

NOT FOR PUBLICATION

NO. 25550

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

TARCELA TODENO, Plaintiff-Appellant, v. JUANITA MAMACLAY; JOHN
DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; ROE "NON-PROFIT" CORPORATIONS 1-10 and ROE
GOVERNMENTAL ENTITITES 1-10, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIV. NO. 00-01-0158)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Foley and Fujise, JJ.)

Plaintiff-Appellant, Tarcela Todeno ("Todeno"), and her counsel, Erlinda Dominguez ("Dominguez") and Ronald Federizo ("Federizo") (hereinafter collectively referred to as the "Appellants"), appeal the Final Judgment filed on November 27, 2002 in the Circuit Court of the Fifth Circuit.^{1/} We resolve Appellants' points of error as follows:^{2/}

1. Appellants failed to properly object to the admission of Todeno's collateral source income evidence. Dominguez agreed to its admission during the trial court's

^{1/} The Honorable George M. Masuoka presided.

^{2/} This appeal was assigned to this court on December 26, 2003.

consideration of the motions in limine. Dominguez also introduced evidence of the chore services at trial, thereby opening the door to this evidence. Havas v. Victory Paper Stock Company, Inc., 90 A.D.2d 864, 456 N.Y.S.2d 489 (1982). Furthermore, Dominguez failed to object a) during cross-examination of the chore service provider, b) to the court's ruling during her re-direct examination of the Department of Health Services social worker, and c) during defense counsel's closing argument. Consequently, we do not decide the foregoing point of error. Hawai'i Rules of Appellate Procedure (HRAP) 28(b)(4); Craft v. Peebles, 78 Hawai'i 287, 893 P.2d 138 (1995); Lee v. Elbaum, 77 Hawai'i 446, 887 P.2d 656 (1993).

2. Appellants also failed to preserve, as error, their contention that the trial court erred in admitting an accident scene sketch because Dominguez did not object on this basis during trial. HRAP 28(b)(4); Hawaii Rules of Evidence Rule 103(a)(1); Craft, 78 Hawai'i at 294, 893 P.2d at 145; Lee, 77 Hawai'i at 453, 887 P.2d at 663, and State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) citing Choy v. Otaguro, 32 Haw. 543 (1932) (objecting on specific ground waives all others). The court reporter's testimony regarding the authentication of that sketch was relevant to establish the foundation for the sketch.

3. Appellants waived the right to object during defense counsel's closing argument to his use of the plastic shopping bags on the grounds that the bags were not in evidence because Dominguez failed to object when he used the same exhibits in direct examination of Mamaclay. Appellants thus have waived the right to raise this point on appeal. HRAP 28(b)(4); Craft, 78 Hawai'i at 294, 893 P.2d at 145; Lee, 77 Hawai'i at 453, 887 P.2d at 663.

4. Appellants contend that the court erred by imposing a sanction on Dominguez and Federizo under Hawai'i Rules of Civil Procedure (HRCP), Rule 11 (2000) for filing the July 5, 2002 answer (the "Answer") to Mamaclay's reply to Toden's opposition to the second motion in limine (the "Reply"). Rules of the Circuit Courts of the State of Hawai'i (RCCH), Rule 7(b) (1997) prohibits filing pleadings other than the motion, the opposition, and the reply. Contrary to Appellants' contention, the Reply did not raise new matters compelling them to file the Answer. Thus, the record supports the trial court's finding that Appellants filed an unwarranted and frivolous pleading.

5. Although the court did not specify which authority it employed in imposing the November 8, 2002 "Order Imposing Sanction" against Dominguez, we may sustain a trial court's ruling on any basis supported by the record. Canalez v. Bob's

Appliance Center, Inc., 89 Hawai'i 292, 972 P.2d 295 (1999).

Attorney misconduct can be addressed under the court's criminal contempt power,^{3/} pursuant to court rule, or under the court's inherent power. In re Dubin, 9 Haw.App. 249, 833 P.2d 85 (1992).

The order imposes a sanction for misconduct committed in court as well as out of court. The in-court misconduct -- the interruptions, commentary, and physical gestures -- constitute criminal contempt. Hawaii Revised Statutes (HRS) § 710-1077(1)(a) and (c) (1993). See also People v. Roberts, 42 Ill.App.3d 604, 356 N.E.2d 429 (4th Dist. 1976). This behavior constitutes summary criminal contempt because it was committed in the view and presence of the court. HRS § 710-1077(3)(a) (1993). Pursuant to HRS section 710-1077(5) (1993), summary criminal contempt is not subject to review by appeal and we therefore lack jurisdiction to determine whether the court satisfied due process by imposing a sanction for the in-court misconduct. State v. Tierney, 92 Hawai'i 178, 989 P.2d 262 (1999); In re Dubin, 9 Haw.App. at 254-258, 833 P.2d at 89-91.

Dominguez' tardiness at the settlement conference is considered out-of-court misconduct. In re Dubin, 9 Haw.App. at 256-258, 833 P.2d at 90-91. We review Appellants' due process challenge to this portion of the November 8, 2002 sanction order

^{3/} Hawaii Revised Statutes § 710-1077 (1993).

de novo as it is a question of constitutional law. Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 984 P.2d 1198 (1999).

Procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before the government may take someone's property. Mathews v. Eldridge, 424 U.S. 319 (1976). However, due process is not a fixed concept, but rather a flexible one which calls for such procedural protections appropriate to the particular situation. Fujimoto v. Au, 95 Hawai'i 116, 19 P.3d 699 (2001) (citing Sandy Beach Defense Fund v. City Council of the City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989)).

Dominguez received notice and an opportunity to be heard during the trial court's consideration of her motion for reconsideration of the sanction order.^{4/} Fujimoto, 95 Hawai'i at 165, 19 P.3d at 748; Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112 (9th Cir. 2000). Dominguez thereby had an opportunity to explain and to proffer evidence in her defense before the judge made a final decision regarding the sanction order. This opportunity to be heard was preceded by notice via the November 8, 2002 sanction order which set forth the sanctionable conduct and the sanction amount. Because Dominguez' motion for reconsideration failed to offer any

^{4/} The court states in the December 3, 2002 "Order Denying Plaintiff's and Counsels' Motion for Reconsideration of Court Order Imposing Sanction" that it reviewed the written submissions of counsel and the record in making its decision.

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evidence as to why she should not be sanctioned, she was not prejudiced by the lack of an oral hearing to adjudicate that motion.

Therefore,

IT IS HEREBY ORDERED that the November 27, 2002 Final Judgment is affirmed.

DATED: Honolulu, Hawai'i, February 28, 2005.

On the briefs:

Erlinda Dominguez and
Ronald N. Federizo,
for Plaintiff-Appellant. Chief Judge

Gregory K. Markham and
Jeffrey S. Masatsugu,
(Chee & Markham)
for Defendant-Appellee. Associate Judge

Associate Judge