

CERTIFICATION FROM
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN

EDWARD J. BYLSMA,

Plaintiff - Appellant,

v.

BURGER KING CORPORATION, a
Florida corporation and
KAIZEN RESTAURANTS, INC.,
an Oregon corporation,

Defendants – Respondents

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U.S. Court of Appeals for the Ninth Circuit No. 10-36125

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RCW 7.72.0106,9
RCW 7.72.0306

I. INTRODUCTION

Plaintiff Edward Bylsma filed suit against Burger King Corporation (BKC) and Kaizen Restaurants, Inc. (Kaizen) in the United States District Court, District of Oregon. He sought damages under Oregon law for emotional distress he claimed was caused by the perception of a Whopper sandwich that had saliva on it. In granting a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), the court ruled that Washington law applied to the case, that the Washington Product Liability Act (WPLA) applied and preempted other claims, and that Plaintiff did not sustain harm cognizable by the WPLA. Plaintiff then appealed to the U.S. Court of Appeals for the Ninth Circuit. Following briefing and oral argument, the court certified a question to the Washington Supreme Court. The issue before the court is whether a claim for infliction of emotional distress in the absence of physical injury is cognizable under the WPLA.

II. ASSIGNMENTS OF ERROR

The assignments of error are as stated in the federal proceeding. The question certified to the Washington Supreme Court is: Does the Washington Product Liability Act permit relief for emotional distress damages, in the absence of physical injury, caused to the direct purchaser

by being served and touching, but not consuming, a contaminated food product?

III. STATEMENT OF THE CASE

Because this case was resolved through a judgment on the pleadings in federal court, the relevant facts are those pled by Plaintiff. According to the complaint, Plaintiff is a deputy with the Clark County, Washington Sheriff's Department. While he was on duty, he visited a Burger King restaurant in Vancouver, Washington at approximately 1:50 a.m. on March 23, 2009. The restaurant is owned and operated by Kaizen, pursuant to a franchise agreement with BKC. Plaintiff ordered a Whopper sandwich at the drive-through speaker and then proceeded to the window to pay for and receive his order. The two employees who were at the restaurant were Jeremy McDonald, who was working at the window, and Gary Herb, who prepared the sandwich. Plaintiff became suspicious and, when he disassembled his sandwich, he discovered what appeared to be saliva on the meat patty. ER 66-7. Plaintiff did not consume the sandwich or saliva, but alleges he "became nauseous" at the sight of it. ER 68 at ¶ 2.6. Ultimately, law enforcement officials determined that the substance on the sandwich was saliva and that it came from Mr. Herb. ER 68.

Plaintiff alleges that he "suffered personal injury and damage." ER 70 at ¶¶ 3.1(g), 3.2(e). The Complaint does not contain any allegation

of facts showing physical injury or harm caused by the sandwich. The Complaint concludes that “Plaintiff suffered physical, emotional, and economic damage, including pain and suffering, and emotional distress.” ER 71 at ¶ 4.1.

IV. SUMMARY OF THE ARGUMENT

Resolution of this case involves the application of a rule of law provided by the Washington Supreme Court. The rule is that damages for emotional distress, which are not accompanied by physical injury, are only available in a statutory action when the statutory standard for liability requires intentional conduct. Because liability under the WPLA would be based on strict liability, emotional distress damages do not constitute cognizable harm. Additionally, Plaintiff’s claim for emotional distress damages is not supported by Washington law. Even if a claim for negligent infliction of emotional distress (NIED) was not preempted, it would not be viable under Washington law. NIED is a limited cause of action and Plaintiff’s claim is not within the specific types of NIED cases recognized by Washington law.

V. ARGUMENT

A. *Fisons and Hiltbruner* Answer the Certified Question

The decision of the federal court was based primarily on the application of a clear rule provided by the Washington Supreme Court.

The rule is that in a statutory cause of action, emotional distress damages in the absence of physical injury are only recoverable where “the statutory violation requires proof of an intentional tort.” *White River Estates v. Hiltbruner*, 134 Wn. 2d 761, 769, 953 P.2d 796 (1998). If the court follows this rule, the answer to the certified question is that Plaintiff does not have a viable claim under the WPLA because the level of culpability is far below that of an intentional tort.

The only case that has addressed the availability of emotional distress damages under the WPLA was *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 122 Wn. 2d 299, 858 P.2d 1054 (1993). The *Fisons* case involved, among several other issues, claims by a physician for emotional distress he allegedly suffered after a patient of his was injured by a drug prescribed by the physician. The court’s analysis began with the statement that the court was “asked to extend recovery for a kind of harm that [the court does] not perceive as having been contemplated by Washington law, that is, emotional distress suffered by a physician as a result of injury to his patient.” *Id.* at 320. The court continued by stating that “[g]enerally, in cases where emotional distress is not a consequence of physical injury, or caused by intentional conduct, Washington courts have been cautious about extending a right to recovery.” *Id.*

The court then considered whether cases involving intentional torts might form a basis for allowing emotional distress damages under the WPLA. The court concluded that cases involving intentional torts are not applicable because “[t]he level of fault in a [WPLA claim] may be considerably less than that in an intentional tort claim.” *Id.* at 321. Continuing, the court wrote that “[i]n a product liability claim, liability can be predicated on negligence or even on strict liability.” *Id.* Because the level of fault in a WPLA case can be much less than negligence or intentional conduct, the court refused to “substantially extend” prior case law and held that “the physician’s pain and suffering are not recoverable” under the WPLA. *Id.* at 322.

Following *Fisons*, additional guidance on whether emotional distress damages are available in a statutory action was provided in the *Hiltbruner* case. That case involved an appeal of emotional distress damages that were awarded based on a violation of the Mobile Home Landlord-Tenant Act (MHLTA). The court reversed the award and held that emotional distress damages were not available. *Hiltbruner*, 134 Wn. 2d at 769. In reaching this conclusion, the court wrote that the focus must be on the level of fault required by the applicable statute. Emotional distress damages are only available if the statute requires intentional conduct in order to impose liability. *Id.* In the case of the MHLTA,

liability was permitted based on “unreasonable” conduct. *Id.* at 768. The lower court had allowed emotional distress damages because the defendant’s actual conduct was found to be intentional; however, the Washington Supreme Court held that this analysis was incorrect. The court wrote that “[t]he focus is not on the particular facts of the case but whether the statutory violation requires proof of an intentional tort.” *Id.* at 769. Thus, unless a statutory action requires proof of intentional conduct in order to impose liability, emotional distress damages are not available.

In this case, as the *Fisons* court recognized, the WPLA can impose liability based on a degree of fault much less than intentional conduct. There is no sound reason to abandon the rule provided by *Fisons* and *Hiltbruner* and the court should answer the certified question accordingly.

**B. Plaintiff’s Claimed Emotional Distress is not “Harm”
under the WPLA**

To avoid the result of the rule discussed above, Plaintiff claims that the WPLA allows a claim for emotional distress damages that are not accompanied by physical injury. Nothing in the statute expressly refers to this type of claim. Rather, the WPLA allows recovery for proximately caused harm. RCW 7.72.030(2). “Harm” is defined generally as “any damages recognized by the courts of this state.” RCW 7.72.010(6). Because emotional distress damages are not recoverable in every action or

based on any fact pattern, it cannot be said that a claimant's alleged emotional distress is universally considered to be "harm" under the WPLA.

Washington law involving the recovery of emotional distress damages has evolved and generally emphasized the level of fault that results in the alleged emotional distress. Where the conduct leading to the emotional distress is intentional, such as with the tort of outrage, Washington courts allow recovery. *See Kloepfel v. Bokor*, 149 Wn. 2d 192, 66 P.3d 630 (2003). In contrast, recovery for conduct that is merely negligent is less certain. The reason for this is that "[c]ourts generally establish rules which make liability more likely to attach to intentional wrongdoers than to those who are merely negligent." *Id.* at 200. Washington courts are "more likely to allow recovery of emotional distress damages for intentional acts than for negligent ones." *Id.* at 201.

Compared with outrage, NIED "is a limited, judicially created cause of action." *Colbert v. Moomba Sports, Inc.*, 163 Wn. 2d 43, 49, 176 P.3d 497 (2008). Although recovery for negligent conduct is sometimes allowed, courts have imposed limitations on the circumstances that warrant recovery, as well as the classes of plaintiffs who may recover. Additionally, requirements such as "objective symptomatology" further

limit recovery. The reason for these limitations is based on the fact that less culpable conduct is involved. *Kloepfel*, 149 Wn. 2d at 201.

In contrast to intentional or negligent conduct, strict liability imposes liability without regard to fault. In the context of the development of product liability law, a manufacturer was strictly liable for the consequences of a product that was not reasonably safe. *See, e.g., Seattle-First Nat'l Bank v. Tabert*, 86 Wn. 2d 145, 154, 542 P.2d 774 (1975). Research found no Washington case that allowed recovery of emotional distress damages in the absence of physical injury based on strict liability. Additionally, to allow such recovery would be contrary to the established principles of limiting recovery based on the reduced level of fault.

In this case, it has been established that the defendants are “manufacturers” for the purpose of the WPLA. *See Almquist v. Finley School District*, 114 Wn. App. 395, 406, 57 P.3d 1191 (2002). Manufacturer liability is imposed under RCW 7.72.030. Although the statute appears to use a negligence standard for design defects and inadequate warnings and a strict liability standard for warranty violations or unsafe construction, the statute has been interpreted to apply strict liability for all theories against a manufacturer. *See Ayers v. Johnson & Johnson Baby Prod. Co.*, 117 Wn. 2d 747, 761-3, 818 P.2d 1337 (1991).

Thus, if liability were to be imposed upon the defendants for the manufacture of a product that was not reasonably safe, it would be based on strict liability. As discussed above, there is no precedent to hold a party strictly liable for the emotional distress sustained in the absence of physical injury and the court should not expand the law to create a new cause of action.

Finally, one additional aspect of the WPLA merits discussion. In the certified question, the court specifically referred to the plaintiff as a “direct purchaser.” Under the WPLA, a claimant is “any person or entity that suffers harm.” RCW 7.72.010(5). The definition also states that “[a] claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.” *Id.* Thus, Plaintiff’s status as a “direct purchaser” is irrelevant under the WPLA and has no effect on the analysis.

**C. Plaintiff’s Emotional Distress Claim is not Supported
by Washington Law**

Even if an NIED claim were not preempted by the WPLA and even if a negligence standard applied to the WPLA claim, Plaintiff’s claim is not viable under Washington law. In an effort to distinguish and avoid the holdings of the *Colbert v. Moomba Sports, Inc.* case, Plaintiff’s Brief devotes considerable effort to argue there are two different types of NIED

actions: so-called “direct” claims and so-called “bystander” cases.

Plaintiff argues that “bystander” cases are more limited and that “direct” claims are merely governed by general negligence principles. To support the assertion that there is a difference between “direct” and “bystander” cases, Plaintiff cites to a footnote in the case of *Bishop v. State of Washington*, 77 Wn. App. 228, 233 n. 4, 889 P.2d 959 (1995). It should be noted that the only authority cited by the court in *Bishop* for the asserted distinction is a law review article.

The claim that there is a distinction between “direct” and “bystander” cases is logically unsupportable. The nature of an NIED claim is that the plaintiff sustained emotion distress as a consequence of the observation or other perception of something. In a “bystander” case, it is the perception of injury or death to a loved one. For other recognized cases, it is the perception of some other equally shocking or disturbing event or circumstance. If a “bystander” is defined as a percipient witness to an event or circumstance that causes distress, then all NIED claimants are “bystanders.” Because there is no physical injury, the emotional distress of a “bystander” is no less direct than the emotional distress of any other claimant. Additionally, use of the word “direct” implies that there is some type of intention or “directed” conduct; however, this implication is inconsistent with a negligence claim.

It is argued that a plaintiff in a “direct” claim is a foreseeable victim; however, *all* plaintiffs making NIED claims must be foreseeable. In fact, much of the case law involving “bystander” claims has focused on drawing the line between foreseeable and unforeseeable plaintiffs. A sounder approach to evaluating an NIED claim is to start with the fact that NIED “is a limited, judicially created cause of action.” *Colbert*, 163 Wn. 2d at 49. Case law has developed to recognize certain types of cases and not others. “Bystander” cases are noteworthy because they have been recognized as involving a fact pattern that may support an NIED claim and because they have well-developed rules.

For other types of NIED cases, recovery is less certain. Plaintiff argues that the general negligence principles that were addressed in the cases of *Hunsley v. Giard*, 87 Wn. 2d 424, 553 P.2d 1096 (1976) and *Corrigal v. Ball and Dodd Funeral Home*, 89 Wn. 2d 959, 577 P.2d 580 (1978) would still apply to any case other than a “bystander” case. This argument has no legal support and ignores the development of the law regarding NIED claims. In *Colbert*, the court analyzed the cases that followed *Hunsley* and which held that “*Hunsley’s* ‘foreseeability’ limitation on liability was contrary to public policy.” *Colbert*, 163 Wn. 2d at 50-1. The court concluded this analysis by explicitly stating that

“*Hunsley* no longer controls with regard to requirements for a claim of [NIED].” *Id.* at 59, n.3.

By requiring something more than general negligence principles to govern NIED claims, Washington courts have restricted the types of claims that are viable. Although there is no clearly established rule, one common element among the cases that do not involve “bystanders” is the existence of some type of prior special relationship between the parties. Examples include the cases of *Price v. State*, 114 Wn. App. 65, 57 P.3d 639 (2002) (adoption agency and prospective adoptive parents), *Anderson v. State Farm Mutual Ins. Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000) (insurer and insured), and *Berger v. Sonneland*, 144 Wn. 2d 91, 26 P.3d 257 (2001) (doctor and patient).

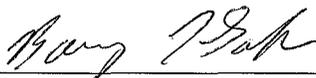
In this case, there is obviously no type of special prior relationship between Plaintiff and Defendants. Accordingly, as a “limited” cause of action, an NIED claim is only viable under the circumstances established by prior case law. No Washington case has allowed an NIED claim based on emotional distress that is allegedly caused by the observation of an adulterated food product and the court should not expand the law to the degree that would encompass such a claim.

VI. CONCLUSION

The simple and direct answer to the certified question is that the precedent of *Fisons* and *Hiltbruner* bars Plaintiff's claim for emotion distress damages. This conclusion has logical support and is consistent with the development of Washington law on the recovery of emotional distress damages. The degree of fault required to impose liability is the most important factor in determining the viability of a claim. In this case, if liability were to be imposed under the WPLA, it would be based on strict liability. There is no authority or good reason to make a manufacturer strictly liable for the alleged emotional distress that might result from a product that is not reasonably safe. Finally, even if the WPLA did not apply and preempt Plaintiff's claim, there is no viable NIED claim under Washington law and the court should not expand liability to such an extreme degree. Accordingly, Defendants respectfully request that the court answer the certified question with a "No."

Dated this 1st day of March, 2012

LAW OFFICE OF BARRY J. GOEHLER

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2012, I served the foregoing BRIEF OF RESPONDENTS on the following attorneys by mailing a true copy thereof, certified as such, contained in a sealed envelope, with postage paid, addressed to:

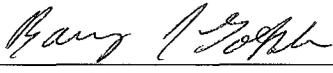
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