*** NOT FOR PUBLICATION ***

NO. 26617

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

E/M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

QUENTIN HIDEYUKI TAHARA, Plaintiff-Appellant/Cross-Appellee,

vs.

MATSON TERMINALS, INC.; MATSON NAVIGATION COMPANY, INC.; McCABE, HAMILTON & RENNY CO., LTD.; INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN'S UNION, LOCAL 142; and HENRY KREUTZ, JR., Defendants-Appellees/Cross-Appellees,

and

BRUCE GEORGE PERRY, Defendant-Appellee/Cross-Appellant,

and

JOHN DOES 1-20, MARY DOES 1-20, DOE CORPORATION 1-20, DOE PARTNERSHIPS 1-20, DOE ASSOCIATES 1-20, DOE GOVERNMENTAL AGENCIES 1-20, DOE STATES and OTHER ENTITIES 1-20, Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-1204)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, and Nakayama, JJ.; Intermediate Court of Appeals Associate Judge Lim, in place of Acoba, J., recused; and Intermediate Court of Appeals Associate Judge Fujise, in place of Duffy, J., recused)

The instant appeal and cross-appeal arise out of an employment-related altercation between plaintiff-appellant/cross-appellee Quentin Hideyuki "Rocky" Tahara and defendant-appellee/cross-appellant Bruce Perry. Tahara appeals from that portion of the Circuit Court of the First Circuit's May 28, 2004 stipulated final judgment entered pursuant to orders granting

summary judgment in favor of defendants-appellees/cross-appellees Matson Terminals, Inc. (Matson), McCabe, Hamilton & Renny, Co. (McCabe), the International Longshoremen and Warehousemen's Union Local 142 (ILWU), and Henry Kreutz, Jr. (Kreutz). Perry cross-appeals from that portion of the May 28, 2004 stipulated final judgment entered pursuant to the special verdict in favor of Tahara, as well as the trial court's: (1) order denying his motion for summary judgment; (2) oral order denying his motion for directed verdict; and (3) order denying his motion for judgment notwithstanding the verdict (J.N.O.V.) and for a new trial.[1]

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

(1) Tahara claims the trial court erred in granting summary judgment in favor of Matson and McCabe. Both Matson and McCabe, however, point out that Tahara's opening brief fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 (2004).

According to HRAP Rule 28(b), an opening brief must include, inter alia:

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[1] The Honorable R. Mark Browning presided over the underlying proceedings pertaining to Matson and McCabe, and the Honorable Dexter Del Rosario presided over the underlying proceedings pertaining to the ILWU, Kreutz, and Perry.

> (3) A concise statement of the case, setting forth . . . the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in summary fashion, with appropriate record references. . . .
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> (4) A concise statement of the points of error set forth in separately numbered paragraphs. . . . Where applicable, each point shall also include the following:
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> . . . .
>
> (C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error.
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> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. . . .
>
> (7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. . . . Points not argued may be deemed waived.

(Emphases added.) We have previously stated that "[a]n appellate court is given full discretion to disregard issues not set forth in compliance with this rule." Sprague v. California Pac. Bankers & Ins. Ltd., 102 Hawai'i 189, 196, 74 P.3d 12, 19 (2003).

Here, Tahara fails to identify the findings of fact (FOFs) and/or conclusions of law (COLs) that he contests with respect to Matson and McCabe in violation of HRAP Rule 28(b)(4)(C). Such an omission places an unnecessary burden upon both the parties compelled to respond to Tahara's opening brief and the appellate court to render an informed judgment. See Mikelson v. United Servs. Auto. Ass'n, 107 Hawai'i 192, 198, 111 P.3d 601, 607 (2005). Moreover, Tahara's "argument" section does not shed any light as to which specific findings and/or conclusions he challenges on appeal. In further violation of HRAP Rule 28(b), Tahara's argument section, for the most part, fails to include citations to parts of the record and authorities

relied on. See HRAP Rule 28(b)(7). In addition, Tahara's "concise statement of the case" fails to comply with HRAP Rule 28(b)(3) inasmuch as Tahara fails to set forth "the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings." HRAP Rule 28(b)(3) (emphasis added). Finally, the deficiencies in Tahara's opening brief are "particularly unacceptable" in light of the fact that this court had earlier struck Tahara's initial opening brief for failure to comply with HRAP Rule 28(b)(4). See Int'l Bhd. of Elec. Workers v. Hawaiian Tel. Co., 68 Haw. 316, 322 n.7, 713 P.2d 943, 950 n.7 (1986) (noting that defects in an amended opening brief were "particularly unacceptable" due to the fact that the court had earlier struck the initial opening brief for inadequately citing to the record). Although "this court has consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible[,]" Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (internal quotation marks and citation omitted) (emphasis added), it is impossible to determine what Tahara contends and does not contend on appeal with respect to the trial court's orders granting summary judgment in favor of Matson and McCabe. Thus, notwithstanding the foregoing policy, Tahara's continuing disregard of the requirements of HRAP Rule 28 is a ground for dismissal. See HRAP Rule 30 (2004); Teller v. Teller, 99 Hawai'i 101, 102-03, 53 P.3d 240, 241-42 (2002)

(declining to review the merits of one of appellant's points of error because appellant's opening brief fell "woefully short of compliance with HRAP Rule 28"). Accordingly, we decline to consider whether the trial court erred in granting summary judgment in favor of Matson and McCabe.

(2) Tahara contends that the trial court erred in granting summary judgment in favor of the ILWU. Although not raised by the ILWU, Tahara's argument section pertaining to the ILWU presents similar deficiencies as Tahara's argument section relating to Matson and McCabe. Tahara's ILWU-argument section fails to include a single citation to parts of the record relied on in support of his contention that the ILWU affirmatively ratified the beating of Tahara, in violation of HRAP Rule 28(b)(7). Instead, Tahara asserts purely conclusory remarks as support for his apparent contention that the ILWU should be responsible for the injuries he sustained as a result of the altercation with Perry. Tahara also does not mention which counts he continues to assert against the ILWU. And, more importantly, Tahara does not indicate that genuine issues of material fact exist or that the ILWU was not entitled to summary judgment as a matter of law. As such, we are unable to discern Tahara's contentions inasmuch as he fails to present any argument as to how the trial court erred in granting summary judgment in favor of the ILWU. Moreover, as discussed supra, the numerous deficiencies found in Tahara's opening brief do not aid us in rendering an informed judgment. Thus, we decline to consider

whether the trial court erred in granting summary judgment in favor of the ILWU.

(3) In challenging the trial court's grant of summary judgment in favor of Kreutz, Tahara maintains that Kreutz should be liable for the intentional torts of IIED and battery because Kreutz, by confronting Tahara regarding Perry's "running away" from a Matson job site,[2] intentionally inflicted emotional distress upon Tahara and because Kreutz ratified Perry's battery.

Under Hawai'i law, the elements of IIED are:

> (1) that the act allegedly causing the harm was intentional or reckless, (2) that the act was outrageous, and (3) that the act caused (4) extreme emotional distress to another.

Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 106-07, 73 P.3d 46, 60-61 (2003). The term "outrageous" has been construed to mean "without just cause or excuse and beyond all bounds of decency." Lee v. Aiu, 85 Hawai'i 19, 34 n.12, 936 P.2d 655, 670 n.12 (1997) (internal quotation marks and citations omitted). Under the circumstances of this case, Kreutz's conduct does not rise to the level of "outrageousness" as construed in our case law and the Restatement. Based on the record references provided, Tahara's only contentions with respect to Kreutz's actions were that Kreutz "stared [him] down" and gave him "those mean looks" during their "tense" conversation that took place a couple of weeks prior to the altercation. Such conduct clearly cannot be

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[2] On March 10, 1994, Tahara observed Perry "run away" (i.e., to leave a job site without permission, yet be paid for work not performed) and confidentially reported the incident to Matson officials, who, in turn, reported Tahara's observation to McCabe. As a result, Perry's pay was docked.

characterized as "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., 76 Hawai'i 454, 465 n.12, 879 P.2d 1037, 1048 n.12 (1994) (citation omitted). Moreover, contrary to Tahara's assertion, the instant case is not "eerily similar" to the Restatement illustration he has cited in his opening brief. Unlike the Restatement illustration, which describes the defendant making direct and specific threats to the plaintiff "in the presence of an intimidating group of associates," Kreutz's confrontation with Tahara was not in the presence of anyone else, and Tahara points to no evidence in the record that Kreutz made any direct and specific threats toward him. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Kreutz on Tahara's IIED claim.

Tahara next alleges that Kreutz is liable for Perry's battery under Restatement (Second) of Torts § 876 (1979), which provides in relevant part:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
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> (a) does a tortious act in concert with the other or pursuant to a common design with him,
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself[.]

(Emphases added.) In this case, Tahara apparently believes that Kreutz's alleged tortious act of confronting Tahara regarding Perry's running away constitutes "a common design" of furthering

the practice of running away. However, as discussed supra, Kreutz's confrontation with Tahara did not rise to the level of tortious conduct that would support Tahara's IIED claim against Kreutz. Thus, it cannot be said that the actions of Kreutz and the actions of Perry constituted a common design of furthering the practice of running away in support of Tahara's battery claim.[3] Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Kreutz on Tahara's battery claim.

(4) On cross appeal, Perry contends that the trial court erred in denying his motion for summary judgment inasmuch as there were no genuine issues of material fact. Although not raised by Tahara, the circumstances of this case present the application of the "Morgan rule," which was recently reaffirmed by this court's decision in Bhakta v. County of Maui, 109 Hawai'i 198, 124 P.3d 943 (2005), i.e., that "an order denying the motion [for summary judgment] could not be appealed if denial was based on the presence of factual questions for the jury, but could be appealed if based on questions of law." Id. at 209, 124 P.3d at 954 (citation omitted). Here, the trial court orally denied Perry's motion for summary judgment because it "believe[d] that the factual circumstances present[] issues of fact for the trier of fact[.]" (Emphasis added.) Subsequently, after a full trial on

[3] To the extent Tahara's argument can also be construed as relying upon subsection (b) of Restatement (Second) of Torts § 876, Tahara's argument is without merit inasmuch as he fails to establish that Kruetz owed any duty to Tahara.

the merits, the jury rendered a verdict in favor of Tahara and against Perry on Tahara's battery claim. Accordingly, inasmuch as the trial court denied summary judgment based upon the existence of genuine issues of material fact, we hold that Perry is not entitled to a review of the denial of his motion for summary judgment.

(5) Perry contends that the trial court erred in denying his motions for directed verdict and J.N.O.V. because, as argued at trial, "the uncontroverted evidence showed that [Tahara] initiated the physical contact with [Perry] and struck [Perry] three times before [Perry] struck him."

In this case, the jury heard conflicting testimony as to the events prior to, during, and after the altercation. Additionally, the jury heard testimony from Tahara and several of his witnesses that Perry had a reputation for violence and was considered a "pretty tough guy," and that, prior to the altercation, Perry had been "planning on seeing" Tahara to ask him why he had Perry's pay docked. Thus, the jury could have readily concluded that Perry was the initial aggressor in the altercation and that Tahara did not consent to a mutual affray with Perry.[4] Inasmuch as the issue whether Tahara consented to

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[4] Even if Tahara had consented, the Restatement provides that "each consents to the other using such force as is reasonably necessary to defend himself against his opponent's attack." Restatement (Second) of Torts § 69 cmt. a (1965) (emphasis added). Here, the jury heard the videotaped testimony of Jeffrey Lau, M.D. (Dr. Lau), who treated Tahara in the emergency room at Kuakini. Dr. Lau testified that Tahara's head injuries were inconsistent with a single blow to the head, as Perry maintained, because there were injuries to both sides of his head and that Tahara's multiple rib fractures were inconsistent with a simple fall. The jury also heard testimony that Perry did (continued...)

the battery was dependent upon the credibility of witnesses and the weight of the evidence, the jury's determination that Perry committed a battery and its implicit determination that there was a lack of consent will not be disturbed on appeal. See State v. Barros, 98 Hawai'i 337, 343 n.4, 48 P.3d 584, 590 n.4 (2002) (noting that "it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the [trier of fact]") (citation omitted).

Accordingly, we hold that the trial court did not err in denying Perry's motions for directed verdict and J.N.O.V.

(6) Perry asserts that the trial court committed reversible error when it excluded Alexander Williams's testimony as to the statements made to him by Perry shortly after Perry had punched Tahara. Perry contends that the testimony could have been admitted pursuant to the excited utterance exception set forth in Hawai'i Rules of Evidence (HRE) Rule 803(b)(2) (1993) or as prior consistent statements under HRE Rule 613(c) (1993). Tahara contends that, because an offer of proof and a ground for admissibility were not made at trial, Perry has waived the issue and, thus, cannot challenge it on appeal. HRE Rule 103 (1993) provides in relevant part:

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[4](...continued)
not display any signs of having been physically injured. Thus, the jury could have concluded that Perry kicked and/or further injured Tahara, thereby exceeding the scope of Tahara's consent, if any, to enter into a mutual affray.

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
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> . . . .
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(Emphasis added.) When making an offer of proof directed towards a ruling excluding evidence, "[t]he offer should incorporate a coherent theory of admissibility, grounded in a designated rule or rules, together with case law and other authority as appropriate, plus a proffer covering the nature and substance of the evidence." State v. Kelekolio, 74 Haw. 479, 523 n.21, 849 P.2d 58, 78 n.21 (1993) (citation omitted) (internal quotation marks omitted). "In the absence of an offer of proof, the trial court committed no reversible error." Id. at 523, 849 P.2d at 78. Here, Perry's counsel did not make a clear and specific offer of proof as to what Williams's testimony would reveal with respect to the conversation he had with Perry. Indeed, at the hearing on Perry's motion for J.N.O.V. and for a new trial, Perry's counsel conceded that he "didn't make an offer of proof[.]" Counsel for Perry's response during trial, "[i]t's part of the event[,]" hardly apprises this court of the nature and substance of the evidence. Moreover, Perry's counsel failed to inform the trial court as to why Williams's testimony was admissible under the HRE. Consequently, Perry's counsel has not provided an adequate record for appellate review. Nonetheless, Perry maintains that "it was or should have been apparent from the immediate context within which [his counsel's] questions

w[ere] asked that evidence of what [Perry] told [Williams] at [the time] was admissible under [HRE Rule 803(b)(2)] as an 'excited utterance.'" However, on appeal, Perry claims that Williams's testimony was admissible not only because (1) it constituted an excited utterance, but also because (2) it constituted prior consistent statements made by Perry. Consequently, based on Perry's own assertions on appeal, Williams's testimony may have been admissible on two entirely different grounds; thus, the substance of the testimony was not apparent from the context within which questions were asked. Accordingly, we hold that Perry has waived his right to challenge the trial court's exclusion of Williams's testimony.

(7) Lastly, Perry contends that Tahara's counsel committed several instances of prejudicial misconduct during closing argument by allegedly violating the trial court's prior rulings. Tahara contends that, because Perry's counsel did not request a curative instruction or move for a mistrial at the time any of the alleged misconduct took place, Perry should be deemed to have waived his right to a new trial.

This court has previously stated that,

> [g]enerally, an improper appeal by an opposing party to the prejudices and sympathies of the jury is a ground for granting a motion for a new trial where[:] (1) the moving party has been injured by the improper appeal; (2) the moving party took proper steps to preserve his or her right to relief; (3) the moving party sought to have the harmful effect of the improper appeal remedied by an appropriate jury instruction; and (4) the effect of the improper appeal was not adequately dissipated by the steps taken[;] or (5) the error was so fundamental that gross injustice would result if a new trial is not granted.

State ex rel. Bronster v. United States Steel Corp., 82 Hawai'i 32, 55-56, 919 P.2d 294, 317-18 (1996) (internal quotation marks, citations, and brackets omitted) (some emphases in original, some omitted, and some added). In this case, Perry did not seek to have the purported harmful effect of any of the allegedly improper remarks by Tahara's counsel remedied by appropriate jury instructions or a motion for a mistrial. Accordingly, we hold that the trial court did not abuse its discretion in denying Perry's motion for a new trial. Therefore,

IT IS HEREBY ORDERED that the trial court's May 28, 2004 stipulated final judgment is affirmed.

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

On the briefs:

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