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

BERNADITA T. PALACIOS,	)	CIVIL CASE NO. 23-0054
	)	
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT
v.	)	MARIANAS MEDICAL CENTER'S
	)	MOTION TO DISMISS PLAINTIFF'S
COMMONWEALTH HEALTHCARE	)	SIXTH CAUSE OF ACTION
CORPORATION and MARIANAS	)	
MEDICAL CENTER,	)	
	)	
Defendants.	)	
	)	

I. INTRODUCTION

THIS MATTER came before the Court on October 24, 2023 at 10:00 a.m. in the CNMI Superior Court, Guma' Hustisia, Courtroom 223A for Oral Argument on Defendant Marianas Medical Center's ("Defendant" or "MMC") Motion to Dismiss the Sixth Cause of Action (Negligent Infliction of Emotional Distress) in Plaintiff Bernadita T. Palacios's ("Plaintiff" or "Ms. Palacios") Complaint. Plaintiff was represented by attorneys Anthony H. Aguon and Keith Chambers. Defendant was represented by attorney Michael W. Dotts.

Based upon a review of the arguments, filings, and relevant law, and for the reasons stated herein, the Court **GRANTS** Defendant's Motion to Dismiss. Plaintiff's Sixth Cause of Action for Negligent Inflection of Emotional Distress is hereby **DISMISSED** without prejudice, and Plaintiff is given leave to amend the Complaint.

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## II. RELEVANT FACTS

Plaintiff's Complaint alleges the following in relation to her claim for Negligent Inflection of Emotion Distress ("NIED") against MMC:

1. On March 30, 2021, Ms. Palacios went to MMC seeking medical care.
2. At MMC, Ms. Palacios complained of experiencing abdominal pain and loose stools.
3. The abdominal pain Ms. Palacios complained of presented signs of possible appendicitis.
4. Despite Ms. Palacios's expressed symptoms, MMC did not perform a test to determine whether Ms. Palacios was suffering from appendicitis.
5. Instead, Ms. Palacios was only prescribed pain medication for her arthritis.
6. Over time, the pain medication prescribed to Ms. Palacios caused Ms. Palacios's appendicitis to worsen.
7. On April 5, 2021, Ms. Palacios described her symptoms to her daughter-in-law, who is a nurse, over the phone.
8. Ms. Palacios's daughter-in-law asked Ms. Palacios to touch her abdomen to see if she felt any pain.
9. Ms. Palacios confirmed over the phone that her abdomen did, in fact, hurt to touch.
10. Ms. Palacios's daughter-in-law recognized Ms. Palacios's symptoms of probable appendicitis and told her to rush to the hospital or else she might die.
11. Ms. Palacios went to the Commonwealth Healthcare Corporation (CHCC), where she was diagnosed with acute complicated appendicitis with perforation and abscess.
12. Ms. Palacios had to undergo surgery for her life-threatening diagnosis.
13. Ms. Palacios was discharged from CHCC on April 8, 2021.

1 14. MMC's failure to test for appendicitis despite the fact that Ms. Palacios was experiencing  
2 symptoms of appendicitis is a basis for Ms. Palacios's claim of experiencing severe emotional  
3 distress.

4 15. In addition to her claim of severe emotional distress, including mental anguish, Ms. Palacios also  
5 claims she suffered physical distress and injury to both mind and body.

### 6 **III. LEGAL STANDARD**

7 A motion to dismiss a complaint for "failure to state a claim upon which relief can be granted"  
8 pursuant to NMI R. Civ. P. 12(b)(6) tests the legal sufficiency of the claims within the complaint.  
9 Generally, a complaint must satisfy the notice pleading requirements of NMI R. Civ. P. 8(a) in order  
10 to avoid dismissal under Rule 12(b)(6). *Cepeda v. Hefner*, 3 NMI 121, 126 (1992). Rule 8(a)(2)  
11 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief"  
12 such that "fair notice of the nature of the action is provided." *Govendo v. Marianas Pub. Land Corp.*,  
13 2 NMI 482, 506 (1992).

14 When deciding a Rule 12(b)(6) motion to dismiss, "the court must accept the allegations in the  
15 complaint as true and construe them in the light most favorable to the plaintiff." *Camacho v.*  
16 *Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. Dismissal is improper unless it appears beyond doubt that  
17 the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*;  
18 *Aurelio v. Camacho*, Civ. No. 10-0021 (NMI Super. Ct. Sept. 10, 2010) (Order Denying Def.'s Mot.  
19 to Dismiss and Granting Pl.'s Cross Mot. for Summary Judgment at 3) ("The burden is upon the  
20 movant to establish beyond doubt that the plaintiff's action is one upon which the law recognizes no  
21 relief.").

22 However, a complaint requires "more than a blanket assertion of entitlement to relief." *Syed*  
23 *v. Mobil Oil Marianas, Inc.*, 2012 MP 20 ¶¶ 20-21. To survive a Rule 12(b)(6) motion to dismiss, "a  
24 complaint must either contain direct allegations on every material point necessary to sustain a recovery

1 on any legal theory, even though it may not be the theory suggested by the pleader, or contain  
2 allegations from which evidence on these material points will be introduced at trial.” *Claassens v.*  
3 *Rota Health Ctr.*, 2021 MP 9 ¶ 17 (internal citations and punctuation omitted). “[A]ll elements must  
4 be supported with some alleged facts.” *Id.* The Court “has no duty to strain to find inferences  
5 favorable to the plaintiff.” *Cepeda*, 3 NMI at 127.

#### 6 IV. DISCUSSION

##### 7 **A. This Court is Bound By *Salty Saipan Corp. v. Shakir* to Apply the NIED Standard Set** 8 **Forth in Section 313 of the Restatement (Second) of Torts.**

9 In the CNMI, there is no statutory authority that establishes the cause of action of NIED, and  
10 very few judicial decisions have considered the issue. As repeatedly explained by our Supreme Court  
11 under circumstances such as these, “[w]hen there is no statutory authority in the Commonwealth,  
12 courts turn to the restatements of law from the American Law Institute.” *Salty Saipan Corp. v. Shakir*,  
13 2018 MP 18 ¶ 12 (citing 7 CMC § 3401).

14 Defendant, in its Motion to Dismiss, argues that the Court must apply the standard for a NIED  
15 cause of action as set forth in Section 313 of the Restatement (Second) of Torts. Section 313 of the  
16 Second Restatement provides:

- 17 (1) If the actor unintentionally causes emotional distress to another, he is subject to  
18 liability to the other for resulting illness or bodily harm if the actor  
19 (a) should have realized that his conduct involved an unreasonable risk of causing the  
20 distress, otherwise than by knowledge of the harm or peril of a third person, and  
21 (b) from facts known to him should have realized that the distress, if it were caused,  
22 might result in illness or bodily harm.

23 Restatement (Second) of Torts § 313 (1965).

24 Under the Restatement (Second) of Torts, a claim for NIED requires not only that an actor’s  
negligent conduct cause emotional distress, but also that the emotional distress result in some

1 manifestation of *physical* harm or ailment. As to this element, Section 436A of the Restatement  
2 (Second) of Torts states that:

3 If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily  
4 harm or emotional disturbance to another, ***and it results in such emotional disturbance alone,  
without bodily harm or other compensable damage***, the actor is not liable for such emotional  
5 disturbance.

6 Restatement (Second) of Torts § 436A (emphasis added).

7 Plaintiff, in her Opposition, argues that this Court should apply the more recently published  
8 standard for NIED found in Section 47 of the Restatement (Third) of Torts. Section 47 of the Third  
9 Restatement provides:

10 An actor whose negligent conduct causes serious emotional harm to another is subject to  
liability to the other if the conduct:

- 11 (a) places the other in danger of immediate bodily harm and the emotional harm  
results from the danger; or
- 12 (b) occurs in the course of specified categories of activities, undertakings, or  
13 relationships in which negligent conduct is especially likely to cause serious  
emotional harm.

14 Restatement (Third) of Torts § 47 (2012).

15 Notably absent from the Third Restatement's definition of NIED is the prior Restatement's  
16 requirement of a physical harm element resulting from the emotional distress: "[T]he rule stated in  
17 [Restatement (Third)], while requiring serious emotional harm, is not limited to cases in which there  
18 are physical manifestations." Restatement (Third) of Torts § 47 cmt. j. According to Plaintiff, courts  
19 have been moving away from the requirement that physical harm must manifest from emotional  
20 distress in order for liability to attach to a NIED claim – in part because the notion that mental suffering  
21 is not as valid or credible as physical suffering has become outdated and largely disproven in the  
22 medical field, and in part because modern society has seen a rise in licensed medical professionals  
23 capable of providing juries with an analysis of a plaintiff's emotional injuries. Plaintiff concludes that  
24 the Court should decline to apply the Second Restatement's antiquated standards, which are "not in

1 line with the modern understanding of mental illness,” and instead adopt the Third Restatement’s more  
2 liberal standard, as other jurisdictions have begun to do.

3 Although the Court finds Plaintiff’s arguments persuasive, well-reasoned, and perhaps fairer  
4 from a public policy standpoint, the Court is nevertheless bound by the NMI Supreme Court’s  
5 pronouncement in *Salty Saipan Corp. v. Shakir*, 2018 MP 18 ¶ 12. In that case, our Supreme Court  
6 recognized that 7 CMC § 3401 is silent as to which version of a restatement should be applied when  
7 multiple versions exist. *Id.* Our Supreme Court also recognized that it had never previously addressed  
8 which restatement controls: the newest iteration, the restatement on the books when Section 3401 was  
9 passed, or the one most commonly used? *Id.* The Court went on to answer its own question decisively:  
10 “When there are multiple restatements available, courts should adopt the newer restatement ***if the new***  
11 ***version represents the current majority common law rule.***” *Id.* (emphasis added).

12 Here, with regard to the prevailing standard for a NIED cause of action, it appears to this Court  
13 that Section 313 of the Restatement (Second) of Torts remains the current majority common law rule.  
14 Defendant, in its Motion to Dismiss, points out that Section 313 of the Second Restatement was cited  
15 by courts in at least 43 jurisdictions, whereas Section 47 of the Third Restatement was cited by courts  
16 in only 11 jurisdictions. Plaintiff, in her Opposition, questions whether all 43 of the jurisdictions found  
17 by Defendant “actually adopted all of the Restatement (Second)’s NIED rules wholesale, or merely  
18 cited to it in the process of adopting their own unique common law rules,” but nevertheless she does  
19 not claim that the Third Restatement has overtaken the Second Restatement as the majority rule for  
20 NIED claims, nor could she. *See, e.g., Diaz v. Ramsden*, 67 V.I. 81, 94 (2016) (recognizing that a  
21 minority – albeit a “growing minority” – of jurisdictions has abandoned the physical injury  
22 requirement due to “advances in medicine and science” that have led to “more accurate methods for  
23 determining whether a plaintiff has suffered severe emotional distress.”).

1 Because Section 47 of the Restatement (Third) of Torts has yet to overtake Section 313 of the  
2 Restatement (Second) of Torts as the majority common law rule, the Court is not at liberty to apply  
3 Section 47's standards to the instant case and is bound by *Salty Saipan Corp. v. Shakir* to continue to  
4 apply Section 313 of the Restatement (Second) of Torts. *See Guerrero v. Century Insurance Co., Ltd.,*  
5 *et al.*, Civ. No. 11-0068 (NMI Super. Ct. June 27, 2011) (Order Granting in Part Defendants' Mot. to  
6 Dismiss at 12) ("Our Courts have consistently held that the Commonwealth does not recognize a cause  
7 of action in tort for negligent infliction of emotional distress if there is no allegation of physical  
8 injury.").

9 **B. Plaintiff's Complaint Lacks Factual Support for Her Conclusory Allegation of**  
10 **Physical Harm.**

11 To summarize, under Section 313 of the Restatement (Second) of Torts, a plaintiff can recover  
12 for a NIED claim if she can show that (i) she was in the "zone of danger" of a bodily harm caused by  
13 the defendant's negligent conduct and (ii) the emotional distress that resulted also manifested in some  
14 form of physical illness or bodily harm. *See* Restatement (Second) of Torts § 313.

15 Defendant argues that Plaintiff's allegation – that she suffered "physical distress" and "injury  
16 to mind *and* body" as a result of MMC's allegedly negligent conduct – lacks sufficient specificity to  
17 survive a 12(b)(6) motion. The Court agrees. Although the NMI Supreme Court has declined to  
18 follow the heightened federal pleading standard outlined in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and  
19 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *see Syed*, 2012 MP ¶ 17, a plaintiff in this  
20 jurisdiction must nonetheless support each element of her claim "with *some* alleged facts." *Claassens*,  
21 2021 MP 9 ¶ 17 (emphasis added).

22 Here, an essential element of a NIED claim in this jurisdiction is that there must be a physical  
23 manifestation of harm in addition to the emotional harm suffered. Plaintiff has provided sufficient  
24 factual allegations to allow this Court to reasonably infer that, as a result of MMC's failure to perform

1 the proper tests and correctly diagnose her, Plaintiff came frighteningly close to losing her life and  
2 experienced severe emotional distress therefrom. However, even accepting all of the factual  
3 allegations in the Complaint as true and construing them in the light most favorable to Plaintiff, the  
4 Court struggles to understand, without more, how Plaintiff's emotional distress culminated in  
5 "physical distress" and "injury to [her] body" (separate and apart from the physical symptoms she  
6 experienced as a direct result of her untreated appendicitis).

7 Defendant is entitled to "fair notice of the nature of the action[.]" *Govendo v. Marianas Pub.*  
8 *Land Corp.*, 2 NMI 482, 506 (1992). General allegations to vague and nondescript "physical distress"  
9 and "injury to . . . body" do not suffice to provide Defendant with fair notice of the true nature of the  
10 claims against it. For these reasons, the Court **GRANTS** Defendant's Motion to Dismiss Plaintiff's  
11 Sixth Cause of Action. Because the defects with Plaintiff's NIED claim are potentially curable, the  
12 dismissal is without prejudice, and Plaintiff is hereby given leave to amend the Complaint.

## 13 **V. CONCLUSION**

14 **THEREFORE**, for the reasons stated above, the Court **GRANTS** Defendant's Motion to  
15 Dismiss. Plaintiff's Sixth Cause of Action for Negligent Inflection of Emotional Distress is hereby  
16 **DISMISSED** without prejudice, and Plaintiff is given leave to amend the Complaint.

17  
18 **SO ORDERED** this 14th day of December, 2023.

19  
20 /s/  
21 **WESLEY M. BOGDAN, Associate Judge**