

NOT FOR PUBLICATION

NO. 22562

IN THE SUPREME COURT OF THE STATE OF HAWAII

SONG HONG and HYANG HONG, Plaintiffs-Appellants

vs.

THE ESTATE OF RUTH GRAHAM, DECEASED, GRAHAM PROPERTIES, INC.,
CHARLOTTE GRAHAM, Defendants-Appellees

and

JONG HYE KIM, RICHARD DAGGETT REALTY, SENTINEL SILENT ALARM CO.,
INC., JOHN DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS
1-10, and DOE ENTITIES 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-2593)

SUMMARY DISPOSITION ORDER

DISSENTING OPINION OF CIRCUIT JUDGE POLLACK,
WITH WHOM, LEVINSON, J., JOINS¹

The majority holds that “the Hongs waived all of their arguments with respect to an alleged duty to disclose by failing to set forth an argument in compliance with to Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(7).” Majority at 4. This failure is explained by the majority, as follows:

bare assertions that a special relationship need not exist to impose a duty, without legal argument as to how Restatement (Second) of Torts § 302 serves as a basis for imposing a duty, are insufficient where Restatement (Second) of Torts § 302 by itself does not create or establish a legal duty, see McKenzie v. Hawai‘i Permanente Medical Group, Inc., 98 Hawai‘i 296, 300, 47 P.3d 1209,

¹ The majority disposition issued on May 30, 2003 because of the imminent retirement of Judge Watanabe. See n. 1 of majority disposition.

1213 (2002).

Id at 4-5 (emphasis added). In reaching its conclusion that the Hongs waived their argument regarding a duty to disclose, the majority has applied a legal standard inconsistent with Hawai'i legal precedent. For this reason, I am unable to agree with the majority's disposition.

I. APPLICABLE LAW

HRAP Rule 28(b)(7)² provides that the argument section of the opening brief must contain the party's contentions, the reasons for the contentions, and citations to the legal authorities, statutes and parts of the record relied upon. Points not argued may be deemed waived. Case law applying HRAP Rule 28(b)(7) has been uniform in approach, invoking the waiver doctrine when the appellant fails to raise a "discernible argument." Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 433, 16 P.3d 827, 838 (App. 2000) ("Appellants fail to cite, however, any specific section of the Truth in Lending Act or HRS chapter (ch.) 48 that CMI may have violated. . . . Due to this lack of specificity, Appellants fail to provide discernible argument on this point." (Emphasis added.)); Norton v. Administrative Director of Court, State of Hawai'i, 80 Hawai'i 197, 200, 908 P.2d 545, 548 (1995) (although Norton contends that the sixth amendment right to counsel extends to an administrative driver's license revocation hearing, "he makes no discernible argument in support of that position" (emphasis added)); Hall v. State, 10 Haw. App. 210, 218, 863 P.2d 344, 348, cert. denied, 76 Hawai'i 246, 868 P.2d 464 (1993) (the court may disregard points of error when the appellant fails to

² HRAP Rule 28(b)(7) provides in relevant part:

(b) Opening brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following section in the order here indicated:

. . . .

(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor with the citations to the authorities, statutes and parts of the record relied on . . . Points not argued may be deemed waived.

present “discernible arguments” supporting those assignments of error).

Thus, the pivotal question, under applicable authority, is whether the Hongs presented a “discernible argument” regarding an imposition of a duty to disclose based upon Restatement (Second) of Torts § 302.³ A brief summary of the facts and prior proceedings provides the requisite context to consider this question.

II. BACKGROUND

In August 1994, Caesar’s Cleaners, one of the tenants at the property located at 1144 Young Street, owned by Ruth Graham (Ruth), was the victim of two robberies. During one of the robberies, the intruder brandished a knife and ordered the employee to hand over money. During the other robbery, the assailant pressed a pipe up against the employee’s back, demanded money, and threatened the employee by saying that he had a gun. The day after the second robbery, Caesar’s Cleaners vacated the premises, citing employee safety as the reason for leaving. Caesar’s Cleaners notified Donnie Graham, Ruth’s son, who was managing the property at the time, of both robberies.

During subsequent attempts to rent the space, Charlotte Graham’s (Charlotte’s) phone number at Graham Properties, Inc. was listed as the contact number. Graham Properties, Inc., a real estate agency solely run and operated by Charlotte as the principal agent and broker, was a tenant of the 1144 Young Street property. In addition, Ruth’s residence was located behind the rental building on the same property.

In April 1995, Song Hong (Mr. Hong) and Hyang Hong (Mrs. Hong) [collectively, “the Hongs”] were interested in opening a pawn shop and asked their real estate agent, Jong Hye Kim (Kim), to find a place in an area with a reasonably low crime rate. Kim,

³ For cases involving a complete failure to raise an argument, see, e.g., Acoba v. General Tire, Inc., 92 Hawai‘i 1, 10, 986 P.2d 288, 297 (1999) (declining to review claim where party failed to present the particulars of each error or to provide reasons for the alleged errors); Weinberg v. Mauch, 78 Hawai‘i 40, 49, 890 P.2d 277, 286 (1995) (“[T]he Mauchs do not present an argument as to why the trial court erred by granting the motion.”).

who had dealt with Charlotte in a previous transaction regarding the premises, showed the Hongs the space at 1144 Young Street formerly occupied by Caesar's Cleaners. Kim said that he did not ask Charlotte about prior incidents of crime, because he believed that was something she would have to disclose if it were present. Mr. Hong, however, said that during one of the meetings, Mrs. Hong asked Charlotte about crime in the area, and Charlotte replied that it was "a very safe building from criminal activities with no incidents of burglaries or robberies." On at least two other occasions, Charlotte allegedly reaffirmed that it was a safe area and that no burglaries or robberies had occurred. Charlotte later stated that she knew about the prior robberies at Caesar's Cleaners but did not believe that she was obligated to disclose those incidents. Charlotte believed that it was Ruth's obligation to disclose these facts.

On May 12, 1995, Ruth and the Hongs entered into a five-year lease. On July 1, 1995, three males entered the pawn shop after Mr. Hong buzzed them in through the security system. One of the males pointed a gun at Mr. Hong, and Mr. Hong told them to take whatever they wanted. Mr. Hong also pressed the alarm button. The males realized that Mr. Hong had pressed the alarm button, and one of them struck Mr. Hong. One of the males then shot Mr. Hong in the head. Before fleeing, the three males broke a glass cabinet and took several items from the pawn shop. Mr. Hong stated that he did not know anything about the previous Caesar's Cleaners robberies until after this incident.

On June 24, 1996, the Hongs filed a complaint against Ruth, Charlotte, Graham Properties, Inc. [collectively, "the Grahams"], Kim, Richard Daggett Realty, the real estate agency Kim worked for, and Sentinel Silent Alarm Co. Against the Grahams, the complaint alleged breach of contract, negligence in failing to disclose the prior robberies, punitive damages, unfair and deceptive trade practices, and loss of consortium.

The Grahams filed a motion for summary judgment, arguing that they did not

owe a duty, as lessors of the property, to protect the Honges from criminal acts of third persons because no special relationship existed pursuant to Restatement (Second) of Torts §§ 315 and 314A (1965) and no liability existed pursuant to Restatement (Second) of Torts § 356 (1965). The Honges argued that a duty did exist pursuant to Restatement (Second) of Torts § 302B, and, therefore, a special relationship was not necessary. The circuit court granted partial summary judgment in favor of the Grahams on the negligence and loss of consortium claims. The Grahams filed a second motion for summary judgment as to all remaining claims, arguing that these claims should be dismissed. The circuit court also granted this motion. The Honges timely appealed.

III. THE HONGES' OPENING BRIEF

As previously noted, the determinative issue is whether a “discernible argument” was made as to the Grahams’ duty to disclose based on Restatement (Second) of Torts § 302. The Argument Section of the Honges’ opening brief contains the following relevant text.

The trial court erred when it ruled that a “duty of care” arises only if there is a “special relationship” between the parties. . .

The trial court erroneously ruled that the Appellees did not owe a “duty to protect Song Hong” from the criminal acts of third persons. However, Appellants did not plead that the Appellees breached a duty to protect, but that the Appellees were negligent for failing to disclose the history of prior criminal acts at the Young Street property. . . .

The trial court erroneously misconstrued and transmogrified the Honges’ Second Claim of failure to disclose prior criminal activities, into a claim alleging a failure to protect Song Hong. . .

Courts are reluctant to impose a duty on landowners to protect others against the criminal acts of third persons because, “criminal acts are not reasonably to be expected, . . . that the burden of taking continual precautions against them almost always exceeds the apparent risk. Maguire [v. Hilton Hotels Corp.], 79 Haw. at 113. However, the burden of

a landowner to disclose foreseeable risks to a prospective tenant, such as Song Hong, would have been minimal in comparison. . . . The burden of disclosing past criminal activities, is clearly different and substantially less than the burden of protecting one from the criminal harm of others.

The trial court erroneously held that Hong's were required to show a "special relationship," but the trial court failed to consider that a duty of care may exist by other than a "special relationship."

Hong's opening brief (OB) at 13-16 (emphasis original). The first subsection of the Argument includes the following pertinent text.

1. APPELLEES OWED A DUTY TO DISCLOSE PRIOR CRIMINAL ACTIVITIES AT THE YOUNG STREET PROPERTY, EVEN IN THE ABSENCE OF A "SPECIAL RELATIONSHIP"

Appellees claimed they were not liable to the Hong's because there was no "special relationship" between the parties in this commercial lease. However, a "special relationship" is not the exclusive basis to impose a duty of care.

"A person may be charged with a duty to take precautions to protect others from intentional criminal acts of third persons. Such a duty arises when one should realize through special facts within his knowledge or a special relationship that an act or omission exposes someone to an unreasonable risk of harm through the conduct of another. If the reasonably prudent person would foresee danger resulting from another's voluntary criminal acts, the fact that another's actions are beyond defendant's control does not preclude liability [A]n act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another" (Emphasis added). 57 Am Jur 2d NEGLIGENCE § 108.

The Hawaii Supreme Court in Touchette v. Ganai, 82 Haw. [sic] 293, 301, 922 P.2d 347 (1996) held there was a duty even when there

was no “special relationship. . . .”⁴

The Hawaii Supreme Court in Touchette recognized that an act or omission is negligent, if it involves an unreasonable risk of harm to another through the “foreseeable” actions of a third person. In this case, the issue which should have been presented to the jury, was whether a reasonably prudent person would have foreseen the danger of possible criminal acts by others based on previous criminal activities at the same location.

OB at 17-18 (emphasis original).

IV. DISCUSSION

Manifestly, the quoted text from the argument section of the Hongs’ opening brief demonstrates that much more than a “discernible argument” was presented regarding whether the Grahams were subject to a legal duty to disclose prior criminal activities at the Young Street property under Restatement (Second) of Torts § 302.

As required by HRAP Rule 28(b)(7), the argument section of the Hongs’ opening brief sets forth the contention that the Grahams owed a duty to disclose to the Hongs the foreseeable danger of possible criminal acts by others based on previous criminal activities at the same location, even absent a special relationship. OB at 13-15. The argument continues in accordance with HRAP Rule 28(b)(7) by explaining the reasons

⁴ The Hongs’ Argument proceeds to quote the following text, which is derived from Touchette, and Restatement (Second) 302, 302A and 302B:

- (1) a negligent act or omission may be one which involves an unreasonable risk of harm to another through either
 - (a) the continuous operation of a force started or continued by the act or omission,
 - or
 - (b) the foreseeable action of the other, a third person, an animal, or a force of nature.
- (2) an act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person; and
- (3) an act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

for the Hong's contention that "a duty arises when one should realize through special facts within his [or her] knowledge that an act or omission exposes someone to an unreasonable risk of harm through the conduct of another." OB at 17. The Hong's even address the societal and economic costs of imposing such a duty: "the burden of a landowner to disclose foreseeable risks to a prospective tenant, such as Song Hong, would have been minimal in comparison" to the apparent risk. OB at 15-16. To support their position, the Hong's provide citations, as required by the rule, to: Touchette; the Restatement (Second) of Torts §§ 302, 302A, and 302B; and American Jurisprudence 2d.

In finding waiver, the majority does not apply the "discernible" standard. "Discern" means "to recognize or identify as separate and distinct . . . to come to know or recognize mentally." Merriam Webster's Collegiate Dictionary 329 (10th ed. 2000). The majority plainly "recognized" and "identified" the Hong's argument regarding the duty to disclose. Indeed, the majority described why the argument, in its view, was incomplete.

bare assertions . . . without legal argument as to how Restatement (Second) of Torts § 302 serves as a basis for imposing a duty are insufficient where Restatement (Second) of Torts § 302 by itself does not create or establish a legal duty, see McKenzie v. Hawai'i Permanente Medical Group, Inc, 98 Hawai'i 296, 300, 47 P.3d 1209, 1213 (2002).

Majority at 4. Equally problematic, under the analysis of the majority, is that compliance of an argument with HRAP Rule 28(b)(7) depends upon the particular Restatement section an appellant happens to rely upon. Herein, the majority deemed reliance upon Restatement § 302 to require more argument than otherwise necessary because that section "by itself does not create or establish a legal duty." However, concepts such as completeness, sufficiency and the particular Restatement section relied upon are alien to the "discernibility" standard, and have never previously been a part of the determination as to whether an argument is compliant with the requirements

of HRAP Rule 28(b)(7).

Additionally, even assuming that HRAP Rule 28(b)(7) contemplates a sliding scale of sufficiency depending on the authority relied upon, the Hong's opening brief satisfied this standard. The majority, in noting that Restatement (Second) of Torts § 302 does not itself create a duty, cites to McKenzie v. Hawai'i Permanente Medical Group, Inc., 98 Hawai'i 296, 47 P.3d 1209 (2002). In McKenzie, the supreme court reiterated that imposition of a duty of care is only an expression of the sum total of those considerations of policy which leads the law to say that the particular plaintiff is entitled to protection.

In determining whether or not a duty is owed, we must weigh the considerations of policy which favor the appellants' recovery against those which favor limiting the appellee's liability. . . . However, we are reluctant to impose a new duty upon members of our society without any logical, sound, and compelling reasons taking into consideration the social and human relationships of our society.

98 Hawai'i at 301, 47 P.3d at 1214. It is the Hong's purported failure to discuss the factors relevant to determining whether a duty is owed under the circumstances of this case that induces the majority into invoking the waiver rule.⁵ However, while the Hong's may not have cited cases discussing such factors, their argument embraced this concept.

Courts are reluctant to impose a duty on landowners to protect others against the criminal acts of third persons because, "criminal acts are not reasonably to be expected, . . . that the burden of taking continual precautions against them almost always exceeds the apparent risk. Maguire [v. Hilton Hotels Corp.], 79 Haw. at 113. However, the burden of a landowner to disclose foreseeable risks to a prospective tenant, such as Song Hong, would have been minimal in comparison. The economic and social costs also justifies a duty to disclose foreseeable risks rather than adopting the doctrine of "caveat emptor" in every business transaction. If the history of known past criminal activities had been disclosed, the lessee could include the costs of appropriate security required as part of its decision making process, and if the additional costs makes

⁵ In Doe Parents No. 1 v. State Dep't of Educ., 100 Hawai'i 34, 58 P.3d 545 (2002), the majority opinion did not discuss the duty calculus.

the venture unprofitable, he can decide not to open the business at that particular location, operate a different kind of business, or have different hours of operation to reduce the potential risk of criminal activities. The burden of disclosing past criminal activities, is clearly different and substantially less than the burden of protecting one from the criminal harm of others.

OB at 15-16. Thus, the Hongs did clearly address many of the factors that a court must evaluate in determining whether to impose a duty of care based upon Restatement (Second) of Torts § 302.

V. CONCLUSION

Applying the waiver doctrine, as the majority has in this case, effectively alters the import of HRAP Rule 28(b)(7), which provides that “[p]oints not argued may be deemed waived.” The substance of the rule itself addresses only whether the elements of the argument section are present, not whether the argument is advanced to an extent deemed sufficient by the appellate court. Here, even assuming the argument could have been more complete, the point was argued and the argument was unquestionably “discernible.” The majority has effectively raised the bar as to what constitutes an argument in compliance with HRAP Rule 28(b)(7). Whether an argument, in any given case, meets that unspecified height will involve the application of undue discretion not previously a part of the rule.

For the foregoing reasons, I believe that the waiver doctrine has been incorrectly applied.