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**FOR PUBLICATION**

**IN THE SUPERIOR COURT FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**MARIEL FALALIMPA, for herself and ) CIVIL ACTION NO. 10-0079C  
as personal representative of )  
JOSELITO BAYSAULI FALALIMPA, )  
deceased, )**

**Plaintiffs,  
vs.**

**DUANE QUITUGUA RICHARDS,  
MARVIN TYDINGCO and  
MELVA ANN ADA,**

**Defendants.**

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS  
PLAINTIFF MARIEL FALALIMPA'S  
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS  
AND  
NEGLIGENCE CLAIMS**

THIS MATTER came before the Court on September 7, 2010 at 9:00 a.m. on Defendants' Motion to Dismiss plaintiff Mrs. Falalimpa's two causes of action that she brings in her personal capacity, Negligent Infliction of Emotional Distress and Negligence, pursuant to Com.R.Civ.P. 12(b)(6). Plaintiff appeared through her counsel F. Matthew Smith, Esq., and Defendants appeared through their counsel Sean E. Frink, Esq.

**Factual Background**

Mrs. Mariel Falalimpa ("Mrs. Falalimpa") brings this action on her own behalf and as personal representative of Mr. Joselito Baysauli Falalimpa ("Mr. Falalimpa"), against Defendants Duane Quitugua Richards, Marvin Tydingco, and Melva Ann Ada ("Defendants") for allegedly causing the death of Mr. Falalimpa.

On October 24, 2009, Mr. Falalimpa was walking down a public street by his home in As Lito, Saipan, when Defendant Richards, driving a car owned by Defendants Tydingco and Ada, struck and

1 killed Mr. Falalimpa with the car. (Complaint, ¶¶ 6, 7) Within moments of the accident, Mrs.  
2 Falalimpa was at her husband's side and witnessed his body lying in a pool of his own blood in the  
3 middle of the road, and stayed at his side during the turmoil surrounding the immediate aftermath of  
4 the accident until the police and medics took Mr. Falalimpa's body to the morgue. (*Id.* ¶9) The  
5 Complaint asserts the claims for (1) negligence, (2) wrongful death<sup>1</sup>, and (3) negligent infliction of  
6 emotional distress against all three defendants.

### 7 Analysis

#### 8 **A. Standard for Dismissal under Com.R.Civ.P. 12(b)(6).**

9 A court may dismiss a claim when it is clear as a matter of law that Plaintiff can prove no set of  
10 facts which would entitle Plaintiff to relief. Com.R.Civ.P. 12(b)(6). For purposes of a Com. R. Civ. P.  
11 12(b)(6) motion, the court views the complaint in the light most favorable to the plaintiff and its  
12 allegations are taken as true. *Cepeda v. Hefner*, 3 N.M.I. 121 (1992). The complaint must contain  
13 either direct allegations on every material point necessary to sustain a recovery on any legal theory, even  
14 though it may not be the theory suggested or intended by the pleader, or contain allegations from which  
15 an inference fairly may be drawn that evidence on these material points will be introduced at trial. *Id.*  
16 (citing *In re Adoption of Magofna*, 1 N.M.I. 449 (1990)). The court has no duty to strain to find  
17 inferences favorable to the non-moving party. *Id.*<sup>2</sup>

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19 <sup>1</sup> Defendants initially also moved to dismiss plaintiffs' claim for wrongful death for failing to allege that Mrs. Falalimpa has  
20 received the Court's appointment as the legal personal representative of the Estate of Joselito Baysauli Falalimpa, a necessary  
21 prerequisite to her suing on the Estate's behalf. 8 CMC § 2102. Subsequent to the filing of the motion, Defendants learned  
22 that Mrs. Falalimpa has in fact been appointed as the personal representative of her husband's Estate and withdrew this  
23 portion of the motion. See Notice of Withdrawal of a Portion of Def's Mot. to Dismiss (June 22, 2010).

24 <sup>2</sup> In support of her opposition, Plaintiff filed a declaration asserting additional facts not contained in the Complaint. Opp'n  
Ex. A (Declaration of Mariel Falalimpa). In their Reply, Defendants moved to strike the Declaration as improper in a motion  
to dismiss. At the hearing, Plaintiff's counsel asserted that the Complaint is sufficient to survive the motion by itself.  
However, the Declaration was nevertheless filed to show additional facts that could be shown in discovery. Although  
Com.R.Civ.P. 12(b)(6) allows for a limited exception to when matters outside the pleading may be presented to and not  
excluded by the Court when considering a motion to dismiss, this Court agrees with Defendants that in this case, the  
Declaration is improper and therefore *sua sponte* strikes it. *In re Estate of Roberto*, 2002 MP 23 ¶¶ 12-13.

1           **B. Mrs. Falalimpa’s Negligent Infliction of Emotional Distress Claim**

2           Mrs. Falimpa’s claim for emotional distress is known as a claim for negligent infliction of  
3 emotional distress (“NIED”). The Commonwealth does not have any written law on a claim for NIED.  
4 In the absence of written or local customary law, 7 CMC § 3401 directs CNMI courts to follow the  
5 common law as expressed in the restatement of law.<sup>3</sup> The Restatement (Second) of Torts (1965)  
6 (“Restatement”) establishes liability on a person for physical harm resulting from emotional disturbance  
7 due to an actor’s negligence. Restatement § 313 (emotional distress unintended) states the general  
8 principles of NIED, which provides as follows:

9           (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the  
10           other for resulting illness or bodily harm if the actor

11           (a) should have realized that his conduct involved an unreasonable risk of causing the distress,  
12           otherwise than by knowledge of the harm or peril of a third person, and

13           (b) from facts known to him should have realized that the distress, if it were caused, might result  
14           in illness or bodily harm.

15           (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is  
16           caused by emotional distress arising solely from harm or peril to a third person, unless the  
17           negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

18           This section is also known as the “zone of danger” rule. Defendants rely upon comment “d” to  
19           Subsection (2) of Section 313 to argue that the Restatement prohibits Mrs. Falalimpa’s NIED claim in  
20           this case. (Mot. at 7) Comment “d” states:

21           The rule stated in Subsection (1) applies only where the negligent conduct of the actor threatens the  
22           other with emotional distress likely to result in bodily harm because of the other's fright, shock, or  
23           other emotional disturbance, arising out of fear for his own safety, or the invasion of his own  
24           interests. ***It has no application where the emotional distress arises solely because of harm or peril***

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22           <sup>3</sup> Section 3401 of Title 7 of the Commonwealth Code provides as follows:

23           In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the  
24           American Law Institute and, to the extent not so expressed as generally understood and applied in the United States,  
              shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary  
              law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of  
              the Commonwealth.

1 *to a third person, and the negligence of the actor has not threatened the plaintiff with bodily harm*  
2 *in any other way.*

3 Thus, where the actor negligently runs down and kills a child in the street, and its mother, in the  
4 immediate vicinity, witnesses the event and suffers severe emotional distress resulting in a heart  
5 attack or other bodily harm to her, *she cannot recover for such bodily harm unless she was herself*  
6 *in the path of the vehicle, or was in some other manner threatened with bodily harm to herself*  
7 *otherwise* than through the emotional distress at the peril to her child.

8 (emphasis added). In this case, the Complaint alleges Defendant Richards hit Mr. Falalimpa with his car  
9 and caused his death. However, Mrs. Falalimpa was not in the immediate vicinity or present to witness  
10 the event, and there is no allegation that Defendant Richard's negligence threatened her with bodily  
11 harm in any other way other than her emotional distress at the peril of her husband. Accordingly, Mrs.  
12 Falalimpa fails to establish a claim for NIED under Restatement (Second) of Torts § 313.

13 Comment d, however, also notes that another rule is to be applied where the other is so  
14 threatened with bodily harm in another manner, and instead suffers emotional distress at the peril or  
15 harm of a third person, which results in bodily harm to the other. That rule is found in Section 436. In  
16 her opposition, Mrs. Falalimpa relies on Restatement Section 436 (physical harm resulting from  
17 emotional disturbance) to support her claim for NIED. (Opp'n at 2) In particular, she relies upon  
18 Subsection (2) of Section 436, its caveat, and comment "c". Restatement Section 436 states as follows:

19 (1) \*\*\*

20 (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to  
21 another otherwise than by subjecting him to fright, shock, or other similar and immediate  
22 emotional disturbance, *the fact that such harm results solely from the internal operation of fright*  
23 *or other emotional disturbance does not protect the actor from liability.*

24 (3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his  
shock or fright at harm or peril to a member of his immediate family *occurring in his presence.*

**CAVEAT: Caveat:**

*The Institute expresses no opinion as to whether the rule stated in Subsection (2) may apply  
where bodily harm to the other results from his shock or fright at harm or peril to a third person  
who is not a member of his immediate family, or where the harm or peril does not occur in his  
presence.*

1 **Comment on Subsection (2):**

2 b. \*\*\*

3 c. \*\*\* If the emotional disturbance is shock, the shock must be due to the other's witnessing the  
4 actor's negligence *or its immediate consequences*.

5 Despite the reference by the caveat and comment “c” to the harm or disturbance occurring without  
6 witnessing the occurrence of the shocking event, the plain language in Subsection (3) to Section 436 still  
7 requires the shock or fright to occur in plaintiff’s presence. It clearly states that “[t]he rule stated in  
8 Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or  
9 peril to a member of his immediate family *occurring in his presence*.” (emphasis added) The  
10 Restatement’s Illustration 3 to Section 436 supports this conclusion. It states:

11 A negligently leaves a truck insecurely parked at the top of a hill. Because of this negligence the  
12 truck starts down the hill. B and C, her child, are in the street in the path of the truck. The truck  
13 swerves, misses B, and strikes C. *B, who is watching C, does not see the truck coming, and is not  
14 alarmed for her own safety, but suffers severe shock and resulting serious illness at the sight of  
15 the injury to C. A is subject to liability to B for the shock and her illness.*  
(emphasis added).

16 In interpreting this same Restatement Section 436(3), another Superior Court trial court found  
17 that negligent infliction of emotional distress will occur only where the bodily harm to the other results  
18 from his shock or fright at harm or peril to a member of his immediate family *occurring in his presence*.  
19 *Evangelista v. Mobil Oil Mariana Islands, Inc.*, Civ. No. 97-0652(T) at 5 (May 19, 1999) (Manibusan,  
20 J.) (emphasis added). It reasoned that the witness or other must not only be in the zone of danger, as  
21 Evangelista was, but must see the event that injures the family member. *Id.*, citing *Malstrom v. Mackey*,  
22 583 N.Y.S.2d 28, 29 (N.Y.App. 1992). The Evangelistas did not actually see the decedent injured.  
23 Although they were injured by the same vehicle, they did not see the vehicle strike the decedent, nor did  
24 they see the decedent at the site of the accident. The court concluded that because the Evangelistas did  
not witness the fatal injury to the decedent, under the law there is no claim for negligent infliction of

1 emotional distress. In this case, although Mrs. Falimpa saw the decedent at the site of the accident, she  
2 did not see the vehicle strike the decedent, nor was she present in the zone of danger. Accordingly, the  
3 NIED claim under Restatement Section 436 also fails.

4 Plaintiff cites to various case law from other jurisdictions in the United States to show that the  
5 zone of danger rule is being abandoned judicially. (Opp'n at 3) However, in as much as this Court is  
6 sympathetic to the arguments and reasoning for the various state courts' abandonment of the rigid zone  
7 of danger rule, this Court cannot do so because it is bound to apply the laws as stated in the restatement  
8 of law under 7 CMC § 3401, until either the American Law Institute amends the Restatement or the  
9 Commonwealth Legislature enacts a written law to the contrary.

10 **C. Mrs. Falalimpa's negligence claim.**

11 At the hearing, Plaintiff's counsel conceded that Mrs. Falalimpa's negligence claim is premised  
12 on the same exact facts as those for her husband's separate claim of negligence against the driver, and  
13 the owners of the vehicle, for their conduct as they relate to him as a pedestrian. Mrs. Falalimpa's  
14 inclusion in the factual allegation for the negligence claim arises only upon her reference to sustaining  
15 damages. This Court agrees with Defendants' argument that such a factual pleading fails to satisfy the  
16 necessary standard under Com.R.Civ.P. 8. Accordingly, Defendants' motion to dismiss Mrs.  
17 Falalimpa's negligence claim is granted.

18 **Conclusion**

19 For the foregoing reasons, Defendants' motion to dismiss Mrs. Falalimpa's claim for negligent  
20 infliction of emotional distress and negligence is hereby GRANTED. Plaintiff's two claims are hereby  
21 dismissed with prejudice.

22 IT IS SO ORDERED this 8<sup>th</sup> day of September, 2010.

23 /s/  
24 RAMONA V. MANGLONA, Associate Judge