

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Feb 13, 2012, 4:57 pm  
BY RONALD R. CARPENTER  
CLERK

86 912 - 0

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

RECEIVED BY E-MAIL

**EDWARD J. BYLSMA**

*Plaintiff / Appellant,*

v.

**BURGER KING CORPORATION, a Florida corporation;  
and BURGER KING RESTAURANT #5259,  
d/b/a KAIZEN RESTAURANTS, INC.,  
an Oregon corporation,**

*Defendants / Respondents*

---

Washington Supreme Court No. 86912-0  
U.S. Court of Appeals for the Ninth Circuit, No. 10-36125

---

**PLAINTIFF'S  
APPELLANT'S OPENING BRIEF**

---

**ATTORNEYS FOR APPELLANT:**

Anne M. Bremner, WSBA #13269  
Darrin E. Bailey, WSBA #34955  
Danford D. Grant, WSBA #26042  
STAFFORD FREY COOPER  
601 Union Street, Suite 3100  
Seattle, WA 98101-1374  
Tel. (206) 623-9900  
Fax (206) 624-6885

**ORIGINAL**

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERROR .....	2
A. Assignment of Error .....	2
B. Issue Pertaining to Assignments of Error.....	2
III. STATEMENT OF THE CASE .....	3
A. Background Facts.....	3
1. The Incident .....	3
2. Plaintiff's Injuries .....	4
B. Procedural History .....	6
IV. SUMMARY OF ARGUMENT .....	7
V. ARGUMENT .....	8
A. Brief Introduction to Washington's Product Liability Act 8	
1. The history of the WPLA is detailed and relevant .....	8
2. The Legislature expressed a clear intent for the WPLA to allow claims for emotional distress damages without a physical injury.....	9
B. Fisons, a Bystander NIED Case, is the Only Case That Has Addressed the Availability of Emotional Distress Damages Under the WPLA .....	10
C. Washington Cases Involving Direct Claims for Emotional Distress Damages in the Absence of Physical Injury Support Bylsma's Claims.....	13
D. Colbert Did Not Rule Overrule Corrigan: Colbert is a Bystander Case That Deals With Policy Concerns Not Present in This Matter.....	19
VI. CONCLUSION .....	22
CERTIFICATE OF SERVICE .....	24

## TABLE OF AUTHORITIES

Page

**Cases**

<i>Anderson v. State Farm Ins. Co.</i> , 101 Wn.App. 323, 2 P.3d 1029 (2000), <i>review denied</i> , 142 Wn.2d 1017, 20 P.3d 945 (2001) .....	17, 22
<i>Berger v. Sonnenland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001) .....	18, 19, 22
<i>Bishop v. State of Washington</i> , 77 Wn.App. 228, 889 P.2d 959 (1995) .....	16
<i>Corrigal v. Ball and Dodd Funeral Home, Inc.</i> , 89 Wn.2d 959, 577 P.2d 580 (1978) .....	17, 18, 22
<i>Cunningham v. Lockard</i> , 48 Wash.App. 38, 736 P.2d 305 (1987) .....	12, 15, 21
<i>Davis v. Tacoma Ry. &amp; Power Co.</i> , 35 Wash. 203, 77 P. 209 (1904) .....	14
<i>Gain v. Carroll Mill Co.</i> , 114 Wn.2d 254, 787 P.2d 553 (1990) .....	21
<i>Hegel v. McMahon</i> , 136 Wn.2d 122, 960 P.2d 424 (1998) .....	16, 21
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976) .....	15, 16, 17, 20
<i>La Hue v. Coca Cola Bottling Co., Inc.</i> , 50 Wn.2d 645, 314 P.2d 421 (1957) .....	8
<i>Murphy v. Tacoma</i> , 60 Wn.2d 603, 374 P.2d 976 (1962) .....	15
<i>Nelson v. W. Coast Dairy Co.</i> , 5 Wn.2d 284, 105 P.2d 76 (1940) .....	8
<i>Pac. Nw. Bell Tel. Co. v. Port of Seattle</i> , 80 Wn.2d 59, 491 P.2d 1037 (1972) .....	8
<i>Percival v. Gen. Elec. Co.</i> , 708 F.Supp.2d 1171 (W.D.Wash. 2010) .....	20, 21
<i>Price v. State</i> , 114 Wash.App. 65, 57 P.3d 639 (2002) .....	18, 19, 22
<i>Pulley v. Pac. Coca-Cola Bottling Co.</i> , 68 Wn.2d 778, 415 P.2d 636 (1966) .....	8

<i>Schurk v. Christensen</i> , 80 Wn.2d 652, 497 P.2d 937 (1972).....	15
<i>Shoemaker v. St. Joseph Hosp. and Health Care Center</i> , 56 Wn.App. 575, 784 P.2d 562 (1990).....	20, 21
<i>Wash. Water Power Co. v. Graybar Elec. Co.</i> , 112 Wn.2d 847, 774 P.2d 1199 (1989).....	9
<i>Whaley v. State</i> , 90 Wash.App. 658, 956 P.2d 1100 (1998) .....	15
<i>Wilson v. Northern Pac. R. Co.</i> , 5 Wash. 621, 32 P. 468 (1893).....	13

**Other Authorities**

16 Wash. Prac., Tort Law and Practice § 5.7 (3d ed.).....	16, 18
Model Uniform Product Liability Act (UPLA), 44 Fed.Reg. 62,713 (1979).....	10
Philip A. Talmadge, <i>Washington's Product Liability Act</i> , 5 SEATTLE U. L. REV. 1, 21 (1981).....	8
Senate Journal, 47th Legislature (1981).....	10

## I. INTRODUCTION

Plaintiff Ed Bylsma became nauseous when he touched and nearly consumed a glob of phlegm that Defendants' employees placed on a Whopper sandwich they prepared for him. He experienced sudden and immediate emotional distress and anxiety that manifested in objective physical symptoms. Mr. Bylsma subsequently developed and continues to suffer food aversion, a known and understood psychological condition for which he has received counseling.

Because this is a contaminated food case, Mr. Bylsma's claim for damages arises under Washington's Product Liability Act ("WPLA"), which preempts all other potential causes of action. The WPLA defines harm as "any damages recognized by the courts of this state." Despite this broad definition of harm, the Oregon federal trial court (applying Washington law) concluded that emotional distress was not a recoverable harm under the WPLA absent physical injury from the product. As a result, the court held that Mr. Bylsma has no remedy for his emotional injury.

The narrow issue before this Court is whether the WPLA permits direct claims for emotional distress when the product at issue did not also cause a physical injury. As noted above, "harm"

under the WPLA is any damages recognized by Washington courts. Washington courts have consistently recognized emotional distress damages, even in the absence of physical injury, when the claimant is the direct and foreseeable victim of the defendants' negligence. In fact, Washington courts generally restrict the availability of emotional distress damages only where the emotional distress arises from injury to a third person. Accordingly, emotional distress is a recoverable harm under the WPLA, despite the absence of a physical injury.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error.**

The U.S. District Court for the District of Oregon erred when it granted Defendants' motion for judgment on the pleadings and dismissed Plaintiff's claims with prejudice, by order entered on November 12, 2010. ER 1-2.

### **B. Issue Pertaining to Assignments of Error.**

The U.S. District Court for the District of Oregon ruled that the WPLA does not permit claims for emotional distress absent physical injury. Plaintiff timely appealed to the U.S. Court of Appeals for the Ninth Circuit and the Ninth Circuit certified the following question to this Court:

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**

#### **A. Background Facts.**

##### **1. The Incident.**

Plaintiff Ed Bylsma is a deputy sheriff with the Clark County Sheriff's Office. ER 66. Just before 2:00 a.m. on March 24, 2009, Bylsma went to one of Defendant Kaizen's Burger King restaurants in Vancouver, Washington during his "lunch" break. ER 66. This particular Burger King was frequented by Bylsma and other deputies because it is one of the only restaurants in the area open at this time of night. ER 66. Bylsma entered the drive-thru, pulled up to the speaker, and ordered a Whopper with cheese. ER 66. Bylsma did not know either of the employees, though he recognized one of them (Jeremy McDonald) from previous visits to the restaurant. ER 66.

After receiving his food, Bylsma pulled away with an uneasy feeling. ER 67. He drove to another parking lot down the street, parked his patrol car, and opened the Burger King bag. ER 67. Before consuming the Whopper, he lifted the bun and found a

slimy, clear, white glob on the meat patty. ER 67. He tried to convince himself that perhaps the glob was oil or fat that had dripped on to the patty from another burger. ER 68. He then put his finger into the substance which stuck to his finger and had a consistency that indicated it was not fat. ER 68. Realizing that the substance was a glob of phlegm, Bylsma immediately became nauseous and called for assistance. ER 67.

There was no supervisor at the Burger King that night. ER 66. The two employees present, Gary Herb and Jeremy McDonald, had criminal records, including convictions for assault and burglary, and one has Hepatitis. ER 66. After the police began investigating the incident, a Burger King supervisor instructed the employee who had spit into the hamburger to say that he was on vacation. ER 68. One of the two employees told the investigating deputies that the two of them "often" violated company rules. ER 68. Forensic testing ultimately identified the substance as human saliva from McDonald. ER 68.

## **2. Plaintiff's Injuries.**

As a result of receiving, opening, touching, and recognizing that he had almost unwittingly consumed a Burger King hamburger containing a large puddle of phlegm, Bylsma suffered physically

manifested emotional injuries, including vomiting, nausea, food anxiety, and sleeplessness. ER 36. Bylsma's response was immediate and physical. ER 36.

Bylsma's food aversion is a rare condition that can be severe. He avoids eating prepared food. ER 36. Although he formerly ate five meals a day, he now eats only one meal per day that he makes himself. ER 36. Bylsma also has difficulty sleeping, including nightmares about food poisoning and communicable diseases. ER 36. His lack of sleep affects his alertness when on duty. ER 36. His social life has also been affected, and he has turned down invitations to go out with friends for fear there will be food and he will become nauseous and vomit. ER 36. On one occasion, Bylsma vomited after his friend served him spaghetti. ER 36.

More than two years after the incident, Bylsma has not fully overcome his food aversion issues. ER 36. Although he has received treatment from a mental health professional, who taught him coping techniques, progress has been slow and he continues to suffer. ER 36.

**B. Procedural History.**

Bylsma commenced this suit in the United States District Court District of Oregon on April 13, 2010, alleging causes of action under Oregon law for 1) product liability, 2) negligence, and 3) vicarious liability/respndeat superior. ER 65-72. Defendants moved for judgment on the pleadings, arguing that 1) Washington law applies to this case, 2) Washington's Product Liability Act ("WPLA") governs the facts alleged and preempts all other cases of action, and 3) the WPLA precludes mental distress damages in the absence of physical injury. ER 71.

On September 3, 2010, Magistrate Judge Paul Papak filed his Findings and Recommendation granting Defendants' motion. ER 8-20. Bylsma timely filed his Objections on September 17, 2010 (ER 21-29), and on November 12, 2010 Judge Malcolm F. Marsh entered an order granting Defendants' motion and dismissing Plaintiff's case with prejudice. ER 6-7. Bylsma timely appealed on December 13, 2010. ER 1.

On January 11, 2012, a three-judge panel of the Ninth Circuit Court of Appeals filed its Order Certifying Question to the Supreme Court of Washington ("Order").

#### **IV. SUMMARY OF ARGUMENT**

The Oregon federal district court held that the WPLA does not recognize emotional distress damages where the contaminated food product does not physically injure the claimant. This holding runs contrary to the language and legislative history of the WPLA, Washington's emotional distress jurisprudence, and public policy.

The WPLA expressly defines harm to allow recovery of "all damages recognized by the courts of this state." Washington courts have long recognized emotional distress damages in the absence of physical injury, and have increasingly shown a willingness to broaden the availability of emotional distress damages for direct claims (as opposed to bystander claims).

In this case, the WPLA provides Bylsma a remedy because he was the direct and foreseeable victim of the defendants' defective product.

## V. ARGUMENT

### A. **Brief Introduction to Washington's Product Liability Act.**

1. The history of the WPLA is detailed and relevant.<sup>1</sup>

Product liability law in Washington has evolved into one of the most comprehensive statutory schemes of any state in the nation. Until the 1960s, product defect claims in Washington sounded in negligence, and strict liability was confined to cases involving ultrahazardous activities<sup>2</sup> and contaminated food.<sup>3</sup> However, the 1981 session of the state legislature took up the challenge of developing a uniform system for dealing with product liability claims. The plaintiff and defense bars both gave input into the legislation, and through hard work and diligence the Washington Products Liability Act was passed by both houses nearly unanimously. *Id.* at 6, FN 31 (43 to 5 in Senate; 97 to 1 in House). The WPLA consolidated common law product liability remedies into a single, comprehensive set of product liability claims. *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d

---

<sup>1</sup> Philip A. Talmadge, *Washington's Product Liability Act*, 5 SEATTLE U. L. REV. 1, 21 (1981) ("The legislative history of the WPLA is probably the most detailed legislative history in Olympia").

<sup>2</sup> See, e.g., *Pac. Nw. Bell Tel. Co. v. Port of Seattle*, 80 Wn.2d 59, 63, 491 P.2d 1037 (1972).

<sup>3</sup> *Pulley v. Pac. Coca-Cola Bottling Co.*, 68 Wn.2d 778, 415 P.2d 636 (1966); *La Hue v. Coca Cola Bottling Co., Inc.*, 50 Wn.2d 645, 314 P.2d 421 (1957); *Nelson v. W. Coast Dairy Co.*, 5 Wn.2d 284, 105 P.2d 76 (1940).

847, 774 P.2d 1199 (1989). The WPLA became the exclusive remedy for product injury litigation, and the common law was only modified to the extent set forth in the WPLA. See RCW 7.72.020; see also *Graybar*, 112 Wn.2d at 847.

2. The Legislature expressed a clear intent for the WPLA to allow claims for emotional distress damages without a physical injury.

Under the WPLA, a manufacturer is liable if “the claimant’s harm” was caused by the manufacturer’s negligence. RCW 7.72.030(1). The WPLA definition of “Harm” is “strikingly broad:”<sup>4</sup>

**“Harm” includes any damages recognized by the courts of this state:** PROVIDED, That the term “harm” does not include direct or consequential economic loss under Title 62A RCW.

RCW 7.72.010(6) (*emphasis added*).

Senate records show that when the Legislature crafted the definition of “harm,” it specifically rejected a more restrictive Uniform Product Liability Act definition. As a result, the Legislature allowed recovery for emotional distress damages in the absence of physical injury.

Although, as noted above, many of the definitions in the WPLA “are taken substantially from the Uniform Product Liability

---

<sup>4</sup> *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 365, 858 P.2d 1054 (1993) (*J. Brachtenbach, dissent*) (noting Legislature specifically rejected a more restrictive definition).

Act,”<sup>5</sup> former Justice Philip A. Talmadge, who at the time the Act was passed was the Chair of the Senate Select Committee on Tort and Liability, explained the unique Washington definition as follows: “The committee declined to adopt the Model Uniform Product Liability Act’s strict definition of harm, particularly as to mental anguish or emotional harm not directly attendant upon personal physical injuries or illness.” *Id.* at 10 FN 47.

Thus, the Legislature made it clear that the WPLA was intended to apply to all cognizable damages, including emotional distress. By defining harm through reference to case law, the Legislature understood that what constitutes “harm” is likely to evolve and did not want to otherwise limit available remedies.

**B. *Fisons*,<sup>6</sup> a Bystander NIED Case, is the Only Case That Has Addressed the Availability of Emotional Distress Damages Under the WPLA.**

In *Fisons*, the Court was asked to decide if the WPLA permitted a physician’s claim for emotional distress as a result of

---

<sup>5</sup> Senate Journal, 47th Legislature (1981) at 629, *citing* the Model Uniform Product Liability Act (UPLA), 44 Fed.Reg. 62,713, 62,717 (1979). The UPLA included four definitions of “harm,” including:

(3) mental anguish or emotional harm attendant to such personal physical injuries, illness or death; and (4) mental anguish or emotional harm caused by the claimant’s being placed in direct personal physical danger and manifested by a substantial objective symptom.... 44 Fed.Reg. 62,717 § 102(F)

<sup>6</sup> *Washington State Physicians Ins. Exch. & Ass’n v. Fisons, Corp.*, 122 Wn.2d 299, 365, 858 P.2d 1054 (1993).

injury to his patient. Following the Act's definition of "harm," the *Fisons Court* recognized that it had to "look to Washington law to define 'harm' for purposes of the [WPLA]." *Fisons*, 122 Wn.2d at 320.

The Court first looked to Washington's product liability jurisprudence, but found no cases involving emotional distress damages claimed by a third party. *Id.* (noting that product liability cases generally involve "injury caused directly *by the product* to the person or the property of the claimant." (*emphasis in original*)). The Court then analogized the physician's claim to a third party claim for negligent infliction of emotional distress ("bystander NIED"), and looked to that line of cases to see if it supported an emotional distress claim by a physician for harm suffered by his patient. *Fisons*, 122 Wn.2d at 320 ("We can find guidance in the cases wherein damages for emotional harm are available to a plaintiff based upon injuries to a third person.").

After reviewing Washington's bystander NIED cases, the Court held that the facts did not support a cause of action under the WPLA, noting that Washington courts have been cautious about extending a right to recover for emotional harm "when the distress is the consequence of an injury suffered by a third person." *Id.* at

320-21, 858 P.2d 1054. The *Fisons* court further explained its narrow decision:

If we were to allow emotional distress damages to be awarded to physicians as a result of injuries sustained by their patients, we would be substantially extending our prior law regarding when a plaintiff could recover emotional distress damages caused by the physical injuries of a third person.

*Id.* at 321; accord *Cunningham v. Lockard*, 48 Wn.App. 38, 44, 736 P.2d 305 (1987) (acknowledging in bystander NIED actions that the boundary “establishing the class of persons who can sue must be drawn.”).<sup>7</sup>

The specific holding in *Fisons* that the physician had no claim for bystander NIED is readily distinguishable from our case, which is not a bystander case. Unlike the physician in *Fisons*, *Bylsma* “alleges injury caused directly to him *by the product*.” Order at 127 (emphasis in original). Although *Fisons* is instructive, it does not control.

Simply put, *Fisons* involved a third party physician seeking emotional distress damages as a result of injuries to his patient.

---

<sup>7</sup> Having correctly focused on the class of persons allowed to recover and concluding that Washington’s bystander NIED cases do not support the physician’s claims, the *Fisons Court* then looked at whether Washington’s intentional tort jurisprudence provided the necessary support. Noting that the WPLA does not require intentional conduct, the Court held that “intentional tort cases do not provide a state law basis for concluding that the physician’s claimed harm here is compensable under the PLA.” *Fisons*, 122 Wn.2d at 321.

Because Washington law has never extended emotional distress damages to this category of claimant—and therefore had no claim for NIED—the court sensibly ruled that such a claim is not recognized in Washington and therefore cannot be made under the WPLA. In contrast, this Court must look to Washington jurisprudence regarding direct claims for emotional distress damages to determine if Mr. Bylsma has a claim under the WPLA.

**C. Washington Cases Involving Direct Claims for Emotional Distress Damages in the Absence of Physical Injury Support Bylsma’s Claims.**

From this state’s infancy, Washington courts have consistently recognized direct claims for emotional distress damages in the absence of physical injury. For example, in the 1893 case *Wilson v. Northern Pacific*,<sup>8</sup> the plaintiff train passenger was mistakenly given the wrong exchange ticket during a train trip from Indiana to Seattle. The plaintiff alleged emotional distress damages when she was mistakenly directed to purchase a new ticket or get off the train in Montana. The court recognized her damages claim, noting that “[t]he contention that there can be no recovery for such damages, where there has been no direct

---

<sup>8</sup> *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621, 627, 32 P. 468 (1893).

physical injury, is clearly untenable, under the weight of the authorities." *Wilson*, 5 Wash. at 627.

Similarly, in *Davis Tacoma Ry. & Power Co.*,<sup>9</sup> the plaintiff alleged emotional distress when she was mistaken for a criminal and, in front of a large group of people, told to leave the premises. Permitting her claim to move forward, the court provided the following analysis:

It is probably true that no court has allowed a recovery for mental suffering, even though it resulted in a bodily injury, where the defendant has been guilty of no wrongful act as against the person seeking the recovery. If, for example, a person passing along a public street should be forced to witness an injury inflicted upon the person of another by the negligence of a third person, there could be no recovery by the first against the third, even though the shock caused by the horror of the sight produced such mental suffering as to materially affect the health of the first person. But when the mental suffering is the result of some wrongful act against the sufferer, even though there may be no actual physical injury, this court has held, and the courts generally hold, that such mental suffering may be taken into consideration in assessing the damages for the wrong. Furthermore, mental suffering on the part of the person wronged has always been held a proper subject for consideration in estimating damages in an action for slander or libel, and the principle which allows such damages in cases of that character applies with all its force to a case of this kind.

---

<sup>9</sup> *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 77 P. 209 (1904).

This early analysis echoes throughout Washington's emotional distress cases, and even foreshadows the arrival of bystander negligent infliction of emotional distress some 72 years later. See, e.g., *Hunsley*, *infra*.

Concerned about the potential for opening a Pandora's Box of "virtually unlimited liability," Washington courts have at times applied various rules to ensure that emotional distress claims have adequate boundaries. *Cunningham v. Lockard*, 48 Wash.App. 38, 44, 736 P.2d 305 (1987). For example, the courts at one time conditioned emotional distress damages absent physical injury on the actual or threatened invasion of the plaintiff's "person or security." E.g., *Schurk v. Christensen*, 80 Wn.2d 652, 655, 497 P.2d 937 (1972). However, this Court recognized that this was "simply a rule of thumb" that it acknowledged deviating from when the circumstances warranted it. *Murphy v. Tacoma*, 60 Wn.2d 603, 374 P.2d 976 (1962). Ultimately, the Court abrogated this rule in *Hunsley* when it recognized the negligent infliction of emotional distress ("NIED") as an independent tort.<sup>10</sup>

---

<sup>10</sup> *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976) (abrogating invasion of personal security rule); see also *Whaley v. State*, 90 Wash.App. 658, 673, 956 P.2d 1100 (1998) (recognizing abrogation).

Under Washington's NIED cases, "[c]auses of action for the negligent infliction of emotional distress may be divided into 1) direct actions, and 2) actions brought by third parties or bystanders who experience emotional distress as a result of injury to another." *Bishop v. State of Washington*, 77 Wn.App. 228, 233 FN 4, 889 P.2d 959 (1995); see also 16 Wash. Prac., Tort Law and Practice § 5.7 and § 5.8 (3d ed.). Washington courts analyze claims for NIED differently depending on whether the claim is a direct or third party action: in direct actions, courts follow the established tort principles of negligence;<sup>11</sup> in third party actions, courts generally limit recoveries to family members who observe injuries to relatives at the scene of the accident and before the relative's condition changes. See, e.g., *Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998).

In *Hunsley*, the plaintiff sought emotional distress damages when a vehicle crashed into the unoccupied utility room in her house, causing dismay about her property and what might have happened to her husband and friend. *Hunsley*, 87 Wn.2d at 425-426. The court applied the traditional standards of negligence and

---

<sup>11</sup> See, e.g., *Corrigal (infra)* (citing duty, breach, causation, and injury); but see *Colbert* (court raised question about how its decision affects *Corrigal*, but acknowledged that *Corrigal* involved a direct action for NIED and therefore presented different issues).

found that the defendant driver had a duty to avoid the negligent infliction of emotional distress. *Hunsley*, 87 Wn.2d at 435. Importantly, the Court also expressed concern about the potentially “boundless liability” of emotional distress “for the *peril of another*,” and added a general requirement for objective symptomatology as one way of limiting liability. *Id.* at 436 (*emphasis added*).

Since *Hunsley*, Washington courts have repeatedly demonstrated a willingness to expand the availability of emotional distress damages in the absence of physical injury where the plaintiff was directly and foreseeably harmed by the defendant’s negligence.<sup>12</sup> For example, in *Corrigal*, this Court recognized the plaintiff’s direct claim for NIED when a funeral home mailed the ashes of Ms. Corrigal’s son to her but failed to place them into an urn. Ms. Corrigal touched what she thought was packing material, and suffered mental distress when she realized it was actually her son’s bones and ashes.

The expansion continued in *Anderson v. State Farm Ins. Co.*, where the court permitted emotional distress damages where

---

<sup>12</sup> *Corrigal v. Ball and Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 577 P.2d 580 (1978); *Anderson v. State Farm Ins. Co.*, 101 Wn.App. 323, 2 P.3d 1029 (2000), review denied, 142 Wn.2d 1017, 20 P.3d 945 (2001); *Berger v. Sonnenland*, 144 Wn.2d 91, 26 P.3d 257 (2001); *Price v. State*, 114 Wash.App. 65, 57 P.3d 639 (2002); cf. *Percival v. Gen. Elec. Co.*, 708 F.Supp.2d 1171 (W.D.Wash. 2010).

an insurer negligently failed to advise plaintiff about her UIM coverage. Likewise, in *Price v. State*,<sup>13</sup> the court recognized the parents' claim for emotional distress damages against DSHS for negligent failure to disclose information pertinent to an adoption. In *Berger v. Sonnenland*, the court permitted emotional distress damages where a physician violated the state's medical malpractice act by negligently disclosing her medical records to a third party.<sup>14</sup> *Berger*, 144 Wn.2d at 94.

Washington's lengthy history of recognizing emotional distress damages, combined with the courts' willingness to broaden the availability of direct claims, supports Bylsma's claims. Here, as in *Corrigal*, Bylsma alleges emotional distress damages directly caused by the negligence of another party. Similar to *Corrigal*, which involved emotional damages arising from receiving and touching something startling, Bylsma suffered emotional damages when he went to eat a burger, put his finger into what turned out to be a glob of phlegm, and suffered objective symptomatology for

---

<sup>13</sup> 114 Wash.App. 65, 57 P.3d 639 (2002).

<sup>14</sup> Over this same period, Washington courts also relaxed the requirement for objective symptomatology. For example, where the plaintiff's claim is based upon a duty other than the general obligation to avoid the negligent infliction of emotional distress, the objective symptomatology requirement does not apply. See, e.g., *Berger, supra*; *Price, supra*; 16 Wash. Prac., Tort Law and Practice § 5.7 (3d ed.).

which he has received treatment. Bylsma's damages are the direct, natural, and foreseeable consequences of Defendants' negligence. *Accord Corrigan, supra; Price, supra; Berger, supra.* In such circumstances, where the plaintiff suffered direct emotional distress injuries, even in the absence of physical injuries, Washington courts consistently award emotional distress damages. Consequently, Bylsma's damages are recognized by the courts of this state, and are therefore permitted under the WPLA.

**D. *Colbert* Did Not Rule Overrule *Corrigan*: *Colbert* is a Bystander Case That Deals With Policy Concerns Not Present in This Matter.**

In its Order, the Ninth Circuit wondered "whether the Washington Supreme Court would import [*Colbert*'s limitations on bystander NIED claims] into direct NIED claims." See Order, p. 129. Because *Colbert* is a bystander NIED case, the policy concerns confronted by the *Colbert* court simply do not exist in this case. In *Colbert*, a father claimed emotional distress arising from the drowning death of his daughter. The father was not with the daughter at the time of her accident, but heard about it. The court held that the father's late arrival at the scene and foreknowledge of the accident precluded recovery under Washington's bystander NIED jurisprudence.

The limitations in *Colbert* do not extend to direct claims. In *Percival v. Gen. Elec. Co.*, the U.S. District Court for the Western District of Washington analyzed the history of bystander claims in Washington, and put the *Colbert* decision into its proper context. *Percival v. Gen. Elec. Co.*, 708 F.Supp.2d 1171 (W.D.Wash. 2010). In *Percival*, the district court was asked to determine whether grandchildren could bring claims for emotional distress after seeing their grandmother get horribly burned in a freak waffle-iron fire. No state supreme court case had extended bystander NIED cases to grandchildren, and the lone appellate decision on the question of what constitutes a family member for purposes of bringing a bystander NIED claim, *Shoemaker v. St. Joseph Hosp. and Health Care Center*, had limited such claimants to those family members who are enumerated in Washington's wrongful death statute, which excluded grandchildren. *Shoemaker v. St. Joseph Hosp. and Health Care Center*, 56 Wn.App. 575, 581-582, 784 P.2d 562 (1990).

Wading through the relevant law, the *Percival Court* painstakingly summarized over 30 years of bystander NIED cases, from *Hunsley* to *Colbert*. The court observed that bystander NIED claims evolved over this time frame, noting that Washington courts

had limited the availability of bystander claims to immediate family members who are physically present, or arrive shortly thereafter, the accident.<sup>15</sup> The *Percival Court* noted that Washington courts have expressed two overriding concerns when deciding bystander cases: 1) the tort concept of foreseeability does not provide an adequate limit on liability, and that some boundaries must be applied; and 2) in establishing such limits, courts must not “draw an arbitrary line that serves to exclude plaintiffs without meaningful distinction.” *Percival*, 708 F.Supp. at 1177.

Weaving this case history into a coherent tapestry, the *Percival Court* concluded that the Washington Supreme Court would not follow the *Shoemaker* case, and held that grandchildren could bring a claim for bystander NIED. The court emphasized that the “purpose of the tort and the court’s repeated statements that limits on negligent infliction of emotional distress actions should not be ‘arbitrary’ supports this view.” *Id.*

Our case is readily distinguishable from *Colbert*: Bylsma has brought a direct claim for NIED, not a bystander claim as in *Colbert*. Moreover, there are no third-party concerns or fear of extending the

---

<sup>15</sup> *Percival*, 708 F.Supp. at 1174-1177 citing *Cunningham v. Lockard*, 48 Wash.App. 38, 44, 736 P.2d 305 (1987); *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990); *Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998); and *Colbert*, *supra*.

WPLA beyond those claimants expressly contemplated by the Act. Therefore, none of the policy concerns about “virtually unlimited liability” apply in this case: because Bylsma was directly harmed by the Defendants’ negligence, the foreseeability and causation challenges discussed by *Colbert* do not apply.

We have found no cases limiting the availability of emotional distress damages where the plaintiff was the direct and foreseeable victim of the defendants’ negligence. To create such a limitation here would be arbitrary and otherwise not supported by Washington’s cases.

## **VI. CONCLUSION**

For the reasons explained above, the Court should conclude that the Washington Product Liability Act permits direct claims for emotional distress damages in the absence of physical injury. Washington courts consistently allow direct claims for emotional distress damages in the absence of physical injury. The Court should do the same here, because there is no way to meaningfully distinguish Bylsma from the claimants in *Corrigan*, *Berger*, *Anderson*, and *Price*.

If this court were to hold otherwise, food service entities can put whatever they want into customer’s food, and nevertheless be

immune from any claim for emotional distress if the contamination does not physically injure the consumer. Such a holding finds no support in the language of the WPLA, Washington case law, or public policy.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February, 2012.

STAFFORD FREY COOPER

By: 

Anne M. Bremner, WSBA #13269

Darrin E. Bailey, WSBA #34955

Danford D. Grant, WSBA #26042

*Attorneys for Appellant*

*Edward J. Bylsma*

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below true and correct copies of APPELLANT'S OPENING BRIEF on the following individuals:

Gary M. Bullock  
Gary M. Bullock and Associates  
1000 SW Broadway, Suite 2460  
Portland, OR 97205  
(503) 228-6277  
FAX: (503) 228-6280

Barry J. Goehler  
Law Office of Barry J. Goehler  
1001 SW 5th Avenue, Suite 1530  
Portland, OR 97204  
(503) 820-2512  
FAX: (503) 820-2513

*Attorneys for Defendants  
Burger King Corporation and  
Kaizen Restaurants, Inc.*

*Attorneys for Defendants  
Burger King Corporation and  
Kaizen Restaurants, Inc.*

- Via Facsimile
- Via First Class Mail
- Via Messenger
- Via Electronic Mail

Dated this 13<sup>th</sup> day of February, 2012, at Seattle, Washington.

  
Mary Ann J. Blackledge