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CNMI SUPERIOR COURT  
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Case Number: 11-0085-CV  
N/A



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

ANTONIO B. CABRERA, individually and as  
Guardian Ad Litem for TIANA ESTELLE ZI  
QING HUANA CABRERA, a minor child, and  
BI RUI H. CABRERA,

CIVIL CASE NO. 11-0085

NOTICE FOR PUBLICATION/ORDER

Petitioners,

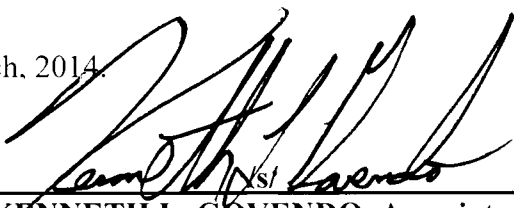
v.

MICRONESIAN RESORT, INC., d/b/a  
PALMS RESORT SAIPAN,

Defendant.

THIS COURT hereby gives notice that the **ORDER** filed on **November 6, 2014** at **3:02 p.m.** is for **PUBLICATION**.

**SO ORDERED** this 20th day of March, 2014.

  
KENNETH L. GOVENDO, Associate Judge



E-FILED  
CNMI SUPERIOR COURT  
E-filed: Nov 06 2013 03:02PM  
Clerk Review: N/A  
Filing ID: 54504983  
Case Number: 11-0085-CV  
N/A

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HUANA CABRERA, a minor child, and )  
BI RUI H. CABRERA )

Civil Case No. 11-0085

Plaintiffs. )

v. )

**ORDER**

MICRONESIAN RESORT, INC., d/b/a )  
PALMS RESORT SAIPAN, )

Defendant. )

MICRONESIAN RESORT, INC., d/b/a )  
PALMS RESORT SAIPAN, )

Third-Party Plaintiffs. )

v. )

KUME ARCHITECTS-ENGINEERS, )  
KUME SEKKEI CO., LTD., aka )  
SHIMIZU CORPORATION, KENMOCHI )  
DESIGN LABORATORY CO., LTD., d/b/a )  
KENMOCHI DESIGN ASSOCIATES and )  
NIPPON OTIS ELEVATOR CO., LTD., aka )  
NIPPON OTIS ELEVATOR COMPANY, )

Third-Party Defendants. )

**I. INTRODUCTION**

1 This is a suit to recover for negligence and negligent infliction of emotional distress, by  
2 Antonio Cabrera and Bi Rui Cabrera, and by Antonio Cabrera on behalf of his daughter, Tiana  
3 Cabrera, against Palms Resort Saipan.

4 This matter came before the Court on April 4, 2013 on the Defendant's motion for partial  
5 summary judgment. The Plaintiffs appeared and were represented by their attorneys of record,  
6 William M. Fitzgerald and Bruce Berline. The Defendant appeared by and through its attorneys of  
7 record, Joseph E. Horey and David G. Banes. The Court, having considered the evidence,  
8 arguments of counsel, and the record, grants the motion for partial summary judgment and  
9 dismisses Count II of the Plaintiffs' Complaint.

## 10 **II. FACTS**

11 The Palms Resort is a hotel operating on the island of Saipan. The lobby of the hotel is one  
12 floor above the ground level and overlooks the ground floor.

13 On May 9, 2010, the Cabreras took their two young children to a restaurant located within  
14 the Palms Resort. The restaurant is situated on the ground floor of the hotel. After the meal the  
15 Cabreras walked to the elevator bank. The elevator call button is located approximately fifteen feet  
16 from the elevator doors. Bi Rui Cabrera pressed the elevator call button. The Cabreras daughter,  
17 Tiana Cabrera, rushed from Bi Rui Cabrera's side into the elevator when the doors opened. The  
18 elevator doors closed before the Cabreras could reach the elevator. The Cabreras went to the lobby  
19 to search for Tiana.

20 Meanwhile, the elevator stopped and Tiana walked into the lobby of the hotel. Tiana  
21 believed that her parents were still on the ground floor of the hotel. She climbed a flower holder,  
22 which overlooked the ground floor of the hotel. Unfortunately, Tiana fell from the flower holder on  
23 the lobby level onto the ground floor. Tiana was seriously injured by the fall.

1 The Cabrerias arrived minutes after Tiana was injured. but they did not actually witness her  
2 fall. Tiana was in a significant amount of pain. The Cabrerias stayed with Tiana for approximately  
3 thirty to thirty-five minutes until Tiana was taken to the hospital by an ambulance.

## 4 **II. LEGAL STANDARD**

5 The Defendant moves the Court to grant summary judgment against Plaintiffs on Count II of  
6 the their Complaint. A party is entitled to summary judgment where “the pleadings, depositions,  
7 answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is  
8 no genuine issue as to any material fact and that the moving party is entitled to summary judgment  
9 as a matter of law.” NMI R. Civ. P. 56(c). “A moving party bears the initial and the ultimate  
10 burden of establishing its entitlement to summary judgment by demonstrating the absence of a  
11 genuine issue of material fact in the record before the court.” *Triple J Saipan Inc. v. Agulto*, 2002  
12 MP 11 ¶ 8. “If, and only if, the party moving for summary judgment meets his initial burden [is] the  
13 burden of production shift[ed] to the non-moving party, who must produce just enough evidence to  
14 create a genuine factual issue.” *In re Estate of Roberto*, 2002 MP 23 n. 11 (citation omitted). Any  
15 doubt as to the existence of a genuine issue of material fact in a motion for summary judgment must  
16 be resolved against the movant. *Id.* “A fact in contention is considered material only if its  
17 determination may affect the outcome of the case.” *Triple J Saipan Inc.*, 2002 MP 11 ¶ 8. With  
18 these principals in mind the Court turns to the issues in this case.

## 19 **III. DISCUSSION**

20 Count II of the Plaintiffs’ Complaint alleges that Tiana’s injuries were proximately caused  
21 by the Defendant’s negligence. The Complaint further alleges that Defendant’s negligence  
22 proximately caused Plaintiffs to experience severe emotional distress.

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1 **A. PLAINTIFFS' ARGUMENT FAILS UNDER THE RESTATEMENT SECOND**

2 The Plaintiffs' claim for negligent infliction of emotional distress is not viable under the  
3 Restatement Second of Torts.

4 First, the Plaintiffs must demonstrate that their emotional distress caused them illness or  
5 bodily harm. See *Lee Bok Yurl v. Yoon Young Byung*, Civ. No. 99-0085 (NMI Super. Ct. March 3,  
6 2000) (Order at 8); Restatement (Second) of Torts § 313(1) (1965); *see also* cmt.a. Here, the  
7 Cabreras have not alleged that they suffered illness or bodily harm resulting from their alleged  
8 emotional distress.

9 Further, "in order to successfully allege a cause of action for negligent infliction of  
10 emotional distress, [Plaintiffs] must allege that [Defendant] subjected them to a traumatic event,  
11 which caused [Plaintiffs] to fear for their own safety." *Id.*: Restatement (Second) of Torts § 313(2)  
12 (1965); *see also* cmt. d. Here, the Cabreras did not fear for their own safety.

13 Finally, the Cabreras' claim for negligent infliction of emotional distress will not be  
14 successful because they did not witness the actual injury. A bystander may only recover for  
15 negligent infliction of emotional distress if the "harm of peril to a member of his immediate  
16 occur[s] in his presence." *Falalimpa v. Richards*, Civ. No. 10-0079 (NMI Super Ct. Sept. 8, 2010)  
17 (Order granting Defendants' motion to dismiss Plaintiff Mariel Falalimpa's negligent infliction of  
18 emotional distress and negligence claims at 5); *Evangelista v. Mobil Oil Mariana Islands, Inc.*, Civ.  
19 No. 97-0652(T) (NMI Super. Ct. May 19, 1999) (Order at 4); Restatement (Second) of Torts  
20 §436(3). Here, the Cabreras did not witness Tiana's fall.

21 Accordingly, the Cabreras claim for negligent infliction of emotional distress is not viable  
22 under the Restatement Second.

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1 **B. RESTATEMENT THIRD**

2 Plaintiffs contend that this Court must adopt the Restatement Third, claiming that the  
3 American Law Institute's adoption of this new Restatement has changed Commonwealth's law.  
4 Opp'n at 4. 6. The Defendant, however, argues that the Court "should 'adopt the most recent  
5 version of the Restatement *unless* local law to the contrary . . . has been previously endorsed by the  
6 courts.'" Reply at 4 (citation omitted). In the Defendant's view, the Court should apply the  
7 Restatement Second to this case.

8 For the reasons that follow, the Court adopts the Restatement Third.

9 **1. WRITTEN CASE LAW DOES NOT INCLUDE SUPERIOR COURT DECISIONS BECAUSE ONE**  
10 **SUPERIOR COURT DOES NOT HAVE THE POWER TO BIND ANOTHER SUPERIOR COURT**

11 The Defendant argues that prior decisions of the Superior Court constitute written law as  
12 defined by 7 CMC § 3401. Thus, the Defendant argues that the Court may not apply the  
13 Restatement Third to the facts of this case because the Court has previously applied the Restatement  
14 Second. The Court holds that published Superior Court decisions do not constitute written law as  
15 defined by 7 CMC § 3401.

16 "In the Commonwealth, the rules of the common law as expressed in the Restatements of  
17 the Law as approved by the American Law Institute serve as the applicable rules of decision, in the  
18 absence of written or local customary law to the contrary." *Ito v. Macro Energy, Inc.*, 4 NMI 46, 55  
19 (1993) (citing 7 CMC § 3401). The text of 7 CMC § 3401 provides:

20 In all proceedings, the rules of the common law, as expressed in  
21 the restatements of the law approved by the American Law  
22 Institute and, to the extent not so expressed as generally  
23 understood and applied in the United States, shall be the rules of  
24 decision in the courts of the Commonwealth, in the absence of  
written law or local customary law to the contrary

1 The Court may not apply the Restatements as the rules of decision when there are applicable  
2 sources of written law. *SARMA v. Wan Jin Yoon*, 2011 MP 12 ¶ 19. “[W]ritten law includes the  
3 Commonwealth Constitution and Commonwealth statutes, along with case law, court rules,  
4 legislative rules, and administrative rules.” *Id.* (citing *Borja v. Goodman*, 1 NMI 225, 242 (1990)).

5 Published Superior Court decisions are case law to the extent that they contribute to the  
6 body of jurisprudence in the Commonwealth. However, the Court finds that the legislature did not  
7 intend for published Superior Court decisions to be considered written law under 7 CMC § 3401.  
8 Section 3401 simply does not contain any indication that it is meant to radically alter the trial  
9 court’s authority to bind other trial courts. Similarly, there is no evidence that this Court is meant to  
10 be bound by other trial courts of the Superior Court.

11 The Commonwealth Supreme Court has never held that a trial court can be bound by  
12 another trial court in the Commonwealth. On the contrary, it is well established that trial courts in  
13 the Commonwealth do not have the authority to bind other trial courts. *Bank of Saipan v. Superior*  
14 *Court*, 2001 MP 7 ¶ 21 (“stare decisis does not compel one trial court . . . to follow the decision of  
15 another trial court.”); *Rosario v. Camacho*, 2001 MP 3 ¶ 86.

16 Accordingly, the Court holds that published Superior Court decisions do not constitute  
17 written law under 7 CMC § 3401.

## 18 **2. THE COURT IS NOT MANDATED TO ADOPT THE RESTATEMENT THIRD**

19 The Court is not required by law to adopt the Restatement Third, as it would be  
20 unconstitutional for the legislature to delegate its powers to an organization, such as the American  
21 Law Institute. The Court interprets statutes in ways that do not make them unconstitutional.  
22 Therefore, the Court is not required to adopt the Restatement third.

1       **3. THE COURT MAY ADOPT THE RESTATEMENT THIRD WHEN THE PROVISION ACTUALLY**  
2       **EXPRESSES THE COMMON LAW OF THE STATES AND WHEN IT IS IN THE BEST INTERESTS OF THE**  
3       **COMMONWEALTH**

4           The Court may adopt provisions of the Restatement Third. The language of 7 CMC § 3401  
5       does not indicate that the Court can never adopt newer versions of the Restatement. Further, policy  
6       supports adopting new provisions on a piecemeal basis because the legislature did not intend to  
7       freeze the Commonwealth in the year 1965. The test requires the Court to determine if a provision  
8       of the Restatement is an actual expression of the common law and then determine whether that  
9       provision is in the best interests of the Commonwealth.

10          Section 48 of the Restatement Third “reflects the rule adopted by the California Supreme  
11       Court in *Dillon v. Legg*, 411 P.2d 921 (Cal. 1968) and the evolution of that rule.” Restatement  
12       (Third) of Torts § 48 cmt. a. (2012). Prior to this case, injured parties could recover for negligently  
13       caused emotional harm only if they suffered physical injuries resulting from the defendant’s  
14       negligent conduct. *Id.* The rule then developed to include those within the “zone of danger” created  
15       by the defendant’s negligent conduct. *Id.* However, the *Dillon* court loosened the antiquated rules  
16       and allowed for emotional distress claims for those who witnessed an injury to family member but  
17       were not themselves harmed or in danger of being harmed. *Id.* “Most American courts have now  
18       adopted some version of the ‘bystander’ rule.” *Id.* Thus, this Court finds that the rule stated in the  
19       Restatement Third more accurately reflects the common law as it presently stands in the United  
20       States than the rule as set forth in the Restatement Second.

21          The Court also finds that adopting the revised rule as expressed in the Restatement Third is  
22       in the best interests of the Commonwealth. Accordingly, the Court holds that section 48 of the  
23       Restatement Third is applicable to claims of negligent infliction of emotional distress in the  
24       Commonwealth.

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1           **4. ELEMENTS OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER RESTATEMENT**

2           The Restatement Third makes it significantly easier for a Plaintiff to sue for negligent  
3 infliction of emotional distress:

4                           An actor who negligently causes sudden serious  
5                           bodily injury to a third person is subject to liability  
6                           for serious emotional harm caused thereby to a  
7                           person who:

- 8                           (a) perceives the event contemporaneously, and  
9                           (b) is a close family member of the person suffering  
10                           the bodily injury.

11           Restatement (Third) of Torts § 48 (2012). Here, Tiana suffered serious bodily injury when she fell  
12 to the ground floor. Tiana’s parents, the Cabrerias, may have suffered extreme emotional harm when  
13 they discovered Tiana’s injuries, but they did not witness Tiana’s fall. The Cabrerias argue that their  
14 arrival at the scene, moments after the injury, was sufficient to contemporaneously perceive the  
15 accident.

16           The Court holds that the Cabrerias did not perceive Tiana’s injury contemporaneously. For  
17 the Cabrerias to recover under section 48 they “must have contemporaneously perceived the events  
18 that caused physical harm to the third person. It is not enough that the person later learned about the  
19 events, later viewed a recording of them, or later observed the resulting bodily injuries.”  
20 Restatement (Third) of Torts § 48 cmt. e (emphasis added). Here, Tiana’s injuries were caused by  
21 her fall. The Cabrerias were not present to witness the fall that caused the injury to Tiana. Therefore,  
22 the Cabrerias did not contemporaneously perceive the injury to Tiana.

23           Section 48 of the Restatement Third is based on the rule “first adopted by the California  
24 Supreme Court in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) and the evolution of that rule.”  
Restatement (Third) of Torts § 48 cmt. a. Twenty years after *Dillon* was decided, the California

1 Supreme Court recognized that “*Dillon’s* progeny have created ever widening circles of liability.”  
2 *Thing v. La Chusa*, 48 Cal. 3d 644, 653 (1989). The California Supreme Court went on to hold that  
3 the Plaintiff could not recover for negligent infliction of emotional distress because she did not  
4 actually observe her son’s injury: “a plaintiff may recover damages for emotional distress caused by  
5 observing the negligently inflicted injury of a third person if, but only if, said plaintiff . . . is present  
6 at the scene of the injury-producing event at the time it occurs and is then aware that it is causing  
7 injury to the victim.” *Thing*, 48 Cal. 3d at 667. Section 48 of the Restatement Third follows this line  
8 of reasoning and clearly requires plaintiff to be present at the scene of the injury-producing event.  
9 Restatement (Third) of Torts § 48 cmt. e. including illus. 1-4.

10 The cases cited by the Cabrerias do not interpret contemporaneous perception to include  
11 viewing the victim immediately after the injury-causing event. Instead, the cases cited by the  
12 Cabrerias demonstrate that some courts will allow recovery when a plaintiff contemporaneously  
13 perceives the injury *or* arrives immediately after the injury-causing event. This Court has been  
14 unable to locate any precedent defining “contemporaneous perception” as meaning arriving after  
15 the fact and notes that in the absence of written law, the Court is bound by the Restatement. *Ito v.*  
16 *Macro Energy, Inc.*, 4 NMI at 55, citing 7 CMC § 3401.

17 The Court recognizes that the line drawn by the Restatement Third is arbitrary. However,  
18 the rule “reflects a judgment that a contemporaneous perception is a more traumatic event than is  
19 learning later about the injury. It also reflects recognition that, as a practical matter, courts must  
20 draw lines, often apparently arbitrary ones, to prevent ‘ever widening circles of liability.’”  
21 Restatement (Third) of Torts Section 48 Reporter Comment e, quoting *Thing v.*, 48 Cal. at 653.  
22 Even so, were it within the Court’s power, the Court would hold that the Cabrerias could maintain  
23 their action for negligent infliction of emotional distress notwithstanding the fact that they did not  
24 perceive the actual injury. However, “[o]ur jurisdiction is not vested with a similar degree of

1 freedom in formulating our own common law as that exercised by courts in other jurisdictions.  
2 because of the statutory dictate that we apply the Restatement. *Ito v. Macro Energy, Inc.*, 4 NMI at  
3 56, citing 7 CMC § 3401.

4 The Court holds that a plaintiff must be “present at the scene of the injury-producing event  
5 at the time it occurs and [must be] aware that it is causing injury to the victim” to maintain an action  
6 for negligent infliction of emotional distress. *Thing*, 48 Cal. 3d at 684. Here, the Plaintiffs were not  
7 present at the scene of the injury producing-event at the time it occurred, and they did not witness  
8 their daughter’s injury as it happened. Accordingly, the Defendant’s motion for partial summary  
9 judgment is granted.

### 10 **III. CONCLUSION**

11 1. The Court will use whatever Restatement was available when the statute was published, unless  
12 the new restatement is an actual expression of the common law and is in the best interests of the  
13 Commonwealth.

14 2. The Court adopts the Restatement of Third for negligent infliction of emotional distress.

15 3. The Motion for Summary judgment is granted because Plaintiffs did not contemporaneously  
16 experience the event.

17 **IT IS SO ORDERED** this 1st day of November 2013.

18 \_\_\_\_\_  
19 KENNETH L. GOVENDO  
20 ASSOCIATE JUDGE  
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23  
24