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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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HEATHER R. WINFREY, Individually and as Personal Representative  
for the Estate of JASMINE ROSE ANNE FRY and SAMUEL J. FRY, JR.,  
Petitioners/Plaintiffs-Appellants,

vs.

GGP ALA MOANA LLC dba ALA MOANA CENTER,  
Respondent/Defendant-Appellee.

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SCWC-30589

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(ICA NO. 30589; CIV. NO. 06-1-0017)

July 18, 2013

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

The majority vacates the Order of the Circuit Court of the First Circuit<sup>1</sup> (the court) granting the summary judgment motion of Respondent/Defendant-Appellee GGP Ala Moana LLC (Ala Moana) because issues of material fact exist as to whether Ala Moana breached its duty to render aid to decedent Jasmine Fry

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<sup>1</sup> The Honorable Gary W.B. Chang presided.

(Fry) under Section 314A<sup>2</sup> of the Restatement (Second) of Torts (1965) (Second Restatement) and whether Ala Moana failed to prevent harm to Fry under Section 338<sup>3</sup> of the Second Restatement.

However, in my view, neither Section 314A nor Section 338 of the Second Restatement apply following this court's decision in Pickard v. City and County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969). Both Section 314A and Section 338 are based on the common law distinction between trespassers, licensees, and invitees. Under Section 314A, a possessor of land is under a duty to give first aid to those on his property, but only to

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<sup>2</sup> Second Restatement § 314A provides in relevant part as follows:

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

. . .

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(Emphasis added.)

<sup>3</sup> Second Restatement § 338 provides as follows:

A possessor of land who is in immediate control of a force, and knows or has reason to know of the presence of trespassers in dangerous proximity to it, is subject to liability for physical harm thereby caused to them by his failure to exercise reasonable care

(a) so to control the force as to prevent it from doing harm to them, or

(b) to give a warning which is reasonably adequate to enable them to protect themselves.

(Emphasis added.)

invitees. Similarly, Section 338 sets forth a duty of care owed only to trespassers. However, in Pickard, this court recognized that "the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others." 51 Haw. at 135, 452 P.2d at 446.

Rather, I would hold that Ala Moana owed a duty to "use reasonable care for the safety" of Fry, id., because Fry was "known to be" on Ala Moana's premises. Kaczmarczyk v. City and County of Honolulu, 65 Haw. 612, 615, 656 P.2d 89, 91-92 (1982) superseded on other grounds as recognized by Bhakta v. County of Maui, 109 Hawai'i 198, 215, 124 P.3d 943, 960 (2005). Inasmuch as an issue of material fact exists as to whether Ala Moana breached that duty, I concur in vacating the Order of the court granting Ala Moana's motion for summary judgment.

I.

To recount briefly, on September 3, 2005, Cary Oshiro (Oshiro), a maintenance worker at Ala Moana, discovered Fry on one of the rooftops of the shopping center between five and ten minutes after 2:00 p.m. Fry proceeded to climb onto a ventilation duct on the rooftop, and "started jumping on [it]." Eventually, the duct "collapsed enough" to allow Fry to crawl inside.

Ala Moana security officer Lukela Bagood (Bagood) arrived on the roof at approximately 2:33 p.m. and Ala Moana

security officer Jowana Lobendahn (Lobendahn) arrived soon after, at approximately 2:35 p.m. At that point, Fry was already in the ventilation duct. After some communication between Fry and Lobendahn, Fry crawled through the duct system, eventually reaching a point near a restaurant called Little Café Siam (Café Siam). Oshiro attempted to find Fry by following the ventilation duct, and therefore also arrived at the restaurant, where the employees told him that the exhaust vent above the stove was moving. Oshiro eventually opened an access panel and saw Fry apparently trapped in a "hood" above the stove of Café Siam. Oshiro related that he did not think that the stoves were in use when he arrived, although he stated that "maybe" the pilot light on the stoves was on.

Lobendahn and Bagood remained on the rooftop, until they were dispatched to Café Siam approximately twenty minutes after Bagood had arrived on the rooftop. Lobendahn recounted that when she arrived, "one stove ewa of where [Fry] was located had [four] pots with hot water," and a "stove directly under [Fry] had two large cooking woks that had nothing on it." Lobendahn explained that she directed the employees to remove the cooking items and then turn off the stoves. Bagood, who arrived at approximately the same time as Lobendahn, stated that the stoves at Poi Bowl, a restaurant that also used the exhaust duct in which Fry was trapped, were also in use at the time.

Bagood related that he was "surprised" that emergency service personnel were not present when he arrived at Café Siam, because it usually took paramedics approximately three minutes to arrive at Ala Moana after they were called. However, Ala Moana security did not call 911 until 2:54 p.m. The purpose of the 2:54 p.m. call was not to request assistance for Fry, but instead to inform the Honolulu Police Department that Fry had forced her way into the ventilation duct. At approximately 2:57 p.m., Ala Moana security called Emergency Medical Services (EMS) to request assistance in removing Fry from the duct. However, Ala Moana security then mistakenly informed EMS that Ala Moana personnel had removed Fry from the duct, and that an ambulance was not necessary. Finally, at approximately 3:00 p.m., Ala Moana security contacted the Hawai'i Fire Department (HFD) to request assistance in removing Fry from the duct. Paramedics arrived at 3:06 p.m., and HFD arrived at 3:10 p.m.

Fry was extricated from the duct at approximately 4:53 p.m. Her condition immediately deteriorated, and she was pronounced dead at Queen's Hospital at 5:33 p.m. An autopsy was performed by Dr. Kanthi De Alwis of the Department of the Medical Examiner. Dr. De Alwis concluded Fry's death was "a result of combined effects of hyperthermia<sup>4</sup> and respiratory compromise."

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<sup>4</sup> Hyperthermia is defined as "exceptionally high fever." Merriam Webster's Collegiate Dictionary 571 (10th ed. 1993).

She also opined that Fry had suffered an "acute psychotic episode of unknown etiology."

II.

On May 5, 2008, Ala Moana filed a motion for summary judgment, arguing that Fry was not "owed a duty of care by Ala Moana" under Pickard because Fry was a trespasser and was not "reasonably anticipated" to be on the rooftop. In opposition, Petitioners/Plaintiffs-Appellants Heather R. Winfrey and Samuel F. Fry Jr., Fry's mother and father (Petitioners) argued that Fry was owed a duty under Pickard. Petitioners did not discuss whether Fry was "reasonably anticipated" to be on the premises.

A hearing was held on August 27, 2009. At the hearing the court "agree[d] that with respect to the Pickard claim, the record does not support the conclusion that it was reasonably foreseeable that the plaintiff would be in th[e] secured area." However, the court found "a residual duty to take reasonable care to provide aid to the plaintiff once her presence came to the attention of the defendants" based on Lundy v. Adamar of New Jersey, 34 F.3d 1173 (3d. Cir. 1994).<sup>5</sup> The court therefore issued an Order granting in part and denying in part Respondent's motion for summary judgment. However, on April 1, 2009, following Respondent's motion for reconsideration, the court

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<sup>5</sup> The Third Circuit's analysis in Lundy was based on Section 314A of the Second Restatement. Lundy, 34 F.3d at 1179.

issued an order granting summary judgment in favor of Respondent on all of Petitioners' claims.

III.

On appeal to the ICA, Petitioners reiterated that Ala Moana owed Fry a duty of care under Pickard. Ala Moana responded that Pickard did not apply because Fry was an "unanticipated trespasser." Holding that Pickard did not apply, the ICA posited that "the dispositive question is whether the person was 'reasonably anticipated to be upon the premises[.]'" Winfrey v. GGP Ala Moana LLC, No. 30589, 2012 WL 456489, at \*3 (Haw. App. Feb. 12, 2012) (SDO) (quoting Pickard, 51 Haw. at 135, 452 P.2d at 446). Because "[Petitioners] offered no evidence to indicate that Ala Moana should have 'reasonably anticipated' that Fry would be on the rooftop," the ICA concluded that Pickard did not apply.

IV.

In their Application for Certiorari (Application), Petitioners maintain that they "produced evidence demonstrating that the door and gate leading to the rooftop were unlocked," and that "[Ala Moana's] only safeguard against entry onto the roof, an alarm wired to the entry door, was not operating properly on the day of the incident." Therefore, Petitioners contend that the ICA erred in concluding that Pickard did not apply because

Ala Moana could not have reasonably anticipated that Fry was on the rooftop.

In its Response, Ala Moana argues that the evidence demonstrates that the rooftop was secured by a locked gate and hatch, and that Ala Moana had no reason to believe that Fry would enter the roof. Further, Ala Moana asserted that it could not have "reasonably anticipated" that Fry would enter the ventilation duct, and therefore it owed no duty to Fry.

V.

A.

Under the common law, the duty a possessor of land owed to persons on the premises depended on the status of the individual, i.e., whether the visitor was a invitee, licensee, or trespasser. In Pickard, however, this court "sought to eliminate distinctions with respect to owner or occupier duty, making clear that there is only one standard of care owed by an owner or occupier of land: 'reasonable care for the safety of all persons reasonably anticipated to be upon the premises.'" Steigman v. Outrigger Enters., Inc., 126 Hawai'i 133, 151, 267 P.3d 1238, 1256 (2011) (Acoba, J., concurring) (quoting Pickard, 51 Haw. at 135, 452 P.2d at 446) (internal brackets omitted). This court's holding was based on the recognition that "the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of



others." Pickard 51 Haw. at 135, 452 P.2d at 446. Rather, Pickard held that "[a] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose." Id. at 136, 452 P.2d at 446 (internal quotation marks omitted). Additionally, "[r]easonable people do not ordinarily vary their conduct depending on such matters." Id. (internal quotation marks omitted). Therefore, the common law rule was "contrary to our modern social mores and humanitarian values." Id. (internal quotation marks omitted). Pickard announced a new standard of care based on "policy considerations eschewing outdated legal classifications, affirming the value of life and limb, and crediting ordinary conduct and expectations." Steigman, 126 Hawai'i at 151, 267 P.3d at 1256 (Acoba, J., concurring).

B.

This court has further clarified that under the standard set forth in Pickard, "an occupier of land is under a duty to exercise all reasonable care for the safety of all persons known to be, or reasonably anticipated to be, upon its premises."<sup>6</sup> Kaczmarczyk, 65 Haw. at 615, 656 P.2d at 91-92

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<sup>6</sup> In Kaczmarczyk, the decedent drowned at Ehukai Beach Park on Oahu despite the efforts of a city lifeguard to save him. 65 Haw. at 613, 656 P.2d (continued...)

(emphasis added) (citing Pickard, 51 Haw. at 135, 452 P.2d at 446). Under that standard, summary judgment was inappropriate because a genuine issue of material fact existed as to whether Ala Moana exercised reasonable care for the safety of Fry once it became aware that Fry was trapped in the ventilation duct. See French v. Hawai'i Pizza Hut, 105 Hawai'i 462, 470-71, 99 P.3d 1046, 1054-55 (2004) (explaining that on a motion for summary judgment, the moving party must demonstrate "the absence of any genuine issue of material fact" after "constru[ing] the evidence in the light most favorable to the non-moving party").

First, after Fry crawled into the ventilation duct, Oshiro followed the duct and found Fry trapped above Café Siam. At that point, Ala Moana owed Fry a "duty of reasonable care" inasmuch as Fry was "known to be" on the premises. Kaczmarczyk, 65 Haw. at 615, 656 P.2d at 92.

Second, both Lobendahn and Bagood testified that the stoves below the ventilation duct were still active approximately twenty minutes after Ala Moana employees became aware of Fry's presence in the ventilation duct. Additionally, the record

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<sup>6</sup>(...continued)  
at 91. This court concluded that the city "had a duty to warn users of Ehukai Beach Park of extremely dangerous conditions in the ocean along its beach frontage which were not known or obvious to persons of ordinary intelligence." Id. at 615, 656 P.2d at 92. This court held that "[t]he plaintiffs . . . were [] entitled to present to the trier of fact the question of whether City was negligent in failing to warn [the] decedent." Id. The City's duty to warn beach users of extremely dangerous conditions was later limited by statute to public beach parks. Bhakta, 109 Hawai'i at 215, 124 P.3d at 960.

indicates that Ala Moana did not call 911 to request medical assistance until well after Ala Moana security was aware that Fry was trapped in the duct. Hence, a genuine issue of material fact exists, inter alia, as to whether Ala Moana "exercised reasonable care for the safety of [Fry]," Kaczmarczyk, 65 Haw. at 615, 656 P.2d at 91-92, inasmuch as that duty could be breached by subjecting Fry to the heat emanating into the vents from the stoves, or by failing to take steps to prevent harm to Fry once her proximity to the stoves became known.<sup>7</sup> Hence, both the court and the ICA erred in concluding that Ala Moana owed no duty to Fry.

VI.

The majority contends that Pickard does not apply because Ala Moana could not have "reasonably anticipated" Fry's presence in the ventilation duct. Majority opinion at 24-25. However, as explained supra, the duty of reasonable care under Pickard also applies once it was "known" to Ala Moana that Fry was present in the ventilation duct. Kaczmarczyk, 65 Haw. at 615, 656 P.2d at 91-92. This conclusion is coincident with the

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<sup>7</sup> I agree with the majority that neither the Good Samaritan Statutes nor Moyle v. Y & Y Hyup Shin Corporation, 118 Hawaii 385, 191 P.3d 1062 (1992), render Ala Moana immune from liability. As explained by the majority, Hawaii Revised Statutes (HRS) § 663-1.5(a) "absolves bystanders providing first aid from liability," but does not apply here, where Ala Moana owed a duty of care to Fry. (Emphasis added.) Majority opinion at 36. Moreover, HRS § 663-1.6 and Moyle both involved criminal actions by a third party, and are therefore inapplicable. Majority opinion at 36-37.

common law which preceded Pickard, inasmuch as under the common law rule an occupier of land owed a duty to all persons, even trespassers, to carry on his or her activities with reasonable care for their safety once he or she became aware of their presence.<sup>8</sup> See Second Restatement § 336.

Pickard did not repudiate the common law duty of reasonable care a landowner owed to those known to be on the premises. Kaczmarczyk, 65 Haw. at 615, 656 P.2d at 91-92. Because Pickard focused on expanding the duty of care owed by occupiers of land, this court clearly did not intend to eliminate the common law duty owed to those whose presence are known to a landowner. Hence, as established in Kaczmarczyk, the duty of reasonable care announced in Pickard applies to those known to be

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<sup>8</sup> Second Restatement § 336 provides for a similar duty with respect to trespassers:

A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.

(Emphases added)

Second Restatement § 341 provides for a similar duty with respect to licensees:

A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, (a) he should expect that they will not discover or realize the danger, and (b) they do not know or have reason to know of the possessor's activities and of the risk involved.

(Emphasis added)

on the premises, in addition to those "reasonably anticipated" to be on the premises.

VII.

The majority instead concludes Ala Moana owed a duty to protect Fry under Farrior v. Payton, 57 Haw. 620, 562 P.2d 779 (1977). In Farrior, however, this court merely cited Section 338 of the Second Restatement and Pickard without analysis, for the proposition that a duty of care was owed to those reasonably anticipated upon the premises. Under the facts in Farrior, such trespassers were reasonably anticipated to enter the premises. Farrior, 57 Haw. at 629, 562 P.2d at 786. The citation in Farrior of both Section 338 and Pickard without comment can only be viewed as illustrating that Section 338, pertaining only to trespassers, was subsumed in Pickard's inclusive duty of care. Thus, Section 338 was not "adopted by this court in Farrior[" Majority opinion at 29.

Respectfully, in my view Section 338 is inconsistent with Pickard. Under the Second Restatement, "a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care," except "as stated in, [inter alia, Section 338]." Second Restatement § 333. Section 338 provides that a possessor of land owes a duty if he "knows or has reason to know of the presence of trespassers" who may be endangered by a force a possessor of land is "in immediate

control of." Second Restatement § 338. Thus, Section 338 effectuates the common law's rigid differentiation between the duties owed to invitees, licensees, and trespassers, inasmuch as it provides a specific duty that is owed only to trespassers.

However, to reiterate, Pickard abolished the common law distinctions between classes of persons because a person's life or limb was not "less worthy of protection" because he or she was a licensee or trespasser. 51 Haw. at 135, 452 P.2d at 446. Pickard recognized that it was "contrary to our . . . humanitarian values" to differentiate the standard of care owed to those on the premises based on their status. Id. at 136, 452 P.2d at 446. Hence, inasmuch as the duty announced in Section 338 of the Second Restatement is limited to trespassers, it is inconsistent with Pickard.

#### VIII.

The majority also concludes that Ala Moana owed Fry a duty under Section 314A(3) of the Second Restatement. Respectfully, Section 314A(3) also conflicts with Pickard's rationale. Under Section 314A of the Second Restatement, a possessor of land owes a duty to "protect [certain persons] against unreasonable risk of physical harm" and to "give them first aid after [he or she] knows . . . that they are ill or injured." That duty is based upon a "special relationship" with

the person protected. Section 314A(3) declines to extend the same protection to others.

The majority indicates Section 314A(3) states that possessors of land owe a duty "to members of the public who enter in response to his [or her] invitation.'" Majority opinion at 30 (quoting Second Restatement § 314A). The same provision was discussed in Doe v. Grosvenor Props. (Hawai'i) Ltd., 73 Haw. 158, 829 P.2d 512 (1992). Referring to Section 314A(3), this court stated that "[Section 314A(3)] describes the relationship between a possessor of land and his invitee" and observed that:

The [Second Restatement] § 332 states:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.<sup>9</sup>

Doe, 73 Haw. at 163-64, 829 P.2d at 515-16 (emphasis added). This court rejected the public invitee definition in the Second Restatement, holding that "where the definition of an invitee is relevant solely to determine the scope of [Second] Restatement [Section] 314A(3), we decline to adopt the broader, public

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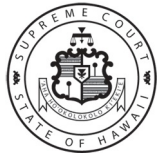
<sup>9</sup> Under the Second Restatement, a "business visitor," is "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Doe, 73 Haw. at 164, 829 P.2d at 515-516 (quoting Second Restatement § 332). Business invitees include "persons who are invited to come on the land for a purpose connected with the business for which the land is held open to the public." Second Restatement § 332 cmt. e. Thus, persons entering a shop are business invitees if they enter to make a purchase or to look at goods on display. Id.

invitee definition, finding that there is no basis upon which to base a duty to protect where a landholder holds open his land gratuitously, and does not receive or hope to receive monetary, commercial, or other tangible benefit from the invitation." Id. at 164, 829 P.2d at 516 (emphasis added).<sup>10</sup> Pickard established that the duty owed by an occupier of land does not vary based on the reason that other persons have come upon his or her land, Pickard, 51 Haw. at 136, 452 P.2d at 446, and the limitation of a "special relationship" in Section 314A(3) would diminish the scope of the Pickard rule.

IX.

Based on the foregoing, I respectfully concur and dissent.

/s/ Simeon R. Acoba, Jr.



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<sup>10</sup> Further, the majority expands the coverage of Section 314A beyond that contemplated by the Second Restatement. The duty owed by a possessor of land under Section 314A does not extend "to one who has ceased to be an invitee." Second Restatement § 314A cmt. c. A "visitor has the status of an invitee only while he is on the part of the land to which his invitation extends." Second Restatement § 332 cmt. 1. When an invitee leaves the area of his invitation, he ceases to become an invitee and generally becomes a trespasser. See id.

However, the majority states that "[t]he law should not automatically absolve a shopping center owner from taking any action to aid possible or actual customers." Majority opinion at 32-33. Therefore, the majority concludes that "[d]espite Ala Moana's contentions that Fry was a trespasser, we hereby recognize a duty to aid under Section 314A(3)." Id. at 33. This approach would seem inconsistent with Section 314A(3).