IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

YOUNG HI KO, individually, and as Personal Representative of the Estate of Hi Sun Ko, and as Personal Representative of Hi Sun Ko in a survivorship claim and the Marital Community composed thereof; MICHAEL M. KO and DAVID J. KO,	)	
Appellants,	)	No. 63312-1-I
v.	)	DIVISION ONE
SEAVIEW CHEVROLET and its Agent CHRISTIAN A. OLSON, TICEN VARNEY and JANE DOE VARNEY, Husband and Wife and the marital Community composed thereof, OMAR J. RUBBA and JANE DOE RUBBA, Husband and Wife and the Marital Community Composed thereof,	)	UNPUBLISHED OPINION
Respondents.	)	FILED: July 19, 2010

Spearman, J.-- Young Hi Ko was injured in a two-car collision involving her vehicle and a vehicle belonging to Seaview Chevrolet that was being test-driven by Ticen Varney. She informed her husband, Hi Sun Ko, over the phone that she had been in a car accident, and a police officer told him the location. By the time he arrived, several minutes later, emergency medical personnel were placing Mrs. Ko into an ambulance. Mr. Ko went to the hospital separately. After spending about two hours with his wife, Mr. Ko went out to the parking lot

to sit in his car, where he suffered a fatal heart attack. His body was discovered by the couple's son Michael. The Kos sued Seaview, Seaview owner Christian Olson, Seaview employee Omar Rubba, and Varney, asserting, among other causes of action, negligent infliction of emotional distress (NIED) on behalf of the late Mr. Ko. The trial court granted the defendants' motion for partial summary judgment, dismissing the NIED claims and leaving only Mrs. Ko's negligence claim for her own accident-related injuries. We affirm.

FACTS

On December 20, 2004, shortly after 5 p.m., there was a two-car collision near the driveway of the Seaview Chevrolet dealership. One car was driven by Young Hi Ko and the other by Ticen Varney, who was test-driving a car belonging to Seaview.[1] Mrs. Ko sustained injuries and her car was destroyed. She asked a police officer who arrived at the scene to call her husband, Hi Sun Ko. The officer used Mrs. Ko's cell phone to dial Mr. Ko and handed the phone to her. Mrs. Ko told her husband that she had been in a car accident, and the officer told Mr. Ko the location. Mr. Ko arrived at the scene about five to six minutes later, as Mrs. Ko was being placed into an ambulance by emergency medical personnel. Mrs. Ko told her husband that her chest was hurting badly, and he said he was glad she did not die despite being in such a huge accident.

Mr. Ko drove separately to Stevens Hospital. He arrived while Mrs. Ko

[1] Respondents will be referred to collectively as "Seaview." Appellants will be referred to collectively as "the Kos."

was waiting to have x-rays taken. After spending about two hours with his wife, Mr. Ko told her he was going outside for some fresh air. He called the couple's son, Michael, at around 8:20 p.m. and told him to come to the hospital. He told Michael that he was experiencing terrible stomach pain. Michael arrived, and after visiting Mrs. Ko in the ER, went to look for his father. He found Mr. Ko in the driver's seat of his car, apparently asleep. Michael tried to wake his father but could not. Mr. Ko was taken to the ER and shortly thereafter pronounced dead. It was later determined that he died from a heart attack.

The Kos filed a lawsuit alleging various causes of action against a number of parties: Seaview Chevrolet; its owner, Christian Olson; Omar Rubba, the Seaview employee riding with Varney; and Ticen Varney. Seaview filed a motion for summary judgment seeking dismissal of the NIED claims, which was granted by the trial court. The Kos filed a motion for reconsideration, which the court denied. The Kos appeal the dismissal of their NIED claim.

DISCUSSION

The court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794–95, 64 P.3d 22 (2003). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law.'" Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (quoting Locke v. City of Seattle, 162 Wn.2d 474, 483, 172 P.3d 705 (2007), and CR 56(c)). "When determining whether an issue of material

fact exists, the court construes all facts and inferences in favor of the nonmoving party." Michael, 165 Wn.2d at 601 (citing Reid v. Pierce County, 136 Wn.2d 195, 961 P.2d 333 (1998)). A genuine issue of material fact exists if reasonable minds could reach different conclusions based on the facts controlling the outcome of the litigation. Michael, 165 Wn.2d at 601 (citing Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982)).

"Summary judgment is subject to a burden shifting scheme." Michael, 165 Wn.2d at 601. " 'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.' " Id. (quoting Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). In doing so, the nonmoving party "may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." Michael, 165 Wn.2d at 602 (alteration in original) (quoting Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

In Washington, the tort of negligent infliction of emotional distress "is a limited, judicially created cause of action that allows a family member a recovery for 'foreseeable' intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident." Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 49, 176 P.3d 497 (2008) (citing Hegel v. McMahon, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998); Gain v. Carroll Mill Co., 114 Wn.2d 254, 261, 787 P.2d 553 (1990)). In order to recover, the bystander plaintiff must be present at

the scene of the injury-causing accident or arrive shortly thereafter, and must demonstrate objective symptoms of emotional distress. Hegel, 136 Wn.2d at 126; Gain, 114 Wn.2d at 261. Moreover, a plaintiff must come across the scene of an event "unwittingly" rather than having been alerted to the event ahead of time. Colbert, 163 Wn.2d at 59.

While the parties contest whether summary judgment was appropriate as to each of these elements, in our view the dispositive issue in this case is whether Mr. Ko arrived at the scene of his wife's accident unwittingly. Seaview argues that he did not because it is undisputed that Mrs. Ko called her husband and told him that she had been in an accident. The Kos contend, however, that mere knowledge of the accident is insufficient. They argue that because Mrs. Ko did not alert Mr. Ko as to the nature of her injuries, his arrival at the scene was nonetheless unwitting. The Kos are incorrect.

In Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 176 P.3d 497 (2008), Jay Colbert received a phone call informing him that his daughter had disappeared from a boat on a lake and a search was taking place for her. Id. at 46. When he arrived at the lake, police cars, ambulances, and a rescue boat were on the scene. Id. A few hours later, Colbert was told that rescuers had found his daughter's body, and he watched as her body was pulled onto a boat. Id. at 47. Colbert brought an NIED claim against the manufacturer of the boat and other parties. Id.

The Washington Supreme Court held that the trial court properly

dismissed Colbert's NIED claim where the undisputed evidence showed that his arrival on the scene did not occur unwittingly, but instead had been prompted by the phone call advising him of his daughter's disappearance. Id. at 59. In affirming the dismissal, the court stated:

> As we observed in Hegel, 136 Wn.2d at 130 …, "'[t]he kind of shock the tort requires is the result of the immediate aftermath of an accident.'" It is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene.

Id. at 60.

The Colbert court cited with approval Mazzagatti v. Everingham, 512 Pa. 266, 516 A.2d 672, 679 (Penn. 1986). In that case, the plaintiff's teenage daughter was riding her bike when she was struck and fatally injured by a car operated by the defendant. The plaintiff "received a phone call immediately after the collision informing her that her daughter had been involved in an automobile accident." Id. at 674. The Mazzagatti court held that because the plaintiff had prior knowledge of the accident before she arrived at the scene, the trial court's dismissal of the NIED claim was proper. Id. at 679.

The pertinent undisputed facts of this case mirror those of Colbert and Mazzagatti. In both of those cases, the plaintiff arrived at the scene in response to a phone call advising that a relative had been in an accident. In neither case was the plaintiff reported to have received information about the relative's condition. In each case the court concluded that dismissal of the NIED claim was proper, in part because the plaintiff had not arrived at the scene unwittingly.

Thus, we agree with Seaview that in order to establish that Mr. Ko arrived at the scene of the accident "unwittingly," it is necessary to show that he arrived with no knowledge that his wife had been involved in an accident. In this case, there is no dispute that he did not. Accordingly, the trial court did not err in dismissing the NIED claim.[2]

Affirmed.

Spearman, J.

WE CONCUR

Dwyer, C. J.

Becker, J.

[2] Because we affirm on this issue we need not resolve the questions of whether there was sufficient evidence that Mr. Ko arrived at the scene before the attendant circumstances of the accident had been materially altered and whether Mr. Ko's distress was caused by viewing his wife's condition at the scene of the accident.