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WASHINGTON CASE UPDATE

case in point...

Plaintiff Must Be "Foreseeable" to Bring Negligent Infliction of Emotional Distress Claim

From the desk of Kyle Riley: Washington law provides for claims of negligent infliction of emotional distress ("NIED") for "foreseeable" plaintiffs. But how do courts examine whether a particular plaintiff is "foreseeable?" Read on to find out.

Claims Pointer: In this case arising out of a parent witnessing her child's death as a result of a car accident, the Washington Court of Appeals held that the parent was not a foreseeable NIED plaintiff because she was told about the accident in advance, arrived on the accident scene after emergency responders, and did not have an "actual sensory experience" of the deceased's pain and suffering. The case provides an important discussion of the requirements of an NIED claim, an important consideration when defending bystander claims.

Cortese v. Wells, No. 76748-8-I, Washington Court of Appeals, Div. I (June 12, 2017) (unpublished)

While driving his pickup truck around a curve, Lucas Wells ("Wells") lost control. The truck overturned and slid to a stop. His passenger, seventeen-year-old Tanner Trosko ("Trosko"), died from mechanical asphyxiation due to his position in the truck. Trosko's parents, Trina ("Trina") and Richard Cortese (collectively, the "Corteses") lived near the accident scene and were doing yard work outside when the accident occurred. They heard the sirens of emergency responders, but at the time they did not realize what had happened or that Trosko was involved. Soon after, Wells's father went to the Corteses' house to inform them that Trosko had been involved in an accident and did not survive. The Corteses drove to the scene, arriving about 20 minutes after the accident. The scene was blocked off by the surrounding emergency vehicles, denying them entry. Trosko's body had been removed from the truck and was lying on the other side of the road covered with a sheet. Trina testified that she could see Trosko's feet under the sheet. A psychiatrist later diagnosed Trina with posttraumatic stress disorder ("PTSD") as a result of her son's accident, and Trina was unable to return to work after the accident.

Trina, both personally and as personal representative of Trosko's estate, brought suit against Wells and his parents on several theories, including NIED. At the time of the accident, the Corteses had an auto insurance policy that included underinsured motorist coverage, with State Farm Mutual Automobile Insurance Company ("State Farm"). State Farm intervened in the suit, and Trina filed an amended complaint adding State Farm as a defendant. State Farm later moved for summary judgment seeking to dismiss the NIED claim, arguing that Trina did not have an NIED claim because she had been informed that her son did not survive the accident before she arrived at the scene. The trial court agreed and granted summary judgment. Additionally, because there were no further claims pending against State Farm, the judgment also dismissed State Farm as a party defendant. Trina appealed, contending that the trial court erred in dismissing her NIED claim on summary judgment.

Under Washington law, the tort of NIED is a limited cause of action that allows a family member to recover for foreseeable intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident. The plaintiff must witness the victim's injuries at the scene of an accident (1) shortly after it occurs and (2) before there is a "material change" in the attendant circumstances. Washington courts have held that the plaintiff cannot recover if he or she did not witness the accident or did not arrive on scene shortly thereafter. In short, the plaintiff must actually witness the pain and suffering of the victim to be able to recover for NIED.
The Washington Court of Appeals examined

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several prior Washington Supreme Court cases involving NIED claims. In one example, a man was severely injured when he was struck by a car and knocked into a ditch by the side of the road. His relatives, the plaintiffs, discovered him when they drove along the same road shortly after the accident. In another example, a man's motorcycle collided with a school bus. His father, the plaintiff, unwittingly came upon on the scene within 10 minutes of the accident, before emergency crews arrived, and he saw his son on the ground, still conscious, but with his leg cut off and another severe injury leading to his death shortly afterwards. In both of these cases, the NIED claims were permitted to proceed because the plaintiffs were present at the scene and may have witnessed their family members' suffering before there was a substantial change in the victim's condition or location.

In contrast, the court discussed a third case in which the parents were awakened by a call from their daughter's boyfriend, who told them that their daughter had disappeared from the back of a boat at a nearby lake and a search was underway. The father drove to the lake, which was about five minutes from his house. Emergency responders were already at the scene. Several hours later, the father watched from a distance as his daughter's body was pulled into a rescue boat. The Supreme Court upheld dismissal of the NIED claim, reasoning that the father was not a foreseeable plaintiff as a matter of law because (1) when he arrived, the accident had already occurred; and (2) he did not observe his daughter's suffering or her condition while she was drowning. Additionally, the Court explained that it is appropriate to consider whether a plaintiff arrives on the scene of an accident unwittingly when determining whether an NIED claim can be brought. For the Court, if a close relative learns of the accident from a third party, that prior knowledge serves as a buffer against the full impact of observing the accident scene. Because Trina was informed of her son's accident by a third party, she arrived at the scene roughly 20 minutes after the accident occurred, emergency responders were already present and had the area cordoned off, and Trosko's body was already moved and covered by a sheet when Trina arrived, the Washington Court of Appeals determined that there was a "material change" in the scene. For the court, while Trina was justifiably upset at seeing her deceased son, she lacked the required actual sensory experience of the pain and suffering of her son to make an actionable NIED claim. Thus, Trina was not a foreseeable plaintiff as a matter of law. The trial court's dismissal on summary judgment of Trina's NIED claim was affirmed.

NOTE: This opinion has not been published. It is provided to demonstrate how the court approaches the issues involved in the case. It cannot be cited as authority to a court of law.

View full opinion at: https://www.courts.wa.gov/opinions/pdf/767488.pdf

Case updates are intended to inform our clients and others about legal matters of current interest. They are not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.

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