CONCURRING OPINION BY ACOBA, J.

I concur in the majority opinion[1] and with the majority's ultimate conclusion that the court did not err in finding Defendant/Third-Party Plaintiff/Third-Party Counterclaim-Defendant/Counterclaim Defendant/Cross-Claim Plaintiff-Appellant Department of Human Services (DHS) liable to Jarrett for Negligent Infliction of Emotional Distress (NIED).[2] Majority opinion at 114. However, I write separately to reiterate what I believe to be the applicable standard in NIED cases where the plaintiff has not suffered physical injury.

I.

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[1] Although the parties did not challenge Conclusion of Law (COL) no. 66 entered by the Circuit Court of the Second Circuit (the court), I respectfully note that the rights of Plaintiff-Appellee Jarrett Kahoʻohanohano (Jarrett) accrued at the time of the reported injury to the child (Minor) and not at the time of the filing of the complaint as stated in COL no. 66. See also majority opinion at 113 n.45.

Act 112, signed into law on May 19, 2006, abolished joint and several liability as to government entities except for "tort claims relating to the maintenance and design of highways pursuant to section 663-10.9" 2006 Haw. Sess. L. Act 112 § 1, at 325. Act 112 also contained a retroactivity provision that allowed for retroactive application of the new rule "to the extent permitted by law." 2006 Haw. Sess. L. Act 112 § 3, at 326. In considering whether Act 112 could be applied lawfully in the instant case, the court correctly concluded that "[t]he legislature's Conference Committee report confirms" that Act 112 may be applied retroactively only to the extent that such application would not "violat[e] accrued or substantive rights." The court further concluded that "[t]he appropriate date for determining when [Jarrett's] substantive right to joint and several liability vested was the date of the filing of the complaint, and retroactive divestiture would be manifestly unjust." While this conclusion has no impact on the disposition of the instant case, inasmuch as Act 112 was not applied, I note the foregoing as Jarrett acknowledged in oral argument, because the question of the correct construction of Act 112 may arise in future cases.

[2] I note that the DHS's argument that "Jarrett's . . . distance from the injury demonstrates that any harm he suffered certainly appears remote from DHS's alleged role[]" is consistent with a recent majority decision of this court regarding NIED. See Liberty Mut. Fire Ins. Co. v. Dennison, 108 Hawai'i 380, 388, 120 P.3d 1115, 1123 (2005) (holding that a father who saw his injured son after a serious automobile accident was not entitled to damages for his emotional distress under his automobile insurance policy).

In Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970), this court abandoned the physical injury rule, concluding that rather than requiring physical injury to the plaintiff as a guarantee of trustworthiness in NIED claims, "the preferable approach is to adopt general standards to test the genuineness and seriousness of mental distress in any particular case." Id. at 171, 472 P.2d at 519. Rodrigues developed the following standard: "[S]erious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Id. at 173, 472 P.2d at 520. This court also opined that "psychic tort law in this jurisdiction [has] progressed beyond the categorical approach in deciding the viability of a mental distress claim." Guth v. Freeland, 96 Hawai'i 147, 159, 28 P.3d 982, 994 (Acoba, J., concurring and dissenting).

Despite the Rodrigues court's rejection of "the categorical approach," the recent evolution of our NIED jurisprudence has been characterized by the case-by-case creation of categorical exceptions to the physical injury rule. This court created such an exception for plaintiffs who were exposed to blood infected with HIV. John & Jane Roes v. FHP, Inc., 91 Hawai'i 470, 472, 985 P.2d 661, 663 (1999) (holding that "(1) Hawai'i law recognizes a cause of action for NIED arising out of a fear of developing AIDS following exposure to HIV-positive

blood resulting in actual physical peril to the claimant; and (2) damages may be based solely upon serious emotional distress, even absent proof of a predicate physical injury" (emphasis added)). In Guth, this court adopted the already widely recognized exception to the general rule that allows plaintiffs whose decedent's corpse had been mishandled to bring a claim for NIED. 96 Hawai'i at 154, 28 P.3d at 989 (adopting a rule "that does not require the plaintiff's emotional distress to manifest itself in a physical injury" in cases involving the mishandling of a corpse). Doe Parents No. 1 v. State, 100 Hawai'i 34, 58 P.3d 545 (2002), saw the creation of yet another exception -- for parents' claims of emotional distress for minor victims of non-violent sexual assault. Id. at 70, 58 P.3d at 581 (concluding that when a child is molested, "the child's resulting psychological trauma, as well as that of the child's parents, involves circumstances that guarantee its genuineness and seriousness" such that the child and his or her parents may bring a claim for NIED without alleging any predicate physical injury (brackets, internal quotation marks, and citation omitted)). In this case, in sustaining Jarrett's NIED claim, the majority declares, apparently as a predicate to recovery for NIED, that there must be "some physical injury to property or another person resulting from the defendant's conduct." Majority opinion at 95 (quoting Doe Parents No. 1, 100 Hawai'i at 69, 58 P.3d at 580 (citation omitted)) (internal quotation marks omitted). But, this is

merely the description of the result reached by the categorical rule approach applied in Doe Parents No. 1 and in this case, and is not the product of a generally applicable rule allowing recovery for NIED.

II.

A.

The better approach is to create a standard of general applicability rather than to continue creating exceptions to the physical injury rule. "Recognition of negligently inflicted psychic injury as an independent tort, like the life experiences that compel it, cannot be confined in a doctrinal straitjacket." Guth, 96 Hawai'i at 159, 28 P.3d at 994 (Acoba, J., concurring and dissenting) (internal citations omitted). Therefore, it must be reiterated that "the advantages gained by the courts in administering claims of mental distress by reference to narrow categories [are] outweighed by the burden thereby imposed on the plaintiff and that the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection." Doe Parents No. 1, 100 Hawai'i at 91, 58 P.3d at 602 (Acoba, J., concurring) (quoting Guth, 96 Hawai'i at 159, 28 P.3d at 994 (Acoba, J., concurring and dissenting) (quoting Rodrigues, 52 Haw. at 173-74, 472 P.2d at 520)) (alteration and internal quotation marks omitted). Thus, I would apply the general rule articulated in Rodrigues to all NIED claims and abandon the piecemeal abrogation of the physical injury rule

exemplified by the current state of our precedent. See id. ("Applying the Rodrigues standard returns reason and symmetry to the law . . . ." (Quoting Guth, 96 Hawai'i at 159, 28 P.3d at 994. (Acoba, J., concurring and dissenting)) (brackets omitted). As previously stated, Rodrigues rejected "the physical injury requirement and the categorical approach to claims of psychic tort sounding in negligence . . . ." Guth, 96 Hawai'i at 159, 28 P.3d at 994 (Acoba, J., concurring and dissenting).

B.

Jarrett's psychological injuries arose after Minor was taken from her pediatrician's office to Maui Memorial Medical Center (MMMC) and later, Kapiolani Medical Center (KMC) on O'ahu. See Finding of Fact (FOF) no. 139 (Jarrett was told that Minor was "in bad condition" at MMMC); FOF no. 157 (Jarrett was told that Minor might die at MMMC and again at KMC); FOF no. 221 (Minor is "often terrorized by nightmares" which require Jarrett "to comfort her back to sleep"); see also COL no. 55 (Jarrett's observation of Minor's injuries and their aftermath caused him emotional distress).

Applying the Rodrigues standard to the case at bar, I conclude that "a reasonable [person], normally constituted, would be unable to adequately cope[,]" Rodrigues, 52 Haw. at 173, 472 P.2d at 520, with the severe mental distress engendered upon learning that one's child has suffered potentially fatal injuries, and the court was therefore correct in finding

liability for this claim. This court has acknowledged in several situations that family members are naturally susceptible to "severe mental distress" as a result of mistreatment of their loved ones. See Doe Parents No. 1, 100 Hawai'i at 70, 58 P.3d at 581 (allowing the parents of a child who had been molested to recover damages for their resulting psychological trauma); id. at 91, 58 P.3d at 602 (Acoba, J., concurring) (recognizing that a child's parents are among those most likely to suffer severe mental distress as a result of child being sexually molested); Guth, 96 Hawai'i at 152, 28 P.3d at 987 (noting that in special cases, such as where a corpse is mishandled, there "is an especial likelihood of genuine and serious mental distress . . . which serves as a guarantee that the [NIED] claim is not spurious" (emphasis omitted)); id. at 159, 28 P.3d at 994 (Acoba, J., concurring and dissenting) (noting that "there is near universal agreement that a reasonable person, normally constituted, may be unable to cope with the mental stress" caused by a family member's corpse being mishandled).

Here, Jarrett was confronted with grievous mistreatment of his young daughter that resulted in grave danger to her. I would conclude that a reasonable jury could find that "a reasonable [person], normally constituted, would be unable to adequately cope" with the emotional distress generated by witnessing the effects of child abuse perpetrated on one's child. See Rodrigues, 52 Haw. at 173, 472 P.2d at 520 (concluding that

"[c]ourts and juries which have applied the standard of conduct of the reasonable [person] of ordinary prudence are competent to apply a standard of serious mental distress based upon the reaction of the reasonable [person]" (citation and internal quotation marks omitted)). Thus, I concur that the court did not err in finding DHS liable to Jarrett for NIED.

III.

Finally, I note that the disposition of this case by the majority is not consistent with that of Liberty Mutual, in which a majority of this court held that a father who saw his injured son immediately after a serious automobile accident was not entitled to damages for his emotional distress under his automobile insurance policy.[3] 108 Hawai'i at 388, 120 P.3d at 1123. The majority reasoned that the father did not have an independent tort claim because he was not involved in the accident. Id. at 386, 120 P.3d 1121.

In Liberty Mutual, the majority acknowledged that "[Hawai'i Revised Statutes (HRS)] § 431:10C-306(b) and this court's decision in [First Insurance Co. of Hawai'i, Ltd. v.] Lawrence, [77 Hawai'i 2, 881 P.2d 489 (1994),] are dispositive of the issue before this court." 108 Hawai'i at 385, 120 P.3d 1120. The majority continued, opining that "pursuant to the plain and

[3] Contrastingly, in this case, the majority holds that "Jarrett's psychological injuries were [not] too remote from DHS's conduct to permit recovery for NIED[]" because "to recover for NIED, Jarrett was required [only] to establish some predicate injury to . . . another person [and] his physical presence and witnessing of Minor's injury is not required." Majority opinion at 95.

unambiguous language of HRS § 431:10C-306(b), persons . . . may assert a claim for accidental harm as long as the threshold requirements are met -- the first being that death or injury occurs 'to such person in' a motor vehicle accident." Id. (quoting Lawrence, 77 Hawai'i at 8, 881 P.2d at 495 (emphasis in original)) (ellipsis in original) (brackets, footnote and internal quotation marks omitted). The majority then interpreted Lawrence as ruling "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."[4] Id. at 387, 120 P.3d at 1122. Respectfully, that statement of the exception articulated in Lawrence was incomplete.

In Lawrence, this court seemingly recognized an exception to the rule that a plaintiff claiming NIED be involved in the predicate incident. See Liberty Mutual, 108 Hawai'i at 389, 120 P.3d at 1124 (Acoba, J., dissenting); see also Lawrence, 77 Hawai'i at 13, 13 n.15, 881 P.2d at 500, 500 n.15 (because it was undisputed that the plaintiffs "did not witness the accident nor were they timely present at the immediate scene of the

[4] As a matter of interest, I note that a related matter was discussed by this court in Guia v. Arakaki, No. 23890, 2004 WL 2516287 at *4 (Haw. Nov. 5, 2004) (unpublished disposition), in which the majority declined to create an exception to the physical injury rule for "near miss" automobile accidents. But see id. (Acoba, J., concurring and dissenting) (arguing that plaintiff should not, as a matter of law, be precluded from bringing NIED claim arising from negligent conduct that "place[d her] in personal peril although no physical contact occur[red]" because the proper test was whether "'a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case'" (quoting Rodrigues, 52 Haw. at 173, 472 P.2d at 520 (some brackets in original))).

accident[,]" the court did not apply the rule from "Lejeune v. Rayne Branch Hospital, 556 So. 2d 559 (La. 1990)[,] wherein [that] court recognized 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" (internal citations and footnote omitted)). The exception allowed witnesses to the accident, and by corollary, those who were "timely present at the immediate scene of the accident[,]" to bring independent NIED claims. Liberty Mutual, 108 Hawai'i at 389, 120 P.3d at 1124 (Acoba, J., dissenting) (quoting Lawrence, 77 Hawai'i at 13, 881 P.2d at 500 (internal quotation marks and citation omitted)).

Although Lawrence considered NIED cases in the context of statutory no-fault insurance claims, the above noted exception was derived from Lejeune, which considered NIED in the "pure tort" context. The focus on the "plain and unambiguous" meaning of "in" as it relates to HRS § 431:10C-306(b) in Liberty Mutual, id. at 385, 120 P.3d at 1120, was inconsistent with this court's prior recognition of the above-noted exception for persons "timely present" at the scene of the accident, indicating that the term "in" was not in fact conclusively unambiguous. Inasmuch as Lawrence controlled the decision in Liberty Mutual as much as the language of the no-fault automobile insurance statute, the question of whether the father in Liberty Mutual was "timely present at the immediate scene" was a question that should have

been submitted to the trier of fact because "reasonable people could differ" on the issue. Id. at 390-91, 120 P.3d 1125-26 (Acoba, J., dissenting).

As a result, because the majority failed to apply the "timely on the scene" exception to the plaintiff in Liberty Mutual, the decision in that case was inconsistent with Lawrence. The result is vastly disparate treatment of similarly situated parties, as illustrated by a comparison of the facts in Liberty Mutual and this case. In Liberty Mutual, (1) a police officer informed the plaintiff-father that his minor son had been involved in an automobile accident and that the police were calling a medevac helicopter; (2) the father ran approximately 100 yards to the scene of the accident and began searching for his son; (3) the father observed two other victims, neither of whom seemed seriously injured, leading the father to deduce that the medevac helicopter was coming for his son; (4) the father eventually located his son, who was being treated in an ambulance; (5) the father (a) observed that his son was being intubated, indicating that he was not breathing on his own, (b) his son had blood on his face, (c) his son was unconscious and unresponsive, (d) no one would tell the father if his son would survive, (e) upon arrival at the hospital, the father was informed that his son was in critical condition, and (f) the son was in a coma, which persisted approximately two months. Id. at 382-83, 120 P.3d at 1117-18.

In the instant case, (1) on April 14, 2001, Jarrett dropped off Minor, who was in general good health, to her mother; (2) on April 16, 2001, after Minor vomited several times, her mother took her to see the pediatrician, who observed that Minor appeared to be in shock; (3) because of the severity of Minor's symptoms, the pediatrician had her taken to MMMC by ambulance; (4) Jarrett arrived at MMMC after Minor and was informed by hospital personnel that Minor "was in bad condition[,]" causing him to fear for her; (5) once Minor was stabilized, she was transported by helicopter to KMC and Jarrett joined her there; (6) Minor was comatose and unresponsive when she was admitted to KMC; (7) Jarrett was informed of the possibility that Minor could die at MMMC and again at KMC as a result of her injuries; (8) Minor remained at KMC for over two months, including a two-week stay in the Intensive Care Unit; and (9) medical experts opined that Minor would suffer ongoing psychological effects as a result of her injuries.

Thus, in both cases, the parent seeking recovery for NIED did not witness the incident in which the child sustained injuries, but did observe the child in a life-threatening medical emergency shortly thereafter, and also observed the long-term results of those injuries. The majority of this court denied the father recovery in Liberty Mutual on the ground that his emotional injury was too remote from the automobile accident, but does grant recovery to Jarrett despite the fact that his

psychological injuries are just as remote from the incident that actually caused Minor's injuries.

IV.

For the reasons stated above, I agree with the result on this NIED issue to the extent it is consistent with the Rodrigues rule rather than the categorical physical injury rule.