*This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-1635**

Mary Jane Gross,
Appellant,

vs.

Prestige Parking & Valet LLC,
Respondent.

**Filed July 26, 2021**
**Affirmed**
**Bjorkman, Judge**

Stearns County District Court
File No. 73-CV-19-8642

Michael A. Bryant, Bradshaw & Bryant, Waite Park, Minnesota (for appellant)

Jeffrey M. Markowitz, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Bjorkman, Judge; and Florey, Judge.

**NONPRECEDENTIAL OPINION**

**BJORKMAN**, Judge

Appellant challenges summary judgment dismissing her negligence-based claim for emotional-distress damages. Because it is undisputed that appellant's claimed emotional distress did not flow from a physical injury or her presence within the zone of danger of physical injury, we affirm.

## FACTS

Early in the morning on February 13, 2018, appellant Mary Jane Gross arrived at a St. Cloud hospital for a surgical procedure related to a heart condition. Her husband left their car with the hospital's valet service operated by respondent Prestige Parking & Valet, LLC. Prestige experienced a "big rush of vehicles" that morning, and Prestige employees did not follow company policy requiring them to secure car keys in a lockbox. Instead, they left the keys in the vehicles waiting to be parked.

When Gross's husband was ready to leave the hospital, Prestige was unable to locate his car and determined that it had been stolen. Prestige's owner reported the theft to police, who later found the stolen car in Mankato. After apprehending the three occupants of the stolen vehicle, officers found several items in the car—including drug paraphernalia, luggage, and several other bags. Gross first learned the car had been stolen when an officer called her at 12:30 a.m. the next morning, while she was recovering in the hospital.

Prestige had the car towed back to St. Cloud. Prestige's owner saw items inside the car that likely did not belong to the Grosses, including speakers, a pair of boxing gloves, and clothing. When Gross and her husband picked up their car, they discovered additional items in the trunk that did not belong to them, including two cell phones and an iPad. They did not turn the items over to the police, but they brought the iPad into their home.

A day or two later, Gross was sitting in her dining room when a car pulled into the driveway. A man approached the house and her husband answered the door. Her husband spoke to the person, went outside to the garage, and then came back inside the house. He reported the man was one of the people police found in their car and he was outside with a

woman to retrieve the phones and the iPad. Gross's husband gathered up the items and gave them to the couple. The couple left after 10 to 15 minutes. They never entered the home and have not returned. Gross did not see or speak to either of them at any time.

Gross's husband did not contact the police because he did not want "any confrontation." But Gross and her husband brought the remaining items to the police station the next day. Although Gross has not had contact with any of the people involved in the car theft since that time, she has experienced distress and anxiety. She was initially afraid to drive and feared that the two individuals would return to her home. About three months later, Gross sought treatment for ongoing emotional distress. She was diagnosed with post-traumatic stress disorder and later reported physical symptoms, including an irregular heartbeat, hair loss, and insomnia.

Gross initiated this action in August 2019, alleging that the car was stolen due to Prestige's negligence. The complaint alleges that Gross suffers "severe anxiety, with physical and emotional symptoms" as a result of Prestige's actions, and seeks compensation for her emotional damages.

Prestige moved for summary judgment on the grounds that its claimed negligence did not cause Gross's distress and that Gross does not meet the elements of a claim for negligent infliction of emotional distress. The district court granted the motion, concluding that Gross's claim fails as a matter of law because there is no evidence upon which a reasonable juror could conclude that she was in the "zone of danger" of physical harm. Gross appeals.

## DECISION

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A party is entitled to summary judgment when the nonmoving party fails to establish an essential element of her claim. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). We review de novo whether there are genuine issues of material fact and whether the district court properly applied the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

To prevail on a negligence claim, a person must prove: "(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury." *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). But when a person, like Gross, seeks to recover emotional-distress damages flowing from negligence, she must meet additional elements of proof. This is so because of our supreme court's concern that "claims of mental anguish may be speculative" and have the "potential for abuse of the judicial process." *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996).

Accordingly, emotional-distress damages are only recoverable in negligence actions in two circumstances. First, a person may recover damages for emotional distress that accompanies a physical injury caused by another's negligence. *Id.* Second, a person may recover emotional-distress damages when "she: (1) was within the zone of danger of physical impact [created by the defendant's negligence]; (2) reasonably feared for her own safety; and (3) [consequently] suffered severe emotional distress with attendant physical

manifestations." *Engler*, 706 N.W.2d at 767 (alteration in original) (quotation omitted). Both circumstances—physical injury and presence within the "zone-of-danger"—serve to "limit the availability" of emotional-distress damages to persons "who prove that emotional injury occurred under circumstances tending to guarantee its genuineness." *Lickteig*, 556 N.W.2d at 560 (quotation omitted).

Gross argues that: (1) this court should expand the law to permit her claim to proceed to a jury trial, (2) the district court misclassified her cause of action because she suffered a physical injury, and (3) her emotional distress flows from being in the zone of danger. None of these arguments persuades us to reverse.

Gross's first—and primary—argument fails for two reasons. First, she did not argue in the district court that Minnesota law should be expanded to allow her claim. We generally do not consider arguments that were not presented to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Second, we are an error-correcting court. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). The task of changing or expanding the law falls to our supreme court. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Gross herself recognizes in her brief that we cannot afford the relief she requests, that: "The Supreme Court should declare that people suffering emotional injuries caused by the negligence of others have the same right to recover appropriate compensation as people suffering physical injuries." Because our supreme court has clearly established the elements of a claim for negligent infliction of emotional distress, we decline Gross's invitation to expand the law. *See State v. Curtis*,

921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent . . . .").

Gross next asserts that the district court erred by applying the zone-of-danger analysis because her emotional distress stems from her physical injuries.[1] *See Lickteig*, 556 N.W.2d at 560 (stating a plaintiff may recover for emotional distress that accompanies a physical injury). This argument is unavailing. Unless the person claiming emotional-distress damages suffered a contemporaneous physical injury, the zone-of-danger standard applies. *See Langeland v. Farmers State Bank*, 319 N.W.2d 26, 31 (Minn. 1982) (stating the zone-of-danger standard applies "[i]n cases in which physical symptoms occur subsequent to and because of the plaintiff's emotional disturbance"). It is undisputed that Gross did not suffer a physical injury on the day her car was stolen or when the two individuals came to her home to retrieve their belongings. Gross acknowledges that she waited three months to seek treatment for her fear and anxiety and that she did not begin experiencing physical symptoms until much later. Indeed, the record shows her claimed physical injuries are the type of "attendant physical manifestations" necessary to sustain a claim for emotional distress arising from being within the zone of physical danger. *Engler*, 706 N.W.2d at 767 (quotation omitted). Accordingly, we see no error in the district court's application of the zone-of-danger analysis.

[1] We note that Gross did not directly state this argument in the district court, and that we generally do not consider arguments raised for the first time on appeal. *Leppink v. Water Gremlin Co.*, 944 N.W.2d 493, 501 (Minn. App. 2020) ("It is an elementary principle of appellate procedure that a party may not raise an issue or argument for the first time on appeal and thereby seek appellate relief on an issue that was not litigated in the district court." (quotation omitted)). But we choose to do so here.

Finally, Gross contends that her claim survives summary judgment under the zone-of-danger standard. We disagree. A person is in the zone of danger if she is "in some actual personal physical danger caused by defendant's negligence." *K.A.C. v. Benson*, 527 N.W.2d 553, 558 (Minn. 1995). Whether a person "is within a zone of danger is an objective inquiry." *Id.* To make this showing, it must have been "abundantly clear that [the person] was in grave personal peril for some specifically defined period of time." *Id.*

The record is devoid of evidence that Gross was within the zone of danger of physical harm for any period of time. It is undisputed that Gross was in the hospital at the time Prestige's alleged negligence permitted her car to be stolen. She was not even aware of the theft until several hours after the car had been recovered. Her argument that she was within the zone of physical danger created by Prestige's negligence a day or two later when the two individuals who occupied the stolen car came to her home is also unpersuasive. Even if we assume that the relevant time period extends to that later date, the record does not establish that she was in grave peril. Gross remained inside during the 10-15 minutes the individuals were at her property. She did not speak to them and they never entered the home. The individuals did not threaten Gross or her husband, and they did not brandish or reveal any weapons. And they never returned to the home or otherwise initiated contact with Gross or her husband. On this record, we conclude that no reasonable finder of fact could find that Gross was within the zone of physical danger at any time.

We do not discount the fear and anxiety Gross has experienced as a result of these events. But the record does not support findings that her distress accompanied a physical

injury or that she was within the zone of physical danger. Prestige is entitled to judgment as a matter of law.

**Affirmed.**