

NO. 27329

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

JUANITA ZARAGOZA, Plaintiff-Appellant, v.  
CMS MONITORING, INC., a New York Corporation  
Defendant/Cross-Claim Defendant-Appellee,  
SOTO'S SAFE & SOUND ALARM CO., Defendant/Cross-Claimant/  
Cross-Claim Defendant-Appellee, LOA'A, INC., a  
Hawaii corporation, Defendant/Cross-Claimant/  
Cross-Defendant, JOHN DOES 1-10, DOE PARTNERSHIPS  
1-10, DOE CORPORATIONS 1-10, AND DOE ENTITIES 1-10,  
Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CIVIL NO. 02-1-0123(3))

MEMORANDUM OPINION

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

Plaintiff-Appellant Juanita Zaragoza (**Zaragoza**) appeals from: (1) the judgment filed on April 27, 2005, in the Circuit Court of the Second Circuit (**Circuit Court**) in favor of Defendant-Appellee Soto's Safe & Sound Alarm Co. (**Soto**) and against Zaragoza (**Judgment**);<sup>1</sup> (2) the order granting Soto's motion for summary judgment, entered on July 20, 2004; (2) the order denying Zaragoza's motion to strike Soto's motion for summary judgment, entered on July 20, 2004; and (3) the order denying Zaragoza's motion to alter, amend, or provide relief from the summary judgment in favor of Soto, entered on August 30, 2004.

I. BACKGROUND

A. The Robbery

On March 14, 2000, Zaragoza was held up at gunpoint during a robbery while working the night shift at Minit Stop #7.

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<sup>1</sup> The Honorable Joseph E. Cardoza presided.

EM. RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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Minit Stop #7 was a twenty-four hour convenience store at a Shell Gas Station located in Wailuku, Maui, owned and operated by Loa'a, Inc. (Loa'a), dba Minit Stop. Soto had installed an alarm system in the store pursuant to a Central Station Protective Service Agreement (**Agreement**) with Loa'a.

On the night of the incident, the robber entered the store from the front door which Zaragoza and the employees on the shift had inadvertently left unlocked. Zaragoza was working the "graveyard shift" from 11:00 p.m. to 7:00 a.m., and the door was supposed to be locked after 6:00 p.m. While following the robber's commands, Zaragoza pressed the hidden silent alarm button three times. At deposition, Zaragoza testified that approximately two or three minutes elapsed between the time that she pressed the button and the time that the robber left the store. After the robber left, Zaragoza called 911 and reported the robbery. She told the dispatcher that she had been pushing the button but that the police had not come.<sup>2</sup> The dispatcher then informed her that it was the first time that they had heard Minit Stop #7 was being robbed.

Zaragoza maintains that her shocking realization that the police were not summoned when she attempted to trigger the alarm caused her to experience trauma. She further alleges that this trauma, which she continues to experience, was the proximate and direct cause of "medically documented damages that [have] scarred and traumatized her for life."

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<sup>2</sup> It is undisputed that the alarm system did not send a signal to the police on the night of the robbery. Soto concedes that there are genuine issues of material fact as to the cause of the alarm system's failure, but argues that it was, nevertheless, entitled to summary judgment for the reasons discussed herein.

B. Procedural History

1. *The Complaint*

On March 13, 2002, Zaragoza filed a complaint against Soto and Loa'a<sup>3</sup> for negligence,<sup>4</sup> averring that Loa'a "had a duty to ensure that their place of employment was safe and would not create a hazardous situation for any employee," and that Soto "had a duty to ensure that the burglar alarms that they installed were serviced properly and were working properly." Zaragoza claimed that due to the negligent acts and/or omissions of Loa'a and Soto, she "sustained severe and permanent injuries, including emotional and psychological distress from which she has suffered since the date of the incident and will continue to suffer in the future." As a result, she claims that she has incurred medical and rehabilitation expenses and loss of wages, and that she will continue to incur medical expenses and lost wages in the future.

2. *The Court Annexed Arbitration Program (CAAP)*

It appears that Zaragoza did not file a request for exemption from CAAP at the time of the filing of the Complaint. See Hawaii Arbitration Rules (**CAAP Rules**) Rule 8 (all tort cases are viewed as CAAP eligible, and are automatically placed in CAAP, unless the plaintiff certifies that the case has a value in excess of the CAAP jurisdiction amount and files a request for exemption with the filing of the complaint). On July 22, 2002, Zaragoza filed a motion to remove the case from CAAP. The motion was denied. A CAAP arbitration hearing was set for May 26, 2004.

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<sup>3</sup> Through a stipulation by Zaragoza, Soto and Loa'a, filed on March 12, 2003, all claims asserted by Zaragoza against Loa'a were dismissed with prejudice. Zaragoza's claims remain against Soto, and Loa'a and Soto have remaining cross-claims against each other.

<sup>4</sup> Zaragoza also joined CMS Monitoring, Inc., the central monitoring station that contracted with Soto, as a co-defendant in her First Amended Complaint, filed on August 7, 2003. Subsequently, pursuant to a stipulation filed on September 24, 2004, all claims asserted against CMS were dismissed with prejudice.

3. *Loa'a's Summary Judgment Motion*

On November 6, 2002, Loa'a filed a motion to dismiss plaintiff's complaint, or in the alternative, for summary judgment (**Loa'a's Motion**). Soto filed a "substantive joinder" arguing, inter alia, that criminal acts are generally unforeseeable, that unforeseeable criminal acts are a superseding cause, and that Soto only needed to exercise reasonable care (**Soto's Joinder**). In a supplemental memorandum, Soto also argued that it did not owe any duty to Zaragoza. The Circuit Court apparently held a hearing on Loa'a's Motion and Soto's Joinder on March 5, 2003; no transcript of that hearing was made part of the record on appeal. On March 12, 2003, by stipulation, all claims asserted by Zaragoza against Loa'a were dismissed with prejudice. On March 13, 2003 (after being dismissed from the case), Loa'a filed a notice of withdrawal of Loa'a's Motion. On February 22, 2005, at Zaragoza's request, the Circuit Court entered an order denying Loa'a's Motion and Soto's Joinder.

4. *Soto's Summary Judgment Motion*

On May 13, 2004, Soto filed a motion for summary judgment (**Soto's Motion**), arguing that: (1) Soto was not liable because, under the Agreement, it had no duty to reset or service the alarm beyond its semi-annual testing unless it first received notification from Loa'a; (2) Soto did not owe any duty to Zaragoza pursuant to the limitation of liability clause contained in the Agreement; (3) Zaragoza failed to demonstrate causation for her injuries; and (4) Zaragoza's alleged injuries were the result of her own negligence. Zaragoza opposed summary judgment on numerous grounds including that: (1) Soto's Motion was untimely; (2) Soto was raising many of the same arguments previously raised in Soto's Joinder in Loa'a's Motion; (3) Loa'a improperly relied on an affidavit which had not been produced to Zaragoza in discovery; and (4) through the evidence presented in

opposition to summary judgment, Zaragoza could establish each element of her claims against Soto.

At the July 7, 2004 hearing on Soto's Motion, without further explanation, the Circuit Court ruled that there were no genuine issues of material fact and, thus, Soto was entitled to summary judgment as a matter of law. A written order granting Soto's Motion was entered on July 20, 2004.

5. *Zaragoza's Motion to Strike*

On July 7, 2004, Zaragoza filed a motion to strike Soto's Motion (**Motion to Strike**), primarily arguing that Soto's Motion was untimely filed. The Motion to Strike was orally denied at the July 7, 2004 hearing on Soto's Motion and a written order was entered on July 20, 2004.

6. *Zaragoza's Motion for Reconsideration*

On July 20, 2004, Zaragoza filed a motion to alter or amend the judgment under HRCF Rule 59(e), and for relief from judgment or order under HRCF Rule 60(b)(1), (3), and (6) (**Motion for Reconsideration**). Zaragoza presented additional evidence, as well as further arguments, and urged the Circuit Court to reconsider its summary judgment ruling. After a hearing, the Motion for Reconsideration was denied. A written order denying the Motion for Reconsideration was entered on August 30, 2004.

On April 27, 2005, the Circuit Court entered the Judgment. On May 27, 2005, Zaragoza timely filed a notice of appeal.

II. POINTS ON APPEAL

Zaragoza identifies fourteen points of error on this appeal. These points can be fairly and most succinctly analyzed as follows:

1. The Circuit Court erred when it denied Zaragoza's Motion to Strike;
2. The Circuit Court erred when it granted Soto's Motion (for summary judgment); and

3. The Circuit Court erred when it denied Zaragoza's Motion for Reconsideration.

III. STANDARDS OF REVIEW

"When interpreting rules promulgated by the court, principles of statutory construction apply. Interpretation of a statute is a question of law which we review de novo." Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 331, 104 P.3d 912, 918 (2004) (internal quotation marks and citation omitted). Thus, we review de novo the issue of whether a CAAP arbitration is considered to be a trial, for the purposes of the HRCP Rule 56 deadline for filing a motion for summary judgment.

We also 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). The Hawai'i Supreme Court has often articulated that:

[S]ummary judgment is appropriate 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 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. 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.

Id. at 56, 109 P.3d at 697 (citation omitted).

HRCP Rule 56(e) provides in relevant part:

**Rule 56. Summary judgment.**

. . . .

(e) Form of affidavits; further testimony; defense required. . . . When a motion for summary judgment is made . . . , 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.

Thus, "[a] party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, 'nor

is [the party] entitled to a trial on the basis of a hope that [the party] can produce some evidence at that time.'" Henderson v. Prof'l Coatings Corp., 72 Haw. 387, 401, 819 P.2d 84, 92 (1991) (quoting 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2727 (1983)).

A motion made pursuant to HRCP Rule 59(e) to alter or amend the judgment is reviewed under the abuse of discretion standard. Gossinger v. Ass'n. of Apartment Owners of the Regency of Ala Wai, 73 Haw. 412, 425, 835 P.2d 627, 634 (1992).

[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.

Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002) (citation omitted). We review a "trial court's ruling on a motion for reconsideration . . . under the abuse of discretion standard." Ass'n of Apartment Owners of Wailea Elua, 100 Hawai'i at 110, 58 P.3d at 621. An abuse of discretion occurs if 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." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992). In Beneficial Hawai'i, Inc. v. Casey, 98 Hawai'i 159, 164, 45 P.3d 359, 364 (2002), the Hawai'i Supreme Court confirmed that a circuit court's disposition of a Rule 60(b) motion is reviewed for an abuse of the court's discretion.

#### IV. DISCUSSION

##### A. Zaragoza's Motion to Strike

In the Motion to Strike, citing HRCP Rule 56(b),<sup>5</sup> Zaragoza argued that Soto had not timely filed its motion for

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<sup>5</sup> HRCP Rule 56(b) provides in relevant part: "[A] motion seeking relief under this rule shall be filed and served no less than 50 days before the date of the trial . . . ."

summary judgment because it was filed approximately two weeks before the CAAP arbitration hearing. This argument is without merit.

Rules 1 and 2 of the CAAP Rules explain that the purpose and intent of CAAP is to provide a mandatory, non-binding procedure for obtaining a prompt and equitable resolution of certain kinds of civil suits. CAAP Rule 7(F) provides: "All dispositive motions shall be made to the Circuit Court as required by law or rule notwithstanding the fact that a case is under [CAAP]." Under CAAP Rule 22, any party may file a written Notice of Appeal and Request for Trial De Novo within twenty days after a CAAP arbitration award is served upon the parties. CAAP Rule 22(C) also explicitly reserves a party's right to a trial by jury. As clearly indicated by the CAAP Rules, although a CAAP arbitration may obviate the need for a trial, it was never intended to be a trial on the merits of a dispute. By its own terms, the HRCF Rule 56(b) deadline sets a cut-off for a summary judgment motion at fifty days before a trial, without reference to arbitration hearings. A trial date was never set in this case. Soto's summary judgment motion was timely filed and, thus, the Circuit Court did not err in denying Zaragoza's Motion to Strike.

B. Soto's Summary Judgment Motion

This case presents various issues that are not clearly settled in this jurisdiction, including whether a plaintiff in Zaragoza's position can pursue a tort recovery based on an alleged breach of an alarm service agreement and, if a duty to such a plaintiff exists, whether and to what extent any recovery is limited by liquidated damages or limitation of liability provisions in the alarm service agreement. We will not address those issues here because, regardless of the legal analysis on the questions of duties and damages, Zaragoza's claim against Soto fails because, even if Soto is presumed to have owed a duty

to Zaragoza, there is no evidence that any breach of a duty by Soto caused the injuries suffered by Zaragoza.

"It is well-established that, in order for a plaintiff to prevail on a negligence claim, the plaintiff is required to prove all four of the necessary elements of negligence: (1) duty; (2) breach of duty; (3) causation; and (4) damages." Cho v. State, 115 Hawai'i 373, 379 n.11, 168 P.3d 17, 23, n.11 (2007) (citation omitted). Thus, we consider these elements in the context of Zaragoza's claim against Soto:

The alleged duty. Zaragoza alleges that Soto owed her a duty to monitor the alarm system and to notify the police and/or fire department in case of an emergency. At her deposition, Zaragoza testified that she was told that the police would respond within three to four minutes of the alarm button being pressed.

The alleged breach. At oral argument, Soto essentially conceded, if Soto owed a monitoring/notification duty to Zaragoza, that duty was breached. Soto maintains there was no such duty. For the purposes of our analysis, we will assume both duty and breach elements were satisfied.

Alleged causation. Zaragoza argues: "The trauma that Ms. Zaragoza experienced and that she continues to experience after realizing that she would have to face the assailant alone, was the proximate and direct cause of medically documented damages that has [sic] scarred and traumatized her for life." In other words, the robbery did not cause Zaragoza's injuries, the failure of the alarm button caused her trauma. While not inconceivable, or wholly implausible, this theory is not supported by any evidence in the record, even Zaragoza's own deposition testimony. Zaragoza's testimony was that the robbers left the store approximately two or three minutes after she pressed the alarm button. As noted above, Zaragoza testified that she was not anticipating the arrival of the police until three or four minutes after the alarm was activated. Thus,

Zaragoza could not prove that a properly functioning alarm system would have prevented the robbery. Indeed, it is undisputed that Zaragoza was completely unaware that the alarm failed to summon the police until, after the robbers were gone, the police dispatcher informed her that Zaragoza's telephone call was the first report of the robbery. There is no evidence in the record supporting an alternative timeline, although in a later declaration Zaragoza stated that she really was not sure how long the robbers were in the store because of the stress of the experience.

Although the robbers did not physically injure Zaragoza in any way, there is evidence that Zaragoza suffered, mentally and physically, as a result of the robbery. That said, this court has carefully reviewed and considered Zaragoza's testimony and the reports of the medical experts who examined Zaragoza and/or opined on Zaragoza's injuries. There is nothing in the record to support that the failure of the alarm button, rather than the trauma of the robbery, caused or contributed to her condition.<sup>6</sup> The Hawai'i Supreme Court has long held that: "The actor's negligent conduct is a legal cause of harm to another if (a) his [or her] conduct is a substantial factor in bringing about the harm. . . ." Estate of Klink ex rel. Klink v. State, 113 Hawai'i 332, 361, 152 P.3d 504, 533 (2007) (citations and internal quotation marks omitted; brackets in original). Under the test for proximate cause, the defendant's negligence need not be the whole cause or the only factor in bringing about the harm. Id. It is sufficient that the defendant's negligence is a substantial factor in causing the plaintiff's injuries. Id.

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<sup>6</sup> The medical reports all seem to indicate that the robbery, and perhaps other physical and mental health conditions, caused Zaragoza to suffer from Post Traumatic Stress Disorder and other maladies. The medical reports do not mention, even in the context of Zaragoza's reports about the incident, any concern, mental anguish, flashbacks, or other indicators, related to the failure of the alarm button. Virtually all references discuss the trauma of the robbery event.

In this case, however, Zaragoza failed as a matter of law to demonstrate that her injuries were caused, even in part, by the failure of the alarm.

Apparently recognizing this failure of proof, in conjunction with the Motion for Reconsideration (discussed below), Zaragoza's attorney submitted a declaration stating, inter alia, that:

Although Dr. Rose's travels prevented Plaintiff from securing a declaration from him at this time, Dr. Rose had assured me that he would provide evidence that it was primarily the anxiety caused by the alarm not working and the police failing to arrive (as expected), that caused her long term damages.

This representation is simply not evidence supporting causation.

The alleged damages. Soto does not dispute that Zaragoza suffered injuries as a result of the robbery of Minit Stop #7.<sup>7</sup>

Particularly in conjunction with a request for reconsideration, a plaintiff's promises of future evidence are insufficient to defeat a defendant's motion for summary judgment. Based on Zaragoza's failure to bring forward prima facie evidence of the causation element of her claim, we conclude that the Circuit Court did not err in granting Soto's Motion.

C. Zaragoza's Motion for Reconsideration

Zaragoza argues that, in the Motion for Reconsideration, she presented newly discovered evidence that "further established" each element of her negligence claim against Soto. However, whether we analyze Zaragoza's request for reconsideration under HRCF Rule 59(e), HRCF Rule 60(b)(1), HRCF Rule 60(b)(3), or HRCF Rule 60(b)(6), we conclude that the Circuit Court did not abuse its discretion in refusing to reverse its earlier decision to grant summary judgment to Soto.

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<sup>7</sup> Although admitting that Zaragoza suffered injuries, in addition to its duty and causation defenses, Soto argues that, under the terms of the Agreement, its liability is substantially limited.

Regardless of whether it was newly discovered or whether, through reasonable diligence, it could have been presented earlier, the evidence brought forward by Zaragoza was completely devoid of support for her claim that her injuries were caused by the trauma of the alarm button failure, as opposed to the trauma of the robbery itself. At oral argument, this court specifically asked Zaragoza's counsel to identify where in the record there was any support for this causation theory. Upon careful consideration of counsel's response, as well as our thorough review of the record, we conclude that there was no evidence supporting the causation element of Zaragoza's claim, either in conjunction with the request for reconsideration or elsewhere in the record of this case. Thus, the Circuit Court did not abuse its discretion in its denial of reconsideration.

V. CONCLUSION

For these reasons, we affirm the Judgment entered by the Circuit Court on April 27, 2005.

DATED: Honolulu, Hawai'i, October 10, 2008.

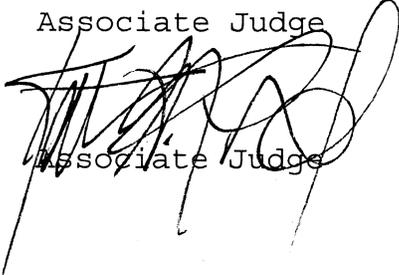
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