

NO. 26718

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

EM. RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

STELLA I. BORGES and RICKIE BORGES, Plaintiffs-Appellants,  
v. DEPARTMENT OF WATER SUPPLY OF THE COUNTY OF HAWAI'I,  
WATER BOARD OF THE COUNTY OF HAWAI'I, JOHN DOES 1-25,  
DOE LIMITED PARTNERSHIPS 1-25, DOE CORPORATIONS 1-25,  
DOE GOVERNMENTAL AGENCIES 1-25, DOE JOINT VENTURES 1-  
25, INCLUSIVE, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(Civ. No. 02-1-0112)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Plaintiffs-Appellants Stella Borges (Stella) and Rickie Borges (Rickie) (collectively Appellants) appeal from the final judgment entered August 31, 2004, in the Circuit Court of the Third Circuit (circuit court).<sup>1</sup> Final judgment was entered pursuant to the order granting a "Motion to Enforce Settlement and for Dismissal of Action with Prejudice" (Motion to Enforce) filed by Defendants-Appellees Department of Water Supply of the County of Hawai'i (DWS) and the Water Board of the County of Hawai'i (WB) (collectively Appellees). After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we conclude that the circuit court did not err. Consequently, we affirm.

Appellants argue for the first time on appeal that (1) the order granting the Motion to Enforce was in error because the moving papers failed to establish: (a) Rickie's competence to settle; (b) Rickie's assent to settlement of his claims; (c) DWS's assent to the settlement; (d) Rickie's claims were

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<sup>1</sup> The Honorable Terence T. Yoshioka presided.

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supported by consideration; (e) there was a meeting of the minds as to all essential elements of the agreement between the parties and (2) that the circuit court considered evidence not part of the record in coming to its decision. Consequently, these points have not been properly preserved for appeal. Kawamoto v. Yasutake, 49 Haw. 42, 45, 410 P.2d 976, 978 (1966) ("[t]his court will not consider a question which was not raised and properly preserved in the lower court" (citations, and internal quotation marks omitted)); Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 107-08, 58 P.3d 608, 618-19 (2002) (a judgment will not be reversed upon a legal theory not raised by the appellant in the court below).

Nevertheless, this rule is not absolute, and issues not raised below may be considered where there is plain error. Greene v. Texeira, 54 Haw. 231, 235, 505 P.2d 1169, 1172 (1973). However, because the issues raised by Appellants do not go to the integrity of the fact finding process and could have been addressed if not corrected had they been properly raised, we do not reach them. In re Hawaiian Land Co., Ltd., 53 Haw. 45, 53, 487 P.2d 1070, 1076 (1971).

The single issue properly preserved for appeal is Appellants' argument that the settlement agreement was void because Stella was not competent to enter into a compromise agreement. However, because there is nothing in the record that established Stella lacked the capacity to understand the nature and consequences of the transaction at the time it was executed, this is not a basis for overturning the lower court's order and judgment. Pontes v. Pontes, 40 Haw. 620, 623 (1954) (mental incapacity is not, standing alone, a sufficient basis for the cancellation of a written instrument; "the state of mind complained of is such that it rendered the afflicted person incapable of understanding the nature and effect of the

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transaction at the time the instrument was executed"); Drewry v. Drewry, 8 Va. App. 460, 467, 383 S.E.2d 12, 15 (1989).

Therefore,

IT IS HEREBY ORDERED that the Circuit Court of the Third Circuit's August 31, 2004, final judgment is affirmed.

DATED: Honolulu, Hawai'i, September 28, 2007.

On the briefs:

Robin R. Horner,  
for Plaintiffs-Appellants.

  
Presiding Judge

Katherine A. Garson and  
Joseph K Kamelamela,  
Deputies Corporation Counsel,  
County of Hawai'i,  
for Defendants-Appellees.

  
Associate Judge

  
Associate Judge