

IN THE SUPREME COURT OF THE STATE OF HAWAII

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NAOMI M.L.K. GUTH, MALCOLM AKIONA, LAWRENCE AKIONA,
DARRYL AKIONA, DENNIS AKIONA, MATTHEW AKIONA,
and ALBERTA ALPHIN, Plaintiffs-Appellants

vs.

HAINES BURT FREELAND, dba SPECIAL SERVICES AND ACCOMMODATION;
HOWARD TAGOMORI, AS MAUI COUNTY CHIEF OF POLICE AND
AS CORONER FOR MAUI COUNTY; COUNTY OF MAUI; MAUI MEMORIAL
HOSPITAL; CLINICAL LABORATORIES OF HAWAII, INC.,
Defendants-Appellees

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10 and DOE GOVERNMENTAL ENTITIES 1-10, Defendants

NO. 22539

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 97-0727(2))

JULY 31, 2001

MOON, C.J., LEVINSON, NAKAYAMA, AND RAMIL, JJ.
AND ACOBA, J., CONCURRING IN PART AND DISSENTING IN PART

OPINION OF THE COURT BY NAKAYAMA, J.

Plaintiffs-appellants Naomi Guth, Malcolm Akiona,
Lawrence Akiona, Darryl Akiona, Dennis Akiona, Matthew Akiona,
and Alberta Alphin (collectively, Plaintiffs) appeal from the
final judgment of the Circuit Court of the Second Circuit, the
Honorable Shackley Raffetto presiding, entered pursuant to an
order granting summary judgment in favor of defendants-appellees
Haines Freeland, dba Special Services and Accommodation
(Freeland), the County of Maui, and Maui Memorial Hospital (MMH)
(collectively, Defendants). Plaintiffs suit arose from

Defendants allegedly negligent handling of the body of Plaintiffs deceased mother, Barbara Akiona (Akiona). The circuit court granted summary judgment in favor of Defendants as to Plaintiffs negligent infliction of emotional distress (NIED) claim because it was barred by Hawaii Revised Statutes (HRS) § 663-8.9 (1993). On appeal, Plaintiffs argue that the circuit court erred in granting summary judgment in favor of Defendants because HRS § 663-8.9 does not apply to NIED claims arising from the negligent mishandling of a corpse. In the alternative, Plaintiffs argue that this court should adopt the rule stated in the Restatement (Second) of Torts § 868 (1979). We hold that HRS § 663-8.9 does not apply to an NIED claim arising from the negligent mishandling of a corpse. Therefore, we vacate the circuit court's order granting summary judgment in favor of Defendants and the judgment entered pursuant thereto and remand the case for further proceedings.

I. BACKGROUND

Akiona was admitted to MMH on September 22, 1995. The next day, she passed away, and Freeland transported her body to the morgue for refrigeration pending testing and a possible autopsy. The morgue is located in MMH. Akiona was considered a coroner's case and was therefore in the custody and control of Maui County. Plaintiffs allege that Defendants negligently failed to refrigerate Akiona's body, causing it to decompose.

Prior to her death, Akiona entered into a contract with Maui Funeral Plan, Inc., which provided for the removal of her body from the hospital, professional embalming, a casket, use of the funeral home facilities, a car and driver to the cemetery, and funeral arrangements by the funeral director and staff. The plan utilized Nakamura Mortuary. In addition, Akiona told Plaintiffs that she wished to be interred according to the wishes of her family. Plaintiffs, some of whom had not seen their mother for some time, desired an open casket funeral.

Anthony Vierra, an employee of Nakamura Mortuary, went to the morgue on the morning of September 25, 1995 to retrieve Akiona s remains. When he arrived, no one was staffing the morgue; a security guard let him in. Vierra discovered Akiona s body outside the refrigeration unit. The body was bloated and partially decomposed. The face was bloated and purple, the eyes were bulging, and the tongue was swollen and partially protruding. Akiona s body was also discolored, and the veins appeared black. Alvin Nakamura, the owner of the mortuary, stated in a deposition that the foregoing indicated an advanced stage of decay. Nakamura also stated that there was a lot of skin slip, a lot of edema in the tissues, it smelled real bad. It was a hazzard to health. Nakamura ordered the body immediately embalmed for safety reasons.

Arthur Souza performed the embalming. The embalming

did not alter the appearance of Akiona's body but delayed further decomposition and prevented any odor. He spoke with Plaintiffs and informed them that the funeral could not be open casket because of the condition of the body. When the Plaintiffs did not understand what he meant, Souza asked if they would like to see the body. Two of the Plaintiffs, Clarence and Malcolm Akiona, went with him to see the body. Plaintiffs claim that the news of what happened to Akiona's body caused them serious emotional distress.¹ None of the Plaintiffs claim that they suffered physical injury as a result of the incident or that their emotional distress was manifested in a physical injury or illness.

On September 22, 1997, Plaintiffs filed a complaint against Defendants and Clinical Laboratories of Hawaii, Inc. (CLHI),² alleging negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, the tort of outrage, abuse of a corpse, and trespass.³ On January 27, 1998, Plaintiffs filed an amended complaint that alleged the same six counts as the original complaint. Defendant MMH moved for summary judgment on all counts on October 8, 1998. Defendants

¹ Although Clarence and Malcolm Akiona saw Akiona's body, they do not allege a separate claim that the sight of the body caused them serious emotional distress.

² On May 25, 1999, Plaintiffs stipulated to the dismissal, with prejudice, of all claims against Defendant CLHI.

³ Plaintiffs did not allege a contract claim.

Freeland, County of Maui, and CLHI joined in MMH's motion. At the hearing on the motion, the circuit court ruled that there was no factual basis to support Plaintiffs' claims, except for those sounding in negligence. Although the court stated that it did not have any doubt [Plaintiffs] experienced emotional distress[,] the court agreed with Defendants' argument that HRS § 663-8.9 barred recovery in this case and that existing Hawaii law did not recognize a separate claim for relief for negligent mishandling of corpse.

On March 9, 1999, the court entered an order stating that no genuine issues of material fact exist and Defendants . . . are entitled to summary judgment as a matter of law as to all claims made by Plaintiffs herein. A judgment pursuant thereto was entered on April 15, 1999. Plaintiffs timely appealed.

On appeal, Plaintiffs argue that HRS § 663-8.9 does not apply to a claim of NIED for the negligent mishandling of a corpse and, therefore, that the circuit court erred in granting summary judgment in favor of Defendants as to the NIED claim. In the alternative, Plaintiffs argue that this court should adopt the rule articulated in the Restatement (Second) of Torts § 868, establishing the independent tort of interference with dead bodies. We agree that HRS § 663-8.9 does not apply to a claim of NIED arising from the negligent mishandling of a corpse and that, therefore, the circuit court erred in granting summary judgment

in favor of the defendants. Because we hold that HRS § 663-8.9 does not apply, we need not address Plaintiffs argument that interference with dead bodies should be adopted as an independent tort.

II. DISCUSSION

A. Standard of review

A circuit court's grant of summary judgment is reviewed de novo under the same standard applied by the circuit court. Dairy Road Partners v. Island Ins. Co., Ltd., 92 Hawai i 398, 411, 992 P.2d 93, 106 (2000) (quoting Bronster v. United Public Workers, 90 Hawai i 9, 13, 975 P.2d 766, 770 (1999)) (some citations omitted). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Hawai i Rules of Civil Procedure (HRCPP) Rule 56(c).

Whether HRS § 663-8.9 applies to a claim for the negligent infliction of emotional distress arising from the negligent mutilation of a corpse is a question of statutory interpretation. Questions of statutory interpretation are questions of law to be reviewed de novo under the right/wrong standard. Flor v. Holguin, 94 Hawai i 70, 77, 9 P.3d 382, 389 (2000) (quoting State v. Kotis, 91 Hawai i 319, 327, 984 P.2d 78,

86 (1999)) (some citations omitted).

Our statutory construction is guided by the following well established principles:

our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .

In construing an ambiguous statute, [t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

Gray [v. Administrative Dir. of the Court], 84 Hawai i 138,] 148, 931 P.2d [580,] 590 [(1997)] (quoting State v. Toyomura, 80 Hawai i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider [t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning. HRS § 1-15(2) (1993). . . .

In re Water Use Permit Applications, 94 Hawai i 97, 121, 9 P.3d 409, 456 (2000) (quoting Barnett v. State, 91 Hawai i 20, 31, 979 P.2d 1046, 1057 (1999) (quoting State v. Davia, 87 Hawai i 249, 254, 953 P.2d 1347, 1352 (1998))) (some alterations in original).

B. HRS § 663-8.9 does not apply to an NIED claim arising out of the negligent mishandling of a corpse.

This court first recognized a claim for the negligent infliction of emotional distress in Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970) (emotional distress caused when house flooded). In Rodrigues, this court stated that serious mental

distress may be found where a reasonable man, 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 later held that recovery for the NIED of one not physically injured is only allowed where there has been some physical injury to property or a person. Chedester v. Stecker, 64 Haw. 464, 468, 643 P.2d 532, 535 (1982).

However, in 1986, as part of an effort to achieve tort reform and stabilize liability insurance, the legislature adopted HRS § 663-8.9, which limited the availability of the claim for relief of NIED. See 1986 Haw. Spec. Sess. L. Act 2, § 1 at 3, § 22 at 12. The statute abolished the claim where the underlying basis for the action was property damage. However, the claim survived where the claimant's emotional distress resulted in physical injury or mental illness. See HRS § 663-8.9; Hse. Stand. Comm. Rep. No. 4-86, in 1986 House Journal, Special Session, at 44. HRS § 663-8.9 provides:

Serious emotional distress arising from property damage; cause of action abolished; exception for physical injury. (a) No party shall be liable for the negligent infliction of serious emotional distress or disturbance if the distress or disturbance arises solely out of damage to property or material objects.

(b) This section shall not apply if the serious emotional distress or disturbance results in physical injury to or mental illness of the person who experiences the emotional distress or disturbance.

HRS Chapter 663 (1993 & Supp. 2000) does not include definitions of property or material objects. Plaintiffs argue that HRS § 663-8.9 does not apply because: 1) a corpse is not property ;

and 2) case law and the legislative history of HRS § 663-8.9 establish that NIED for the negligent mishandling of a corpse exists as an independent tort.

1. Whether a corpse is property

Plaintiffs argue that a corpse is not property within the meaning of HRS § 663-8.9 because it cannot be sold or transferred and has no utility except to be interred or cremated. Although this court has noted that [i]t is axiomatic that a corpse is not a person[,], Menashe v. Sutton, 38 Haw. 449, 461 (1950) (quoting Brooks v. Boston & Northern St. Ry., 97 N.E. 760 (Mass. 1912)), we have not addressed the issue whether a corpse is considered property.

It is universally recognized that there is no property in a dead body in a commercial or material sense. [I]t is not part of the assets of the estate (though its disposition may be affected by the provision of the will); it is not subject to replevin; it is not property in a sense that will support discovery proceedings; it may not be held as security for funeral costs; it cannot be withheld by an express company, or returned to the sender, where shipped under a contract calling for cash on delivery; it may not be the subject of a gift causa mortis; it is not common law larceny to steal a corpse. Rights in a dead body exist ordinarily only for purposes of burial and, except with statutory authorization, for no other purpose. Snyder v. Holy Cross Hosp., 30 Md. App. 317 at 328 n. 12, 352 A.2d 334 at 340, quoting P.E. Jackson, The Law of Cadavers and of Burial and Burial Places (2d ed. 1950).

State v. Powell, 497 So.2d 1188, 1192 (Fla. 1986) (quoting Dougherty v. Mercantile-Safe Deposit & Trust Co., 387 A.2d 244, 246 n.2 (Md. Ct. App. 1978)), cert. denied, 481 U.S. 105 (1987).⁴

⁴ Many courts have instead recognized that the nearest relatives of the deceased have a quasi-property right in the deceased's body that arises from their duty to bury the deceased. See, e.g., Travelers Ins. Co. v. Smith, 991 S.W.2d 591, 595 (Ark. 1999); Bauer v. North Fulton Med. Ctr., Inc., 527 S.E.2d

(continued...)

We agree with the reasoning of the Powell court and hold that a corpse is not property for purposes of HRS § 663-8.9.

2. Whether a corpse is a material object

HRS § 663-8.9(a) also applies to NIED claims arising solely out of damage to material objects. As noted supra, there is no definition of the term material objects in HRS Chapter 663, nor is this term used in any other chapter. Ordinarily we would presume that, because the legislature used both the term property and the term material objects, the two terms are not synonymous. See, e.g., In re Doe, 90 Hawaii 246, 250, 978 P.2d 684, 688 (1999) (stating that courts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute).

However, the statute's legislative history refers only to NIED claims arising from damage to property. See Sen. Stand. Comm. Rep. No. S5-86, in 1986 Senate Journal, Special Session, at 29 ([t]his section abolishes any cause of action for

⁴(...continued)
240, 243 (Ga. App. 1999); Massey v. Duke Univ., 503 S.E.2d 155, 158 (N.C. App. 1998); Coleman v. Sopher, 499 S.E.2d 592, 604 (W.Va. 1997); In re Estate of Medlen, 677 N.E.2d 33, 36 (Ill. App. 1997). But see Carney v. Knollwood Cemetary Ass'n, 514 N.E.2d 430, 435 (Ohio App. 1986) (A trend away from the quasi-property fiction is discernible in the case law.); Strachan v. John F. Kennedy Mem'l Hosp., 538 A.2d 346, 350 (N.J. 1988) (noting the somewhat dubious nature of a property right to the body (internal quotation marks omitted)).

negligent infliction of serious emotional distress where the underlying basis for such a claim arises solely from property damages (emphasis added)); Hse. Stand. Comm. Rep. No. 4-86, in 1986 House Journal, Special Session, at 44 ([t]his section is intended to abolish the cause of action for negligent infliction of serious emotional distress where the underlying basis for an emotional distress claim emanates from property damage only (emphasis added)).

Neither the statute nor its legislative history shed light upon the meaning of the term material objects. However, as this court recently noted, HRS § 663-8.9 reflects the view expressed by Justice [Bernard] Levinson, concurring and dissenting in Rodrigues[.] ⁵ Roes v. FHP, Inc., 91 Hawaii 470, 474, 985 P.2d 661, 665 n.6 (1999). Justice Levinson used the term material objects, equating it with property. Rodrigues, 52 Haw. at 178, 472 P.2d at 522 (the reality of mental suffering because of the loss of or injury to property is offset by my disagreement with the policy of recognizing emotional ties to material objects and by the vast potential for abuse inherent in such a theory of recovery (emphases added)). Justice Levinson echoed the concern of Dean William Lloyd Prosser that allowing recovery for emotional distress due to damage to property would

⁵ Justice Abe joined in Justice Levinson's concurring and dissenting opinion. Rodrigues, 52 Haw. at 174, 472 P.2d at 523.

engender vexatious suits and fictitious claims. Id. at 178, 472 P.2d at 523 (quoting Prosser, Torts § 55 at 347 (3d ed. 1964)). Justice Levinson went on to state:

It further appears to me that when a person's material possessions are threatened by the negligence of another, it cannot be said that the owner is within a foreseeable zone of psychic risk. Even though a person's injury may be very real and can be proven, I would question the policy behind recognizing the value of an attachment to material possessions. This attachment should neither be encouraged by society nor made a basis for recovery in a court of law in an age when man has surrounded himself with a veritable plethora of material possessions approaching the limits of what even an affluent society needs or can afford.

Id. at 179, 472 P.2d at 523 (emphases added). Justice Levinson's concerns dealt solely with claims for emotional distress arising from damage to property. The remains of a loved one cannot be considered within the universe of material possessions to which Justice Levinson believed society should not encourage attachment. Because Justice Levinson's view appears to be embodied in HRS § 663-8.9, and the legislative history refers to emotional distress claims arising from property damage, we believe that the legislature was concerned solely with NIED claims associated with damage to what is traditionally considered property. There is no indication in the legislative history that the legislature contemplated the exclusion of claims for emotional distress arising from the negligent mishandling of a corpse.

Further, the policy behind the NIED claim and HRS § 663-8.9 support the foregoing interpretation of the statute.

Cf. State v. Eleneki, 92 Hawaii 562, 565-66, 993 P.2d 1191, 1194-95 (2000) (examining the policies behind the statutes where neither the plain language nor the legislative history provide guidance as to the issue in question). Some of the primary concerns that prompt courts to limit recovery for emotional distress in general are: 1) emotional distress is temporary and often trivial; 2) the distress may be imagined and is easily feigned; and 3) it may seem unfair to hold defendants, whose actions were merely negligent, financially responsible for harm that appears remote from the actual conduct. See W. Page Keeton et. al., Prosser and Keeton on the Law of Torts § 54, at 360-61 (5th ed. 1984); see also Rodrigues, 52 Haw. at 178, 472 P.2d at 522 (Levinson, J., concurring and dissenting) (stating that [t]he majority fail[ed] to adopt a sufficiently stringent test to measure the genuineness and seriousness of mental distress in cases arising out of property damage).

However, commentators have noted that:

In two special groups of cases, however, there has been some movement to break away from the settled rule and allow recovery for mental disturbance alone. A number of courts have allowed recovery against a telegraph company for the negligent transmission of a message, especially one announcing death, which indicates upon its face that there is an especial likelihood that such mental distress will result. The other group of cases has involved the negligent mishandling of corpses. Here the traditional rule has denied recovery for mere negligence, without circumstances of aggravation. There are by now, however, a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like without such circumstances of aggravation. What all these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious.

. . . Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery.

Keeton, supra, § 54, at 362 (emphases added) (footnotes omitted). Thus, the perceived unfairness of holding defendants financially responsible for emotional distress caused by their negligent conduct is ameliorated in cases involving mishandling of a corpse. Due in part to the vulnerability of grieving loved ones, see infra, and the importance of the opportunity for them to pay their final respects, see, e.g., Quesada v. Oak Hill Improvement Co., 261 Cal. Rptr. 769, 774 (App. 1989) (Parties charged with the care, custody and control of the remains of a deceased know or reasonably should know that the surviving friends and relatives are emotionally vulnerable.), their suffering does not seem too remote from defendant s negligence in mishandling the body. Although emotional distress damages are difficult to quantify monetarily, this difficulty should not preclude plaintiffs from undertaking to establish them. Cf. Lauer v. Young Men s Christian Ass n of Honolulu, 57 Haw. 390, 557 P.2d 1334 (1976) (discussing the difficulty of proving damages for an alleged fourth amendment violation). Further, defendants in cases involving the mishandling of a corpse are in a better position than the plaintiffs both to try to prevent such occurrences and to pay for the consequences when they do occur. Therefore, it is not unfair to hold defendants financially responsible for their negligent mishandling of corpses.

We also note that several jurisdictions, although representing the minority view,⁶ have recognized these and similar principles and allow plaintiffs who have not suffered physical injury to recover damages for emotional distress arising from the negligent mishandling of corpses. See, e.g., Contreraz v. Michelotti-Sawyers, 896 P.2d 1118, 1121 (Mont. 1995) (although not creating a new claim for relief, holding that one who negligently removes, withholds, mutilates, embalms, provides funeral, burial, or crematory services, or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability); Brown v. Matthews Mortuary, Inc., 801 P.2d 37 (Idaho 1990) (mishandling of a corpse constitutes an exception to the general rule that plaintiffs must show physical

⁶ For examples of the majority view, see, e.g., Rekosh v. Parks, 735 N.E.2d 765, 771 (Ill. App. 2000) (declining to recognize mishandling of a corpse as an exception to the impact rule and the zone of physical danger rule); Hall v. Carney, 511 S.E.2d 271, 274 (Ga. App. 1999) (physical injury required); Reid v. Pierce County, 961 P.2d 333, 338 (Wash. 1998) (en banc) (plaintiffs must be present at the scene where the tortious conduct occurred); Jaynes v. Strong-Thorne Mortuary, Inc., 954 P.2d 45, 50 (N.M. 1997) (no liability for NIED except for bystander liability, which requires a contemporary sensory perception of the harm); Gonzalez v. Metropolitan Dade County Public Health Trust, 651 So.2d 673 (Fla. 1995) (plaintiffs must show that they suffered physical injury or that defendants' conduct was willful or wanton); Washington v. John T. Rhines Co., 646 A.2d 345 (D.C. 1994) (plaintiffs must have been in the zone of danger); Kearney v. City of Philadelphia, 616 A.2d 72, 74 (Pa. Commw. Ct. 1992) (noting that Pennsylvania has only adopted Restatement of Torts § 868 (1939), which allows recovery for intentional or wanton mistreatment of a corpse), appeal denied, 626 A.2d 1160 (Pa. 1993); Jobin v. McQuillen, 609 A.2d 990, 993 (Vt. 1992) (plaintiffs must have suffered physical injury or been in the zone of danger); Kimelman v. City of Colorado Springs, 775 P.2d 51 (Colo. App. 1988) (zone of danger), cert. denied, 493 U.S. 981 (1989); Galvin v. McGilley Mem'l Chapel, 746 S.W.2d 588 (Mo. App. 1987) (physical injury or intentional or malicious conduct); Burgess v. Perdue, 721 P.2d 239 (Kan. 1986) (same). But see Brady v. Criswell Funeral Home, Inc., 916 P.2d 269 (Okla. App. 1996) (some physical suffering required).

injury in order to recover damages for emotional distress); Strachan, 538 A.2d at 353 (plaintiffs need not establish physical injury based on either the long-recognized exception for negligent mishandling of a corpse or the especial likelihood that this claim is genuine (citation omitted)); Morton v. Maricopa County, 865 P.2d 808, 812 (Ariz. App. 1993) (claim for relief for mental distress and suffering arising from interference with decedent's body does not require a showing of physical injury). These principles have also been recognized in cases involving the post-interment mishandling of human remains. See, e.g., Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 443 (W. Va. 1985) (holding that [a] cause of action for negligent or intentional mishandling of a dead body does not require a showing of physical injury or pecuniary loss); Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430, 435 & n.9 (Ohio App. 1986) (recognizing the claim for relief for the mishandling of a dead body as a subclass of the tort of infliction of serious emotional distress and is one of the special circumstances under which recovery is allowed in the absence of physical injury).

In the present case, Plaintiffs argue that, if claims such as theirs are barred, there will often be no one to hold defendants accountable for their negligent handling of dead bodies. A defendant does not owe a duty of care to the decedent, who is not himself actually harmed by the defendant's actions.

The court in Quesada stated:

As a society we want those who are entrusted with the bodies of our dead to exercise the greatest of care. Imposing liability within the limits described will promote that goal. Further, those who come in contact with the bereaved should show the greatest solicitude; it is beyond a simple business relationship -- they have assumed a position of special trust toward the family. Few among us who have felt the sting of death cannot appreciate the grief of those bereaved by the loss. It is neither unreasonable nor unfair to expect the same appreciation by those who prepare our dead.

261 Cal. Rptr. at 778 (citation omitted). We agree that those who are entrusted with the care and preparation for burial of a decedent's body have a duty to exercise reasonable care. Further, we believe that the minority view, that does not require the plaintiff's emotional distress to manifest itself in a physical injury, is the better reasoned approach.

Based on the foregoing, we believe that the policies behind the NIED cause of action and HRS § 663-8.9 support allowing a claim for NIED arising from the negligent mishandling of a corpse.⁷ Because a corpse is neither property nor a material object for purposes of HRS § 663-8.9, we hold that the statute does not apply to NIED claims arising from the negligent

⁷ The concurring and dissenting opinion argues that this court should base its holding upon the Rodrigues reasonableness standard. Having decided the paramount issue that a person's interest in freedom from serious emotional distress was entitled to legal protection, this court stated that serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case. Rodrigues, 52 Haw. at 173, 472 P.2d at 520. This court remanded the case to the trial court to apply the foregoing rule to the award of damages for mental distress. Id. at 174, 472 P.2d at 521. Rodrigues does not stand for the proposition that whether a plaintiff's mental distress satisfies the reasonable person standard is a threshold question that determines whether he or she has alleged an actionable claim.

mishandling of a corpse.⁸

3. Standing

The class of plaintiffs who may assert a claim for relief for the emotional distress suffered as a result of the negligent mishandling of a corpse is not unlimited. Many of the courts that have allowed recovery to those who have not been physically injured have limited standing to those entitled to dictate the disposition of the decedent's remains. See, e.g., Brown, 801 P.2d at 44 (only the surviving spouse or next surviving kin is entitled to the exception); Morton, 865 P.2d at 812 (nearest of kin); Whitehair, 327 S.E.2d at 443 (surviving spouse and, in the absence thereof, the next of kin according to the laws of intestate succession). However, the California Supreme Court has adopted a broader rule. In Christensen v.

⁸ We note that our holding is consistent with Francis v. Lee Enters., Inc., 89 Hawaii 234, 971 P.2d 707 (1999). In Francis, we held that damages for emotional distress arising from a breach of contract are only recoverable where they are specifically provided for in the contract or where nature of the contract is such that emotional distress damages are within the contemplation or expectation of the parties. Id. at 240, 971 P.2d at 713. Specifically, we noted that courts may still award emotional distress damages in two types of situations: 1) where the emotional distress is accompanied by a bodily injury; and 2) where, because of the nature of the contract, serious emotional distress is a particularly foreseeable result of a breach[.] Id. As an example of the second type of situation, we cited Wilson v. Houston Funeral Home, 50 Cal. Rptr.2d 169, 173 (Cal. Ct. App. 1996), which involved a mortician's contract to prepare a body for burial. Thus, Francis impliedly recognizes a claim for emotional distress in a breach of contract action where the contract involves the provision of funeral or burial services. However, Francis is not controlling in the present case because Plaintiffs have not alleged a breach of contract claim. See supra note 3.

⁹ Those who are not the decedent's nearest of kin may only recover under a traditional negligent infliction of emotional distress claim, which requires that the emotional distress be manifested in physical injury. Morton, 865 P.2d at 812.

Superior Court, 820 P.2d 181, 183 (Cal. 1991), the court held that the class of potential plaintiffs who may bring such a claim is close family members who were aware that funeral and/or crematory services were being performed, and on whose behalf or for whose benefit the services were rendered. See also Contreras, 896 P.2d at 1123 (adopting Christensen standing rule).

We believe that limiting recovery to immediate family members who are aware that the funeral, burial, or crematory services are being performed and for whose benefit the services are being performed is a reasonable limitation on the class of potential plaintiffs and that to extend the class further could encourage vexatious suits and fictitious claims. Therefore, we hold that the duty to use reasonable care in the preparation of a body for funeral, burial, or crematory services, or in the rendition of those services, runs to the decedent's immediate family members who are aware of the services and for whose benefit the services are being performed.¹⁰ We define immediate

¹⁰ The concurring and dissenting opinion argues that the requirement that the plaintiff be aware of the funeral, burial, or crematory services is irrelevant and that the requirement that the services be rendered on the plaintiff's behalf is contractual in nature and remote from the interest sought to be protected. Dissent at 12. However, if the plaintiffs were not aware that the funeral, burial, or crematory services were being performed and/or did not intend to attend the ceremony, they cannot be foreseeably harmed by any negligent conduct occurring in the course of the preparations or the ceremony. For example, Plaintiffs in the present case argue that they were harmed because the mutilation of their mother's body prevented them from paying their final respects in the way that they had hoped. In contrast, the expectations of a family member who did not know about the funeral have not been harmed. Finally, we clarify that the requirement that the services be rendered on the plaintiffs' behalf does not implicate or require a contractual relationship.

family members as the decedent's surviving spouse, reciprocal beneficiary, children, parents, siblings, or any other person who in fact occupies an equivalent status. Cf. HRS § 663-3(b) (Supp. 2000) (stating that a wrongful death action may be brought by the surviving spouse, reciprocal beneficiary, children, father, mother, and by any person wholly or partly dependent upon the deceased person).

Having reviewed the record in the light most favorable to Plaintiffs, it is apparent that they are within the class of persons that have standing to bring a cause of action for NIED resulting from Defendants' allegedly negligent mishandling of Akiona's body and that there are genuine issues of material fact regarding their cause of action. Therefore, we hold that the circuit court erred in granting summary judgment in favor of Defendants on Count I.

C. It is unnecessary to address the adoption of interference with dead bodies as an independent tort.

Plaintiffs argue that, if HRS § 663-8.9 bars recovery in the instant case, this court should adopt the rule stated in Restatement (Second) Torts § 868¹¹ because: 1) the negligent

¹¹ Restatement (Second) Torts § 868, entitled Interference with Dead Bodies, provides that [o]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body. However, section 868 was subsequently amended so that it no longer limits recovery to family members. Restatement (Second) Torts (Appendix) § 868, reporter's note.

mishandling of a corpse involves a special likelihood of genuine and serious emotional distress; 2) the harm is foreseeable; 3) the fact that it is difficult to calculate the damages should not prevent this court from adopting the rule; and 4) rejecting the rule would insulate the negligent acts of those entrusted with the care of the remains of loved ones. Because we hold that HRS § 663-8.9 does not apply to NIED claims arising from the negligent mishandling of a corpse, we need not address whether interference with dead bodies should be adopted as an independent tort.

III. CONCLUSION

Based on the foregoing, we vacate the circuit court's order granting summary judgment in favor of the Defendants as to

Count I and the judgment entered pursuant thereto. We remand the case to the circuit court for further proceedings.

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