of NIED. *See* 132 Wn. App. at 932-33. Review was not granted on this issue. Thus, whatever this Court does with the first issue, the summary judgment of dismissal must be affirmed. The shortcomings in this aspect of plaintiff’s claim were identified in Respondents’ Court of Appeals Brief at pp. 25-29, and in Respondents’ Answer to Petition for Review at pp. 16-19.

And finally, the rescue scene, which Colbert viewed from afar, was substantially changed in time and place from where Denise originally had drowned in the lake hours earlier.

(Emphasis in original.)

The plaintiff father filed a petition for review which was granted in March 2007.

IV. ARGUMENT

A. AMERICAN COURTS CONTINUE TO LIMIT THE SCOPE OF BYSTANDER NIED CLAIMS.

The tort of bystander NIED is a limited, judicially-created cause of action. *Hegel v. McMahon*, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998). It is “limited” because there is a potential for “unlimited liability” to anyone who hears of the death or injury of a loved one. *Hegel*, 136 Wn.2d at 127. This judicial restraint on this tort continues to appear in the recent case law.

In *Timson v. Pierce Count Fire Dist. No. 15*, 136 Wn. App. 376, 149 P.2d 427 (2006), the plaintiff sought to raise a bystander NIED claim notwithstanding that she arrived at the accident scene after the police and the emergency personnel. The court pointed out that she was not by definition a “bystander.”

Hunsley was the first Washington case to recognize a cause of action for bystander negligent infliction of emotional distress. However, Timson’s reliance on *Hunsley* is misplaced because she was not a bystander to the accident.

A bystander is one who is present when an event takes place, but who does not become directly involved in it. BLACK'S LAW DICTIONARY, 214 (8th ed. 2004).

136 Wn. App. at 385 (citation omitted).

In *Brannan v. Northwest Permanente*, 2006 W.L. 2841793 (W.D.Wash. 2006), the court described the requirements of Washington thus:

Defendants move for dismissal of these claims as to Mrs. Brannan's daughters, Rhiannon and Stephanie for the reason that they did not see their mother die. Under Washington law, a plaintiff must have observed the accident's immediate aftermath and effect on the victim before rescuers and paramedics altered the scene, or the victim's location or condition.

Id. at *4.

The court concluded that since the plaintiffs were in fact present when their mother fell, they could pursue a bystander claim. *Id.*

In *Gregory v. Town of Plainville*, 2006 WL 2675830 (Conn. 2006)⁶, the plaintiff who first saw her injured son in the hospital sought to raise a bystander claim. The court rejected her claim pointing out: (1) she did not see her son when he was injured; (2) she did not have emotional injury caused by the contemporaneous sensory perception of the event; (3) she did not arrive on the scene of the injury soon thereafter; and (4) she did not arrive before a substantial change had occurred in the victim's condition or location. *Id.* at *3.

In *Smith v. Toney*, 862 N.E.2d 656 (Ind. 2007), the Indiana Supreme Court discussed the need for “bright line rules” in claims for emotional distress. It went on to comment:

“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. . . . 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

⁶ Copy attached as Appendix B. Cited pursuant to Connecticut Court Rule: Practice Book, 2007, § 67-9.

same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene.

Id. at 663.

These recent cases reflect the same public policy set forth by this Court in *Gain v. Carroll Mill Co., Inc.*, 114 Wn.2d 254, 787 P.2d 553 (1990), and *Hegel*: A reasonable limit must be placed on the scope of defendants' liability. Without that, "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." *Hegel*, 136 Wn.2d at 127-28.

B. PUBLIC POLICY IN WASHINGTON LIMITS A "BYSTANDER" CLAIM TO A FAMILY MEMBER WHO IS PRESENT AT THE TIME OF THE ACCIDENT, OR WHO ARRIVES "SHORTLY THEREAFTER," I.E., BEFORE SUBSTANTIAL CHANGE HAS OCCURRED IN THE VICTIM'S CONDITION OR LOCATION.

In the Court of Appeals, respondents carefully traced the evolution of the bystander NIED tort in Washington.⁷ After this Court first recognized it in 1976,⁸ this Court did not review it again until 1990.⁹ At that time, the *Gain* Court, in *dictum*, indicated that a relative who arrives

⁷ Brief of Respondents pages 14-20.

⁸ *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976).

⁹ *Gain v. Carroll Mill Co., Inc.*, 114 Wn.2d 254, 787 P.2d 553 (1990).

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 stated 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.

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 consistent with the general rule that bystander plaintiffs had to be at the scene when the accident occurred.

This Court first noted how the *Cunningham*¹⁰ court had restricted the potentially unlimited liability situation created by *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.

¹⁰ *Cunningham v. Lockard*, 48 Wn. App. 38, 736 P.2d 305 (1987).

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.

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.

Having noted the existence of a “wide spectrum of rules,” the Court cited with approval Connecticut and Wyoming¹¹ as states which had adopted “a principled intermediate approach.” This approach 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

¹¹ *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. Libery 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).

horror of the accident has abated.

The Court went on to hold that a family member bystander may 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 or location. The Court concluded that the plaintiffs might have a "bystander" 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.

Plaintiff/petitioner Colbert witnessed neither the suffering of nor the infliction of injury on his daughter. He does not come within the class of individuals identified by this Court who may maintain a bystander tort claim.

Our review of Washington case law on bystander tort claims reveals a thread running through all the opinions. 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 but who “witnesses the victim’s suffering.” 136 Wn.2d at 130. Plaintiff/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. Plaintiff/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 seeing the suffering of his daughter.

The *Hegel* Court adopted the “principled intermediate approach.” The *Hegel* Court kept a limit on liability but allowed recovery to the bystander relative who witnesses injuries at the scene shortly after they occur. The *Gates* opinion from Wyoming, cited in *Hegel*, explains:

[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, plaintiff/petitioner got the phone call every parent dreads. Your child has 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, public policy requires 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. Plaintiff/petitioner did not observe his daughter until three hours after she had drowned. He did not witness his daughter suffering. He arrived after the police and fire units were already operating.

As summarized by the Court of Appeals, the undisputed facts negate plaintiff/petitioner's bystander claim, even under the most liberal construction of the Washington rule.

1. Plaintiff 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. His daughter was not visible when plaintiff arrived at the lake.

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

4. What plaintiff witnessed for several hours was the activity of the rescue workers.

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

6. 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.

7. The rescue scene which plaintiff viewed was substantially changed in time and place from 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 shortly thereafter. Plaintiff/petitioner satisfies neither requirement. His bystander claim was correctly dismissed.

V. CONCLUSION

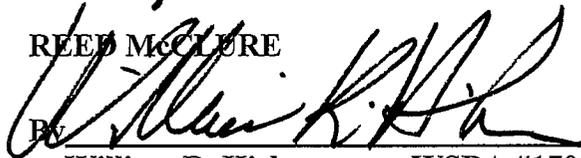
Washington has adopted a "principled intermediate" rule for bystander claims. It limits the scope of liability but it still allows recovery to those plaintiffs who witness their relative's injuries at the scene of an accident. It recognizes a cause of action where a plaintiff witnesses the victim's injuries at the scene of an accident shortly after it occurs and before there is material change in attendant circumstances.

The facts of this case do not bring plaintiff/petitioner's claim within the Washington rule. The superior court and the Court of Appeals were correct in dismissing the bystander claim.

DATED this 4th day of April, 2007.

REED McCLEURE

BY



William R. Hickman WSBA #1705
Miry Kim WSBA # 31456
Attorneys for Respondents

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

Westlaw.

Not Reported in A.2d

Page 1

Not Reported in A.2d, 2006 WL 2675830 (Conn.Super.)
(Cite as: Not Reported in A.2d)

Briefs and Other Related Documents

Gregory v. Town of
PlainvilleConn.Super.,2006.Only the Westlaw
citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut,Judicial District of
New Britain.

Joseph GREGORY et al.

v.

TOWN OF PLAINVILLE.

No. HHBCV030523568S.

Aug. 29, 2006.

Spinella A. Paul & Associates Law O, Hartford, for
Joseph Gregory.

Ryan Ryan Johnson & Deluca LLP, Stamford, and
Michalik Bauer Silvia & Ciccarillo, New Britain,
for Town Of Plainville.SHABAN, J.

I

FACTUAL AND PROCEDURAL BACKGROUND

*1 On April 3, 2006, the plaintiffs, Joseph Gregory and Cheryl Gregory, filed an eight-count revised complaint ^{FN1} against the defendant Town of Plainville alleging negligent infliction of emotional distress.^{FN2} The complaint alleges in part that Joseph Gregory, a football player at Plainville High School and the son of Cheryl Gregory, was severely injured during a football practice that was conducted in a school hallway. While running sprints in the school building as part of a team practice, Joseph Gregory attempted to stop short of a set of closed doors at the end of the hallway. In doing so, he put his arm out to brace his impact with the door only to have it go through the glass window on the door. His arm was badly cut as a result. Thereafter, the football coach called Cheryl

Gregory to inform her that her "son was hurt and probably needed stitches." Told that her son would be transported to the hospital, Cheryl Gregory went to the hospital, rather than to the scene of the injury. At the hospital, she saw her son in a trauma unit "surrounded by doctors with oxygen tubes in his nose and an intravenous needle in his left arm." His clothes and body, as well as material on the floor, were covered in blood and it was obvious that he had been badly hurt. In counts five, six, seven and eight, Cheryl Gregory claims that she suffered emotional distress from unexpectedly seeing her son in such a condition at the hospital. She claims additional damages and injuries based on the Town of Plainville and/or its agents' failure to warn her of the actual severity of her son's injuries.

FN1. The plaintiffs filed the original complaint on October 3, 2003.

FN2. This case is consolidated with a companion case *Gregory et al. v. Cipriano, et al.*, Superior Court, judicial district of New Britain, Docket No. CV-03-0522872S. The motion to strike is applicable only to the instant file.

On May 17, 2006, the defendant filed a motion to strike, accompanied by a memorandum of law, requesting that the court strike the claims of Cheryl Gregory as set forth in counts five, six, seven and eight of the amended complaint, for the reason that they fail to state a claim upon which relief could be granted. Thereafter, on May 26, 2006, the plaintiff filed an objection to the motion to strike, supported by a memorandum in opposition. Oral argument was held before the court on June 13, 2006.

II

STANDARD OF REVIEW

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

APPENDIX B

Not Reported in A.2d

Page 2

Not Reported in A.2d, 2006 WL 2675830 (Conn.Super.)
(Cite as: Not Reported in A.2d)

“The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted.” (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). “Practice Book ... § 10-39, allows for a claim for relief to be stricken only if the relief sought could not be legally awarded.” *Pamela B. v. Ment*, 244 Conn. 296, 325, 709 A.2d 1089 (1998).

“It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted.” (Internal quotation marks omitted.) *Commissioner of Labor v. C.M.J. Services, Inc.*, 268 Conn. 283, 292, 842 A.2d 1124 (2004). “The role of the trial court [is] to examine the [complaint], construed in favor of the plaintiffs, to determine whether the [pleading party has] stated a legally sufficient cause of action.” (Internal quotation marks omitted.) *Szczapa v. United Parcel Service, Inc.*, 56 Conn.App. 325, 328, 743 A.2d 622, cert. denied, 252 Conn. 950, 748 A.2d 299 (2000). “Moreover, [the court] note[s] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged.” *Commissioner of Labor v. C.M.J. Services, Inc.*, *supra*, 268 Conn. 292.

III

DISCUSSION

*2 In its memorandum of law in support of its motion to strike, the defendant states that the plaintiff Cheryl Gregory has sued the Town of Plainville claiming negligent infliction of emotional distress. Count five alleges such distress based upon the phone call from the coach understating the injury and thereafter, without warning, seeing her son in the hospital in a severe condition. Counts six through eight base the claim of negligent infliction of emotional distress against the Town of Plainville on General Statute § 52-557n (liability of a political subdivision of the state for personal injury caused

by the negligent acts or omissions of any employee, officer, or agent acting within the scope of his employment or official duties), on the doctrine of respondeat superior, and, General Statute § 7-465 (assumption of liability by a town for an employee causing damage while acting within the scope of their employment).

A cause of action for negligent infliction of emotional distress was first recognized in Connecticut in *Montinieri v. Southern. New England Telephone Co.*, 175 Conn. 337, 345, 398 A.2d 1180 (1978). It has been more recently addressed in *Carrol v. Allstate Insurance Company*, 262 Conn. 433, 815 A.2d 119 (2003), and *Perodeau v. City of Hartford*, 259 Conn. 729, 792 A.2d 752 (2002). The elements of such a cause of action are that (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress. *Carrol v. Allstate Insurance Co.*, *supra* at 444. However, despite initially characterizing Cheryl Gregory's claims as sounding in negligent infliction of emotional distress, the defendant's memorandum in support of its motion to strike addresses her claims under the standard of a bystander emotional distress claim. In their objection to the motion to strike, the plaintiffs also substantively address the legal argument in the context of a bystander emotional distress claim, but then briefly argue in the alternative that the defendant has mischaracterized the plaintiffs' claims and that they should be construed only as ones for negligent infliction of emotional distress. At oral argument, the defendant argued that even though the plaintiffs' pleading may have used the language of negligent infliction of emotional distress, that the claims were in fact bystander emotional distress claims. The plaintiffs argued that they are separate and distinct claims and that Cheryl Gregory had properly pled a negligent infliction claim. More specifically, plaintiffs argue that the phone call from the football coach was the negligence that led to the emotional distress because it had not properly prepared Cheryl Gregory for the scene that she came upon at the hospital. Because the parties are in

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in A.2d

Page 3

Not Reported in A.2d, 2006 WL 2675830 (Conn.Super.)
(Cite as: Not Reported in A.2d)

dispute over the meaning and intent of the language used by the plaintiffs in their pleading, the court must review the pleading to determine what cause of action the plaintiffs have attempted to allege.

*3 In this case the plaintiffs have given different headings to each count. For example, count five states "Negligent Infliction of Emotional Distress." However, the heading of the count is not dispositive of what cause of action is alleged. See *Blardo v. General Security Indemnity Co. of Arizona*, Superior Court, judicial district of Hartford, Docket No. CV 03 0829825 (September 28, 2004, Shapiro, J.) ("[t]he titles which a plaintiff assigns to his causes of action in his complaint are not determinative"). It is the language of the complaint itself that must be analyzed. See *Sampiere v. Zaretsky*, 26 Conn.App. 490, 494, 602 A.2d 1037, cert. denied, 222 Conn. 902, 606 A.2d 1328 (1992) ("[b]ecause we are bound by the four corners of the plaintiff's complaint, we must examine the specific language to determine the particular causes of action alleged"). Here, a review of the pleadings leads the court to the conclusion that the plaintiffs have attempted to allege in each count a bystander emotional distress claim. For example, paragraph 29 of counts five, six, seven and eight, states: "[a]s a result of seeing Plaintiff [Joseph Gregory] in such condition, without warning, the Plaintiff [Cheryl Gregory] sustained damages and personal injuries, some or all of which may be permanent in nature, including but not limited to the following: a. Emotional distress; b. Psychological pain and suffering; c. fear and apprehension for her son's safety at school; d. anxiety attacks over her son's ability to pursue his love of football and continue his education." Although paragraphs 32 and 33 of each of the counts allege that Cheryl Gregory's damages were caused by the negligence of the defendant's agents through their failure to warn her of her son's condition and appearance, and by the defendant's failure to properly supervise its employees or promulgate and enforce rules regarding the conduct of practices in school hallways, such paragraphs must be read in context with the overall pleading. In so doing, it appears the gravamen of Cheryl Gregory's complaint is one of bystander emotional distress. This is underscored by Cheryl Gregory's allegation that her damages were

as a result of seeing her son's physical condition at the hospital. (Plaintiffs' amended complaint, paragraph 29 of counts five, six, seven and eight.) In fact, in the objection to the motion to strike, the plaintiffs state that "Cheryl Gregory sustained her emotional injury when she saw her son in the hospital trauma center just after the injury in substantially unchanged condition from the time of the accident."

The elements of a bystander emotional distress claim were addressed by our Supreme Court in *Clohessey v. Bachelor*, 237 Conn. 31, 56, 675 A.2d 852 (1996): "... [A] bystander may recover damages for emotional distress under the rule of reasonable foreseeability if the bystander satisfies the following conditions: (1) he or she is closely related to the injury victim, such as the parent or the sibling of the victim; (2) the emotional injury of the bystander is caused by the contemporaneous sensory perception of the event or conduct that causes the injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the victim's condition or location; (3) the injury of the victim must be substantial, resulting in his or her death or serious physical injury; and (4) the bystander's emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response." From a reading of the pleadings, it is clear that Cheryl Gregory did not see her injured son at the location where the injury took place. She first saw him at the hospital trauma room. (Plaintiff's amended complaint counts five through eight, paragraph 27.) She did not therefore have an emotional injury caused by the contemporaneous sensory perception of the event or conduct that caused the injury. Moreover, she did not arrive on the scene of the injury soon thereafter, nor did she arrive before a substantial change had occurred in the victim's condition or location.^{FN3} Accordingly, her claims do not meet the second prong of the test set forth in *Clohessey*.

FN3. In footnote 14 of the *Clohessey* decision, the court took note of a Massachusetts case with a scenario fundamentally similar to the present case.

Not Reported in A.2d

Page 4

Not Reported in A.2d, 2006 WL 2675830 (Conn.Super.)
(Cite as: Not Reported in A.2d)

Our Supreme Court expressly declined “to follow *Ferriter v. Danile O’Connell’s Sons, Inc.*, 381 Mass. 507, 518-19, 413 N.E.2d 690 (1980), wherein the Massachusetts Supreme Judicial Court expanded the *Dziokonski* rule [claims for bystander emotional distress] to include emotional distress claims predicated on viewing the injured person at the hospital rather than at the scene of the accident.”

*4 Plaintiffs, although specifically addressing the bystander emotional distress argument of the defendant, concurrently argue that the claims of Cheryl Gregory have been misconstrued by the defendant. They argue that the claims are not that of bystander emotional distress, but rather are separate and distinct claims of negligent infliction of emotional distress. Though making such a claim, the plaintiffs cite no legal authority for such a proposition. As noted above there are specific elements needed to establish a claim of bystander emotional distress (as set forth in *Clohessy*) as opposed to those elements necessary for a claim of negligent infliction of emotional distress (as set forth in *Montinieri v. Southern New England Telephone Co.* and *Carrol v. Allstate Ins. Co.*). In *McKiernan v. Kmarynsky*, 49 Conn.Sup. 161, 165-66, 865 A.2d 1262 (2004), the court addressed and reviewed the differences between claims involving bystander emotional distress (noting there is no direct duty between the parties), and cases of negligent infliction of emotional distress (where the duty between the parties must be direct in order for it to be viable).^{FN4}

FN4. In *McKiernan* the court found that there was an exception for birthing mothers to the general rule that there must be a direct duty to assert a claim for negligent infliction of emotional distress when a baby was injured due to medical malpractice during birth.

As noted above there are four elements to a negligent infliction of emotional distress claim. One of the necessary allegations to such a claim is that the foreseeability of the precise nature of the harm

to be anticipated is a prerequisite to recovery even if a breach of duty is otherwise found. (Internal quotations omitted.) *Perodeau v. City of Hartford*, *supra*, 259 Conn. at 754. “The foreseeability requirement in a negligent infliction of emotional distress claim is more specific than the standard negligence requirement ...” *Olson v. Bristol-Burlington Health District*, 87 Conn.App. 1, 5, 863 A.2d 748, cert. granted, 273 Conn. 914, 870 A.2d 1083 (2005). A review of the allegations of Cheryl Gregory in counts five, six, seven and eight of the amended complaint finds that she has failed to allege that the conduct of the defendant and/or its agents created an unreasonable risk of causing her emotional distress, that the distress was foreseeable, or that it was severe enough that it might result in illness or bodily harm. Because multiple elements to bring such a claim are missing, she has failed to state a cause of action for which relief can be claimed.

IV

CONCLUSION

Although a reading of counts five through eight of the plaintiffs' amended complaint leads to the conclusion that Cheryl Gregory has attempted to state a cause of action for bystander emotional distress in each count, she has failed to adequately allege at least one of the necessary elements to state such a cause of action. Moreover, she has failed to adequately state a cause of action for negligent infliction of emotional distress. Therefore, the motion to strike counts five, six, seven and eight of the amended complaint is granted.

Conn.Super.,2006.
Gregory v. Town of Plainville
Not Reported in A.2d, 2006 WL 2675830
(Conn.Super.)

Briefs and Other Related Documents (Back to top)

• HHB-CV-03-0523568-S (Docket) (Oct. 3, 2003)

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.