***** NOT FOR PUBLICATION *****

NO. 23787

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---

NANCY HUTCHINSON, Individually and as Special Administrator of the Estate of MARTI HUTCHINSON, and as Prochein Ami for KATYA HUTCHINSON, a minor, and as Prochein Ami for ALEC HUTCHINSON, a minor, DEBRA SOTO, Individually and as Special Administrator of the Estate of MICHELLE SOTO, ERIK HUTCHINSON, DAVID HANSELL, CHRISTOPHER TINER, KEVIN IRWIN, and RAYLENE MAPSON,
Plaintiffs-Appellants,

vs.

STATE OF HAWAIʻI, Defendant and Third-Party Plaintiff-Appellee,

and

JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE GOVERNMENTAL ENTITIES 1-10, DOE NON-PROFIT ENTITIES 1-10, Defendants,

vs.

ROMAN E. NAKANO,
Third-Party Defendant.

---

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 97-372)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ., and Chief Circuit Judge Hirai, in place of Duffy, J., recused)

The plaintiffs-appellants Nancy Hutchinson, individually and as special administrator of the estate of Marti Hutchinson, and as prochein ami for Katya Hutchinson and Alec Hutchinson, minors, Debra Soto, individually and as special administrator of the estate of Michelle Soto, Erik Hutchinson, David Hansell, Christopher Tiner, Kevin Irwin, and Raylene Mapson, [collectively hereinafter, "the Appellants"] appeals from

the final judgment of the third circuit court, the Honorable Greg K. Nakamura presiding, filed on September 12, 2000.

On appeal, the Appellants contend that the circuit court erred by excluding the following evidence: (1) party admissions and evidence of subsequent remedial measures; (2) testimony regarding evidence of subsequent and prior accidents at the site of the subject accident; (3) police and State of Hawai‘i Department of Transportation (DOT) reports regarding the subject accident; and (4) the testimony of lay witnesses regarding flooding at the site of the subject accident. The Appellants also challenge as clearly erroneous certain findings of fact (FOFs) entered by the circuit court on December 21, 1999, specifically, FOF Nos. 13, 17, 22, 23, 24, 25, 27, 28, 30, 31, 35, 36, 37, 41, 42, 43, 44, 45, 46, 47, and 48. The Appellants further assert that the circuit court erred in failing to address the defendant-appellee and third-party plaintiff-appellee State of Hawaii's [hereinafter, "the State"] duty of care pursuant to this court's decision in Taylor-Rice v. State, 91 Hawai‘i 60, 979 P.2d 1086 (1999).

The State responds as follows: (1) substantial evidence supports the circuit court's FOFs; and (2) the circuit court's FOFs were not clearly erroneous, inasmuch as (a) evidence of prior and subsequent accidents was properly excluded, (b) evidence of subsequent remedial measures was properly excluded because (i) none of the exceptions for admissibility apply and (ii) the State did not waive its right to assert nonadmissibility pursuant to Hawai‘i Rules of Evidence (HRE) Rule 407 (1993), (c) lay witness testimony regarding flooding was properly excluded,

(d) the circuit court properly concluded that the condition of the Pāhoa Bypass Road was not a legal cause of the accident, and (e) the circuit court properly excluded police and DOT reports based on inadmissible hearsay and opinion.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the circuit court's final judgment.

The Appellants cannot appeal the redactions of Exhibits 47, 48, 50, and 59 because they have invited the very "error" that they are presently contesting, see State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001) ("We acknowledge that, generally, invited errors are not reversible." (citation omitted)); State v. Puaoi, 78 Hawai'i 185, 189, 891 P.2d 272, 276 (1995) ("We acknowledge that invited errors are not reversible errors." (citation omitted)); State v. Batson, 73 Haw. 236, 247, 831 P.2d 924, 930 (1992) (holding "that a trial court's acquiescence in the making of a factual finding expressly requested by a defendant in a criminal case cannot thereafter form the basis of alleged error in the making of the same finding"); State v. Smith, 68 Haw. 304, 313, 712 P.2d 496, 502 (1986) ("We are, of course, mindful that 'invited errors [generally] are not reversible [errors].'" (citation omitted)), and are judicially estopped from "tak[ing] a position in regard to a matter which is directly contrary to, or inconsistent with, one [they have] previously assumed[.]" Torres v. Torres, 100 Hawai'i 397, 408, 60 P.3d 798, 809 (2002).

The Appellants also did not properly preserve all of the alleged error that they request this court to review, inasmuch as they did not make an "offer of proof" every time the circuit court sustained objections interposed by the DAG. State v. Kelekolio, 74 Haw. 479, 520-22, 849 P.2d 58, 77-78 (1993) (holding that "[i]n the absence of an offer of proof, the trial court committed no reversible error"). In particular, the Appellants' counsel failed to provide any "offer of proof" when the circuit court sustained objections to the following questions and attempts by the Appellants' counsel to offer exhibits into evidence: (1) during direct examination of HPD Officer Moller -- (a) "Are you aware of . . . whether the prior accidents involved . . . accidents pertaining to water on the roadway?", (b) "Are you aware of any other incidents involving hydroplaning at this area of the roadway?", and (c) "Do you recall a discussion with any other police officer regarding hydroplaning at this location? . . . And I'm not asking for what you discussed but simply whether you had a discussion."; (2) during direct examination of Hawai'i County EMT Gates -- "[D]o you recall if it was raining on the other instances when you were at the scene?"; (3) during re-direct examination of forensic engineering consultant Dr. Thomas Shultz -- "[A]t this time I would o[ff]er Exhibit 2[, the reports of prior accidents,] for identification into evidence."; and (4) during direct examination of vehicular accident investigation specialist Dr. Yoshida -- (a) "Your Honor, at this time, for the record I would offer Exhibit 2[, being reports of prior and subsequent accidents,] for identification into evidence.", and (b) "I offer Exhibit 147[, being police reports of accidents that

occurred during the period of August 25, 1995, through March 9, 1997,] into evidence, Your Honor." Even assuming arguendo that the substance of the evidence was apparent from the context within which the questions were asked, see HRE Rule 103(a)(2) (1993), inasmuch as a reasonable judge could conclude that the evidence that the Appellants sought to admit was more prejudicial than probative, we hold that the circuit court did not abuse its discretion in sustaining the State's objections to the foregoing questions by the Appellants. See HRE Rule 403 (1993); State v. St. Clair, 101 Hawai'i 280, 286, 67 P.3d 779, 785 (2003).

The only instances set forth in the Appellants' statement of points on appeal and correctly preserved by "offers of proof" by the Appellants' counsel were the following: (1) during direct examination of Hawai'i County EMT Michael Roy Gates -- "And . . . why did you understand that [Pāhoa Bypass Road] was the location where you had to go?"; and (2) during direct examination of DOT engineer Bruce C. McClure -- (a) "And would these dates of accidents be those dates as reflected in the traffic accident analysis which is Exhibit 46-B for identification?", (b) "Are you able to determine whether or not these accidents occurred during wet weather conditions as a result of or relating to water being on the road?", and (c) ". . . I'd like to, for the record, offer [Exhibits] 46-A, 46-B, and 46-C[, being reports of prior accidents,] into evidence[.]"

With regard to Gates's testimony, the Appellants' counsel's "offer [of proof] should [have] incorporate[d] a coherent theory of admissibility, grounded in a designated rule or rules, together with case law and other authority as

appropriate, plus a proffer covering the nature and substance of the evidence." Kelekolio, 74 Haw. at 522 n.21, 849 P.2d at 78 n.21. The Appellants' counsel did not, however, address all of the grounds for excluding the testimony stated by the DAG, either at trial or in its appellate briefs. More specifically, the Appellants have overlooked, and therefore conceded, the DAG's "[l]ack of foundation" and "opinion testimony" objections, which are salient inasmuch as the Appellants' counsel admitted that he was trying to prove "the fact that other people have talked about having crossed the road at that location knowing that it's a dangerous area based on other instances." (Emphasis added.)1; Gates's apparent lack of personal knowledge underscores the absence of any foundation upon which he could have issued an opinion as to the dangerousness of the Pāhoa Bypass Road, such that the circuit court's exclusion of his testimony pursuant to HRE Rule 702, was "right[.]" State v. Martinez, 101 Hawai'i 332, 339, 68 P.3d 606, 613 (2003).

As to McClure's testimony and the Appellants' attempts to introduce two exhibits, which were reports of two subsequent accidents, although the two subsequent accidents involved the same "risk of injury" as the subject collision, to wit, loss of vehicular control, Warshaw v. Rockresorts, Inc., 57 Haw. 645, 652, 562 P.2d 428, 434 (1977), requires a stricter standard for substantial similarity when the proponent of the evidence is not simply trying to prove that the opposing party had notice of the dangerous condition. Warshaw, 57 Haw. at 652, 562 P.2d at 434. The Appellants obviously could not have offered the evidence of subsequent accidents to prove that the State had notice of the

allegedly dangerous condition; the Appellants instead offered the evidence as independent proof that the site of the subject collision was actually dangerous (e.g., "To show that this is an area where there was water on the road relating to accidents."). Thus, the circuit court correctly required a "stronger showing" of substantial similarity than the Appellants provided, requesting, consonant with Tabieros v. Clark Equipment Co., 85 Hawai'i 336, 944 P.2d 1279 (1997), and Warshaw, that the Appellants prove the similarity of the accidents with greater particularity as to the conditions, the type of vehicles, and the loss of control. Notwithstanding the "stricter standard," the circuit court actually admitted one of the reports, Exhibit 46-A, "just for the purpose of [showing that] notice was given with regard to further action to be taken by Mr. McClure[,]" but excluded the other exhibits, which were not probative of notice to the State. Moreover, we do not believe that the circuit court committed an abuse of discretion in excluding the reports of prior and subsequent accidents. Warshaw at 652-53, 562 P.2d at 434 (noting that, "even when sufficient similarity is shown, the admission of evidence of . . . similar accidents is within the discretion of a trial court," and that "[e]vidence of . . . similar accidents may be excluded if the danger of unfair surprise, prejudice, confusion of the issues or the consideration of undue consumption of time is disproportionate to the value of the evidence" (internal citations omitted)).

Although the Appellants assert that the circuit court erred in excluding police and DOT reports based on hearsay and improper opinion objections, they failed to make "offers of

proof" with regard to much of the controverted police testimony and reports, and therefore did not preserve their objections to several of the circuit court's evidentiary rulings, both regarding the testimony of HPD Officer Miller and HPD Officer Newcomb, on appeal. Kelekolio, 74 Haw. at 522, 849 P.2d at 78 (1993); see also id. at 486 n.1, 849 P.2d at 62 n.1. Even assuming arguendo that the substance of the evidence was apparent from the context within which the questions were asked, see HRE Rule 103(a)(2), the circuit court did not abuse its discretion in concluding that HPD Officers Miller and Newcomb were not qualified to testify as experts pursuant to HRE Rule 702 (1993). See State v. Cordeiro, 99 Hawai'i 390, 404, 56 P.3d 692, 706 (2002). Similarly, the circuit court did not err in the instances in which the Appellants correctly made sufficient "offers of proof," inasmuch as (1) the police officers were not qualified to offer opinions pursuant to HRE Rule 702 and (2) the exhibits contained such inadmissible opinions and were therefore properly excluded pursuant to HRE Rule 803(b)(8)(C). Id.

The Appellants did not preserve the issue of lay witness testimony on appeal. In particular, the circuit court, after stating that it would evaluate the Appellants' offers of lay testimony on a case-by-case basis, invited the Appellants to preserve the issue: "If at some time you want to make a record, though, of who you would call and what they would testify to, that might be helpful for your purposes." The Appellants, however, either failed to make such a record or omitted their citation of it from their briefs. In either case, the Appellants have waived any argument as to such testimony. See Hawai'i Rules

of Appellate Procedure (HRAP) Rule 28(b)(4) (2004). The Appellants were also required to make an "offer of proof" as to each evidentiary ruling that they now allege as erroneous. See Kelekolio, 74 Haw. at 522, 849 P.2d at 78; see also id. at 486 n.1, 849 P.2d at 62 n.1; HRE Rule 103(a) (1993). The Appellants' "statement of points on appeal" does not refer this court to any instances in which they were barred from adducing lay witness testimony when their counsel made an "offer of proof." See HRAP Rule 28(b)(4)(a). Thus, the Appellants have waived any argument regarding the admissibility of lay witness testimony.

Finally, notwithstanding that the Appellants claim that the circuit court erred in finding that Nakano caused the subject accident by braking and causing his vehicle to enter a "locked wheel skid" and challenge as clearly erroneous FOF Nos. 13, 17, 22, 23, 24, 25, 27, 28, 30, 31, 35, 36, 37, 41, 42, 43, 44, 45, 46, 47, and 48, the State, in its answering brief, has identified "credible evidence . . . of sufficient quality and probative value" such that a reasonable person would conclude that the foregoing FOFs were not clearly erroneous. See Doe Parents No. 1 v. State, Dept. of Educ., 100 Hawai'i 34, 57-58, 58 P.3d 545, 568-69 (2002). Moreover, our review of the State's citations to the record indicates that substantial evidence supports the FOFs. Id. The Appellants reliance on Taylor-Rice, therefore, is misplaced; the circuit court did not clearly err in finding and concluding that the State did not breach its duty of care. Thus, although that the State may have been liable if it had breached its duty of care and could reasonably have foreseen Nakano's negligence in braking while driving on unsafe tires, the

circuit court did not clearly err in finding -- and therefore was not wrong in concluding -- that the Appellants failed to prove that the State negligently designed and constructed Pāhoa Bypass Road. Therefore,

IT IS HEREBY ORDERED that the circuit court's September 12, 2000 final judgment against the Appellants and Roman E. Nakano, and in favor of the State, from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, September 21, 2004.

On the briefs:

David M. Robinson,
Daniel E. Chur, and
Steven T. Brittain, of
Robinson & Chur, and
Peter Van Name Esser,
for the plaintiffs-appellants
Nancy Hutchinson, Individually
and as Special Administrator
of the Estate of Marti Hutchinson,
et al.

Jack A. Rosenzweig,
Deputy Attorney General
James Kawashima,
Lyle Y. Harada, and
Kristine N.Y. Kinaka, of
Watanabe, Ing & Kawashima
for defendant-appellee and
third-party plaintiff-appellee,
State of Hawai'i