* * * **FOR PUBLICATION** * * *

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

--- o0o ---

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Plaintiff-Appellant,

vs.

DONALD H. DENNISON and LYNN T. DENNISON,
Individually and as Next Friend of TYRONE
DENNISON, a minor, Defendants-Appellees.

NO. 24975

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 00-1-1323)

OCTOBER 11, 2005

MOON, C.J., LEVINSON, NAKAYAMA, AND DUFFY, JJ.;
ACOBA, J., DISSENTING

OPINION OF THE COURT BY MOON, C.J.

This action for declaratory relief arises out of an automobile accident in which then-fifteen year old Tyrone Dennison (Tyrone) suffered severe injuries, including brain damage. The dispute on appeal centers around Tyrone's father, defendant-appellee Donald H. Dennison (Donald) and his separate claim for underinsured motorist (UIM) benefits. Briefly stated, although Donald was not involved in the accident, he claimed emotional distress as a result of seeing his son being attended to by emergency medical personnel at the triage area near the

accident scene and eventually taken away by the medi-vac helicopter. Plaintiff-appellant Liberty Mutual Fire Insurance Company [hereinafter, Liberty Mutual] tendered a policy limit payment for UIM benefits[1] to Donald and defendant-appellee Lynn T. Dennison [hereinafter, collectively, the Dennisons] as next friends of Tyrone. Donald also filed a separate claim for UIM benefits based on his emotional distress. Liberty Mutual subsequently filed this declaratory judgment action, requesting the Circuit Court of the First Circuit, the Honorable Richard W. Pollack presiding, to declare that, because Donald was not involved in nor witnessed the accident, he was not entitled to compensation under Hawai'i Revised Statutes (HRS) § 431:10C-306(b) (1993)[2] and First Ins. Co. of Hawai'i v.

---

[1] At the time of the accident, Tyrone's parents were the named insureds under a motor vehicle insurance policy issued by Liberty Mutual that included a UIM coverage endorsement of a policy limit of $35,000.00 per accident.

[2] HRS § 431:10C-306(b) (1993), which has since been amended, was in effect at the time of the February 21, 1997 accident and is, therefore, applicable in the instant case. See 1987 Haw. Sess. L. Act 347, § 4 at 342; 1997 Haw. Sess. L. Act 251, § 70 at 553. It provided in pertinent part:

> (b) Tort liability is not abolished as to the following persons, their personal representatives, or their legal guardians in the following circumstances:
> (1) (A) Death occurs to such person in such a motor vehicle accident;
> . . . .
> (2) Injury occurs to such person in a motor vehicle accident in which the amount paid or accrued exceeds the medical-rehabilitative limit established in section 431:10C-308 for expenses provided in section 431:10C-103(10(A) and (B); provided that the expenses paid shall be presumed to be reasonable and necessary in establishing the medical-rehabilitative limit; or
> (3) Injury occurs to such person in such an accident and as a result of such injury that the aggregate limit of no-fault benefits outlined in section 431:10C-103(10) payable to such person are exhausted.

(continued...)

Lawrence, 77 Hawai'i 2, 881 P.2d 489, reconsideration denied, 77 Hawai'i 373, 884 P.2d 1149 (1994) [hereinafter, Lawrence].[3]

Liberty Mutual appeals from the circuit court's: (1) September 26, 2001 order denying its motion for summary judgment [hereinafter, motion or motion for summary judgment]; and (2) February 5, 2002 judgment in favor of the Dennisons, individually and as next friends of their son, Tyrone. On

---

[2](...continued)
(Emphases added.)

[3] We note that Lawrence concerned the then-repealed HRS chapter 294 (1985) because, "[a]lthough Hawai'i's No-Fault Law, HRS chapter 294 (1985) was repealed in 1987, it [was] applicable [in Lawrence] because the recodified chapter HRS chapter 431:10C, became effective after the date of the accident involved in [Lawrence]." Lawrence, 77 Hawai'i at 4 n.3, 881 P.2d at 491 n.3 (citation omitted). The precise statute at issue in Lawrence was HRS § 294-6 (1985), which provided in relevant part:

> **Abolition of tort liability.** (a) Tort liability of the owner, operator, or user of an insured motor vehicle, or the operator or user of an uninsured motor vehicle, or the operator or user of an uninsured motor vehicle who operates or uses such vehicle without reason to believe it to be an uninsured motor vehicle, with respect to accidental harm arising from motor vehicle accidents occurring in this State, is abolished, except as to the following persons or their personal representatives, or legal guardians, and in the following circumstances:
> (1) Death occurs to such person in such a motor vehicle accident; or injury occurs to such person which consists, in whole or in part, in a significant permanent loss of use of a part or function of the body; or injury occurs to such person which consists of a permanent and serious disfigurement which results in subjection of the injured person to mental or emotional suffering;
> (2) Injury occurs to such person in a motor vehicle accident in which the amount paid or accrued exceeds the medical-rehabilitative limit established in section 294-10(b) for expenses provided in section 294-1(10)(A) and (B); provided that the expenses paid shall be presumed to be reasonable and necessary in establishing the medical-rehabilitative limit; or
> (3) Injury occurs to such person in such an accident and as a result of such injury the aggregate limit of no-fault benefits outlined in section 294-2(10) payable to such person are exhausted.

Id. at 8, 881 P.2d at 495 (citing HRS § 294-6(a) (1985)) (emphasis in original). However, as previously indicated, we apply the substantively similar HRS § 431:10C-306(b) (1993) to the instant case.

appeal, Liberty Mutual contends that the circuit court erred in denying its motion and entering judgment in favor of the Dennisons based on its conclusion that Donald was not precluded from filing, under his insurance policy, a separate and independent claim for emotional distress allegedly arising from the instant accident.[4] Liberty Mutual maintains that, because Donald was neither involved in the car accident nor witnessed the accident, he is precluded from recovering for any emotional distress under HRS § 431:10C-306(b) and Lawrence, 77 Hawai'i 2, 881 P.2d 489.

As discussed more fully infra in section III, we vacate the circuit court's September 26, 2001 order and February 5, 2002 judgment and remand this case for entry of judgment in favor of Liberty Mutual.

---

[4] Specifically, Liberty Mutual contends that the circuit court "erred in denying [its] motion for summary judgment based on its holding that 'direct emotional trauma may be inflicted where the claimant did not witness the injury-producing event at the time it occurred but arrived onto the accident scene shortly thereafter,' and thus, Donald is not 'precluded as a matter of law from asserting an independent claim for emotional distress.'" Regarding the circuit court's judgment, Liberty Mutual argues:

> The [circuit] court erred in entering a judgment in favor of the Dennisons and against Liberty Mutual following the non-jury trial, based on its conclusions that:
>
> a) Donald "suffered his 'accidental harm' in the accident within the meaning of HRS Chapter 431:10C-306(b)" (emphasis in original)
>
> b) "'direct emotional trauma' may be inflicted where the claimant did not witness the injury-producing event at the time it occurred but arrived onto the accident scene shortly thereafter"; and
>
> c) "[Donald] is not precluded from asserting a separate [UIM] policy limit under the applicable policy for his emotional distress claim."

(Emphasis in original.)

I. BACKGROUND

A. Factual Background

The parties stipulated to the following statement of facts:

> 1. At approximately 1:06 a.m. on Friday, February 21, 1997, [Tyrone] was a passenger in a 1992 Toyota Corolla driven by nineteen year old Michael Lutz.
> 2. [Lutz] had a blood alcohol level of .09 percent and had lost control of the Toyota Corolla which crashed into a utility pole on Kuloa Avenue in Kapolei.
> 3. [Tyrone], the son of [the Dennisons], was fifteen years old at the time (DOB January 19, 1982).
> 4. [Tyrone] suffered severe injuries, including brain damage and jaw injuries in the collision.
> 5. [Tyrone] was found unconscious and in critical condition in the back seat of the Lutz vehicle.
> 6. [The Dennisons] were not in the Lutz car when the collision occurred and they did not witness the actual collision.
> 7. At about 1:30 a.m., police officer Joseph Tabarejo, one of the investigating officers, went to the Dennison home and told [the Dennisons] that Tyrone was in an accident and that they were going to medevac him.
> 8. At that time, [Donald] had already heard a helicopter overhead.
> 9. Prior to notification by officer Tabarejo, [Donald] was not aware that his son had been involved or injured in an accident.
> 10. Immediately after speaking with officer Tabarejo, [Donald] did not hesitate, and he ran out the side door of his garage, jumped a wall behind his house and ran to the triage area where the ambulance and firemen had congregated which was down the street from the site of the collision. [Donald] estimated that the distance from the wall behind his house to the ambulance may have been about the length of a football field.
> 11. [Donald] looked closely at two boys who were on gurneys. Neither was his son Tyrone. Both boys were conscious, and nothing seemed to be wrong with them. After he saw those two boys, [Donald] knew that the medevac helicopter was for his son.
> 12. [Donald] proceeded toward the ambulance at the scene and looked inside.
> 13. Medical technicians and a fireman were in the ambulance intubating a patient, i.e. placing a mask attached to a manual pump, over the patient's nose and mouth.
> 14. The patient's face was partially covered, so [Donald] could not recognize his son.
> 15. One of the medical technicians asked [Donald] "who you looking for?" [Donald] said "my son." The attendant said "what, the kid with the tattoo?" [Donald] said "yeah" and the medical technician said "that's him there[]", referring to the individual the medical technicians were working on.

16. [Tyrone] was unconscious and completely unresponsive.

17. [Donald] knew that his son's condition was serious when he saw the medical technicians intubating Tyrone. He wondered how long his son had not been breathing and how long his brain had been deprived of oxygen.

18. [Donald] asked if Tyrone was going to make it and no one would give him an answer. The medical technicians just told [Donald] that they were going to fly [Tyrone] to Queen's Medical Center and that he should go there.

19. The medical technicians then took Tyrone out of the ambulance and wheeled him by gurney to the helicopter which was waiting. [Donald] could see blood on his son's face.

20. As [Tyrone] was being taken to the medevac helicopter, [Donald] told him to "hang on" and "I love you".

21. [Donald] ran back to his house and told his wife what happened. [Donald] then broke down and cried.

22. [The Dennisons] then went to the hospital and were told that Tyrone was in critical condition. [Tyrone] was in a coma, which lasted approximately two months.

23. After the accident, [Donald] underwent individual and group counseling on the mainland for psychological injuries.

24. Robert C. Marvit, M.D. has also reviewed medical records and examined [Donald] and states in his February 20, 2001 report that "it is [his] opinion with reasonable probability that indeed, [Donald] had suffered a significant, severe, mental and emotional distress of this automobile accident and his coming upon the scene in the manner described."

25. At the time of the accident, [the Dennisons] were the named insureds under a motor vehicle insurance policy issued by Liberty Mutual, with a policy period of January 10, 1997 to January 10, 1998, which included an [UIM coverage] endorsement.

26. The insuring agreement for the UIM endorsement provided in pertinent part:

> We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of bodily injury:
> 1. Sustained by an **insured**; and
> 2. Caused by an accident.
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **underinsured motor vehicle.**
> We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

27. The UIM endorsement provided that the [UIM] policy limit was $35,000 per accident, stacked times two vehicle[s], or $70,000.

28. At the time of the underlying accident, [Lutz] was insured by AIG Hawaii ("AIG"), with a bodily injury policy limit of $25,000 per person. On August 30, 1999, AIG, on behalf of [Lutz], tendered the sum of $50,000. One $25,000 policy limit was paid for the injuries to [Tyrone].

> A separate policy limit of $25,000 was paid for what AIG characterized as [Donald]'s independent claims.
>
> 29. Thereafter, Liberty Mutual tendered a UIM policy limit in the amount of $70,000 to [the Dennisons], as Next of Friend of [Tyrone].
>
> 30. [Donald] made a demand for a separate UIM policy limit under Liberty Mutual's policy for his claim of emotional distress.
>
> 31. Liberty Mutual refused to pay on a separate UIM policy limit for [Donald]'s claims and filed the above-captioned declaratory judgment action on April 24, 2000.

(Brackets and underscored emphases added.) (Bold emphases in original.)

B. Procedural Background

On April 24, 2000, Liberty Mutual filed a complaint for declaratory judgment, wherein it sought "[a] declaration that [Donald] is not entitled to [UIM] benefits under the policy arising out of the underlying accident[.]" On May 17, 2000, the Dennisons filed an answer to the complaint.

On August 14, 2001, Liberty Mutual filed a motion for summary judgment, acknowledging that "the crux of this case is whether [Donald]'s alleged emotional distress is derivative of Tyrone's injuries in the accident." Liberty Mutual contended: "Under the controlling authority of First Insurance Co. of Hawaii vs. Lawrence, 77 Hawai'i 2, 881 P.2d 489 (1994), [Donald]'s alleged emotional distress is clearly derivative of Tyrone's injuries, and [Donald] is therefore not entitled to a separate UIM policy limit as a matter of law." (Emphases in original.) (Parenthetical notation omitted.) Liberty Mutual also asserted that, "since it is undisputed that [Donald] was not 'in' the motor vehicle accident that injured his son, his claim for

[negligent infliction of emotional distress (NIED)] is derivative and he is not entitled to a separate UIM policy limit as a matter of Hawaii motor vehicle insurance law." (Capital letters altered.) On September 7, 2001, the Dennisons filed a memorandum in opposition to Liberty Mutual's motion for summary judgment, arguing that Donald's claim for emotional distress was not derivative -- i.e., it was separate from and independent of Tyrone's claim -- and that, therefore, he was not precluded from recovering UIM benefits from Liberty Mutual.

On September 17, 2001, the circuit court held a hearing on Liberty Mutual's motion. The court entered an order denying Liberty Mutual's motion for summary judgment on September 26, 2001. Therein, the court noted that, under Lawrence, "'direct emotional trauma' may be inflicted where the claimant did not witness the injury-producing event at the time it occurred but arrived onto the accident scene shortly thereafter." (Emphasis added.) Thus, the court denied Liberty Mutual's motion and ruled that Donald was not precluded from asserting an independent claim for emotional distress.

Following the denial of Liberty Mutual's motion for summary judgment, a bench trial commenced on November 13, 2001. On November 16, 2001, the parties entered into the foregoing stipulated statement of facts. The stipulated statement phrased the issue before the circuit court as follows:

> Whether [Donald] is precluded from making a claim on a separate policy limit of [UIM] coverage for his emotional distress allegedly suffered in the subject February 21, 1997 motor vehicle collision, because [Donald] was not in the motor vehicle with his son [Tyrone] at the time of the collision and did not witness the actual collision itself?
>
> Liberty Mutual and [the Dennisons] agree that the above captioned [d]eclaratory [j]udgment action will not address the following issues which are reserved for a private [UIM] arbitration under the terms of the Liberty Mutual auto policy issued to [the Dennisons]:
>
> 1. The extent of damages, if any, to which [Donald] is entitled for his emotional distress claim.
> 2. Issues of proximate cause.
> 3. Issues of negligence and tort liability of the responsible driver in this single car accident, [Lutz].

On February 5, 2002, the circuit court entered its judgment in favor of the Dennisons and against Liberty Mutual, concluding that "[Donald] is not precluded from asserting a separate [UIM] benefits policy limit under the applicable policy for his emotional distress claim." Liberty Mutual filed its timely notice of appeal on March 7, 2002.

II. STANDARDS OF REVIEW

A. Statutory Interpretation

"The standard of review for statutory construction is well-established. The interpretation of a statute is a question of law which this court reviews de novo. Where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning." Labrador v. Liberty Mut. Group, 103 Hawai'i 206, 211, 81 P.3d 386, 391 (2003) (citations, internal quotation marks, and brackets omitted).

B. Conclusions of Law

"We review the circuit court's conclusions of law de novo." Chock v. Gov't Employees Ins. Co., 103 Hawai'i 263, 265,

81 P.3d 1178, 1180 (2003) (citing Troyer v. Adams, 102 Hawai'i 399, 409-10, 77 P.3d 83, 93-94 (2003)).

III. DISCUSSION

The sole issue in the instant case is:

> Whether [Donald] is precluded from making a claim on a separate policy limit of [UIM] coverage for his emotional distress allegedly suffered in the subject February 21, 1997 motor vehicle collision, because [Donald] was not in the motor vehicle with his son [Tyrone] at the time of the collision and did not witness the actual collision itself?

As the parties suggest, HRS § 431:10C-306(b) and this court's decision in Lawrence are dispositive of the issue before this court.

Liberty Mutual contends that, under the plain language of HRS § 431:10C-306(b), see supra note 2, "Donald did not sustain his alleged accidental harm 'in' a 'motor vehicle accident'" and, thus, is precluded from recovering UIM benefits for his emotional distress. Liberty Mutual also argues that, pursuant to Lawrence, "a claimant is required to 'witness an event that caused injury' in order to assert an independent claim for negligent infliction of emotional distress." (Brackets omitted.) Thus, Liberty Mutual urges that, because Donald did not witness the car accident and arrived at the "triage area" thirty minutes after the accident occurred, Donald is precluded from recovering UIM benefits separate and apart from Tyrone's claim.

In response, the Dennisons assert that the circuit court properly concluded that Donald was not precluded from

recovering for his emotional distress inasmuch as "Lawrence did not establish a requirement that the actual impact must be observed." (Capital letters altered.) The Dennisons argue that:

> All of the issues raised on this appeal are controlled by [Lawrence, 77 Hawai'i 2, 881 P.2d 489]. Lawrence held: (1) that emotional distress injuries are allowed under Hawai'i's motor vehicle insurance law; (2) claims for emotional distress experienced by a bystander as a result of injury to another are permitted under Hawaii's motor vehicle insurance law if they arise in the context of motor vehicle accidents; and (3) such emotional distress injury is independent and entitled to a separate policy limit if there is direct emotional trauma involving a sensory perception of either the accident or the scene shortly thereafter to witness the injured or efforts to revive them.

(Emphasis added.)

Preliminarily, we note that the Dennisons' assertion emphasized above is merely their interpretation of the holding in Lawrence. No such language exists in that opinion. Moreover, as discussed infra, the holding in Lawrence does not allow for independent UIM claims where the claimant did not witness the event causing injury or death to the host plaintiff.

As this court noted in Lawrence, the state legislature abolished tort liability for accidental harm arising from motor vehicle accidents such that accident victims are no longer able "to maintain a traditional negligence tort action against an alleged wrongdoer" except in specific circumstances as delineated under HRS § 431:10C-306. 77 Hawai'i at 7-8, 881 P.2d at 494-95 (quoting Parker v. Nakaoka, 68 Haw. 557, 560, 722 P.2d 1028, 1030 (1986). In that regard, HRS § 431:10C-306 does not abolish tort liability where, inter alia, "[i]njury occurs to such person in a motor vehicle accident[.]" (Emphasis added.) As such,

"[p]ursuant to the plain and unambiguous language of [HRS § 431:10C-306(b)], persons . . . may assert a claim for accidental harm[5] as long as the threshold requirements are met -- the first being that death or injury occurs 'to such person in' a motor vehicle accident." Lawrence, 77 Hawai'i at 8, 881 P.2d at 195 (emphasis in original). Although the parties in this case agree that, pursuant to HRS § 431:10C-306(b), Donald may not recover insurance benefits from Liberty Mutual unless he suffered emotional distress "in" the February 21, 1997 car accident, they disagree as to whether Donald was "in" the accident for purposes of HRS § 431:10C-306. Thus, the issue before this court is whether Donald, who was not a passenger in the Lutz car, did not witness the car accident, and arrived "down the street from the site of the collision" approximately thirty minutes after the accident occurred, sustained his emotional distress "in" the car accident for purposes of HRS § 431:10C-306(b) and, therefore, may maintain an independent claim against Liberty Mutual.

In Lawrence, 77 Hawai'i at 4, 881 P.2d at 491, this court addressed whether emotional distress claims brought by family members, who were not involved in and did not witness the car accident that killed their relative, are entitled to independent protection under Hawaii's no-fault law. In that case, Christopher Smith, Jr. (Christopher), a pedestrian, was

---

[5] In Lawrence, this court held that "the statutory definition of accidental harm includes emotional distress[.]" 77 Hawai'i at 4, 881 P.2d at 491.

struck and killed by a car being pursued by the police. Lawrence, 77 Hawai'i at 5, 881 P.2d at 492. Christopher's parents, wife, and children [hereinafter, collectively, the Smiths] thereafter filed an action claiming NIED against the driver and the driver's parents, who were insured by First Insurance Co. of Hawai'i (First Insurance). Id. It was undisputed that "[t]he Smiths were not involved in nor did they witness the accident." Id. Thus, First Insurance argued that the Smiths' NIED claims "were derivative and, therefore, subject to a single limit of liability coverage under the policy." Id. The circuit court disagreed, ruling that "NIED is an independent tort requiring proof based on ordinary tort principles and exists apart from the underlying tort claimed by the host tort plaintiff." Id. (ellipses points, brackets, and internal quotation marks omitted).

On appeal, this court reversed in part the circuit court's order, holding that, "although NIED claims are entitled to independent protection under general Hawai'i tort law, such claims under Hawai'i's No-Fault Law, HRS chapter [431:10C], are derivative,[6] subject to the exception discussed below[.]" Id. at 4, 881 P.2d at 491 (emphasis added); see also id. at 10, 881 P.2d at 497 (noting that "derivative claims . . . arising from bodily injuries suffered by one's spouse in an automobile

[6] This court noted that "'[d]erivative' means 'that which has not its origin in itself, but owes its existence to something foregoing.'" Lawrence, 77 Hawai'i at 10 n.10, 881 P.2d at 496 n.10 (some brackets omitted, some added).

accident . . . are not independent to the extent that they may be asserted without regard to the nature or extent of the injuries to the person suffering accidental harm" (citing Doi v. Hawaiian Ins. & Guar. Co., 6 Haw. App. 456, 727 P.2d 884 (1986) (emphasis omitted))). This court formulated the "exception" to the general rule after reviewing the following cases from other jurisdictions: Employers Cas. Ins. Co. v. Foust, 105 Cal. Rptr. 505 (Cal. Ct. App. 1972) [hereinafter, Foust]; Crabtree v. State Farm Ins. Co., 632 So. 2d 736 (La. 1994) [hereinafter, Crabtree]; Wolfe v. State Farm Ins. Co., 540 A.2d 871, cert. denied, 546 A.2d 562 (N.J. 1988) [hereinafter, Wolfe]; State Farm Mut. Auto. Ins. Co. v. Ramsey, 368 S.E.2d 477 (S.C. Ct. App.), aff'd, 374 S.E.2d 896 (S.C. 1988) [hereinafter, Ramsey]. With respect to Ramsey, Wolfe, and Foust, this court stated:

> We have reviewed these cases and find a common, factually distinguishable thread running through them. In Ramsey, the mother witnessed her daughter being fatally struck in an automobile accident. In Wolfe, the father pulled his daughter from a car where she had been fatally exposed to carbon monoxide and carried her into the home where he and his wife helplessly watched a first aid squad's attempt at revival fail. Finally, in Foust, a mother witnessed the automobile accident where her son was struck and the father learned of his child's severe injuries within ten minutes of the accident.
>
> In all three cases, a family member directly witnessed the accident. Here, none of the Smiths were present at the accident scene and their basis to recover damages is upon the emotional distress they allegedly suffered after Christopher's death. Thus, the Smiths' claims are consequentially related to Christopher's death.

Lawrence, 77 Hawai'i at 11, 881 P.2d at 498 (footnote omitted) (emphases added). This court also discussed Crabtree v. State Farm Ins. Co., 632 So. 2d 736 (La. 1994), wherein "the wife of a motorcycle rider . . . witnessed a vehicle strike him head-on."

Lawrence, 77 Hawai'i at 12-13, 881 P.2d at 499-500 (emphasis added). Relying on these cases, this court "adopt[ed] the proposition that, if the Smiths had been witnesses to the event that caused Christopher's death, they would have non-derivative and wholly independent NIED claims that would trigger separate single limits under the policy as to each proven claim." Id. at 13, 881 P.2d at 500 (some emphasis in original, some added). In other words, the Lawrence court held that NIED claims are derivative under Hawaii's no-fault law unless the claimant witnessed the event causing injury or death to the host plaintiff. On this basis alone, it appears that, because it is undisputed that Donald "[was] not in the Lutz car when the collision occurred and . . . did not witness the actual collision" and because Tyrone survived the car accident, Donald's claim for emotional distress is derivative of Tyrone's claim for UIM benefits.

Notwithstanding the foregoing, however, the Dennisons point to the Lawrence court's conclusion that:

> claims for emotional distress under Hawai'i's No-Fault Law . . . are derivative if they (a) arise in the context of motor vehicle accidents and (b) "owe their existence" to any injury to another person that does not involve the kind of direct emotional trauma to a witness or bystander, as in Ramsey, Wolfe, Foust, and Crabtree[.]"

Id. at 17, 881 P.2d at 504 (emphases added). Based on this statement, the Dennisons assert that "the dispositive question in this appeal is therefore whether [Donald] experienced the kind of 'direct emotional trauma' illustrated in Ramsey, Wolfe, Foust,

and Crabtree." The Dennisons focus on Wolfe inasmuch as they believe the claimants in that case "did not see the actual impact or injury-producing event."[7] Rather, contrary to the Lawrence court's characterization of Wolfe as a case in which "a family member directly witnessed the accident[,]" Lawrence, 77 Hawai'i at 11, 881 P.2d at 498, the Dennisons assert that, in Wolfe, "[w]hat her parents actually witnessed was an unsuccessful attempt to revive her." Thus, the Dennisons believe that the Lawrence court did not limit recovery to only those claimants who witnessed the injury producing event. We disagree.

In Wolfe,

> Brenda Haines [hereinafter, Brenda] died from being exposed to carbon monoxide while she sat in a car belonging to David A. Phillips. Brenda's father pulled her from the car, and carried her into the house and called the local first aid squad. Brenda's parents and their other children watched helplessly as the first aid squad's revival attempt failed.

540 A.2d at 872 (brackets added). Inasmuch as Brenda's father opened the car door, exposing himself to the carbon monoxide that caused Brenda's death, we believe her father was involved in the circumstances of her death. In other words, in coming upon the

---

[7] We note that the Dennisons further cite to cases from other jurisdictions that concern NIED generally -- i.e., not in the context of no-fault insurance coverage. Similarly, in Lawrence, the Smiths referred to the following cases, which did not concern automobile insurance: Rodrigues v. State, 52 Haw. 156, 472 P.2d 509, reh'g denied, 52 Haw. 156, 472 P.2d 509 (1970) (claim for property damage caused by surface waters overflowing a blocked drainage culvert), and Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981) (claim for emotional distress suffered when the plaintiffs' dog died in the Animal Quarantine Station). 77 Hawai'i at 9, 881 P.2d at 496. However, the Lawrence court stated: "the crucial distinction overlooked by the appellees is that the Smiths' NIED claims are not being reviewed within a 'pure' tort context . . . the appellees have apparently overlooked the fact that Rodrigues and Campbell were not considered within the context of automobile insurance coverage." Id. at 9, 881 P.2d at 496. Similarly, the cases cited by the Dennisons do not concern no-fault insurance coverage and are, therefore, inapposite to the instant case.

scene of Brenda's death as he did, Brenda's father witnessed the fatal "accident." Thus, the Lawrence court properly characterized Wolfe as a case in which the claimant, Brenda's father, witnessed the event causing her death. Furthermore, this court noted that the Wolfe court

> implied in its reasoning that a difference exists where NIED claimants have not witnessed the accident resulting in injury or death:
>
> > While any harm to a spouse or a family member causes sorrow, we are here concerned with a more narrowly confined interest in mental and emotional stability. When confronted with accidental death, the reaction to be expected of normal persons, is shock and fright. It is the sensory perception of a shocking event which causes a separate, compensable injury. In a Portee claim,[14] it is the plaintiff's perception which causes the perceiver to suffer a traumatic sense of loss. Such emotional distress is not equivalent of grief from losing a loved one, but is inflicted by the trauma of seeing a loved one suffer or die or of seeing efforts to revive her being unsuccessful.
>
> 14. "Portee claim" refers to Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980), wherein the court held that emotional distress claims are not derivative, but separate and independent actions.

Lawrence, 77 Hawai'i at 11-12, 881 P.2d at 498-99 (quoting Wolfe, 540 A.2d at 873) (ellipses points omitted). This court additionally found it significant that Wolfe distinguished United Pacific Ins. Co. v. Edgecomb, 706 P.2d 233 (Wash. 1985), wherein a father's claim was held to be "derivative from his son's injuries particularly because he did not witness the accident." Id. at 12, 881 P.2d at 499 (brackets omitted) (emphasis in original) (quoting Wolfe, 540 A.2d at 874). Consequently, because Brenda's father witnessed the event which caused her death, the Wolfe court held that his claim was separate from and independent of Brenda's claim.

Citing Wolfe, the Dennisons assert that Donald may recover for his emotional distress inasmuch as he observed Tyrone "suffer or die or . . . efforts to revive [him] being unsuccessful." It is noteworthy, however, that the Lawrence court did not expressly adopt that assertion and, moreover, even assuming that this court agreed with Wolfe's assertion, the facts of this case do not permit such recovery. First, inasmuch as Tyrone survived the accident, Donald did not witness unsuccessful revival efforts or Tyrone's death. Second, it is undisputed that Tyrone was "unconscious and completely unresponsive" when Donald saw him and remained as such for two months after the accident. Thus, it cannot be said that Donald observed Tyrone suffering in pain. As such, Donald's claim for emotional distress is derivative of Tyrone's claim for UIM benefits.[8] See id. at 9, 881 P.2d at 496 (noting that "[c]ommon sense dictates that but for Christopher's death, [the Smiths] would not have any claims

[8] We agree with the dissent's proposition that this court in Lawrence recognized the potential for an independent claim by a family member for "witnessing serious injury to a close relation . . . coming onto the scene of the event soon thereafter," Dissent at 3 (citation omitted) (emphasis in original), as discussed in Crabtree and Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990). However, we do not believe that it applies to the facts of the instant case. In Crabtree, the court held that a woman's claims for emotional distress were independent because she was "in the accident." 632 So. 2d at 745. There, the claimant, who was following her husband in another vehicle, witnessed a vehicle strike him head-on, and rushed to his side where she saw his leg nearly completely severed below the knee. In Lejeune, the court approved of a cause of action by the wife of a comatose patient who arrived at his hospital room shortly after a rat had bitten him on the face and before he had either been moved or bandaged. 556 So. 2d at 571. These facts do not align themselves with the instant case inasmuch as Donald did not "timely arrive at the immediate scene of the accident." Crabtree, 632 So. 2d at 745 n.19. Rather, Donald learned of the accident while at home and arrived at the "triage area" which was "down the street from the site of the collision," Stipulated Statements of Fact (SSF) No. 10, approximately thirty minutes after the accident occurred and saw Tyrone unconscious in the ambulance. See SSF Nos. 1, 7, 13, and 16.

of severe emotional distress to assert in the first instance" and that, "[b]ecause the Smiths' claims clearly originate[] from the primary claim -- the death of Christopher -- we conclude that such claims are derivative."). Therefore, we hold that the circuit court erred in concluding that Donald was not precluded from asserting a separate and independent UIM benefits claim for his emotional distress.

IV. CONCLUSION

Based on the foregoing, we hold, as a matter of law, that Donald's claim for emotional distress is derivative of Tyrone's claim for UIM benefits. Accordingly, we vacate the circuit court's September 26, 2001 order denying Liberty Mutual's motion for summary judgment and February 5, 2002 judgment in favor of the Dennisons and remand this case with instructions for the circuit court to enter judgment in favor of Liberty Mutual.

On the briefs:

Randall Y. Yamamoto and Brian A. Kang (of Watanabe, Ing & Kawashima), for plaintiff-appellant

Bert S. Sakuda, Gregory L. Lui-Kwan, and Geoffrey K.S. Komeya (of Cronin, Fried, Sekiya, Kekina & Fairbanks), for defendants-appellees