DISSENTING OPINION BY ACOBA, J.

In First Ins. Co. of Hawai'i v. Lawrence, 77 Hawai'i 2, 8, 881 P.2d 489, 495, reconsideration denied, 77 Hawai'i 373, 884 P.2d 1149 (1994), it was concluded that, under the Hawai'i No-Fault Law, tort liability was abolished except with respect to "accidental harm" sustained by persons "in" a motor vehicle accident. In that regard, this court decided that generally, negligent infliction of emotional distress claims as an aspect of "accidental harm" are to be treated as derivative claims rather than independent claims under the no fault law. Id. at 4, 881 P.2d at 491. Lawrence went on to hold that "derivative claims are not subject to separate 'each person' liability coverage limits[,]" id., in an automobile insurance policy.

Thus, this court declared that the plaintiffs in the underlying case of Lawrence, the "Smith claimants[,] . . . must first meet the threshold requirement that [their] accidental harm occurred 'in' the accident." Id. at 11, 881 P.2d at 498. But this court observed that "[t]he Smiths were not involved in nor did they witness the [subject] accident." Id. at 5, 881 P.2d at 492. It was decided, therefore, that "[b]ecause the Smiths' claims clearly originate[d] from the primary claim -- the death of Christopher -- . . . that such claims are derivative." Id. at 9, 881 P.2d at 498. As a result the Smiths' "independent claims of emotional distress separate and apart from the claim being

made on behalf of Christopher by his estate[,]" id., were rejected by this court.

Nevertheless, it was recognized that because the no fault law was "in derogation of principles of common law tort liability, [it] must be strictly construed . . . ." Id. at 8, 881 P.2d at 495 (internal quotation marks and citations omitted). Despite the fact that the Smiths had not been involved in the accident, it was determined "[b]ased on the analysis of [other] authorities . . . that, if the Smiths had been witnesses to the event that caused Christopher's death, they would have . . . independent . . . claims[.]" Id. at 13, 881 P.2d at 500. Thus, on a claim for emotional distress, this court indicated that not only one involved in an accident but also one who was a witness to an accident could assert an independent claim. See infra. In adopting this "witness" exception to the requirement that the plaintiffs' accidental harm occur "in" the accident, this court also seemingly acknowledged a corollary to the witness exception that included a claim of one "timely present at the immediate scene of the accident." Id. at 13, 881 P.2d at 500 (internal quotation marks and citation omitted). In the context of the witness exception adoption, this court said:

> It is undisputed that the Smiths did not witness the accident nor were they "timely present at the immediate scene of the accident." [Crabtree v. State Farm Ins., 632 So. 2d 736, 745 n.19 (La. 1994)]. Thus, the cases relied upon by the appellees are inapposite here.
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> Based on the analysis of the authorities cited above, we adopt 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 [negligent infliction of emotional distress] claims that would trigger

> separate single limits under the policy as to each proven claim.

Id. (emphasis in original and emphases added). Under such a corollary, "the court recognize[s] a cause of action for witnessing serious injury to a close relation in either viewing the event causing the injury or coming onto the scene of the event soon thereafter." Id. at 13 n.15, 881 P.2d 500 n.13 (citing Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990)) (emphasis added). Based on the passages above and as the circuit court in the instant case noted, "the rule espoused by Lawrence . . . does not preclude as a matter of law the assertion of an independent claim for emotional distress where the claimant did not witness the collision itself but was 'timely present' thereafter at the accident scene."

In recognizing that the no fault statute must be strictly construed, an exception to the requirement that accidental harm must be sustained "in" the motor vehicle accident was approved for familial witnesses to accidents. That policy and logic warrant the same treatment under the law for one who witnesses the accident involving a relative and one who timely arrives "at the immediate scene" of the accident involving a relative, in light of the tort's objective of independently protecting against "serious mental distress." Rodrigues v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970). No new objections can be raised reasonably to the recognition of a claim of one timely on the scene than would exist with respect to a

witness to an accident. The safeguards against disproportionate verdicts for family witnesses timely on the scene of an accident would be the same as "in innumerable other negligence cases where a 'reasonable [person]' standard and general tort principles are applied[.]" Id. at 175 n.8, 472 P.2d at 521 n.8.

The majority maintains, however, that the facts of this case do not fit into the rubric of "'coming onto the scene of the event soon thereafter,' . . . as discussed in Crabtree and Lejeune[]." Majority opinion at 18 n.8. Crabtree, however, was not concerned with applying that test[1] and Lejeune would not foreclose the claim of Defendant-Appellee Donald H. Dennison (Donald).[2] The parameters of the "scene" and the measurement of

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[1] While the majority cites to Crabtree v. State Farm Ins. Co., 632 So. 2d 736 (La. 1994), that case does not resolve the issue of what constitutes a claimant's arrival at the accident or injury scene. In Crabtree, the court found that the claimant, Mrs. Crabtree, met all the requisites for a "Lejeune claim," which is the "right to recover damages for severe mental pain and anguish caused by witnessing serious injury to a close relation." Id. at 738. The court interpreted the claim in light of an insurance policy which allowed for $50,000 in coverage for "all damages due to bodily injury to two or more persons in the same accident." Id. at 739 (emphasis added). Thus, in determining whether Mrs. Crabtree could recover under the policy, the court had to decide whether Mrs. Crabtree suffered her mental anguish in the "same accident" as that which caused the victim's bodily injuries. Id. Because the court found that Mrs. Crabtree directly witnessed the event causing her mental anguish, (her husband being hit by another car), it concluded that the mental anguish she suffered occurred "in the same accident" as that which caused her husband's bodily injuries. Id. at 745. Inasmuch as Mrs. Crabtree directly witnessed the injury-causing event, the Crabtree court did not have to engage in any analysis of what constitutes the "accident scene." Crabtree thus is not instructive in defining the meaning of "accident scene." While Defendant-Appellee Donald H. Dennison (Donald) did not directly witness his son's injury, that does not disqualify his claim under Crabtree.

[2] In Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 561 (La. 1990), the Supreme Court of Louisiana found that Mrs. Lejeune successfully stated a cause of action for mental pain and anguish damages arising from her discovery that her hospitalized comatose husband had sustained rat bites. The court examined the circumstances, concluding in pertinent part that "[a claimant] must . . . either view the accident or injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in

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the "soon thereafter" are issues to be determined by the fact finder on a case-by-case basis subject only to this court's determination on "whether the case presents questions on which reasonable men would disagree[.]" Rodrigues, 52 Haw. at 175 n.8, 472 P.2d at 521 n.8.

Under the stipulated facts, Donald arrived at the "triage area" and saw his son in the ambulance -- circumstances one might reasonably expect to encounter at the "scene" of an automobile accident. He arrived within thirty minutes of the accident, not a lengthy period after the accident. The "scene" and time of arrival under these facts were not so remote from the accident so as to absolutely preclude consideration of Donald's claim under the test. This is a case where "'reasonable persons

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[2](...continued)
the victim's condition." Id. at 569-70 (emphasis added). In determining that Mrs. Lejeune effectively stated a cause of action, the court relied on the fact that "Mrs. Lejeune arrived at her husband's hospital room shortly after the injury-causing event and after the student nurse cleaned blood from Mr. Lejeune's wounds." Id. at 571 (emphases added). Her husband's appearance was not "appreciably chang[ed]," he remained in the same room, and he had not been bandaged. Id. However, some of the blood on his face had been removed. Id.

In the case at hand, the facts indicate that Donald arrived at the "triage area" which was "down the street from the site of the collision" approximately thirty minutes after the accident and saw his son in an unconscious and unresponsive condition in the ambulance. Accordingly, Donald's son's appearance had not "appreciably changed" because he remained in an unconscious and unresponsive state from the accident. Apparently, the only change in appearance is that he had a mask partially covering his face. As in Lejeune, then, there was also a slight change in appearance due to the nurse having cleaned blood from the victim's wounds. Id. at at 562.

The facts in the instant case do not show that "substantial change ha[d] occurred in the victim's condition," id. at 570, because Donald's son remained in the unconscious and unresponsive state that the accident ostensibly caused. Similarly, the victim in Lejeune remained essentially the same. While the Lejeune court did note the fact that the victim there had not been moved to another room, the court did not define, nor express the bounds of what might encompass the "scene of the injury." Id. at 571. Therefore, while Donald's son had been moved from the site of the collision to the "triage area" which was "down the street from the site of the collision," Lejeune does not indicate whether such movement would lie outside the bounds of what constitutes the appropriate scene.

in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue[.]'" Chambers v. City & County of Honolulu, 48 Haw. 539, 541, 406 P.2d 380, 382 (1965) (quoting Young v. Price, 47 Haw. 309, 313, 388 P.2d 203, 206 (1963)). It is not a case where reasonable persons could reach only one conclusion. Any dispute in this case as to the compensable nature of the distress is an issue which appropriately concerns the amount of damages, if any, that should be awarded and should not operate as a bar to consideration of the claim itself. In view of the facts here, Donald was one who should not be excluded as a matter of law from asserting such a claim.

Accordingly, I respectfully disagree and would affirm the circuit court's order denying both Plaintiff-Appellant Liberty Mutual's Motion for Summary Judgment and Defendants-Appellees Donald and Lynn T. Dennison's Motion for Summary Judgment.