*** NOT FOR PUBLICATION ***

NO. 22874

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

JERRY KOTZ; JOHN F. METZLER; JONI J. METZLER; FRANK H. BRAMLETT, JR.; MAMIE E. BRAMLETT; WALTER PILOR; WAYNE BOTHELO; KATHLEEN BOTELHO; JOHN B. ROBERTSON, III; JAMES B. CHANNON; RODNEY Y. ISHIMINE; GINGER Y. ISHIMINE; ROBERT M. GOLDZWEIG; LES ARNOLD; ELENA ARNOLD; ANA NA'WAHINE-KAHOOPII; NANCY STEINECKE; TREY PIERCE; GALE SCUDDER; RANDALL T. ELARCO, SR.; FLORINE D. ELARCO; CARTER J. CHU and MARY CHU dba KOHALA VILLAGE RESTAURANT & INN; MARK J. McGOWAN; JOHN SEERY; RICKY KUHAIKI; and MARK SCHWARTSMAN dba OHANA PIZZA,
Plaintiffs-Appellants

vs.

HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawaii corporation,
Defendant-Appellee

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 98-173)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ. and Acoba, J., concurring separately)

Plaintiffs-Appellants Jerry Kotz, John F. Metzler, Joni J. Metzler, Frank H. Bramlett, Jr., Mamie E. Bramlett, Walter Pilor, Wayne Bothelo, Kathleen Botelho, John B. Robertson, III, James B. Channon, Rodney Y. Ishimine, Ginger Y. Ishimine, Robert M. Goldzweig, Les Arnold, Elena Arnold, Ana Na'Wahine-Kahoopii, Nancy Steinecke, Trey Pierce, Gale Scudder, Randall T. Elarco, Sr., Florine D. Elarco, Carter J. Chu and Mary Chu dba Kohala Village Restaurant & Inn, Mark J. McGowan, John Seery, Ricky Kuhaiki, and Mark Schwartsman dba Ohana Pizza [hereinafter, collectively, "Appellants"] appeal from the August 31, 1999 final

judgment of the circuit court of the third circuit, the Honorable Greg K. Nakamura presiding, entering judgment in favor of Hawai‘i Electric Light Company, Inc. (HELCO) and against Appellants on all claims. On appeal, Appellants argue that: (1) the circuit court was wrong, as a matter of law, in denying Appellants's motion for partial summary judgment on their products liability and strict liability claims; (2) the circuit court was wrong, as a matter of law, and/or abused its discretion in granting a directed verdict in favor of HELCO against Appellants' negligence claims by requiring proof of ownership of the broken tree; and (3) the circuit court was wrong, as a matter of law, and/or abused its discretion in deciding that HELCO could not be liable for breach of warranty or trespass for faulty electrical power.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the issues raised and the arguments advanced, we hold that: (1) the circuit court did not err in denying Appellants's motion for partial summary judgment under principles of products liability and strict liability in tort, inasmuch as, under the circumstances of this case, an over-voltage of electricity generated from a falling tree branch is not a product and, thus, HELCO was not liable under the theory of strict products liability, see Bowen v. Niagara Mohawk Power Corp., 590 N.Y.S.2d 628 (N.Y. App. Div. 1992); Mancuso v. Southern Cal. Edison Co., 232 Cal. App. 3d 88

(Cal. App. 2d. Dist. 1991); Otte v. Dayton Power & Light Co., 523 N.E.2d 835 (Ohio 1988); Smith v. Home Light and Power Co., 734 P.2d 1051 (Colo. 1987); (2) the circuit court did not err in entering judgment for HELCO on Appellants' claims of negligence, inasmuch as (a) HELCO exceeded all vertical and horizontal clearance requirements of General Order No. 6, (b) it was common industry practice to have circuits of different voltage levels on a single pole, (c) HELCO never experienced any problems from the subject trees in the past, (d) Appellants failed to demonstrate that HELCO had notice that the trees would likely pose a problem, and (e) no expert testimony was presented to the contrary, see Pilkington v. Hendricks County Rural Elec. Membership Corp., 460 N.E.2d 1000 (Ind. Ct. App. 1984); Smith v. Home Light and Power Co., 734 P.2d 1051 (Colo. 1987); and (3) the circuit court did not err in determining that HELCO could not be liable for breach of implied warranty, inasmuch as, under the circumstances of this case, electricity is not a "product," and, therefore, Hawai‘i's Uniform Commercial Code (UCC) is inapplicable, see HRS § 490:2-105, and, moreover, the evidence established that (a) HELCO constructed and maintained its lines in compliance with its rules and regulations, (b) HELCO never experienced any problems from the subject trees in the past, and (c) HELCO's Tariff Rules expressly recognize voltage variations and are devoid of a specific provision providing for liability for over-voltage, see

generally Torres v. Northwest Eng'g Co., 86 Hawai'i 383, 949 P.2d 1004 (App. 1997); Ontai v. Straub Clinic and Hosp., Inc., 66 Haw. 237, 659 P.2d 734 (1983). In addition, this court will disregard Appellants' trespass claim, inasmuch as Appellants failed to argue, or even discuss, in their opening and reply briefs, the issue of trespass. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7)(2002). Therefore,

IT IS HEREBY ORDERED that the circuit court's August 31, 1999 judgment, from which this appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, February 11, 2004.

I concur in the result.

On the briefs:

Mark Van Pernis and Gary W. Vancil of Van Pernis Smith & Vancil for plaintiffs-appellants

Diana L. Van De Car for defendant-appellee