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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF PLACER

7 ALAN HARDING,)
8 Plaintiff)
9 vs.)
10 SNOW BOWL, INC.)
and DOES I through XX,)
11 Defendants.)
12 _____)

March 21, 2006
Dept No: LARAW § K
Hearing Judge: Karen Markus
Case No. H0-2004-1234
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S DEMURRER OF
PLAINTIFF'S COMPLAINT

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17 Dated this 21st day of March, 2006

18
19 *Andy Chen*

20 _____
Andy Chen
Defendant's counsel

1 INTRODUCTION

2 Defendant Snow Bowl Inc. is a ski resort operator and has been sued by
3 Plaintiff Alan Harding, a patron of Defendant’s ski resort, for negligent infliction
4 of emotional distress. Plaintiff’s four-count complaint seeks to recover for pain and
5 suffering as well as medical expenses incurred as a result of the distress.

6 Defendant demurs to Plaintiff’s complaint under section 430.10(e) of the
7 California Code of Civil Procedure (West 2004), which allows a demurrer on the
8 grounds that a complaint “does not state facts sufficient to constitute a cause of
9 action.” Plaintiff has failed to plead facts sufficient to support a claim of negligent
10 infliction of emotional distress because he was one-half mile away from his son at
11 the time of the avalanche and did not contemporaneously perceive his son’s
12 injuries until he arrived at the accident site five minutes later.

13 STATEMENT OF FACTS

14 Plaintiff alleges that he and his son Gabriel, age fourteen, were
15 snowboarding on Devil’s Ridge, a mountain located within Defendant’s ski resort,
16 on the morning of December 20, 2005. (Compl. ¶ 4.) Plaintiff and his son were
17 approximately one-half mile apart and communicating by walkie-talkie when the
18 latter stated that he was at Twin Forks, a location on Devil’s Ridge. (Compl. ¶ 5.)
19 Immediately after, Plaintiff heard what he believed to be an avalanche coming
20 from the top of Devil’s Ridge. (Compl. ¶ 6.) Plaintiff then heard his son yell,

1 “Dad!” into his walkie-talkie before radio communication was abruptly lost.
2 (Compl. ¶ 6.) Plaintiff snowboarded towards his son’s location and upon arriving
3 at Twin Forks five minutes later, saw his son lying underneath an uprooted tree at
4 the edge of the avalanche. (Compl. ¶ 7.) Plaintiff’s son was conscious, but was
5 bleeding and unable to move his legs. (Compl. ¶ 7.)

6 Plaintiff states that he then suffered chest pain, nausea, and intense sweating,
7 all of which were later confirmed as evidence of a heart attack. (Compl. ¶ 8.)
8 Plaintiff alleges that seeing his son’s injuries caused him severe and ongoing
9 emotional distress and mental suffering which requires ongoing medical and
10 psychiatric treatment. (Compl. ¶¶ 10, 11.) Plaintiff contends that his son’s injuries
11 as well as his own distress and suffering were a proximate result of Snow Bowl
12 negligently failing to carry out avalanche abatement procedures on Devil’s Ridge
13 on the morning of December 20. (Compl. ¶ 9.)

14 ARGUMENT

15 Plaintiff’s complaint should be dismissed because the alleged facts foremost
16 do not constitute contemporaneous awareness as required under California law to
17 in order to recover for negligent infliction of emotional distress. In order to
18 recover, Plaintiff must prove that he was (1) contemporaneously aware of his son’s
19 injury, (2) that he was also contemporaneously aware that the avalanche was the
20 cause of Gabriel’s injury, (3) that Gabriel’s injury was ongoing when he arrived at

1 Twin Forks, and (4) that he suffered emotional distress more severe than that of a
2 disinterested witness that was not abnormal given the circumstances. *Thing v. La*
3 *Chusa*, 48 Cal. 3d 644, 677, 771 P. 2d 814, 829 (1989).

4 I. PLAINTIFF CANNOT RECOVER FOR NEGLIGENT INFLICTION OF
5 EMOTIONAL DISTRESS BECAUSE HE WAS NOT
6 CONTEMPORANEOUSLY AWARE OF HIS SON'S INJURY.

7 California law requires that a plaintiff be contemporaneously aware of an
8 injury in order to recover for emotional distress experienced as a result of it. *Thing*,
9 48 Cal. 3d at 661, 771 P. 2d at 825. A contemporaneous awareness that the injury
10 is probable is insufficient. *Scherr v. Las Vegas Hilton Hotels Corp.*, 168 Cal. App.
11 3d 908, 214 Cal. Rptr. 393 (1985) (woman was barred from recovery because she
12 was contemporaneously aware of a fire at the hotel where her husband was staying,
13 but not of his condition). It is also insufficient to discover the injury moments after
14 it has occurred. *Parsons v. Super. Ct.*, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495
15 (1978) (parents who came upon a car accident in which their children were
16 involved moments before were unable to recover).

17 Aside from a strict visual observation, contemporaneous awareness of an
18 injury can come from perception such as knowledge that, given the victim's
19 location relative to an injury-causing object, the victim had insufficient time to
20 remove herself to a safe location. In such an instance, the injury is all but certain
and plaintiff can be deemed contemporaneously aware of it even though he or she

1 did not witness the injury. *Krouse v. Graham*, 19 Cal. 3d 59, 562 P. 2d 1022
2 (1977) (a man who saw his wife behind their car immediately before he saw
3 another car speed towards her on a collision course was deemed
4 contemporaneously aware of her injury even though he did not observe the actual
5 collision). *See also Wilks v. Hom*, 2 Cal. App. 4th 1264, 3 Cal. Rptr. 2d 803 (1992)
6 (mother who knew her daughter was in a room where an explosion occurred was
7 deemed contemporaneously aware of the daughter's injury even though she did not
8 see the injury occur); *In re Air Crash Disaster near Cerritos, California*, 967 F. 2d
9 1421 (9th Cir. 1992) (woman was deemed contemporaneously aware that her
10 family had been injured when a plane crashed into their home even though she did
11 not witness their injury because she had seen her family in the home minutes
12 before).

13 Plaintiff's facts do not permit the conclusion that he was contemporaneously
14 aware of his son's injuries because Plaintiff was half a mile away from Twin Forks
15 and could not have seen his son's injuries as they occurred. In addition, Plaintiff's
16 facts do not permit the conclusion that he could infer that his son's injuries were all
17 but certain because Plaintiff was not contemporaneously aware of the precise
18 location of the avalanche. Plaintiff's facts do not indicate that he heard the
19 avalanche coming from Twin Forks (where his son said he was), but rather that he
20 heard it coming "from the direction of the top of Devil's Ridge." (Compl. ¶ 6.)

1 Since Plaintiff was also on Devil's Ridge, there were multiple locations the
2 avalanche could go towards and Plaintiff could not have known for certain that it
3 was headed towards Twin Forks.

4 Plaintiff's cause of action for negligent infliction of emotional distress must
5 fail because he did not visually observe his son's injuries as they occurred and
6 because Plaintiff was not contemporaneously aware of the avalanche's location
7 and, thus, could not infer that his son had been injured.

8
9 **II. PLAINTIFF CANNOT RECOVER FOR NEGLIGENT INFLECTION OF**
10 **EMOTIONAL DISTRESS BECAUSE HE WAS NOT**
11 **CONTEMPORANEOUSLY AWARE THAT THE AVALANCHE WAS**
12 **THE CAUSE OF HIS SON'S INJURY.**

13 Under California law, a plaintiff must also be contemporaneously aware of
14 causation between the victim's injury and the act resulting from defendant's
15 negligence. *Thing*, 48 Cal. 3d at 668, 771 P. 2d at 839. Acquiring this awareness
16 even moments after the victim's injury has occurred will prevent recovery. *Fife v.*
17 *Astenius*, 232 Cal. App. 3d 1090, 284 Cal. Rptr. 16 (1991) (family was barred from
18 recovery because they discovered moments after a car crash that their daughter had
19 been the victim). *See also Hathaway v. Super. Ct.*, 112 Cal. App. 3d 728, 169 Cal.
20 Rptr. 435 (1980) (parents barred from recovery because they discovered their son
had been electrocuted moments after it had occurred.); *Bird v. Saenz*, 28 Cal. 4th
910, 51 P. 3d 324 (2002) (family barred from recovery because they were not

1 contemporaneously aware that their mother's injury was the result of defendant's
2 medical negligence).

3 Plaintiff's facts do not permit the conclusion that he was contemporaneously
4 aware that the avalanche allegedly resulting from Snow Bowl's negligence was the
5 cause of his son's injuries. While Plaintiff knew his son was at Twin Forks,
6 Plaintiff did not know that the avalanche was also there. Plaintiff's complaint states
7 that he only heard what he assumed to be an avalanche "coming from the direction
8 of the top of Devil's Ridge." (Compl. ¶ 6.) In addition, the complaint states that his
9 son was found lying under a tree at the edge of the avalanche instead of buried
10 within it. While his son could have possibly outrun the avalanche, the manner in
11 which Gabriel was found suggests that he could have simply collided with the tree
12 independent of the avalanche or that he took shelter in the tree, only to be injured
13 when it was uprooted.

14 Plaintiff's attempt to recover for negligent infliction of emotional distress
15 cannot succeed because the facts alleged are insufficient to conclude that Plaintiff
16 was contemporaneously aware that his son's injuries were the result of the
17 avalanche allegedly caused by Snow Bowl's negligence.

1 III. PLAINTIFF CANNOT RECOVER FOR NEGLIGENT INFLICTION OF
2 EMOTIONAL DISTRESS BECAUSE HE DID NOT WITNESS
3 ONGOING INJURY TO GABRIEL.

4 California law requires that a plaintiff witness ongoing injury to the victim
5 in order to recover for negligent infliction of emotional distress. *Thing*, 48 Cal. 3d
6 at 668, 771 P. 2d at 839. Courts have indicated that an ongoing injury is one that
7 will get progressively worse without intervention. *Ortiz v. HPM Corp.*, 234 Cal.
8 App. 3d 178, 285 Cal. Rptr. 728 (1991) (woman who found her husband caught in
9 a running industrial machine was allowed to recover). *See also Ochoa v. Super.*
10 *Ct.*, 39 Cal. 3d 159, 703 P. 2d 1 (1985) (woman who witnessed the progression of
11 her son's pneumonia due to medical negligence was allowed to recover after he
12 died).

13 Plaintiff's complaint does not allege facts sufficient to conclude that his
14 son's injuries were ongoing when Plaintiff arrived at Twin Forks. Plaintiff states
15 that, upon arriving at Twin Forks, he discovered that Gabriel's paralysis had
16 already occurred and that he had already lost mobility in his legs. (Compl. ¶ 7.)
17 While Plaintiff may contend that Gabriel was still bleeding when he arrived at
18 Twin Forks and this constitutes ongoing injury, the Complaint does not indicate
19 that the bleeding was from anything more serious than a cut or scrape that would
20 be the naturally-expected consequence of any injury.

1 As a result, Plaintiff's cause of action for negligent infliction of emotional
2 distress cannot succeed because his son's injuries were not ongoing when Plaintiff
3 arrived at Twin Forks.

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5 IV. PLAINTIFF CANNOT RECOVER FOR NEGLIGENT INFLICTION OF
6 EMOTIONAL DISTRESS BECAUSE THE FACTS INDICATE THAT
7 PLAINTIFF'S HEART ATTACK RESULTED FROM WITNESSING HIS
8 SON'S INJURIES AFTER THEY HAD OCCURRED.

9 Under California law, a plaintiff cannot recover for negligent infliction of
10 emotional distress if he merely views an victim after an accident has occurred.
11 *Thing*, 48 Cal. 3d at 667-68, 771 P. 2d at 829-30 (mother who saw her child
12 minutes after he had been struck by an automobile was unable to recover for
13 emotional distress). Similarly, the facts indicate that Plaintiff experienced his heart
14 attack upon arriving at Twin Forks five minutes after the avalanche occurred. As a
15 result, Plaintiff cannot recover for his emotional distress because it did not arise
16 from witnessing the infliction of his son's injury.

17 In addition, a plaintiff must show that upon observing the negligently
18 inflicted injury of a third person, he suffered emotional distress that was more
19 severe than that which a disinterested witness would suffer and which was not an
20 abnormal response given the circumstances. *Thing*, 48 Cal. 3d at 668, 771 P. 2d at
839. Plaintiff states that he traversed the one-half mile to Twin Forks in five
minutes, or the equivalent of a walking pace of six miles per hour. Given

1 Plaintiff's suspicion that his son was injured, such a speed is inconsistent with
2 snowboarding downhill. It is more, however, consistent with either snowboarding
3 up a slight incline or along a level path. Traveling on snow in such a way is
4 extremely strenuous and would have been made all the more so because of
5 Plaintiff's age as well as his concern that his son was indeed injured. Therefore, the
6 precise contribution of this exertion to Plaintiff's ultimate distress is unknown. As
7 a result, the facts do not permit any conclusion as to whether Plaintiff's distress
8 upon seeing Gabriel's injuries was more severe than that of the disinterested
9 witness or whether it was abnormal given the circumstances.

10 Plaintiff cause of action for negligent infliction of emotional distress must
11 fail because the facts are insufficient to conclude that, upon seeing Gabriel's
12 injuries, Plaintiff suffered distress more severe than the disinterested witness and
13 that such distress was not abnormal given the circumstances.

14 CONCLUSION

15 For the foregoing reasons, Defendant Snow Bowl, Inc. respectfully requests
16 that this Court enter an order dismissing Plaintiff's Complaint without leave to
17 amend.

18 Snow Bowl, Inc.
19 By: *Andy Chen*
20 Their Attorney