NO. 25953

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NATHAN CHOI, and MI HYON LIM, Plaintiffs-Appellants, v.
WINDWARD BOATS, INC., Defendant-Appellee,
and
JOHN DOE 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, and
DOE ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 01-1-2800)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe and Lim, JJ.)

Nathan Choi (Choi) and Mi Hyon Lim (Plaintiffs) appeal the July 17, 2003 judgment the Circuit Court of the First Circuit (circuit court)[1] entered in favor of Windward Boats, Inc. (Defendant). The judgment was based on, *inter alia*, the June 24, 2003 order granting Defendant's April 17, 2003 motion for summary judgment.

Plaintiffs also purport to appeal other predicate orders; namely, (1) the November 1, 2002 order granting Defendant's August 13, 2002 motion for Hawai'i Rules of Civil Procedure (HRCP) Rule 37(b) (2003) sanctions, (2) the February 28, 2003 order granting Defendant's August 13, 2002 motion to

[1] The Honorable Dexter D. Del Rosario presided.

strike counts six and seven of the first amended complaint (see also Defendant's November 12, 2002 motion for HRCP Rule 37(b) sanctions, footnote 2), and (3) the February 28, 2003 order granting Defendant's November 12, 2002 motion for HRCP Rule 37(b) sanctions (collectively, the Predicate Orders).

After a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Plaintiffs' points of error on appeal as follows:

1. We decline to review the Predicate Orders, because Plaintiffs have failed to include in the record on appeal the pertinent hearings transcripts, without which we are unable to conduct a meaningful review. According to Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(a)(4) (2003), "The record on appeal shall consist of the following: . . . . the transcript of any proceedings prepared pursuant to the provisions of [HRAP] Rule 10(b)[.]" (Format modified.) HRAP Rule 10(b)(1)(A) (2003) places on the appellant the affirmative burden of providing necessary transcripts:

> When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

Hence, as a well-settled principle, "'The burden is upon appellant in an appeal to show error by reference to matters in

the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)). See also State v. Hoang, 93 Hawai'i 333, 334, 3 P.3d 499, 500 (2000); Lepere v. United Pub. Workers, Local 646, AFL-CIO, 77 Hawai'i 471, 474, 887 P.2d 1029, 1032 (1995); State v. Goers, 61 Haw. 198, 202-3, 600 P.2d 1142, 1144-45 (1979); State v. Hawaiian Dredging Co., 48 Haw. 152, 158, 397 P.2d 593, 598 (1964); Marn v. Reynolds, 44 Haw. 655, 663, 361 P.2d 383, 388 (1961); Ling v. Yokoyama, 91 Hawai'i 131, 135, 980 P.2d 1005, 1009 (App. 1999); Costa v. Sunn, 5 Haw. App. 419, 430, 697 P.2d 43, 50 (1985); Johnson *ex rel.* Galdeira v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 178, 664 P.2d 262, 265 (1983); Hawaiian Trust Co., Ltd. v. Cowan, 4 Haw. App. 166, 168, 663 P.2d 634, 636 (1983). Furthermore, HRAP Rule 11(a) (2003) provides: "After the filing of the notice of appeal, the appellant . . . shall comply with the provisions of [HRAP] Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record." See also Bettencourt, 80 Hawai'i at 231, 909 P.2d at 559 ("it is counsel's responsibility to review the record once it is docketed and if anything material to counsel's client's case is omitted or misstated, to take steps to have the record corrected" (brackets, citation and internal quotation marks omitted)).

2. "We review the circuit court's grant or denial of summary judgment *de novo*." Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (citation and block quote format omitted). We conclude that the circuit court's grant of Defendant's motion for summary judgment was correct, because Choi's declaration about the alleged defects in the boat they bought from Defendant, which Plaintiffs submitted in response to the motion, neither "set forth such facts as would be admissible in evidence," nor demonstrated "affirmatively that the affiant is competent to testify to the matters stated therein." HRCP Rule 56(e) (2003). Appending an unauthenticated letter from an expert does not meet these requirements. Hawaii Rules of Evidence Rule 901 (1993) ("authentication or identification [is] a condition precedent to admissibility"); Fuller v. Pac. Med. Collections, Inc., 78 Hawai'i 213, 224, 891 P.2d 300, 311 (App. 1995) ("the mere fact that counsel received the documents from a non-party in response to a request does not establish the authenticity of the documents"). And attaching an incomplete and unsigned copy of Choi's letter to Defendant's counsel, which essentially paraphrased Plaintiffs' expert's observations and conclusions, cannot finesse these requirements.

3. The circuit court did not abuse its discretion in granting in its summary judgment Defendant's request for attorney's fees, Hawaii Revised Statutes § 607-14 (Supp. 2005), and costs. HRCP Rule 68 (2003).

Therefore,

IT IS HEREBY ORDERED that the July 17, 2003 judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, March 13, 2006.

On the briefs:

Nathan Choi and
Mi Hyon Lim,
Plaintiffs-Appellants,
pro se.

Joseph A. Gomes
for Defendant-Appellee.

James L. Burns
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Associate Judge