***** NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER *****

NO. 25475

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

JACK THOMAS, Plaintiff-Appellant/Cross-Appellee,

vs.

JOHN HASSLER, CARLETON REID, and REID RICHARDS & MIYAGI, Defendants-Appellees/Cross-Appellants,

and

DOES 1-100, Defendants.

APPEAL FROM THE THIRD CIRCUIT COURT
(Civ. No. 98-0218)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ., Circuit Judge Ayabe in place of Acoba, J., recused, and Circuit Judge Chang, in place of Duffy, J., recused)

The plaintiff-appellant Jack Thomas appeals from the October 23, 2002 judgment of the circuit court of the third circuit, the Honorable Greg K. Nakamura presiding, entered pursuant to the circuit court's grant on the same day of the June 12, 2002 motion for summary judgment filed by the defendants-appellees/cross-appellants John Hassler, Carleton Reid, and Reid Richards & Miyagi law partnership (hereinafter, "the Reid firm") [hereinafter, collectively, "the Appellees"].

On appeal, Thomas argues: (1) that the circuit court erred in granting summary judgment inasmuch as (a) genuine issues of material fact remained with respect to the five alleged misrepresentations, (b) the question of his reliance on the five alleged misrepresentations was for the trier of fact, and (c) the

genuine issues of material fact pertaining to the five alleged misrepresentations prevented summary judgment on his derivative emotional distress claim; and (2) that the circuit court erred in denying his motion to amend his second amended complaint.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we resolve Thomas's appeal as follows:

(1) Summary judgment was rightly entered in favor of the Appellees and against Thomas with respect to all five of the alleged misrepresentations.

With regard to the first alleged misrepresentation, the February 7, 1991 letter from Debra Wright, Peter Capriotti's attorney, to Colonial Penn Insurance Company (hereinafter, "Colonial Penn"), Capriotti's insurer, concerned a matter of pending litigation in which the parties shared a common interest in defending against Thomas's tort claim. However, inasmuch as the letter was not made a part of the record, it cannot be determined whether Wright wrote to "a lawyer or a representative of a lawyer" at Colonial Penn and, therefore, whether the privilege of HRE Rule 503(b)(3) applies. Still, the letter qualifies as privileged work product pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 26(b), entitled "Discovery Scope and Limits,"

> which states that [(1) "p]arties []may obtain discovery regarding any matter, <u>not privileged</u>,"

> (emphasis added), and indicates that "[3][1]]discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial" shall be disclosed ["]only upon a showing["] of "substantial need of the materials" and "undue hardship" in obtaining the materials in another fashion.

Save Sunset Beach Coalition, 102 Hawai'i at 484, 78 P.3d at 20 (emphasis and ellipsis in original) (footnote omitted). The Appellees, therefore, were under no duty to reveal the contents of the letter to Thomas.

Given that the Appellees were not subject to a duty to disclose the contents of the privileged letter, there is no genuine issue of material fact that would support a finding or conclusion that the Appellees acted fraudulently in withholding the letter from Thomas or that they failed to exercise reasonable care or competence in failing to notify Thomas of its contents. Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai'i 309, 321, 47 P.3d 1222, 1234 (2002); Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 386, 14 P.3d 1049, 1067 (2000). Thomas therefore failed to raise any genuine issues of material fact as to any misrepresentations made by the Appellees on the issue of Capriotti's willingness to settle.

With regard to Capriotti's premiums following the June 1, 1988 incident, the alleged statements of Richard Sutton and Capriotti are irrelevant to the matter at hand. If Sutton made his statement when Thomas alleges, he would have been serving as the attorney for Colonial Penn. Capriotti is the

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[1] Effective July 1, 2004, this court renumbered paragraph (3) as paragraph (4).

underlying tortfeasor in the original action. Neither is a party to the present lawsuit, nor is there any evidence in the record indicating that either is an agent or representative of the Appellees. The hearsay exception set forth in HRE Rule 803(a)(2)(A) and asserted by Thomas is therefore inapplicable. In sum, the record raises no genuine issue of material fact suggesting that the Appellees misrepresented information to Thomas concerning Capriotti's premiums following the June 1, 1988 incident.

With respect to the alteration of the Bowker tape, Thomas admits that he knew that one copy of the tape was "taped over" but insists that Hassler's failure to inform him that Hassler had "erased" a portion of the tape constituted a misrepresentation upon which he relied. Nevertheless, Thomas's audio expert, Donn Tyler, confirmed in a deposition almost two years before Thomas signed the agreement to arbitrate that he was in possession of an unaltered copy of the tape and a transcript of the interview, which he employed in ascertaining that "three or four sentences" of the copy of the tape in question had been "recorded over."

Furthermore, Thomas fails to articulate any meaningful difference between the terms "recorded over" and "erased."[2] In weighing a motion for summary judgment, "inferences drawn from the evidence must be logical and reasonable," Wong v. Panis, 7

[2] Thomas attempts to craft a distinction by characterizing an "altered" tape as innocent and an "erased" tape as tampered with. Nevertheless, by May 1, 1995, nine months before agreeing to arbitrate, Thomas had already ascribed malicious intent to the "altered" tape.

Haw. App. 414, 418, 772 P.2d 695, 699 (1989), abrogated on other grounds by Hac v. Univ. of Hawai'i, 102 Hawai'i 92 (2003). No reasonable mind could discern a misrepresentation by the Appellees in comparing Thomas's knowledge that a portion of the copy had been "recorded over" with subsequent information that the portion had been "erased." "When the evidence is so clear that reasonable minds could only come to one conclusion, it is not error for the trial judge to remove the . . . question from the jury and to determine that question as a matter of law." Parker v. Nakaoka, 68 Haw. 557, 562, 722 P.2d 1028, 1031 (1986). See also Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 108, 839 P.2d 10, 24 (1992).

With respect to Thomas's allegation that the Appellees wrongfully withheld the January 21, 1994 letter[3] describing contacts between Capriotti's attorney and the Maui prosecutor's office, the letter, written by Rodney Sisson, Capriotti's counsel, to Colonial Penn regarding pending litigation in which they shared a common defense interest, was privileged under HRE

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[3] Thomas's claim of error rests on the Appellees' failure to divulge the contents of the January 21, 1994 letter and the circuit court's ruling that the letter was inadmissible. To the degree that Thomas protests the failure of the Appellees to disclose the mere existence of the letter, however, any failure to do so was harmless. Had Thomas been informed, in response to interrogatories concerning what information Colonial Penn had gathered on the incident, that Sisson had written to Colonial Penn on January 21, 1994, Thomas could have sought a motion to compel production of the letter, requesting the circuit court to make a ruling on the admissibility of the letter and its contents. The circuit court has, in fact, made such a ruling, discussed infra, correctly concluding that the letter and its contents are privileged. In either case, the Appellees were under no duty to disclose the contents of the letter to Thomas and, therefore, Thomas fails to raise a genuine issue for trial as to any fraudulent or negligent omission on the part of the Appellees that could have effected his choice between arbitration and a jury trial.

Rule 503(b)(3), and the circuit court did not abuse its discretion in so ruling. The Appellees were, therefore, under no duty to disclose the contents of the letter to Thomas.[4]

In sum, there is no genuine issue of material fact with respect to whether the Appellees, in withholding from Thomas the contents of the January 21, 1994 letter, acted fraudulently or failed to exercise reasonable care or competence with regards to the information. Zanakis-Pico, 98 Hawai'i at 321, 47 P.3d at

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[4] Thomas alleges that Sisson's contact with Polak was an illegal invasion of privacy, in violation of HRS § 846-9 (Supp. 1996), which strictly limits the dissemination of non-conviction-related criminal data, and HRS § 92F-17(b) (1993), which provides in relevant part that any individual "who intentionally gains access to . . . a copy of a government record by false pretense, bribery, or theft, with actual knowledge that access is prohibited, or who intentionally obtains any confidential information by false pretense, bribery, or theft, with actual knowledge that it is prohibited [by] a confidentiality statute" is guilty of a misdemeanor. (Brackets in original.) However, the circuit court correctly concluded that the uncontested evidence in the record demonstrates that Sisson did not violate HRS § 846-9 in that "Sisson was soliciting information from Polak about what an independent witness might have stated. This does not constitute 'nonconviction data' as the term is defined under HRS § 846-1 [(1993)]." (Emphasis added.) HRS § 846-1 defines nonconviction data as

> arrest information without a disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

(Effective July 1, 2006, the legislature amended HRS § 846-1 through Act 132, §§ 1 and 4, in respects immaterial to the present matter.) Similarly, as Sisson's inquiries focused entirely on Polak's recollections as to what Bowker observed on the day of the incident and the record is devoid of any evidence that Sisson gained access to any confidential government records, much less through false pretense, bribery, or theft with actual knowledge that access was prohibited, the circuit court was correct in concluding that Sisson's contacts with Polak did not violate HRS § 92F-17(b). In any case, Thomas fails to demonstrate how Sisson's allegedly illegal activity altered the privileged nature of the letter.

1234; Shoppe, 94 Hawai'i at 386, 14 P.3d at 1067. Indeed, the Appellees were under a duty to their client at the time, Colonial Penn, not to reveal confidential information such as was contained in the letter.

As for the relationship between the arbitrator, Walter Davis, and the Appellees, any alleged misrepresentations concerning Davis were wholly irrelevant to Thomas's decision to arbitrate, because the record reflects that, at the time Thomas signed the arbitration agreement, Davis had not been selected as the arbitrator; the agreement to arbitrate states in pertinent part that "[i]f the parties cannot agree on the selection of an arbitrator, then [the mediator] is authorized to select an arbitrator." Consequently, had Thomas not consented to Davis as the arbitrator, that decision would not have nullified the agreement to arbitrate and allowed Thomas to proceed to a jury trial. At most, it would have led to the selection of a different arbitrator. Therefore, Thomas's claim for damages on the issue of Davis's relationship with the Appellees appears to be grounded in the notion that, with a different arbitrator, Thomas would have received a more favorable arbitration award.

In any case, there is no evidence that the Appellees played any role in, or were even aware of, the selection of Davis as the arbitrator, nor does Thomas so allege.[5] Thomas was aware that Sutton had, by December 20, 1995, replaced the Reid firm as

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[5] Thomas also concedes that he knew that Davis was a former law partner of Reid's when Thomas signed the agreement to arbitrate on February 23, 1996.

the attorney actively representing Colonial Penn and concedes that, thereafter, the Reid firm did not participate as counsel. Moreover, Thomas concedes that Davis was unaware of any continuing involvement of the Reid firm in the matter. Thomas, therefore, fails to point to any evidence in the record raising a genuine issue of material fact as to whether any of the Appellees -- i.e., Hassler, Reid, or the Reid firm -- knew of Davis's selection and breached a duty to Thomas by not informing him, before he signed the agreement to arbitrate, of the precise nature of the professional and financial relationship between Davis and the Appellees.

Furthermore, for Thomas to demonstrate possible reliance, any alleged misrepresentation must have occurred prior to the signing of the arbitration agreement. See Dement v. Atkins & Ash, 2 Haw. App. 324, 328, 631 P.2d 606, 609 (1981). Thomas and Sutton signed the agreement to arbitrate on February 23, 1996. Davis began the arbitration on March 25, 1996. Thomas asserts that Hassler made his statement to Thomas concerning Davis's relationship with the Reid firm on April 26, 1996.[6]

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[6] Thomas reiterates other allegations made in earlier affidavits to the effect that "both [] Reid and [] Hassler led [] Thomas to believe that there was no connection, whether professional or financial[,] between [] Davis and [] Reid after 1989" and "Thomas had been specifically told that [] Davis was not affiliated with the firm when [] Thomas's case was being handled by the firm, and was specifically told that [] Davis had no financial connection with the firm after 1989." Apart from the April 26, 1996 statement attributed to Hassler, however, Thomas fails to support his broad assertions with any facts pertaining to the nature of the representations, the identity of the speaker, or the date upon which the alleged representations were made. In fact, in his opening brief, Thomas seems to admit that he did not discuss the relationship between Davis and Reid with the Appellees at all until sometime after arbitration had begun, stating that "[i]t was at this point [during

(continued...)

Hassler's alleged misrepresentations were made two months after Thomas signed the arbitration agreement, and Thomas himself admits he did not become aware of any reason to question Hassler's statement until almost three years later.

The record is therefore devoid of any evidence of any misrepresentation or omission on the part of the Appellees upon which Thomas could have relied when he chose, on February 23, 1996, to forego a jury trial in favor of arbitration by an arbitrator as yet to be named.

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[6](...continued)
arbitration under Davis] that [] Thomas began to ask [] Hassler and [] Reid about [] Davis."

HRCP Rule 56(e) provides in relevant part:

> [w]hen a motion for summary judgment is made and supported as provided in this rule, 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.

(Emphases added.) Because Thomas fails to set forth any specific facts pertaining to identifiable misrepresentations apart from Hassler's statement of April 26, 1996, Thomas's claim that the Appellees misrepresented the nature of Davis's professional and financial relationship with the Reid firm rests solely on that statement by Hassler. See Dairy Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 412, 992 P.2d 93, 107 (2000) (citing Rule 56(e)); Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 30-31, 837 P.2d 1273, 1288 (1992) ("[A] plaintiff must state the circumstances constituting fraud or mistake with particularity (e.g., allege who made the false representations) and specify the representations made.") (citing Ellis v. Crockett, 51 Haw. 45, 59, 451 P.2d 814, 823 (1969)); Briggs v. Hotel Corp. of the Pac., 73 Haw. 276, 281, 286, 831 P.2d 1335, 1339, 1341 (1992) (vague statements void of specific facts were insufficient to raise a genuine issue of material fact in a motion for summary judgment); Chuck Jones & MacLaren v. Williams, 101 Hawai'i 486, 497, 71 P.3d 437, 448 (App. 2003); Foronda ex rel. Estate of Foronda v. Hawaii Int'l Boxing Club, 96 Hawai'i 51, 58, 25 P.3d 826, 833 (App. 2001).

We hold, therefore, that the grant of summary judgment in favor of the Appellees and against Thomas was correct with regards to the five alleged misrepresentations.[7]

(2) "Although . . .[intentional infliction of emotional distress (]IIED[)] . . . [is an] independent tort[], there still must be some underlying intentional . . . action undertaken by the defendant in order to render the IIED . . . claim cognizable." Calleon v. Miyagi, 76 Hawai'i 310, 320, 876 P.2d 1278, 1288 (1994).[8] Inasmuch as summary judgment in favor of the Appellees was correctly entered with respect to all five alleged misrepresentations, summary judgment as to Thomas's derivative IIED claim was also correctly entered.

(3) The circuit court did not abuse its discretion in denying Thomas's July 22, 2002 motion to amend his second amended complaint. Thomas requested leave to amend his complaint in order to include the allegation that the Appellees wrongfully

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[7] Inasmuch as summary judgment pertaining to the five misrepresentations is affirmed without any remaining issues pertaining to Thomas's reasonable reliance, Thomas's claim of error on that point need not be addressed. Thomas also fails to include in his statement of the points of error any mention of the civil conspiracy allegation against the Appellees raised in passing in the argument section of his brief and, therefore, pursuant to Hawai'i Rules of Appellate Procedure Rule 28(b)(4), this point is disregarded. In any case, Thomas concedes that civil conspiracy requires an underlying tort, but fails to raise any genuine issues that an underlying tort exists. Finally, inasmuch as we affirm the circuit court's final judgment, this court does not reach the Appellees' cross-appeal.

[8] On appeal, Thomas did not raise any point of error pertaining to the claim of negligent infliction of emotional distress contained in his second amended complaint. It is well settled that, in an action for misrepresentation, "'[t]here may be no recovery for mental anguish and humiliation not intentionally inflicted.'" Zanakis-Pico, 98 Hawai'i at 320, 47 P.3d at 1233 (quoting Ellis v. Crockett, 51 Haw. 45, 52, 451 P.2d 814, 820 (1969)).

withheld from him the contents of the February 7, 1991 letter. Inasmuch as the letter was privileged work product, see supra, the Appellees were under no duty to disclose them to Thomas. Thomas's proposed amendment was, therefore, futile. A circuit court "does not abuse its discretion in refusing leave to amend where such an amendment would be futile." Fed. Home Loan Mortgage Corp. v. Transamerica Ins. Co., 89 Hawai'i 157, 166, 969 P.2d 1275, 1284 (1998). Therefore,

IT IS HEREBY ORDERED that the October 23, 2002 judgment of the third circuit court is affirmed.

DATED: Honolulu, Hawai'i, August 30, 2006.

On the briefs:

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