***** NOT FOR PUBLICATION *****

NO. 23890

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

DEBORAH A. GUIA,
Plaintiff-Appellant,

vs.

DENNIS T. ARAKAKI, U-HAUL OF HAWAIʻI, INC., JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE NON-PROFIT ENTITIES 1-10, and DOE GOVERNMENTAL ENTITIES 1-10,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 99-0391)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ., and Acoba, J., concurring separately and dissenting)

The plaintiff-appellant Deborah A. Guia appeals from the following rulings by the circuit court of the third circuit, the Honorable Riki May Amano presiding: (1) the findings of fact (FOFs), conclusions of law (COLs), and order granting summary judgment in favor of the defendants-appellees Dennis T. Arakaki and U-Haul of Hawaiʻi, Inc. [collectively hereinafter, "the Defendants"], filed October 12, 2000; and (2) the final judgment, filed October 30, 2000.

On appeal, Guia contends as follows: (1) "[t]he circuit court erred when it ruled that the lack of any relationship between . . . Guia and the accident victim completely foreclosed . . . Guia's [negligent infliction of emotional distress (NIED)] claim as a matter of law," insofar as Guia asserts that "[t]he nature of the relationship between an NIED plaintiff and an accident victim, rather than extinguishing

a claim altogether, is considered one factor in assessing damages"; and (2) the circuit court erred in ruling that the Defendants "did not owe . . . Guia a duty to refrain from the [NIED]" because "[t]he circuit court's concern related to unlimited or unmanageable liability in stranger-bystander cases[, an issue that] has already been addressed by effective policy limitations on NIED recoveries that are [currently] in place." Guia's points of error specifically challenge the circuit court's COLs and its oral ruling at a September 8, 2000 hearing on the Defendants' August 4, 2000 motion for summary judgment.

The Defendants counter that the circuit court's rulings were not erroneous, inter alia, for the following reasons: (1) "[t]he prevailing body of law underlying bystander claims for NIED does not support [Guia's] claim"; (2) "[e]xisting limitations on bystander NIED claims are inadequate to prevent unlimited liability," inasmuch as, inter alia, (a) "[t]he 'foreseeability' approach alone is an inadequate limitation to bystander NIED liability" and (b) "[m]erely requiring proof of serious mental distress does not realistically and reasonably limit the liability of defendants"; (3) "[p]recluding complete strangers from the class of eligible plaintiffs for bystander NIED would not be arbitrary line-drawing"; and (4) Guia's "narrow-miss theory does not change the conclusion that damages for NIED are not recoverable in this case," insofar as "Hawaii law does not support the imposition of liability under [Guia's] 'narrow-miss' theory." The Defendants also argue that,

> [i]n the alternative, should [Guia] be permitted to proceed under her 'narrow-miss' theory, pursuant to [John & Jane Roes, 1-100 v. FHP, Inc., 91 Hawai'i 470, 985 P.2d 661 (1999) (FHP)], damages must be confined . . . to the time between when [Guia] first felt 'in peril for her own safety'

> until that time when [Arakaki's] vehicle had passed without striking her vehicle.

Guia replies that this court should broaden the duty of care it articulated in Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970), and Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974), so that it includes "the situation where the witness-bystander NIED plaintiff was placed in personal peril for the plaintiff's own safety as a result of a defendant's negligence," inasmuch as, inter alia, this court "has already ruled in . . . FHP . . . that a plaintiff whose physical safety is directly threatened by a defendant's negligence should be able to maintain an NIED cause of action."

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as a matter of law that Guia does not have a cognizable NIED claim predicated either on (1) her observation of the defendant's injury of a stranger or (2) the "near-miss" of her vehicle by the Defendants' vehicle. Accordingly, we affirm the circuit court's (1) October 12, 2000 FOFs, COLs, and order granting summary judgment in favor of the Defendants and (2) October 30, 2000 final judgment.

In every NIED case cited by Guia, this court has only approved claims involving a relationship between plaintiff and "victim" that was close in nature. See, e.g., Rodrigues, 52 Haw. at 156-60, 472 P.2d at 512-14 (predicate injury to home that plaintiffs built and owned); Leong, 55 Haw. at 399, 520 P.2d at 760 (predicate injury to step-grandmother of plaintiff); Campbell v. Animal Quarantine Station, 63 Haw. 557, 558-59, 632 P.2d 1066, 1067-68 (1981) (predicate injury to dog that plaintiffs had owned

for nine years); Masaki v. General Motors Corp., 71 Haw. 1, 30, 780 P.2d 566, 569 (1989) (predicate injury to the plaintiffs' son); and Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 6, 837 P.2d 1273, 1278 (1992) (predicate injury to plaintiff's husband). Even in cases in which this court has upheld NIED claims without some predicate physical injury, the "bad act" has either been directly to the plaintiff or to a person closely related to the plaintiff. See, e.g., Brown v. Bannister, 14 Haw. 34, 36-37 (1902) (predicate injury was humiliation suffered by plaintiff as a result of a breach of a promise to marry); Francis v. Lee Enters., Inc., 89 Hawai'i 234, 235, 971 P.2d 707, 708 (1999) (predicate injury was defendant's breach of contract with plaintiff). In the present matter, it is undisputed that Guia and Joseph Moke, the pedestrian who was struck by Arakaki's vehicle, were strangers at the time of the accident.

Our evaluation of NIED claims is not limited to precedent: "[I]n determining whether or not a duty is owed by [an alleged tortfeasor] herein, we must weigh the considerations of policy which favor [a plaintiff's] recovery against those which favor limiting the [alleged tortfeasor's] liability." Kelley v. Kokua Sales and Supply, Ltd., 56 Haw. 204, 207, 532 P.2d 673, 675 (1975) (emphasis added). Nonetheless, policy considerations are unhelpful to Guia. In Kelley, this court observed that it would be unreasonable to find NIED liability where a plaintiff has absolutely no relationship with the "victim" prior to the subject injury:

> Without a reasonable and proper limitation of the scope of the duty of care owed by appellees, appellees would be confronted with an unmanageable, unbearable and totally unpredictable liability.
>
> As stated in W. Prosser, Law of Torts s 54 at 334 (4th

ed. 1971):

> It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends. . . .

Kelley v. Kokua Sales and Supply, Ltd., 56 Haw. 204, 209, 532 P.2d 673, 676 (1975) (emphases added). Notwithstanding Guia's attempts to distinguish Kelley on its facts, the Kelley court's adoption of Prosser's policy considerations was not fact-specific and we may and do, therefore, apply the foregoing reasoning to the present matter.

Thus, insofar as there is no precedent in Hawai‘i jurisprudence for extending NIED liability to plaintiffs with no relationship to the injured party, and based on the policy considerations noted in Kelley, we hold that Guia did not have a valid NIED claim based upon her observation of the subject accident.

FHP noted that this court has "subscribed to the principle that recovery for [NIED] by one not physically injured is generally permitted only when there is some physical injury to property or [another] person resulting from the defendant's conduct." 91 Hawai‘i at 473-74, 985 P.2d at 664-65 (internal quotation signals and citations omitted) (some brackets added and some in original). Guia invites this court to deviate, as it did in FHP, Guth v. Freeland, 96 Hawai‘i 147, 28 P.3d 982 (2001), and Doe Parents No. 1 v. State, Dep't of Educ., 100 Hawai‘i 34, 58 P.3d 545 (2002), from the general rule by approving her NIED claim based on the "near-miss" of her vehicle by Arakaki's vehicle instead of upon any injury to herself. Based on FHP,

Guth, and Doe Parents, we consider whether Guia's emotional distress was reasonably foreseeable, FHP, 91 Hawai'i at 475, 985 P.2d at 666, as well as the following "concerns":

> 1) emotional distress is temporary and often trivial; 2) the distress may be imagined and is easily feigned; and 3) it may seem unfair to hold defendants, whose actions were merely negligent, financially responsible for harm that appears remote from the actual conduct.

Guth, 96 Hawai'i at 152, 28 P.3d at 987 (internal citations omitted). Although the foregoing considerations, in themselves, may not absolutely rule out the cognizability of Guia's NIED claim, we are mindful of the general principles underlying NIED, as set forth supra in Kelley, 56 Haw. At 209, 532 P.2d at 676.

Given the circumstances underlying the present matter, our recognizing the cognizability of Guia's NIED claim would result in "unmanageable, unbearable and totally unpredictable liability." Id. In light of the ever-increasing traffic on Hawaii's roadways, there is a substantial likelihood of frequent multiple bystander "near-misses," which, if allowed to serve as the bases of NIED claims, would result in the kind of "entirely unreasonable burden" envisioned in Kelley. Id. Moreover, as the Defendants note in their answering brief, assuming arguendo that Guia's NIED claim were cognizable, her damages resulting from the "near-miss" are unquantifiable. FHP observed that "any damages recoverable for NIED should be confined to the time between discovery of the actual exposure and the receipt of a reliable negative medical diagnosis." 91 Hawai'i at 477, 985 P.2d at 668 (internal citations omitted). By analogy, therefore, Guia's damages could only accrue from the instant during which she feared a collision with Arakaki's vehicle to the virtually immediate realization that a collision would not occur, an amount

that defies computation.

Thus, inasmuch as the prospect of allowing Guia's NIED claim based upon her "near-miss" theory presents both an "entirely unreasonable burden" and an unquantifiable measure of damages, and in light of our rejection of Guia's NIED claim predicated upon her observation of the subject accident, we adhere to the general rule that "recovery for [NIED] by one not physically injured is . . . permitted only when there is some physical injury to property or [another] person resulting from the defendant's conduct." 91 Hawai'i at 473-74, 985 P.2d at 664-65 (citing Jenkins v. Liberty Newspapers Ltd. Partnership, 89 Hawai'i 254, 269, 971 P.2d 1089, 1104 (1999); Tseu ex rel. Hobbes v. Jeyte, 88 Hawai'i 85, 92-93, 962 P.2d 344, 351-52, reconsideration denied, 91 Hawai'i 124, 980 P.2d 998 (1998); Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., 76 Hawai'i 454, 466, 879 P.2d 1037, 1049 (1994)). Therefore,

IT IS HEREBY ORDERED that the circuit court's (1) October 12, 2000 FOFs, COLs, and order granting summary judgment in favor of the Defendants and (2) October 30, 2000 final judgment from which the appeal is taken are affirmed.

DATED: Honolulu, Hawai'i, November 5, 2004.

On the briefs:

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for the plaintiff-appellant
Deborah A. Guia

J. Patrick Gallagher,
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Dennis T. Arakaki and U-Haul
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