

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I would affirm summary judgment as to the negligent infliction of emotional distress claim by Plaintiff-Appellant Deborah A. Guia (Plaintiff) based on her observation of an injury to a stranger caused by Defendant-Appellee Dennis T. Arakaki. However, I would vacate summary judgment as to the emotional distress claim based on the "near-miss" of Plaintiff's vehicle that allegedly placed Plaintiff in fear of her physical safety.

It is foreseeable that negligent conduct such as that in an automobile accident may place one in personal peril although no physical contact occurs. In such a case, the question of whether recovery is allowed should rest on whether "a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Rodrigues v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970)). "It is the reasonableness of a plaintiff's response . . . that should define the ambit of a plaintiff's recovery and delimit the extent to which a defendant must render compensation." Guth v. Freeland, 96 Hawai'i 147, 157, 28 P.3d 982, 992 (2001) (Acoba, J., dissenting). The fact that the plaintiff did not suffer some physical injury should not be dispositive. We have held to that effect. See Doe Parents No. 1 v. State, Dep't of Educ., 100 Hawai'i 34, 58 P.3d 545 (2002); Guth, 96 Hawai'i 147, 28 P.3d 982; John & Jane Roes, 1-

100 v. FHP, Inc., 91 Hawai'i 470, 985 P.2d 661 (1999).

In the absence of any judicial experience as to whether vacating summary judgment in a case like this one would result in an "entirely unreasonable burden" and the lack of evidence at this point as to whether the measure of damages in this case would be "unquantifiable," SDO at 6, I would not reject this claim. "[T]he advantages gained by the courts in administering claims of mental distress by reference to narrow categories [is] outweighed by the burden thereby imposed on the plaintiff and . . . [by] the "interest in freedom from negligent infliction of serious mental distress [that] is entitled to independent legal protection." Guth, 96 Hawai'i at 159, 28 P.3d at 994 (Acoba, J., dissenting) (quoting Rodrigues, 52 Haw. at 173-74, 472 P.2d at 520). "[P]sychic tort law in this jurisdiction [has] progressed beyond the categorical approach in deciding the viability of a mental distress claim." Id. In a common occurrence such as that of an automobile accident, the jury can properly determine, under the guidance of the general test set down in Rodrigues, whether under the particular facts of the case a plaintiff's serious mental distress claim is reasonable and genuine.