NO. 23750

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

NINA DOWSETT, Plaintiff-Appellant, v.
JUDITH MORRIS, Defendant-Appellee,
and
DOE ENTITIES 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 97-4063)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Plaintiff-Appellant Nina Dowsett (Dowsett) appeals the August 29, 2000 judgment of the circuit court of the first circuit, the Honorable Karen N. Blondin, judge presiding. Dowsett also appeals the following orders of the court underlying its August 29, 2000 judgment: (1) the July 28, 2000 order granting Defendant-Appellee Judith Morris's (Morris) motion for summary judgment, (2) the July 28, 2000 order denying Dowsett's motion to continue the hearing on the motion for summary judgment, and (3) the August 29, 2000 order denying Dowsett's motion for reconsideration of the motion for summary judgment.[1]

[1] On appeal, Plaintiff-Appellant Nina Dowsett (Dowsett) fails to present discernible argument specifically applicable to the circuit court of the first circuit's August 29, 2000 order denying Dowsett's motion for reconsideration of Defendant-Appellee Judith Morris's (Morris) motion for summary judgment. Dowsett also fails to present discernible argument with respect to the following points of error she presents on appeal: (1) "The Court erred when it granted [Morris's] Motion for Attorney's fees and Costs filed on September 5, 2000, on October 30, 2000"; and (2), "The Court erred

We affirm.

I. Background.

On April 9, 1993, Dowsett was injured when the car she was driving was struck from behind, while stopped in traffic, by a car driven by Morris. Opposing pleadings below described the impact in different ways. Dowsett alleged that Morris "caused her vehicle to violently crash into [my] vehicle" at "approximately 15 miles per hour." Morris maintained, on the other hand, that she "tapped" the back of Dowsett's car "at no more than 5 miles per hour." Morris described the incident as "a minor low impact rear-end accident[.]"

About four-and-a-half years after the accident, on October 3, 1997, Dowsett filed a complaint against Morris, alleging that Morris had been negligent or reckless in operating her vehicle, and that her wrongdoing had caused Dowsett injury. The complaint described Dowsett's injuries as follows: "[Dowsett] suffered severe physical injuries, pain, suffering, serious emotional distress, and a loss of enjoyment of life.

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when it entered the Amended Judgment [(the judgment on the order granting Morris's motion for attorney's fees and costs)] on October 31, 2000." Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (2001) provides, in relevant part, that the opening brief on appeal shall contain "[t]he argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived." See also Weinberg v. Mauch, 78 Hawai'i 40, 49, 890 P.2d 277, 286 (1995) (failure to present argument on a point of appeal in accordance with HRAP Rule 28(b)(7) renders point "not subject to review" by the appellate court). We will therefore not review the neglected order and points of error.

[Dowsett] further incurred property loss and medical expenses." Dowsett's May 27, 1999 pretrial statement described the injuries caused by the accident in language identical to that used in her complaint.

Apparently, no police report on the accident had been filed, and service of the complaint and summons was delayed by Dowsett's lack of knowledge of Morris's whereabouts. Dowsett eventually served Morris on January 8, 1999. Morris answered the complaint on January 25, 1999, and in her answer asserted various defenses, including, that "[Dowsett's] claim is barred in whole or part by the applicable provisions of H.R.S. §431." In her July 26, 1999 responsive pretrial statement, Morris raised, *inter alia*, "the defense that [Dowsett's] claims are barred by the appropriate provisions of Hawaii's no-fault law."

On April 19, 1999, Dowsett's attorney signed and filed a certificate of service of Dowsett's answers to interrogatories propounded by Morris. Dowsett's answers, dated April 19, 1999, were not given under oath and signed by Dowsett, as required by Hawai'i Rules of Civil Procedure (HRCP) Rule 33(a) (1999). They were signed by her attorney instead. They included the following:

> 6. State all physical and/or mental injuries or conditions you claim are a result of the incident.
>
> Answer: Inability to function in my daily routine as a wife and mother of three and then four children. My neck and back hurt so much, I was unable to take care of my baby, nurse him, clean our condo, take care of my family. I could not exercise, because I did not want to do any further damage and I had searing pain from my neck down my arm

and leg.

7. State all physical and/or mental injuries or conditions you suffered from at any time before the accident.

Answer: At the time of the accident I was 38. I had not had any previous car accidents. I had three children. My husband and I visited the chiropractor as preventive maintenance from time to time (when we felt we could afford it) and we both felt it was important to stay in alignment.

8. State all physical and/or mental injuries or conditions you have incurred since the date of the incident which you claim either (a) aggravated your incident [(sic)] or (b) were new injuries.

Answer: Since the accident we have had another child. He is now 4 years old. It was a normal pregnancy and natural birth. What has aggravated my condition was not getting enough treatment so that I could go back to exercising more vigorously to maintain my strength and maximize my health.

. . . .

11. List all medical or health care expenses you incurred as a result of the incident.

Answer:

Rathjen Clinic	$3,778.06
Koichiro Togo	1,480.23
Koichiro PT	2,386.41
Lyna Morimoto, LAc, LMT	1,291.42
Victor Koyoday	592.06 (at least)
[(TOTAL	$9,528.18)]

12. If applicable, identify each insurance carrier providing no-fault benefits or which might provide no-fault benefits to you.

Answer: Aetna[.]

13. If you are claiming any loss of earnings as a result of the incident, state the periods of time you were off work, state the name of employer, their [(sic)] address, rate of pay, and the amount of such loss.

Answer: Not applicable.

14. What loss of earnings, if any, do you believe you will incur in the near future as a result of the accident?

Answer: If an injury to my back or neck occurs in the future, what stops any future insurer from claiming it is because of this injury? It's important that this past injury is treated fully to allow me to get strong, be able to exercise, and prevent further injuries.

An arbitration was held under the Court Annexed Arbitration Program. On October 29, 1999, the arbitrator found for Morris on liability, because "[Dowsett] failed to meet any of the tort/no-fault thresholds." On November 1, 1999, Dowsett filed a notice of appeal of the arbitrator's award and a request for trial *de novo*. On December 2, 1999, the court set a jury trial on Dowsett's complaint for October 2, 2000.

On May 3, 2000, Morris filed a "Motion for Summary Judgment for Failure to Meet Tort Threshold." The motion was served upon Dowsett's attorney on May 8, 2000. The hearing on the motion was set for July 6, 2000, less than a month before the discovery cut-off date.

Morris based her motion on Hawaii Revised Statutes (HRS) § 431:10C-306 (1993), which provided, in pertinent part:

> (a) Except as provided in subsection (b), this article abolishes tort liability . . . with respect to accidental harm arising from motor vehicle accidents occurring in this State[.]
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> . . . .
>
> (b) Tort liability is not abolished as to the following persons, their personal representatives, or their legal guardians in the following circumstances:
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> (1) (A) Death occurs to such person in such a motor vehicle accident;
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> (B) Injury occurs to such person which consists, in whole or in part, in a significant permanent loss of use of a part or function of the body; or
>
> (C) Injury occurs to such person which consists of a permanent and serious disfigurement which results in subjection of the injured person to mental or emotional suffering;
>
> (2) Injury occurs to such person in a motor vehicle accident in which the amount paid or accrued exceeds the medical-rehabilitative limit established in section 431:10C-308 for expenses provided in section 431:10C-103(10)(A) and (B); provided that the expenses paid shall be presumed to be reasonable and necessary in establishing the medical-rehabilitative limit; or
>
> (3) Injury occurs to such person in such an accident and as a result of such injury that the aggregate limit of no-fault benefits outlined in section 431:10C-103(10) payable to such person are exhausted.

At the time of the accident, the aggregate limit of medical-rehabilitative expenses referred to in HRS § 431:10C-306(b)(2) was $10,000.00 per person. HRS § 431:10C-308(c) (1993); HRS § 431:10C-103 (1993).

In the memorandum in support of her motion for summary judgment, Morris claimed that Dowsett did not come within any of

the three applicable exceptions to the general abolition of tort liability in motor vehicle accident cases, because (1) Dowsett did not suffer an injury in the accident "which consists, in whole or in part, in a significant permanent loss of use of a part or function of the body[,]" HRS § 431:10C-306(b)(1)(B); (2) Dowsett did not incur medical-rehabilitative expenses for injuries sustained in the accident in excess of the aggregate limit of $10,000.00, HRS § 431:10C-306(b)(2); and (3) Dowsett did not exhaust the aggregate limit of no-fault benefits payable to her as a result of the accident. HRS § 431:10C-306(b)(3).[2] Hence, Morris maintained, tort liability was abolished in this case and full summary judgment in her favor was appropriate.

Morris attached three exhibits to her motion, Exhibits A, B and C. As Morris concedes on appeal, Answering Brief at 22 n.11, Exhibit B[3] was not properly before the court at the hearing on the motion, and Exhibit C[4] was surplusage. The remaining exhibit, Exhibit A, was a copy of Dowsett's April 19, 1999 answers to the interrogatories propounded by Morris. In a declaration attached to the motion, Morris's attorney stated,

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[2] Dowsett did not dispute below, and does not dispute on appeal, that she did not exhaust the aggregate limit of no-fault benefits payable to her as a result of the accident. Hawaii Revised Statutes § 431:10C-306(b)(3) (1993).

[3] Exhibit B was a copy of a December 9, 1993 report by Porter V. Turnbull, D.C., on his December 1, 1993 independent medical examination of Dowsett.

[4] Exhibit C was a copy of the October 29, 1999 arbitration award in this case.

under oath and penalty of perjury and "to the best of my knowledge and belief[,]" that "the attached Exhibit 'A' is a true and correct copy of Plaintiff Nina Dowsett's Answers to Defendant Judith Morris' First Request for Answers to Interrogatories."

On June 27, 2000, Dowsett filed a memorandum, signed by her attorney, in opposition to Morris's motion for summary judgment. In the memorandum, Dowsett's attorney stated, in pertinent part:

> B. [Dowsett] has had extensive treatment for back injury and pain and incurred additional expenses toward meeting tort threshold since a work-related incident on October 5, 1999 which aggravated her previous back condition. The work injury should be apportioned a percentage attributable to the auto accident in the instant case. Extensive medical records and billing have been obtained and attached hereto as exhibits. A percentage of such medical bills and expenses should be considered expenses for meeting the tort threshold in this case.
>
> As of the date of the submission of [Dowsett's] Prehearing Statement on September 30, 1999,[5] [Dowsett's] attorneys were able to obtain records and billing in the sum of $9,528.18, which is $471.82 short of the no fault tort threshold of $10,000. Clearly, the additional expenses shown in the attached exhibits of $3,443.75 prove that there have been sufficient expenses for [Dowsett] to meet tort threshold. [Dowsett] has also filed a motion to continue the hearing on [Morris's] motion for summary judgment now scheduled for July 6, 2000 in order to ontain [(sic)] further records and to obtain the medical opinion of Dr. Gregory Chow [(Dr. Chow)], [Dowsett's] treating physician, as to [Dowsett's] previous back problems, the permanency thereof, the matter of apportionment and the diagnosis and treatment of [Dowsett's] back pain and injuries.
>
> C. [Dowsett] has suffered a permanent loss of use of a part or function of the body.
>
> . . . .
>
> [Dowsett] submits the attached Affidavit of Nina Dowsett in which she outlines her injuries and loss or [(sic)] use of a part or function of her body which has prevented her from continuous pain-free living. [Dowsett] believes that her injures are permanent.
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> . . . .
>
> In the instant case based upon the Affidavit of Plaintiff Nina Dowsett has subsequently suffered a work related incident aggravating her previous back injury, for which she has incurred expenses which contribute to the meeting of the tort threshold as well as potential

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[5] It is not clear from the record what Dowsett's attorney was referring to when she mentioned the "Prehearing Statement on September 30, 1999[.]"

> permanent injuries. Such problems have been in existence for approximately seven years, which point to the permanency of her condition. She lives in the body that has suffered a significant permanent loss of use of part or function.

(Footnote supplied.) Attached to Dowsett's memorandum in opposition was her affidavit, in which, "being duly sworn on oath," she deposed as follows:

> 1. Affiant was in an accident on april [(sic)] 9, 1993 whereby a vehicle driven by [Morris] failed to stop in time and rear-ended affiant while traveling on Kamaehameha Highwayupon [(sic)] impact, affiant felt a jolt to her nech [(sic)] and back.
>
> 2. Currently affiant is suffering from a limited range of motion in her neck and continuous pain in her back. Affiant went to see [Dr. Chow] for the recent October 5, 1999 work-related injury, wherein he begins his October 11, 1999 "Initial Report" as follows:
>
> > Ms. Dowsett is a 46-year old woman who has chief complaint of previously (emphasis ours) very severe back pain. She injured herself while working on October 5, 1999. She was lifting heavy buckets of ice and cases of soda. She states that her lower back "froze up." She reported the injury to her supervisor and then went to Straub Occupational Medicine. She was treated with some anti-inflammatories. . . . She states that her pain was very severe in her low back going into both legs, left worse than right. The pain was bad enough that she was having cold sweats.
>
> 3. Affiant's back is currently very painful (needle-like and electric shock-like type pain), both while sleeping and awake during the day. Affiant cannot bend or turn her body without pain, and cannot walk any distance. This condition has prevented affiant from the normal use or function of her upper body.
>
> 4. Affiant has included in Exhibit 1 additional expenses incurred for treatments by Key to Life Chiropractic on Maui, receipts for shoes recommended by Dr. Chow, a firmer bed, and massage obtained as recommended by Dr. Chow. Further, affiant made personal direct payments to Rathjen Clinic.

(Emphasis and ellipsis in the original.)

Also attached to Dowsett's memorandum in opposition was the Exhibit 1 referred to in Dowsett's affidavit. It consisted of seven pages.

The first page was a collage copy of various items -- first, the business card of Sandra L. Clegg, L.M.T., a licensed massage therapist practicing in the Kahala Professional Building

in Honolulu; second, a business card from Key to Life Chiropractic in Napili, Maui, with the name Edie Van Hoose handwritten on the copy and the printed title of licensed massage therapist; third, Dowsett's December 29, 1999, $50.00 check, written to Key to Life Chiropractic, without indication of its purpose on the memo line but with a notation hand-written on the copy -- "Maui"; and fourth, a receipt from the Foot Locker store at Kahala Mall, date indecipherable, indicating an expenditure of $124.97 for certain unintelligibly-coded items, with a reminder hand-written on the copy -- "Keep for Back Injury[.]"

The second page was a copy of a typed, unsigned "Reevaluation" of Dowsett, purportedly by an outfit named Therapeutic Bodyworks in Honolulu, dated February 25, 1994, referencing the "Date of Injury" as "04-09-94, no-fault[,]" and the insurance company as "AEtna [(sic)] Casualty & Surety[.]" It also indicated a referral by Dr. John Rathjen, D.C. It related "Subjective Statements" of complaints similar to those Dowsett complained of in her answers to the interrogatories propounded by Morris. The "Subjective Statements" also included this entry: "her symptoms progressively getting worse due to no treatment since June, 1993."

The third page was a copy of a December 27, 1995 invoice from Coyne Mattress Co., Ltd. in Waipahu, showing a sale to Dowsett's husband of a "Cal King Mattress" and presumably associated items, for $385.42.

The fourth page was a copy of a June 13, 2000 statement from Straub Clinic & Hospital in Honolulu, sent to Dowsett's husband for patient Dowsett, showing a balance due, without insurer contribution, of $44.47, and an indication of unidentified services performed on October 6, 1999 by Deborah A. Agles, M.D., in "CLAIM #: 47562715."

The fifth page was a copy of an October 6, 1999 credit card statement, containing a handwritten notation, "Terry's [(presumably, Dowsett's husband)] Master Card[.]" It showed a September 26, 1999, $228.05 charge, underlined by hand, made at the Cal-Neva Resort in Crystal Bay, California, alongside of which was a handwritten notation, "$80.00 Massage[.]"

The sixth page contained a copy of a June 9, 1995 check, in the amount of $90.00, written by Dowsett to the Rathjen Clinic, without any indication as to its purpose.

The seventh and final page contained a copy of a November 15, 1999 prescription slip from Dr. Chow for Dowsett, prescribing, "Massage Therapy 1-2 x/wk for 2-3 wks[.]"

The day after Dowsett filed her memorandum in opposition to Morris's motion for summary judgment, Dowsett's attorney filed some supplemental exhibits in opposition, Exhibits 2-7. In a declaration included in the filing, Dowsett's attorney -- "being duly sworn on oath" and "under penalty of law" -- explained that the supplemental exhibits had not been attached, along with Exhibit 1, to the memorandum in opposition filed the

day before, "because of a malfunction with the office copy machine." Dowsett's attorney declared that Exhibits 3-7 were records and/or billings from a physical therapy office, a chiropractor's office and two physicians, one of whom was Dr. Chow. Dowsett's attorney further deposed that Exhibit 2, showing a total of $3,443.75, was, "to the best of Declarant's knowledge, a summary of expenses incurred as contained in Exhibits 1 through 7 that are in addition to the $9,528.18 in no fault expenses toward tort threshold that was previously submitted." Exhibits 3-7 comprise a voluminous filing. Most of the medical and physical therapy records refer to Dowsett's October 5, 1999 work injury. Inexplicably, many refer to various dermatological or gynecological problems Dowsett was experiencing.

On June 29, 2000, Dowsett filed a motion to continue the July 6, 2000 hearing on Morris's motion for summary judgment. The hearing on the motion to continue was set for the same time as the hearing on the motion for summary judgment. In a hand-dated, June 22, 2000 declaration attached to the motion to continue, Dowsett's attorney stated, "under penalty of law[,]" but this time not under oath:

> 3. [Dowsett's] treating physician, [Dr. Chow], has been contacted by this office in connection with his opinion as to necessary future medical expenses and as to injuries sustained by [Dowsett] which qualify as an exception to the abolition of tort liability under HRS Sec. 431:10C-306. He is in the process of preparing his report, but has advised us that he will be unable to complete it in the time for the filing of the Opposition Memorandum in this case, which Opposition Memoranda [(sic)] is due June 27, 2000.
>
> 4. [Dowsett] seeks a continuance of [Morris's] Motion for Summary Judgment for the following reasons:

a) Declarant and [co-counsel] will be out of the State attending the American Bar Association meetings and conducting depositions from July 6, 2000 until July 23, 2000. There will be no other attorney familiar with this case to be present in Court for the hearing scheduled on July 6, 2000.

b) [Dowsett] has had extensive treatment for back injury and pain and has incurred additional expenses toward meeting tort threshold since a work-related incident on October 5, 1999 which aggravated her previous back conditions.

c) This work injury should be apportioned with a percentage attributed to the auto accident in the instant case. Extensive medical records and billings have been obtained, a portion of which should be considered expenses for meeting the tort threshold in this case. [Dowsett] has diligently collected much of the relevant data as to additional expenses; however, more time is required to obtain complete records.

d) [Dr. Chow] has been treating [Dowsett] in this case. However, despite many calls to Dr. Chow's office, there will not be sufficient time to obtain a complete medical opinion from him regarding the previous back problems, the permanency thereof, the matter of apportionment and diagnosis and treatment for [Dowsett's] back pain and injuries. Dr. Chow was out of the office from June 26, 2000 and will be on vacation until July 18, 2000 and therefore your Declarant was not able to secure an affidavit or deposition from him on the relevant issues. Therefore, more time is needed to obtain a medical opinion from Dr. Chow, [Dowsett's] treating physician, in order for this Court to make the appropriate ruling on the defense motion.

5) Declarant therefore believes that under [HRS] Rule 56(e) and 56(f) [(2000)] the Court "may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other orders [(sic)] as is just." Your Declarant believes that a continuance in this case wold be appropriate.

On the morning of July 6, 2000, the day set for the hearing on Morris's motion for summary judgment and Dowsett's motion to continue, Dowsett noticed the deposition of Dr. Chow, set for July 28, 2000.[6] At the hearing, an associate of Dowsett's attorney appeared and argued the motions. The court heard and orally denied Dowsett's motion to continue, commenting that,

> It doesn't appear to the Court that [Dowsett has] demonstrated that [she has] had an insufficient amount of time to conduct the discovery. The discovery cut-off is less than a month away. And it appears that they have -- [Dowsett] has had an ample opportunity to conduct the necessary

[6] There is no indication in the record that the deposition of Gregory Chow, M.D., was ever taken.

> discovery or to obtain any necessary affidavit.

The court then heard and orally granted Morris's motion for summary judgment, finding that

> [Morris] has met [her] burden of establishing that there is no genuine issue as to any material fact and that [Morris] is entitled to judgment as a matter of law. [Dowsett] has failed to submit appropriate information to indicate that there are genuine issues for trial. Therefore, the motion is granted.

On July 21, 2000, three days after Dr. Chow was to have returned from his vacation, Dowsett filed a motion for reconsideration of the motion for summary judgment. The motion for reconsideration made no mention of Dr. Chow.

The court's written order denying Dowsett's motion to continue was filed on July 28, 2000, along with the order granting Morris's motion for summary judgment. The order denying Dowsett's motion for reconsideration was filed on August 29, 2000, the same day the court entered final judgment in favor of Morris and against Dowsett. This timely appeal followed.

II. Discussion.

As noted previously, only two primary issues are before us on this appeal: (1) whether the court erred in denying Dowsett's motion to continue, and (2) whether the court erred in granting Morris's motion for summary judgment.

A. The Motion to Continue.

The supreme court has stated the applicable standard of

review of a motion to continue premised upon HRCP Rule 56(f):[7]

> A trial court's decision to deny a request for a continuance pursuant to HRCP Rule 56(f) will not be reversed absent an abuse of discretion. See Wilder v. Tanouye, 7 Haw.App. 247, 254, 753 P.2d 816, 821 (1988). Additionally, the "request must demonstrate how postponement of a ruling on the motion will enable him [or her], by discovery or other means, to rebut the movants' showing of absence of a genuine issue of fact." Id. at 253, 753 P.2d at 821 (citations and internal quotation marks omitted). An abuse of discretion occurs "where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State ex rel. Bronster v. United States Steel Corp., 82 Hawai'i 32, 54, 919 P.2d 294, 316 (1996).

Josue v. Isuzu Motors America, Inc., 87 Hawai'i 413, 416, 958 P.2d 535, 538 (1998) (brackets in the original).

In Wilder, we held that an HRCP Rule 56(f) continuance had been properly denied because "Wilder failed to give any reason why he had been unable to conduct adequate discovery during the period of 29 months since September 10, 1984, when he filed the original complaint." Wilder, 7 Haw. App. at 253, 753 P.2d at 821 (citation omitted). Cf. Crutchfield v. Hart, 2 Haw. App. 250, 252, 630 P.2d 124, 126 (1981) (HRCP Rule 56(f) continuance improperly denied where there was only a three month interval between the filing of the complaint and the filing of the motion for summary judgment).

Here, Dowsett failed to give any reason why she could not conduct adequate discovery during the twenty-nine month

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[7] Hawai'i Rules of Civil Procedure (HRCP) Rule 56(f) (2000) provides that, "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

interval between the filing of her complaint and the filing of Morris's motion for summary judgment. It is surely also germane, with respect to Dowsett's knowledge of the purported permanence of her physical loss and the cost of her treatment, that the motor vehicle accident occurred some four-and-a-half years before her complaint was filed. Moreover, Dowsett should have known pertinent discovery was necessary by the time Morris raised the pertinent defenses in her answer and responsive pretrial statement in January and July of 1999, respectively. Certainly, Dowsett must have known in October 1999, when the arbitrator ruled against her because she "failed to meet any of the tort/no-fault thresholds."

Even assuming, *arguendo*, that the need for adequate discovery first became evident and exigent when the motion for summary judgment was served on May 8, 2000, Dowsett has no explanation for the persistence of inadequate discovery nearly a month-and-a-half later on June 22, 2000, the date of her attorney's declaration in support of the motion to continue. Indeed, even on that date, there were four days remaining before Dr. Chow was to leave on his vacation, in which Dowsett could have obtained at least his affidavit rebutting the motion for summary judgment or, at the very least, his affidavit confirming the need for a continuance.

Dowsett states her position on appeal as follows:

> In our case, the testimony of [Dr. Chow] would have definitively established that [Dowsett's] injuries from the [accident] were aggravated by the October 1999 work-related injury. This being the case, clearly a portion of [Dowsett's] medical expenses for the October 1999 injury would have been applicable to reach the tort threshold ([Dowsett] lacked only $471.82 from the amount argued by Morris to meet the threshold). The testimony of [Dr. Chow] would also have definitively established that Ms. Dowsett met the statutory standard for a Permanent Loss.

Opening Brief at 9-10.

> The lower court denial of the motion for continuance was an abuse of discretion. In every case where the party opposing the motion for summary judgment complies by giving reasons in support of the continuance, the continuance is granted.
>
> At page 16 of the Answering Brief, Appellee Morris states:
>
> > In this case, as in Wilder, Dowsett failed to explain why she could not present by affidavit facts essential to justify her opposition, and failed to give any reason why she had been unable to conduct adequate discovery during the period of 9 months since October 5, 1999, when she allegedly experienced a work-related injury.
>
> . . . .
>
> The second part of the above statement has nothing to do with HRCP [Rule] 56(f) -- there is no requirement that an explanation be made as the reasons [(sic)] for inadequate discovery. HRCP [Rule] 56(f) merely requires that a party state the reasons that they cannot obtain facts essential to justify opposition. This Court should totally disregard Morris' attempt to place a burden on Dowsett which is not contained in the Rules of Civil Procedure.

Reply Brief at 4-5.

We agree that an HRCP Rule 56(f) movant "must demonstrate how postponement of a ruling on the motion [for summary judgment] will enable him or her, by discovery or other means, to rebut the movants' showing of absence of a genuine issue of fact." Josue, 87 Hawai'i at 416, 958 P.2d at 538 (brackets, citation and internal quotation marks omitted). See also Wilder, 7 Haw. App. at 253, 753 P.2d at 821; HRCP Rule 56(f). But we do not agree with Dowsett's following assertion --

that why she could not conduct adequate discovery before the hearing on the motion for summary judgment was irrelevant to the court's decision on her motion for continuance. Dowsett's position ignores established law, see, e.g., Wilder, 7 Haw. App. at 253, 753 P.2d at 821, and essentially gives the party opposing a motion for summary judgment a *carte blanche* continuance without regard to that party's diligence. This is unfair to the movant and inimical to the administration of justice.

At any rate, we do not agree that Dowsett fulfilled the very requirement she contends was the only one incumbent upon her -- to "demonstrate how postponement of a ruling on the motion [for summary judgment] will enable . . . her, by discovery or other means, to rebut [Morris's] showing of absence of a genuine issue of fact." Josue, 87 Hawai'i at 416, 958 P.2d at 538 (brackets, citation and internal quotation marks omitted). Nowhere in the materials Dowsett submitted to the court -- indeed, nowhere in the record -- does Dr. Chow express or imply an opinion, or the willingness to render an opinion, with respect to the medical-rehabilitative expenses attributable or apportionable to Dowsett's motor vehicle accident, or the purported significant, permanent loss of use of a part or function of Dowsett's body. Dowsett's adamant assertions that Dr. Chow would have done so if a continuance had been granted ring hollow in light of the complete absence of reference to or

opinion from Dr. Chow in Dowsett's motion for reconsideration of the motion for summary judgment, filed three days after Dr. Chow was supposed to have returned from his vacation.

We conclude that the court did not abuse its discretion in denying Dowsett's motion to continue.

B. The Motion for Summary Judgment.

"On appeal, an award of summary judgment is reviewed under the same standard applied by the trial court." Pioneer Mill Co., Ltd. v. Dow, 90 Hawai'i 289, 296, 978 P.2d 727, 734 (1999). HRCP Rule 56(c) (2000) establishes the standard:

> The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Macabio v. TIG Ins. Co., 87 Hawai'i 307, 312, 955 P.2d 100, 105 (1998) (citation and internal quotation marks omitted).

In considering a motion for summary judgment,

> the evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Pioneer Mill, 90 Hawai'i at 296, 978 P.2d at 734 (brackets, emphasis, ellipsis, citation and internal quotation marks omitted). HRCP Rule 56(e) (2000) governs the kind of evidence

that may be considered on a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Accordingly, and as detailed previously, the only item of evidence Morris properly presented to the court on her motion for summary judgment was Dowsett's answers to the interrogatories propounded by Morris. See HRCP Rules 56(c) & (e) (both specifically referencing answers to interrogatories as evidence properly before the trial court on a motion for summary judgment); Au v. Au, 63 Haw. 210, 213, 626 P.2d 173, 176 (1981) ("The court may consider matters outside the pleadings in a summary judgment proceeding under Rules 12(b) and 56(c), H.R.C.P., including depositions, answers to interrogatories, admissions on file and affidavits." (Citations omitted.)). However, these alone were sufficient to demonstrate that Dowsett did not exceed the $10,000.00 medical-rehabilitative aggregate expenses limit, HRS § 431:10C-306(b)(2), and that she did not suffer an injury in the accident "which consists, in whole or in part, in a significant permanent loss of use of a part or function of the body[.]" HRS § 431:10C-306(b)(1)(B).

Dowsett argues on appeal that her interrogatory answers were not properly before the court on the motion for summary judgment, because she did not sign them, as required by HRCP Rule 33. We disagree. We will not allow a party to use her own violation of the rules of court as a sword against the opposing party. At any rate, Dowsett's answers to the interrogatories were signed by her attorney and hence, were her admissions, admissible against her regardless of whether she or her attorney signed them:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Admissions.
>
> (1) Admission by party-opponent. A statement that is offered against a party and is (A) the party's own statement, in either the party's individual or a representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth.
>
> (2) Vicarious admissions. A statement that is offered against a party and was uttered by (A) a person authorized by the party to make such a statement, (B) the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or (C) a co-conspirator of the party during the course and in furtherance of the conspiracy.

Hawaii Rules of Evidence (HRE) Rule 803(a)(1) & (a)(2) (1993).

Dowsett also asserts that her answers to the interrogatories were not properly before the court because the declaration of Morris's attorney, in which he identified Dowsett's answers to the interrogatories, "was not made upon personal knowledge, and . . . did not state affirmatively that he 'is competent to testify to the matters stated therein.' HRCP [Rule] 56(e)." Opening Brief at 12. But this contention is

neither here nor there, because Dowsett's answers were signed by her attorney, HRE Rule 803(a)(2), and a certificate of service of her answers, signed and filed by the same attorney, was one of the pleadings in the file before the court. HRCP Rule 56(c) (referring to "the pleadings . . . on file" as evidence properly before the trial court on a motion for summary judgment). Hence, we believe Dowsett's interrogatory answers were sufficiently authenticated and identified. HRE Rule 901(a) (1993).[8]

Because Morris's motion for summary judgment demonstrated that tort liability was abolished in this case, HRS § 431:10C-306, certain obligations devolved upon Dowsett if she desired to avoid summary judgment:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

HRCP Rule 56(c). See also GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995), aff'd and modified, 80 Hawai'i 118, 905 P.2d 624 (1995). Dowsett failed to meet those obligations.

In response to the motion for summary judgment, Dowsett filed a memorandum in opposition. Along with the memorandum,

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[8] Hawaii Rules of Evidence Rule 901(a) (1993) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Dowsett filed her affidavit and the attached Exhibit 1. A day later, Dowsett's attorney presented a declaration and supplemental exhibits in opposition.

The memorandum in opposition made various assertions and arguments about attributable expenses, apportionable expenses, and permanent loss. It was, however, not evidence properly before the court on the motion for summary judgment. Au, 63 Haw. at 213, 626 P.2d at 176-77 ("A party making or opposing a motion for summary judgment may only rely on facts which are before the court as provided in Rule 56, H.R.C.P. Unverified statements of fact in counsel's memorandum or representations made in oral argument cannot be considered in determining a motion for summary judgment." (Citations omitted.)). Its assertions and arguments would have to be otherwise verified, in accordance with HRCP Rule 56.

But such verification could not come from the supplemental exhibits, because they were not properly before the court on the motion for summary judgment. The supplemental exhibits were hearsay, HRE Rules 801 & 802 (1993),[9] and were not properly authenticated by the declaration of Dowsett's attorney, Pioneer Mill, 90 Hawai'i at 297, 978 P.2d at 735 ("an affidavit

[9] HRE Rule 801(3) (1993) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." HRE Rule 802 (1993) provides that "[h]earsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii supreme court, or by statute."

of counsel swearing to the truth and accuracy of exhibits does not authenticate exhibits not sworn to or uncertified by the preparer or custodian of those exhibits" (citation omitted)), and were therefore inadmissible on the motion for summary judgment.

We are left, then, with Dowsett's affidavit. But it was no help to Dowsett. The quotation from Dr. Chow's "Initial Report" contained in the affidavit was inadmissible hearsay, HRE Rules 801 & 802, and its substance, in any event, shed no light on the issues pertinent to this case. The balance of Dowsett's affidavit was similarly irrelevant. Dowsett described her April 1993 motor vehicle accident and detailed certain of her current physical symptoms and disabilities, but never related the two. Dowsett mentioned her October 1999 work injury, but did not allege that it aggravated previous injuries such that associated expenses should be apportionable to the motor vehicle accident. In addition, nowhere in the affidavit did Dowsett aver that the motor vehicle accident caused permanent loss, or attributable expenses above and beyond those she detailed in her interrogatory answers. With respect to the various medical-rehabilitative expenses indicated in Exhibit 1, Dowsett did not depose that those expenses were related to the motor vehicle accident, and nothing in Exhibit 1 shows that they were.

At bottom, Dowsett presented no evidence to rebut her own admissions, that showed she did not fit within any of the exceptions to the abolition of tort liability in motor vehicle

accident cases. We therefore conclude that the court properly granted the motion for summary judgment.

III. Conclusion.

We therefore affirm the August 29, 2000 judgment, the July 28, 2000 order granting Morris's motion for summary judgment, the July 28, 2000 order denying Dowsett's motion to continue the hearing on the motion for summary judgment, the August 29, 2000 order denying Dowsett's motion for reconsideration of the motion for summary judgment, the October 30, 2000 order granting Morris's motion for attorney's fees and costs, and the October 31, 2000 amended judgment.

DATED: Honolulu, Hawaii, November 29, 2002.

On the briefs:

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James T. Wong,
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Chief Judge

Associate Judge

Associate Judge