NO. 27857

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

KIYOSHI SHIGA, individually and in his capacity as the parent, agent, and assignee of the rights and claims of his son, Daisuke Shiga, and DAISUKE SHIGA,
Plaintiffs/Appellants/Cross-Appellees,
v.
HAWAIIAN MISSION ACADEMY and JOSUÉ ROSADO,
Defendants/Appellees/Cross-Appellants,
and
DOE persons and/or Entities 1-5, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 04-1-1705)

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

Plaintiff/Appellants/Cross-Appellees Kiyoshi Shiga (Mr. Shiga), individually and in his capacity as parent, agent, and assignee of the rights and claims of his son, Daisuke Shiga, and Daisuke Shiga (Daisuke) (collectively, the Shigas), appeal from the Final Judgment entered on May 4, 2006 in the Circuit Court of the First Circuit[1/] (circuit court). Defendants/Appellees/Cross-Appellants Hawaiian Mission Academy (HMA) and Josué Rosado (Rosado) (HMA/Rosado or Defendants) filed a cross-appeal from the May 4, 2005 Final Judgment.

On appeal, the Shigas contend the circuit court erred in its September 28, 2005 "Order Granting Defendants and Third-Party Plaintiffs Hawaiian Mission Academy and Josué Rosado's Motion for Summary Judgment on Plaintiffs' Complaint, Filed on July 26, 2005" when it

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[1/] The Honorable Bert I. Ayabe presided.

(1) granted summary judgment in favor of HMA/Rosado on Counts I-VI and IX of the Shigas' complaint.

(2) made the following findings/conclusions:

> Regarding the breach of contract claims for the expulsion of Plaintiff Daisuke Shiga, the Court finds that there are no genuine issues of material fact that Defendants followed their proper procedure in the expulsion of Plaintiff Daisuke Shiga under the Hawaiian Mission Academy school policy as set forth in the School Bulletin. The Hawaiian Mission Academy school policy allows the principal or designee to recommend expulsion of a student for committing various acts which include sexual assault and battery or wilfully using force upon another person.

(3) made the following findings/conclusions/order:

> The school principal is in a difficult position and has to make a decision to protect the safety of his students. This would be especially true in a situation such as this, where a student claims that she was raped by another student. The Hawaiian Mission Academy Board then decides whether to expel a student, which is what happened in this case. Plaintiffs were given the opportunity to appeal the Defendants' decision for expulsion but Plaintiffs did not appeal the decision.
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> The Hawaiian Mission Academy school policy also does not allow for refunds for international students who are suspended, as more administrative commitments are provided for international students. There was no breach of the Hawaiian Mission Academy school policy and consequently, the Court grants the motion as to the breach of contract and the quantum meruit claims.
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> Accordingly, the following Counts are ordered dismissed with prejudice:
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> Count VII: Breach of Contract
> Count VIII: Quantum Meruit
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> WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Complaint filed on September 17, 2004 is hereby dismissed in its entirety with prejudice.

On cross-appeal, HMA/Rosado contend the circuit court erred in its:

(1) March 8, 2006 "Order Granting in Part and Denying in Part Defendants and Third-Party Plaintiffs Hawaiian Mission Academy and Josué Rosado's Motion for Award of Attorneys' Fees and Costs Filed October 6, 2005" when it denied HMA/Rosado

attorneys' fees of $63,440.55[2/] pursuant to Hawaii Revised Statutes (HRS) § 607-14.5 (Supp. 2006) and "pursuant to the court's inherent powers" under HRS § 603-21.9 (1993) ("Defendants' said Motion is denied in all other respects") because the Shigas' "claims were frivolous and were not reasonably supported by the facts and the law."

(2) March 30, 2006 "Order Denying Defendants and Third-Party Plaintiffs Hawaiian Mission Academy and Josue [sic] Rosado's Motion for Imposition of Sanctions Pursuant to [Hawai'i Rules of Civil Procedure (HRCP) Rule] 11"[3/] when the court failed to impose sanctions of $65,974.83 in attorneys' fees to HMA/Rosado for defending the action.

(3) April 18, 2006 "Order Denying Plaintiffs' Motion for Preparation of Findings of Fact and Conclusions of Law Filed March 16, 2006" when the court declined to award sanctions of $1,021.35 to HMA/Rosado for having to defend against the Shigas' "frivolous, baseless" motion.

(4) April 18, 2006 "Order Denying Plaintiffs' Motion for Entry of Amended Judgment Filed March 16, 2006" when the court declined to award sanctions of $963.54 to HMA/Rosado after "yet another frivolous, baseless pleading" filed by the Shigas.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the parties' points of error as follows:

(1) The argument section of the Shigas' brief is almost entirely devoid of citations to the record and cites no

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[2/] The circuit court granted HMA/Rosado, as the prevailing party on the Shigas' claim for attorneys' fees pursuant to Hawaii Revised Statutes (HRS) § 607-14 (Supp. 2006), attorneys fees of $2,534.28 (25% of Plaintiffs' assumpsit claim); the court's award of the $2,534.28 is not an issue on appeal.

[3/] HMA/Rosado asked for $66,698.27 in fees and $6,060.35 in costs.

applicable case law; such arguments should be rejected. To the extent the Shigas fail to cite applicable precedent in support of their arguments, we infer that they were unable to find any. Ala Moana Boat Owners Ass'n v. State of Hawaii, 50 Haw. 156, 157-59, 434 P.2d 516, 517-19 (1967). Nonetheless, this court's policies are to permit litigants to appeal and to have their cases heard on the merits, where possible. See e.g., Montalvo v. Chang, 64 Haw. 345, 350, 641 P.2d 1321, 1326 (1982); Jordan v. Hamada, 62 Haw. 444, 451-52, 616 P.2d 1368, 1373 (1980); Jones v. Dieker, 39 Haw. 208, 209 (1952).

(2) HMA/Rosado did not owe a special duty, arising out of the principal/student relationship, to Daisuke to investigate Complainant's accusations prior to contacting police. "The existence of a duty owed by the defendant to the plaintiff . . . is entirely a question of law." Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 385, 742 P.2d 377, 383 (1987) (internal quotation marks and citation omitted). In determining whether a duty exists in a situation such as this one, we look to these principles:

> [W]e recognize that duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. In determining whether or not a duty is owed, we must weigh the considerations of policy which favor the [plaintiffs'] recovery against those which favor limiting the [defendants'] liability. The question of whether one owes a duty to another must be decided on a case-by-case basis. However, we are reluctant to impose a new duty upon members of our society without any logical, sound, and compelling reasons taking into consideration the social and human relationships of our society.

Blair v. Ing, 95 Hawai'i 247, 259-60, 21 P.3d 452, 464-65 (2001) (citations omitted).

It is settled that public school systems have a general duty of reasonable supervision of their students. Miller v.

Yoshimoto, 56 Haw. 333, 340, 536 P.2d 1195, 1199 (1975). The Hawai'i Supreme Court has held that "there is a duty that arises between a teacher or school district and a student. This duty has previously been recognized by this Court as simply a duty to exercise reasonable care in supervising students while they are attending school." Doe Parents No. 1 v. State of Hawai'i, Dep't of Education, 100 Hawai'i 34, 79, 58 P.3d 545, 590 (2002) (brackets omitted) (quoting Brooks v. Logan, 903 P.2d 73, 79 (Idaho 1995)). However, no Hawai'i case directly addresses the question of what duty is owed by private schools in situations like this. Whether a duty exists and the scope of that duty is a question of law. Doe Parents No. 1, 100 Hawai'i at 57, 58 P.3d at 568. The Shigas cite a number of cases from other jurisdictions where courts have held private schools to a general standard of reasonable supervision, but direct us to no case law indicating that such a duty of general reasonable care would require a private school principal to investigate an accusation of a sexual assault made by another student before contacting police.[4/] Public policy favors the prompt reporting of felonies to the police and does not support the investigation of crimes by school principals. See Roberts v. United States, 445 U.S. 552, 558, 100 S. Ct. 1358, 1363 (1980) ("gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship"). Following the Blair v. Ing duty analysis, the Shigas offer no logical, sound, and compelling policy reasons in support of the duty they would impose on private school headmasters to conduct an investigation into the details of an alleged sexual assault before reporting it to police.

[4/] The Shigas' Opening Brief cites to nine cases from foreign jurisdictions, but fails to provide spot citations to the specific page(s) supporting their argument.

(3) The circuit court did not err in granting summary judgment in favor of HMA on the Shigas' negligent hiring claim. Again, the Shigas offer no record citations or applicable precedent in support of their claim, and therefore this point of error is deemed waived. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7). The claim also lacks support in the record and the law. "The Restatement (Second) of Agency § 213 (1958) reads in part: 'A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . (b) in the employment of improper person or instrumentalities in work involving risk of harm to others[.]" Janssen v. American Hawaii Cruises, Inc., 69 Haw. 31, 34, 731 P.2d 163, 166 (1987) (brackets and ellipsis in original). "The existence of a duty under a negligent hiring theory depends upon foreseeability, that is, whether the risk of harm from the dangerous employee to a person such as the plaintiff was reasonably foreseeable as a result of the employment." Id. (internal quotation marks and citation omitted). "Liability for negligent hiring must be distinguished from liability imputed to the employer for an employee's wrongful acts under the doctrine of respondeat superior." Id. at 34 n.2, 731 P.2d at 166 n.2.

The Shigas characterize Rosado's actions as "shocking and inconceivable" and assert that HMA "cannot justify how or why they hired Rosado to be school principal." These conclusory assertions do not amount to a substantive argument.

(4) The circuit court did not err by granting summary judgment in favor of HMA/Rosado on the Shigas' negligent supervision claim. As Rosado had no duty to conduct a detailed investigation of the reported sexual assault, it follows that HMA would not be liable for Rosado's failure to conduct such an investigation. Moreover, because "negligent supervision may only

be found where an employee is acting outside of the scope of his or her employment," Dairy Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 427, 992 P.2d 93, 122 (2000) (emphasis in original), and the Shigas do not allege that Rosado was acting outside the scope of his employment with HMA, the Shigas cannot maintain a claim for negligent supervision.

(5) The circuit court did not err by granting summary judgment in favor of HMA/Rosado on the Shigas' claim of false imprisonment. The essential elements of this tort are "(1) the detention or restraint of one against his [or her] will, and (2) the unlawfulness of such detention or restraint." Reed v. City and County of Honolulu, 76 Hawai'i 219, 230, 873 P.2d 98, 109 (1994). Although the Shigas acknowledge that it was police and not Rosado who actually physically detained Daisuke, they seemingly argue that Rosado's act of reporting the Complainant's allegations to police satisfies both elements. The Shigas assert that (1) Rosado's written statement to police was made with the intent that Daisuke be punished and (2) Rosado had reason to know that the statements made to him by Complainant were inherently unreliable. The Shigas offer no record citations in support of these two claims. Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact and therefore, insufficient to reverse a grant of summary judgment. Briggs v. Hotel Corp. of the Pacific, 73 Haw. 276, 281 & 281 n.5, 831 P.2d 1335, 1339 & 1339 n.5 (1992). Even if the Shigas' assertions were true, a false imprisonment claim would not lie because there exists no evidence that Rosado detained or restrained Daisuke. The police, not Rosado, lawfully detained Daisuke, pursuant to a judicial determination of probable

cause.[5/] Without any unlawful confinement, a false imprisonment claim fails. Reed, 76 Hawai'i at 230, 873 P.2d at 109.

(6) The circuit court did not err by granting summary judgment in favor of HMA/Rosado on their claim of intentional infliction of emotional distress. The Shigas cite no case law in support of their argument. Points not argued may be deemed waived. HRAP Rule 28(b)(7). To prevail, the Shigas must show that the act causing the harm was intentional or reckless, was outrageous, and caused extreme emotional distress to another. Hac v. Univer. of Hawai'i, 102 Hawai'i 92, 106-07, 73 P.3d 46, 60-61 (2003). Although Rosado's act of calling the police clearly satisfies the requirement of an intentional act, the Shigas fail to show how this act was in any way outrageous.

(7) The circuit court did not err by granting summary judgment in favor of HMA/Rosado on the Shigas' claim for negligent infliction of emotional distress. In Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970), Hawai'i "became the first jurisdiction to allow recovery [for negligent infliction of emotional distress] without a showing of physically manifested harm" to the plaintiff. Campbell v. Animal Quarantine Station, 63 Haw. 557, 560, 632 P.2d 1066, 1068 (1981). However, "recovery for negligent infliction of emotional distress by one not physically injured is generally permitted only when there is some physical injury to property or [another] person resulting from

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[5/] The determination of probable cause is a defense to common law claims of false imprisonment. Reed v. City and County of Honolulu, 76 Hawai'i 219, 230, 873 P.2d 98, 109 (1994). The Shigas argue that the defense of probable cause would not apply if Rosado had reason to know that Complainant's statements were unreliable and cite to House v. Ane, 56 Haw. 383, 538 P.2d 320 (1975), in support of that proposition. House does not stand for the proposition cited. It stands only for the general rule that a showing that a person was arrested without a warrant by police officers for disorderly conduct committed in their presence and that such person was later convicted of such offense in district court would, absent a showing that the conviction was obtained by fraud, perjury or other corrupt means, conclusively establish the existence of probable cause to arrest and thus bar a subsequent action against officers for false imprisonment. Id. at 391-92, 538 P.2d at 326.

the defendant's conduct." Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., 76 Hawai'i 454, 465-66, 879 P.2d 1037, 1048-49 (1994) (internal quotation marks and citation omitted).[6/] Having already concluded that neither Rosado nor HMA acted negligently, recovery under a theory of negligent infliction of emotional distress is precluded. Even assuming, arguendo, that the Shigas alleged a valid negligence claim, the record contains no evidence that Daisuke or anyone else suffered any physical injury as a result of said negligence.

(8) The circuit court did not err in granting summary judgment in favor of HMA/Rosado on the Shigas' contract and quantum meruit claims. The Shigas' opening brief on these issues fails to offer a single record citation and cites no applicable precedent. The point is waived. HRAP Rule 28(b)(7). Even disregarding this failure to adequately brief the issue, the claim fails. The Shigas fail to suggest what contract provisions were breached or how HMA failed to follow its procedures by expelling Daisuke. Mr. Shiga received the letter notifying him of Daisuke's expulsion, and that letter referred to a right of appeal that the Shigas apparently never exercised. The Shigas demonstrate no breach of contract.

Quantum meruit is an equitable remedy courts apply to prevent unjust enrichment. Hiraga v. Baldonado, 96 Hawai'i 365, 370, 31 P.3d 222, 227 (App. 2001). "The basis of recovery on quantum meruit is that a party has received a benefit from

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[6/] However, recovery may be had for "particularly foreseeable" emotional distress in the context of a breach of contract where there is no predicate injury to the person. Francis v. Lee Enterprises, Inc. dba KGMB, 89 Hawai'i 234, 240, 971 P.2d 707, 713 (1999). See also Brown v. Bannister, 14 Haw. 34, 36-37 (1902) (discussing recovery for humiliation suffered as a result of a breach of a promise to marry), and Wilson v. Houston Funeral Home, 42 Cal. App. 4th 1124, 1133, 50 Cal. Rptr. 2d 169, 173 (Cal. Ct. App. 1996) (discussing recovery for mental anguish caused by a mortician's errors in preparing a body for burial).

another which it is unjust for him to retain without paying therefor." Maui Aggregates, Inc. v. Reeder, 50 Haw. 608, 610, 446 P.2d 174, 176 (1968). As HMA/Rosado note, the provisions of the HMA School Bulletin unequivocally state that "[n]o tuition refund will be given if the student is asked to withdraw" and "refunds will be made only in cases of extreme hardship beyond the control of the student, such as denial of entry, or emergency returns to the home country. Students asked to withdraw because of disciplinary and/or attendance problems will not be entitled to any refund." The Shigas do not claim they were unaware of these provisions of the HMA School Bulletin and cite no precedent supporting a quantum meruit recovery under these circumstances.

(9) The circuit court did not abuse its discretion by denying HMA/Rosado's motion for fees and costs. HMA/Rosado assert that the Shigas' claims were frivolous and "not reasonably supported by the facts and the law" as required by HRS § 607-14.5. HMA/Rosado cite to deposition testimonies of Mr. Shiga, in which he expresses concern for the Shiga family honor as motivating the litigation, and Daisuke, in which he purportedly blames Rosado for his arrest. HMA/Rosado also point to the weakness of the Shigas' case as further evidence of its frivolous nature and note that the Shigas cited no applicable case law in support of their claims.

HRS § 603-21.9 gives the circuit court the power to award fees. HRS § 607-14.5 provides for fee awards where a party makes frivolous claims.[7/]

[7/] HRS § 607-14.5 (Attorneys' fees and costs in civil actions) provides in relevant part:

> (a) In any civil action in this State where a party seeks money damages or injunctive relief, or both, against another party, and the case is subsequently decided, the court may, as it deems just, assess against either party . . . a reasonable sum for attorneys' fees and costs . . . upon a specific finding that all or a portion

(continued...)

In Kawaihae v. Hawaiian Ins. Cos., 1 Haw. App. 355, 361, 619 P.2d 1086, 1091 (App. 1980), this court defined a frivolous claim as a claim "so manifestly and palpably without merit, so as to indicate bad faith . . . such that argument to the court was not required." The circuit court, by denying HMA/Rosado's request for fees, impliedly determined that the Shigas' action was not frivolous. This determination presents mixed questions of fact and law. Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991). "Where the court's conclusions are dependent upon the facts and circumstances of each individual case, the clearly erroneous standard of review applies." Id. The Hawai'i Supreme Court in R.W. Meyer, Ltd. v. McGuire, 36 Haw. 184, 187 (1942), stated that "[f]or an assignment of error to be frivolous . . . it must be manifestly and palpably without merit."

On the record before us, we cannot say the circuit court abused its discretion when it decided the Shigas' claims were not frivolous.

(10) The circuit court did not abuse its discretion in denying HMA/Rosado's HRCP Rule 11 motions for sanctions. Rule 11(b) requires that all claims not be "presented for any improper purpose, such as to harass" and that all claims "are warranted by existing law" and "have evidentiary support." HRCP Rule 11 is modeled after Federal Rules of Civil Procedure Rule 11, which was amended in 1983 to "set a more demanding standard for establishing the propriety of court filings," Lepere v. United

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(...continued)

> of the party's claim or defense was frivolous as provided in subsection (b).
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> (b) In determining the award of attorneys' fees and costs and the amounts to be awarded, the court must find in writing that all or a portion of the claims or defenses made by the party are frivolous and are not reasonably supported by the facts and the law in the civil action.

Public Workers, Local 646, AFL-CIO, 77 Hawai'i 471, 473-74, 887 P.2d 1029, 1031-32 (1995), and "deter baseless filings." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 S. Ct. 2447, 2454 (1990). Although HMA/Rosado contend that the standard of review for circuit court sanctions rulings is "reasonableness under the circumstances," we review sanctions rulings for abuse of discretion. Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 331, 104 P.3d 912, 918 (2004).

HMA/Rosado contend the Shigas (motivated solely by revenge) and their counsel (knowing of the inaccuracies in and improper purpose of the complaint) violated HRCP Rule 11(b)(1) by filing the complaint. HMA/Rosado assert the Shigas and their counsel violated HRCP Rule 11(b)(2) by pursuing claims they knew lacked any legal basis. HMA/Rosado also argue that the Shigas and their counsel violated HRCP Rule 11(b)(3) by filing claims they knew lacked evidentiary support. Having concluded that the circuit court did not abuse its discretion on the motion for fees and costs, we likewise conclude the circuit court did not abuse its discretion in not awarding sanctions.

Therefore,

The Final Judgment entered on May 4, 2006 in the Circuit Court of the First Circuit is affirmed.

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

On the briefs:

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Cross-Appellees.

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Daniel R. Foley
Presiding Judge

Craig H. Nakamura
Associate Judge

Associate Judge