NO. CAAP-17-0000776

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

CHRISTIAN GROEGER and KNUT GROEGER,
Plaintiffs-Appellants,
v.
KAISER FOUNDATION HEALTH PLAN, INC.,
KAISER FOUNDATION HOSPITALS, INC.,
HAWAII PERMANENTE MEDICAL GROUP, INC.,
Defendants-Appellees,
and
JOHN DOES 1-99; JANE DOES 1-99; DOE ENTITIES 1-20;
AND DOE GOVERNMENTAL UNITS 1-10, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 15-1-0031)

MEMORANDUM OPINION
(By: Ginoza, Chief Judge, Leonard and McCullen, JJ.)

Plaintiffs-Appellants, Christian Groeger (**Christian**) and his brother Knut Groeger (**Knut**) (collectively **Groegers**), appeal from the Final Judgment, filed on October 20, 2017, by the Circuit Court of the First Circuit (**Circuit Court**) in favor of Defendants-Appellees, Kaiser Foundation Health Plan, Inc. (**Kaiser Health Plan**), Kaiser Foundation Hospitals, Inc. (**Kaiser Hospital**), and Hawaii Permanente Medical Group, Inc. (**Kaiser Medical Group**) (collectively **Kaiser Defendants**).[1] The Groegers also challenge the following: (1) "Order Granting Defendants

[1] The Honorable Keith K. Hiraoka presided.

Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals, Inc.; and Hawaii Permanente Medical Group Inc.'s Motion for Partial Summary Judgment Against Plaintiff Knut Groeger," filed June 8, 2017 (**Order Granting Partial SJ**); (2) "Order Granting Defendants' Motion for Summary Judgment," filed September 5, 2017 (**Order Granting SJ**); and (3) "Order Granting Defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Inc., and Hawaii Permanente Medical Group Inc.'s Motion for Taxation of Costs Against Plaintiffs," filed December 21, 2017 (**Order Granting Costs**).

The Groegers assert three causes of action against the Kaiser Defendants for: breach of the implied duty of good faith and fair dealing (**bad faith**), intentional infliction of emotional distress (**IIED**), and negligent infliction of emotional distress (**NIED**).[2] The claims arise from circumstances in which Christian was hospitalized at a Kaiser Hospital and mostly paralyzed for approximately ten months, until his family arranged for him to be transported to a medical facility in Germany. The Groegers' Complaint alleges, *inter alia*, that the Kaiser Defendants acted unreasonably and with conscious indifference in failing to investigate and in mishandling numerous requests for coverage of medically necessary services that Christian needed to overcome his serious condition after being admitted to the hospital, thereby delaying his recovery and causing pain and emotional distress. In their opening brief, the Groegers state "[t]he theory of the case expressed in the Complaint is that decisions by doctors who participate exclusively with one health insurance plan have incentives to authorize a less expensive alternative treatment or no treatment, potentially at the expense, and to the detriment, of a patient."

The Groegers contend the Circuit Court erred by: (1) concluding that Christian's friend Katarzyna Peninska (**Peninska**) received Exhibit F, a Kaiser Health Plan service agreement

[2] The Groegers also claim punitive damages.

(**Service Agreement**), for purposes of charging the Groegers with knowledge of it and enforcing its terms; (2) failing to conclude that Christian's insurance agreement was a contract of adhesion; (3) ignoring Kaiser Defendants' failure to respond to appeals to the Kaiser Health Plan and denying the Groegers' request to correct the record; (4) concluding there was no evidence that Christian's doctors acted as agents for Kaiser Health Plan; (5) rejecting Christian's assertion that he had a right under Hawaii Revised Statutes (**HRS**) Chapter 432E to appeal denials of requests for services; (6) granting summary judgment against Knut on grounds that Kaiser Health Plan did not owe Knut a legal duty; and (7) awarding costs to Kaiser Defendants incurred for redundant experts to testify on medical negligence in an effort to transform the Groegers' bad faith claims.

For the reasons discussed below, the Final Judgment is affirmed in part and vacated in part. The appeal from the Order Granting Costs is dismissed because the Circuit Court lacked jurisdiction to issue that order.

I. Background

A. Christian's Illness and Recovery

In March 2012, Christian, a German citizen living on Maui, was diagnosed with Guillain-Barre Syndrome (**GBS**), an illness in which a person's immune system attacks part of the peripheral nervous system.[3] Christian was initially admitted to Maui Memorial Hospital and then admitted to Moanalua Medical Center, part of Kaiser Hospital, for ten months from April 2012 until February 2013. During that time, Christian was insured under a medical plan with Kaiser Health Plan. While at Kaiser Hospital, Christian was on a ventilator and could not move his muscles.

Christian's mother and father, brother Knut, and Peninska spent time with Christian during his treatment at Kaiser Hospital. Peninska and Knut were Christian's representatives regarding medical decisions.

[3] Christian is now recovered from his GBS condition.

Christian, Knut, and Peninska submitted declarations in opposing the Kaiser Defendants' summary judgment motions. Knut attested he was not satisfied with Christian's medical treatment at Kaiser Hospital. Knut independently researched care and rehabilitation for people suffering from GBS. He was eventually referred to Asklepios Schlossberg Hospital (**Asklepios**) in Bad Koenig, Germany. Knut and Peninska attested they made multiple requests for treatment that they believed was necessary for Christian's recovery, but claim Kaiser Medical Group doctors ignored or denied their requests, often without or with little explanation. Knut attested that he repeatedly requested a treatment plan for Christian but none was ever provided, which caused great distress. Peninska also attested that Kaiser Defendants never provided her with instructions on requirements for submitting requests for care or services and she thus assumed she was making requests in the accepted form or method. Peninska also attested that the Kaiser Defendants did not provide her with information about Christian's right to appeal an adverse decision on requests for coverage of care or services. Knut and Peninska attested that the Kaiser Defendants sought their consent to discharge Christian to a nursing facility, which they refused; eventually they were told Christian's level of care was lowered to that of "nursing facility" and he was using up his sixty-day benefit. Peninska attested that although she insisted she would not consent to Christian's discharge from the hospital, she was told his benefits would run out on February 23, 2013.

In February 2013, doctors from Asklepios with experience in treating patients with GBS visited Christian at Kaiser Hospital to evaluate his condition. The Asklepios doctors attested to the types of treatment they would have provided if Christian had been in their facility in Germany, which differed from the treatment he received at Kaiser Hospital. In February 2013, Christian was relocated and admitted to Asklepios. He subsequently recovered following his treatment at Asklepios.

B. Service Agreement

The Groegers assert that Christian was enrolled in Kaiser Health Plan's Gold II Plan before and during his treatment for GBS. The Kaiser Defendants submitted the Service Agreement in support of their summary judgment motion, asserting that it set out the medical coverage to which Christian was entitled during his hospitalization.

C. Relevant Procedural History

The Groegers filed their Complaint on January 8, 2015. With regard to the bad faith claim, the Complaint alleges, *inter alia*, that:

> Count I (Bad Faith)
>
> . . . .
>
> 85. Kaiser Permanente is, by its own admission, an "integrated health plan" with two health care entities integrated into the Kaiser Foundation Health Plan, the financier at the center of the system ultimately determining the resources available to patients at any given time through hospital services and staff, and physician salaries.
>
> 86. Kaiser Permanente had a duty to act in good faith and deal fairly with Plaintiffs and the handling of Christian's claims for coverage of medically necessary care and services.
>
> 87. The implied covenant of good faith and fair dealing is breached, whether the insurer pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance.
>
> 88. Kaiser Permanente induced Christian to believe that he would receive "excellent care. . ." by the "best doctors. . ." and he would "Thrive" because "We're always here when you need us, however you need us. . . ." if he was stricken with a catastrophic or life-threatening illness, and these were misrepresentations and conscious omissions in bad faith according to the following:
>
> a. Kaiser Permanente omitted to disclose in good faith that the resources it made available to provide medical care were in-elastic and relatively fixed across a wide range of demand and patient needs such that the care Christian could actually expect would depend on the size of the patient population in Moanalua Medical Center at the time he was stricken with a catastrophic or life-threatening illness (because Kaiser Permanente was not about to pay for a lengthy stay at Maui Memorial with the services of a full GBS team, and was not about

to transfer him to a Kaiser Permanente hospital on the mainland), which, if Kaiser Permanente had sufficiently disclosed, Christian would likely have selected a competing health plan.

b. Kaiser Permanente omitted to disclose in candidly and in good faith that it was very unlikely that it would increase the resources it made available to provide medical care to meet demand, which, if Kaiser Permanente had sufficiently disclosed, Christian would likely have selected a competing health plan.

89. Kaiser Permanente breached the implied covenant of good faith and fair dealing when it failed in good faith to institute adequate protections for Kaiser Permanente neurologists, pulmonologists, physiatrists, skilled therapists, internists and hospitalists, and nursing staff from various pressures to put Kaiser Permanente's interests in avoiding deficits and in maintaining profitability or solvency by minimizing demands for staffing at the expense of patients, and at Christian's expense, to his extreme detriment.

90. As a direct and foreseeable result of Kaiser Permanente's breach of the covenant of good faith and fair dealing, Kaiser Permanente neurologists, pulmonologists, physiatrists, skilled therapists, internists and hospitalists, and nursing staff failed to deliver medically necessary care and services to treat Christian's GBS, and failed to meet the standard of care for his treatment despite pleas by his family members and by Christian himself, day-after-day, for the support he needed to recover.

91. Kaiser Permanente's wrongful conduct described above constitutes bad faith and a breach of the implied duty of good faith and fair dealing, and bad faith claims settlement practices.

With regard to the IIED claim, the Complaint alleges:

Count II (IIED)

. . . .

99. Defendants knew or should have known that Christian would suffer extreme emotional distress if he was neglected.

100. Defendants knew or should have known that Christian's condition was life threatening and Christian's best chance for recovery required Kaiser Permanente to proactively investigate the standard of care and provide Christian the services the standard of care required for GBS, which included daily supportive therapy of increasing duration and intensity by skilled manual and speech therapists, planned, frequently evaluated, and supervised by skilled pulmonologists, physiatrists, neurologists, and internists/hospitalists, and nurse practitioners.

101. Defendants knew or should have known that Plaintiffs were particularly vulnerable because a catastrophic and life-threatening illness induces severe

> distress and anguish, and is a time when very protection and security Christian and his family expected from his Gold II Plan was at its greatest.
>
> 102. Defendants knew or should have known that, as a result of their withholding medically necessary care and services from Christian and choosing to limit the information available to themselves by failing or refusing to obtain opinions on the plan of care for Christian from qualified experts in GBS care, it was foreseeable that Plaintiffs would suffer extreme emotional distress, anguish, hopelessness, and helplessness when they were at their most vulnerable.
>
> 103. Despite their knowledge of Plaintiffs' circumstances, Defendants unjustifiably delayed and then denied coverage for the medically necessary care and services causing Plaintiff[s] to suffer foreseeable mental anguish, extreme emotional distress, depression, anxiety, loss of sleep and quality of life, and other symptoms of severe emotional distress.

With regard to the NIED claim, the Complaint alleges:

> Count III (NIED)
>
> . . . .
>
> 107. Defendants owed a duty of reasonable care to all Kaiser Permanente members, and were required to use that degree of care and skill which is expected of a reasonably competent health insurer in the same or similar circumstances, and to employ competent medical directors and avail itself of expert opinion and information necessary to make valid and timely coverage determinations and ensure the availability of essential treatments for its members.
>
> 108. It was reasonably foreseeable that Plaintiffs would suffer extreme pain, anxiety, mental anguish, and emotional distress if Christian was denied coverage for medically necessary services he needed to survive and overcome GBS.

After the parties engaged in discovery, the Circuit Court ordered the parties to mediation. On January 31, 2017, the Kaiser Defendants filed their first Motion for Summary Judgment (**First MSJ**), attaching declarations and reports by their medical experts. On February 23, 2017, the Kaiser Defendants made an offer of settlement, which the Groegers did not accept.

On February 23, 2017, the Kaiser Defendants also filed a Motion for Partial Summary Judgment Against Plaintiff Knut Groeger (**MPSJ Against Knut**) on grounds that Knut lacked standing because he was not a party to, or an intended beneficiary of, the Service Agreement. In support of the MPSJ Against Knut, the

Kaiser Defendants submitted, *inter alia*, transcript excerpts of Knut's deposition and Knut's responses to Kaiser Defendants' request for answers to interrogatories. In opposition, the Groegers submitted the entire transcript from Knut's Deposition.

The Circuit Court heard oral arguments on the First MSJ and MPSJ Against Knut in May 2017.[4] At the hearing, the Circuit Court denied the First MSJ without prejudice indicating that it could not decide summary judgment in a bad faith case without having the Service Agreement properly before it. The Circuit Court, however, granted summary judgement to the Kaiser Defendants on the MPSJ Against Knut.

On July 12, 2017, the Kaiser Defendants filed a second Motion for Summary Judgment against Christian (**Second MSJ**). In support of the Second MSJ, the Kaiser Defendants submitted, *inter alia*, a copy of the Service Agreement. In opposition to the Second MSJ, the Groegers submitted, *inter alia*, declarations from Christian, Knut, and Peninska and excerpts from deposition transcripts of Christian and Knut.

On September 5, 2017, the Circuit Court filed an order granting the Second MSJ, concluding, *inter alia*, "the uncontroverted evidence is that no [Kaiser] Medical Group physician prescribed or recommended the German treatment protocol that [Christian] claims the [Kaiser] Health Plan wrongfully failed to authorize or approve" and therefore, "as a matter of law, the requested treatment was not 'Medically Necessary' as defined by [the] Service Agreement."[5]

On October 23, 2017, the Kaiser Defendants filed a Motion for Taxation of Costs against the Groegers (**Motion for**

[4] The First MSJ and the MPSJ Against Knut were initially heard by the Honorable Karen T. Nakasone, before the case was reassigned to the Honorable Keith K. Hiraoka.

[5] On September 5, 2017 after the Circuit Court granted the Second MSJ, the Groegers filed an *ex parte* Motion to Correct the Record on Summary Judgment (**Motion to Correct the Record**), to include letters between the Groegers' attorney and Kaiser Health Plan regarding Christian's treatment at Kaiser Hospital and Asklepios. The Circuit Court denied the Motion to Correct the Record on September 7, 2017.

Costs). The Kaiser Defendants sought costs and attorneys' fees as the prevailing party pursuant to Hawaiʻi Rules of Civil Procedure (**HRCP**) Rule 54(d)(1)[6] and because the Final Judgment was not more favorable than the settlement offer made to the Groegers in February 2017 pursuant to HRCP Rule 68.[7]

On October 30, 2017, while the Motion for Costs was still pending, the Groegers filed their Notice of Appeal. Subsequently, on December 21, 2017, the Circuit Court awarded $22,650 in costs to the Kaiser Defendants.

II. Standard of Review

The grant or denial of summary judgment is reviewed *de novo*. Nozawa v. Operating Eng'rs Local Union No. 3, 142 Hawaiʻi 331, 338, 418 P.3d 1187, 1194 (2018) (citing Adams v. CDM Media USA, Inc., 135 Hawaiʻi 1, 12, 346 P.3d 70, 81 (2015)). "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." Id. at 342, 418 P.3d at 1198 (brackets omitted) (quoting Adams, 135 Hawaiʻi at 12, 346 P.3d at 81).

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[6] HRCP Rules 54(d)(1) provides:

> **(d) Costs; attorneys' fees.**
> (1) COSTS OTHER THAN ATTORNEYS' FEES.
> Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State or a county, or an officer or agency of the State or a county, shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 48 hours' notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

[7] HRCP Rule 68 provides, in relevant part:

> At any time more than 10 days before the trial begins, any party may serve upon any adverse party an offer of settlement or an offer to allow judgment to be taken against either party for the money or property or to the effect specified in the offer, with costs then accrued . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The following burden-shifting paradigm is well-established in Hawaiʻi:

> The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.
>
> First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the nonmoving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.
>
> Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law.

Ralston v. Yim, 129 Hawaiʻi 46, 56–57, 292 P.3d 1276, 1286–87 (2013) (citing French v. Haw. Pizza Hut, Inc., 105 Hawaiʻi 462, 470, 99 P.3d 1046, 1054 (2004)). "The evidence must be viewed in the light most favorable to the non-moving party." Nozawa, 142 Hawaiʻi at 342, 418 P.3d at 1198 (brackets omitted) (quoting Adams, 135 Hawaiʻi at 12, 346 P.3d at 81).

III. Discussion

A. Summary Judgment Against Christian was Incorrect[8]

The Circuit Court's summary judgment ruling against Christian is based on the provisions for coverage under the

[8] We note the Kaiser Defendants argue that the Groegers' opening brief is deficient and we should thus dismiss the appeal. We recognize instances in which the Groegers fail to comply with some requirements of Hawaiʻi Rules of Appellate Procedure (**HRAP**) Rule 28(b), which are grounds for waiver of certain arguments, Sheehan v. Cnty. of Kauaʻi, No. CAAP-11-0000601, 2014 WL 5326516, at *13 (Haw. App. Oct. 17, 2014) (mem. op.) (citing Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawaiʻi 92, 111, 176 P.3d 91, 110 (2008)). However, Hawaiʻi's appellate courts seek to address appeals on the merits and afford litigants the opportunity to have their cases heard on the merits, where possible. Bettencourt v. Bettencourt, 80 Hawaiʻi 225, 230, 909 P.2d 553, 558 (1995) (citation omittted). Therefore, we address the merits of the appeal as set forth herein.

Service Agreement. The Groegers contend, however, that the Kaiser Defendants never established that the Service Agreement, submitted to the Circuit Court as Exhibit F, was provided to the Groegers or Peninska. The Groegers thus argue that this document should not have been applied to grant summary judgment.

The Kaiser Defendants assert in response that there is no dispute that Peninska had a copy of the Service Agreement based on Peninska's deposition testimony. They assert she was the person authorized to make decisions on behalf of Christian and she testified in her deposition that she had a copy of Christian's service agreement and had discussed it with the Groegers' counsel, Rafael del Castillo (**del Castillo**), who she had retained on Christian's behalf in the winter of 2012.

The threshold issue we address is whether, viewing the evidence in the light most favorable to the non-movant Groegers, the Kaiser Defendants established that Peninska had a copy of the Service Agreement submitted as Exhibit F, such that the Circuit Court properly applied its terms and established Peninska's knowledge of its terms in granting summary judgment.[9]

Here, the record does not establish the particular service agreement or medical benefits plan that Peninska was referring to in her deposition testimony, and Exhibit F was not established as the document that she reviewed. Peninska testified in her deposition that she received a copy of a service agreement or plan, and discussed it with attorney del Castillo, as follows:

> Q . . . . Did you ever read or review Christian's Kaiser service agreement, his plan, his medical plan, his benefits?
> A Yes.
> Q And how did you get it? How did you get a copy of it?
> A I don't remember.
> Q Do you remember whether it was at the time he was in the hospital or afterwards?
> A At the time he was in the hospital.
> Q And did you ever go through it with Christian?

[9] It is undisputed that Knut did not have a copy of the Service Agreement.

> A No.
> . . . .
> Q So somehow you got a copy of Christian's medical plan, you reviewed it but never talked to him or anybody else about it; is that right?
> A No, that's not right.
> Q Who else did you discuss it with?
> A Mr. del Castillo.

The Groegers argue this evidence is insufficient on summary judgment because Kaiser Defendants' counsel "never asked [Peninska] to review and identify [the Service Agreement] at her deposition when he had the opportunity" and the subpoena *dueces tecum* served on Peninska "omitted to request production of the 'plan' she supposedly had." Nothing in the record reflects that Peninska identified what she believed to be the service agreement, plan or medical plan that she referenced in her deposition. Viewed in the light most favorable to the Groegers, the Kaiser Defendants failed to demonstrate that the Service Agreement submitted to the Circuit Court was the agreement or plan that Peninska reviewed, such that she had an understanding of applicable terms. See Siopes v. Kaiser Found. Health Plan, Inc., 130 Hawaiʻi 437, 449, 453, 312 P.3d 869, 881, 885 (2013) (concluding that an insurer did not meet its initial burden of establishing evidence that the insured possessed a copy of a group health insurance plan to assent to an arbitration agreement). Thus, there are genuine issues of material fact whether the terms of applicable medical coverage were met and whether the Groegers were properly informed of the coverage or agreement terms.

We further note that under Hawaiʻi law compliance with the terms of an insurance contract does not necessarily mean there has been no bad faith conduct. In adopting the tort of bad faith, the Hawaiʻi Supreme Court stated:

> we hold that there is a legal duty, implied in a first-and third-party insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action. The breach of the express covenant to pay claims, however, is not the *sine qua non* for an action for breach of the implied covenant of good faith and fair dealing. The implied covenant is breached, whether the

> carrier pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance.

Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawaiʻi 120, 132, 920 P.2d 334, 346 (1996), as amended (June 21, 1996) (emphasis added) (citations and quotation marks omitted).

More recently, in a case involving a bad faith claim against a health insurance company, the Hawaiʻi Supreme Court noted that under Hawaiʻi case law:

> A claim for bad faith arising from the relationship between the insurer and the insured can be grounded in an "unreasonable handling" of the insured's claim. This court has held that reasonableness can only constitute a question of law suitable for summary judgment when the facts are undisputed and not fairly susceptible of divergent inferences, because, where, upon all the evidence, but one inference may reasonably be drawn, there is no issue for the jury.

Adams v. Hawaii Med. Serv. Ass'n, 145 Hawaiʻi 250, 256, 450 P.3d 780, 786 (2019) (citations, quotation marks, and brackets omitted).[10] In determining "whether an insurer reasonably handled a claim, we consider the conduct of the parties to the contract before and after the formal submission of the claim." Id. at 257, 450 P.3d at 787. "It is not sufficient to determine only whether the insurer complied with the terms of the contract." Id. (citation omitted). Thus, in Adams, the Hawaiʻi Supreme Court determined it was

> necessary to examine the relationship between the insurer and the insured throughout the entire claims process, starting from the first communication between the parties, to determine whether the insurer acted in bad faith. It is not sufficient to determine only whether the insurer complied with the terms of the contract.

Id. (citations, quotation marks, and brackets omitted).

[10] On December 9, 2019, the Groegers re-submitted a letter under HRAP Rule 28(j), for this court to consider the opinion in Adams (**Supplemental Authorities Letter**). The Kaiser Defendants, on December 16, 2019, filed a Motion to Strike the Supplemental Authorities Letter (**Motion to Strike**), asserting it violated HRAP Rule 28(j), and the Groegers filed an Opposition to the Motion to Strike on December 23, 2019. We hereby grant the Motion to Strike. The letter filed by the Groegers on December 9, 2019 is stricken from the record and was not considered. Nonetheless, we are not prevented from considering Adams.

Here, it is unclear if the Kaiser Defendants met the terms of the medical coverage agreement with Christian or provided coverage information to the Groegers, because it was not established what agreement or plan Peninska had reviewed. Additionally, considering the relationship between Christian and the Kaiser Health Plan throughout the relevant period he was hospitalized, and viewing the evidence in the light most favorable to the Groegers, we cannot say there was no unreasonable handling of Christian's medical coverage as a matter of law. The Groeger's theory in this case is that the medical treatment and coverage that Christian received, and the decisions of his medical care providers, were affected by the financial concerns of the integrated system involving the Kaiser Defendants. The Kaiser Defendants submitted declarations by Christian's treating doctors attesting that their medical decisions were based on their medical training and experience, that they were not influenced or directed by anyone at Kaiser Health Plan or Kaiser Medical Group, that they were never instructed to make decisions on a patient's care based on a medical plan, and that they were not aware what was covered or not by Christian's medical plan. However, the evidence in the record also includes the declarations and testimony of Knut and Peninska, including that they made numerous requests for specific treatment for Christian, who was incapacitated at the time. Knut and Peninska attest their requests were ignored and denied without much, if any, explanation. Peninska attests, among other things, that a respiratory therapist told her he would do more for Christian but was not permitted to do so by those who were higher up. Peninska attests she never received instructions on how to submit requests for care and thus assumed she was making requests in the accepted method or form, and she was not informed Christian had a right to appeal decisions about his care or services. Knut and Peninska also attest that although they would not agree to having Christian discharged from the hospital, Christian's care was lowered to "nursing facility" level for

which there was a sixty-day benefit period. Peninska attests she was told Christian's benefits would run out on February 23, 2013, and thus his family had no choice but to find a facility that could provide the care he needed.

Given this record, there are genuine issues of material fact and we conclude summary judgment in favor of the Kaiser Defendants on Christian's bad faith claim was not warranted.

With regard to Christian's IIED and NIED claims, the Circuit Court did not explain its reasons for granting summary judgment on these claims. The IIED and NIED claims asserted in the Complaint are based on alleged delay and denial of coverage for medical services. With respect to an IIED claim, the Hawaiʻi Supreme Court has stated:

> the tort of IIED consists of four elements: 1) that the act allegedly causing the harm was intentional or reckless, 2) that the act was outrageous, and 3) that the act caused 4) extreme emotional distress to another. The term "outrageous" has been construed to mean without just cause or excuse and beyond all bounds of decency. The question whether the actions of the alleged tortfeasor are unreasonable or outrageous is for the court in the first instance, although where reasonable people may differ on that question it should be left to the jury.

Young v. Allstate Ins. Co., 119 Hawaiʻi 403, 429, 198 P.3d 666, 692 (2008) (citations, footnote, and some quotation marks omitted). In Young, the Hawaiʻi Supreme Court addressed a motion to dismiss and determined that an insurance company's alleged conduct in addressing a claim for insurance, including its communications with the claimant, the offers it made her, and the ultimate award that she received, might reasonably be deemed outrageous and should be left to a jury. Id. at 429-30, 198 P.3d at 692-93.

With regard to an NIED claim, the Hawaiʻi Supreme Court has stated the standard for imposing a duty as follows: "[w]here serious mental distress to plaintiff was a reasonably foreseeable consequence of defendant's act, defendant's liability would be imposed by the application of general tort principles." Leong v. Takasaki, 55 Haw. 398, 408, 520 P.2d 758, 764-65 (1974) (citation omitted).

Here, given the applicable standards set forth above and the record in this case, we cannot conclude that summary judgment was appropriate on Christian's claims for either IIED or NIED.

B. The Circuit Court Erred In Granting Summary Judgment to the Kaiser Defendants on Knut's NIED Claim

As to Knut's claims, the Circuit Court concluded that the Kaiser Defendants did not owe a duty of good faith or tort duty to Knut for emotional distress because he was not party to the insurance agreement between the Kaiser Defendants and Christian, and was not an intended third-party beneficiary of the agreement.

The Groegers' argument on appeal concerning Knut is focused on his NIED claim. They make no argument related to Knut's claim for IIED, which we thus conclude is waived.

The Groegers argue that under Leong, bystander witnesses of traumatic torts are entitled to relief for NIED. The Kaiser Defendants respond that Kaiser Health Plan did not owe Knut a duty of care because the Service Agreement was between Christian and Kaiser Health Plan. The Kaiser Defendants further argue that the Groegers' reliance on Leong is improper because the NIED claim it recognized still required a duty of care, to which Knut was not entitled because he was not a party to the Service Agreement.[11]

Viewing the evidence in the light most favorable to Knut, we conclude there are genuine issues of material fact as to Knut's claim for NIED. See Adams v. Hawaii Med. Serv. Ass'n, No. 30314, 2013 WL 5443025, at *1-2 (Haw. App. Sept. 30, 2013) (SDO) (vacating lower court's summary judgment in favor of insurer as to insured's NIED claim based on bad faith denial of treatment).

[11] The Kaiser Defendants do not challenge Knut's NIED claim under the requirement in Ross v. Stouffer Hotel Co. (Hawaiʻi) Ltd., 76 Hawaiʻi 454, 465-66, 879 P.2d 1037, 1048-49 (1994), that "recovery for [NIED] by one not physically injured is generally permitted only when there is 'some physical injury to property or a person' resulting from the defendant's conduct." (Citation omitted.)

In Leong, the Hawaiʻi Supreme Court noted it had previously considered "whether the plaintiff's interest in freedom from mental distress is entitled to legal protection from defendant's conduct." 55 Haw. at 407, 520 P.2d at 764 (quoting Rodrigues v. State, 52 Haw. 156, 170, 472 P.2d 509, 518 (1970)). As noted above, the court in Leong stated that "[w]here serious mental distress to plaintiff was a reasonably foreseeable consequence of defendant's act, defendant's liability would be imposed by the application of general tort principles." Id. at 408, 520 P.2d at 764-65 (citation omitted). Based on the evidence presented, including Knut's declaration and deposition testimony, we conclude there are genuine issues of material fact as to whether he sustained serious mental distress that was a reasonably foreseeable consequence of the Kaiser Defendants' actions related to alleged delay and denial of medical coverage for Christian. Therefore, the Circuit Court erred in granting summary judgment to Kaiser Defendants as to Knut's NIED claim.

Although Knut fails to present specific arguments as to his bad faith claim, he makes some assertion that his claim is valid based on Kaiser Health Plan's bad faith denial of services to Christian. The tort of bad faith requires that a duty exists. See Adams, 145 Hawaiʻi at 256, 450 P.3d at 786. However, an insurer does not owe a duty of good faith and fair dealing to a party not in contract with the insurer or not a third-party beneficiary of a contract with the insurer. Young, 119 Hawaiʻi at 427 & n.25, 198 P.3d at 690 & n.25 (declining to extend duty of good faith to a third-party claimant involved in an accident with insurer's policyholder); Hough v. Pac. Ins. Co., 83 Hawaiʻi 457, 468, 927 P.2d 858, 869 (1996), as amended (Dec. 4, 1996) (insurance company owed employee-claimant duty of good faith as third-party beneficiary of workers' compensation coverage between employer and insurance company).

In Adams, the Hawaiʻi Supreme Court stated, "the tort of bad faith [arises] from a breach of a duty to act in good

faith inherent in the relationship between the insurer and the insured." 145 Hawaiʻi at 256, 450 P.3d at 786 (emphasis added). It is undisputed that Knut was not a party to the insurance agreement between Christian and Kaiser Health Plan. The Groegers also make no claim that Knut was an intended third-party beneficiary of the insurance agreement between Christian and Kaiser Health Plan. Thus, as a matter of law, Kaiser Health Plan did not owe Knut a duty of good faith and fair dealing.

In sum, therefore, we affirm summary judgment on Knut's claims for IIED and bad faith, but vacate as to his claim for NIED.

C. Order Granting Costs

The Circuit Court lacked jurisdiction to issue the Order Granting Costs. The Kaiser Defendants filed a Motion for Costs on October 23, 2017. The Notice of Appeal was filed seven days later, on October 30, 2017. The Order Granting Costs was then entered on December 21, 2017, and the "Amended Final Judgement," which entered final judgment on the Order Granting Costs, was filed on January 26, 2018.[12]

The Motion for Costs was filed under HRCP Rules 54(d)(1) and 68, neither of which imposes a time limit for requesting costs. "Under HRAP Rule 4(a)(3), only the filing of a timely motion for costs, where court rules specify the time by which the motion must be filed: (1) tolls the time for filing a notice of appeal, and (2) extends the time the trial court retains jurisdiction to resolve the motion." Nakaoka v. Shirizu, 151 Hawaiʻi 510, 514, 517 P.3d 793, 797 (App. 2022) (citations and footnote omitted), aff'd SCWC-20-0000320, 2023 WL 4399999 (Haw. July 7, 2023) (SDO). Hence, the Circuit Court was divested of jurisdiction to decide the Motion for Costs once the Notice of Appeal was filed on October 30, 2017. Id.

[12] On May 9, 2018, the Kaiser Defendants filed a Request for Judicial Notice, seeking to have this court take judicial notice of the Order Granting Costs and the Amended Final Judgment, because they were not included in the record on appeal. We hereby take judicial notice of these documents, which were filed in the Circuit Court after the Notice of Appeal.

Given our conclusion above, we dismiss the Groegers' appeal from the Order Granting Costs. The Motion for Costs remains pending before the Circuit Court and may be resolved after this appeal is concluded and jurisdiction is returned to the Circuit Court.

IV. Conclusion

Based on the foregoing, we vacate the Final Judgment with respect to Christian's claims for bad faith, IIED and NIED, and with respect to Knut's claim for NIED. We affirm the Final Judgment with respect to Knut's claims for bad faith and IIED.

Further, we dismiss the Groegers' appeal from the Order Granting Costs. On remand, the parties may address the Motion for Costs, which remains pending before the Circuit Court.

The case is remanded to the Circuit Court for further proceedings consistent with this memorandum opinion.

DATED: Honolulu, Hawaiʻi, August 29, 2023.

On the briefs:

Rafael G. del Castillo,
for Plaintiffs-Appellants

William S. Hunt,
Maile Osika,
for Defendants-Appellees

/s/ Lisa M. Ginoza
Chief Judge

/s/ Katherine G. Leonard
Associate Judge

/s/ Sonja M.P. McCullen
Associate Judge