CONCURRING AND DISSENTING OPINION BY MOON, C.J.,
IN WHICH NAKAYAMA, J., JOINS

Although I agree with the majority's resolution of plaintiff-appellant Anna Hac's claims, I disagree with its decision to, sua sponte, alter the elements of the tort of intentional infliction of emotional distress inasmuch as the issue is neither raised by the parties nor presented by the present appeal.

This court has previously stated:

> Prudential rules of judicial self-governance properly limit the role of the courts in a democratic society. Cf. Trustees of OHA v. Yamasaki, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987); Life of the Land v. Land Use Commission, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981) (citing Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). One such prudential rule is that "the use of judicial power to resolve public disputes . . . should be limited to those questions capable of judicial resolution and presented in an adversary context." Yamasaki, 69 Haw. at 171, 737 P.2d at 456 (citation omitted). Another such rule is that, "even in the absence of constitutional restrictions, [courts] must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government." Id. [(emphasis in original omitted)] (citation omitted). Although, generally, issues concerning prudential rules of self-governance arise in cases where justiciability is at issue, self-governance and the proper role of the courts preclude this court not only from considering a case, but also from considering any issue that is not properly before it. We do not have the prerogative . . . to discharge . . . our individual judicial obligations in our written opinion[s], . . . where the case on appeal does not bring the issue squarely before this court. To refrain from doing so represents an exercise in judicial self-restraint, not a shirking of judicial responsibility.
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> James Madison, speaking on the notion of checks and balances in a democratic society, wrote that, "[i]n framing a government which is to be administered by [the people] over [the people], the great difficulty lies in this: You must first enable the government to controul [sic] the governed; and in the next place, oblige it to controul itself." The Federalist Papers No. 51 (J. Madison). Although judicial review serves as a check on the unconstitutional exercise of power by the executive and legislative branches of government, "the only check upon [the judicial branch's] exercise of power is [its] own sense of self-restraint." U.S. v. Butler, 297 U.S. 1, 78-79, 56

> S. Ct. 312, 80 L. Ed. 477 (1936) (Stone, J., dissenting). For that reason, alone, judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review.

In re Attorney's Fees of Mohr, 97 Hawai'i 1, 9-10, 32 P.3d 647, 655-56 (2001) (emphases added) (some internal quotation marks omitted) (some ellipsis points added).

In the present case, the majority recognizes that neither party advocates changing established precedent and observes that "the parties cited to our jurisdiction's present formulation of the elements of the tort of intentional infliction of emotional distress[.]" Majority Opinion at 30. Given the absence of any argument by the parties, the majority's decision to refashion the elements of intentional infliction of emotional distress evinces a lack of judicial restraint. I, therefore, respectfully dissent.