AMENDED CONCURRING OPINION BY ACOBA, J.

I agree that the judgment in this case should be vacated and the case remanded for a new trial, but on the bases that follow. In my view, (1) Simi Tupuola (Tupuola) should not have been included on the special verdict form because the Circuit Court of the First Circuit (the court) had previously denied making Tupuola a third party defendant, and Petitioner/Plaintiff-Appellant Roger Scott Moyle (Petitioner) foreseeably relied on the court's ruling in presenting his case; (2) under our precedent, Tupuola should be excluded because the court abused its discretion based on the circumstances of this case and not, as the majority asserts, because it is required as a matter of law, (3) the jury's determination that Respondents/Defendants-Appellees Y & Y Hyup Shin, Corp. and TTJJKK Inc., both d/b/a/ Do Re Mi Karaoke (collectively, Respondents) were not liable for Petitioner's injuries was premised on faulty jury instructions regarding the criminal acts of third parties and dram shop liability. Because of these errors, Petitioner is entitled to a new trial.

I.

As to point (1), I concur with the majority's ultimate conclusion that "[t]he [Intermediate Court of Appeals (ICA)] erred in affirming the [court's] inclusion of Tupuola on the special verdict form." Majority opinion at 24 (formatting altered). However, I would hold that under the specific facts of

this case, it was highly prejudicial to introduce the issue of Tupuola's culpability so late in the proceedings, and thus, the court abused its discretion by including him on the special verdict form.

When it denied Respondents' motion for leave to file a third-party action against Tupuola, the court expressed doubt that Tupuola's actions were relevant to Petitioner's theory of liability. The court stated that it was denying the motion for leave to file a third-party complaint because, in part, "there's the question of whether there really is a claim against [Tupuola] in light of the manner in which the complaint was drafted." Accordingly, Petitioner prepared and presented his case on the assumption that Tupuola's intentional conduct had been deemed unrelated to the issue of "whether [Respondents] were liable for not having provided any security at the [c]lub and/or for not having rendered assistance after the mugging." (Citation omitted.)

In that connection, according to Petitioner's assertions at oral argument, the jury learned about Tupuola's conduct, but it was made clear that Tupuola was not part of the case before the jury. Cf. Swietlowich v. Bucks County, 610 F.2d 1157, 1164 (3d Cir. 1979) (explaining that a trial judge who "decides to change . . . an earlier ruling . . . must also take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling" and finding that "the plaintiff

suffered no prejudice at trial . . . since she was fully prepared to meet the limitations defense"); Barcai v. Betwee, 98 Hawai'i 470, 488, 50 P.3d 946, 964 (2002) (Acoba, J., concurring, joined by Ramil, J.) (arguing that "[i]f, after trial has begun, a ruling made pretrial is modified or reversed, the trial court must adopt such measures as will mitigate any resulting prejudice"); Roxas v. Marcos, 89 Hawai'i 91, 124, 124 n.19, 969 P.2d 1209, 1242, 1242 n.19 (1998) (rejecting the appellants' argument that her stipulation to be substituted for deceased party was ineffective because the stipulation had been accepted by the trial court and relied upon by the appellees); State v. Dowsett, 10 Haw. App. 491, 495, 878 P.2d 739, 742 (1994) ("We hold, therefore, that before the court orders dismissal of a case because of the State's violation of [Hawai'i Rules of Penal Procedure] Rule 16, it must consider whether less severe measures would rectify prejudice caused to the defendant by the violation."), overruled on other grounds by State v. Rogan, 91 Hawai'i 405, 423, n.10, 984 P.2d 1231, 1249 n.10 (1999)); Marshall v. Osborn, 571 N.E.2d 492, 496 (Ill. App. Ct. 1991) (finding no abuse of discretion where the trial court reversed its original in limine ruling in part because "the trial court made a conscientious effort to minimize any surprise or potential prejudice by offering to rule before plaintiffs presented their case and by offering them the opportunity to reopen their case after the ruling [reversing the original determination]"). Given

the court's previous refusal to allow the third party claim against Tupuola and Petitioner's reliance thereon, it was an abuse of discretion to thereafter include Tupuola on the special verdict form over Petitioner's objection.

II.

Although I conclude that the court abused its discretion in including Tupuola on the special verdict form, with respect to point (2) I respectfully disagree that he had to be excluded as a matter of law, as the majority holds. See majority opinion at 28 (holding that "as a matter of law, exclusion is mandated when a party fails" to interplead a potentially liable party). It must be emphasized that contrary to the foregoing statement by the majority, "[t]his court has held that a court in its discretion may treat a non-party to the suit as a party for purposes of apportioning damages." Doe Parents No. 1 v. State of Hawai'i, 100 Hawai'i 34, 96, 58 P.3d 545, 607 (2002) (Acoba, J., concurring) (citing Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 423, 5 P.3d 407, 413 (2000) [hereinafter "Gump II"]); see also Gump II, 93 Hawai'i at 422, 5 P.3d at 412 (explaining that including nonparty joint tortfeasors on a special verdict from is "in the trial court's sound discretion" (emphasis added)). Hence, the majority's interpretation of the Gump cases as requiring a cross-claim as a prerequisite to apportionment is in direct contravention of the express language of Gump II.

III.

A.

The Gump cases arose from an incident in which the plaintiff, Linda Gump (Gump), slipped and fell on a McDonald's french fry while exiting a Wal-Mart store. Gump v. Walmart Stores, Inc., 93 Hawai'i 428, 433, 5 P.3d 418, 423 (App. 1999) [hereinafter, "Gump I"]. Gump filed suit against both McDonald's and Wal-Mart, alleging negligence and recklessness. Id. Prior to trial, Gump and McDonald's settled, and Gump requested that McDonald's be dismissed. Id. at 434, 5 P.3d at 424. On the second day of trial, the circuit court granted the motion and also "limited the introduction of evidence relating to McDonald's." Id.

The jury was provided a special verdict form which required it to determine only the relative liability of Gump and Walmart. See id. Notably, the special verdict form did not permit the jury to consider McDonald's as a potentially liable party. See id. The jury determined that Gump was 5% at fault and Wal-Mart was 95% at fault for Gump's injuries. Id.

B.

On appeal to the ICA, Wal-Mart contended, inter alia, that the circuit court "erred, as a matter of law, in dismissing settling co-defendant McDonald's from the action, excluding evidence of McDonald's' negligence at trial, and preventing apportionment of McDonald's' fault in the special verdict form."

Id. at 435, 5 P.3d at 425 (emphasis added). The ICA reiterated that the Uniform Contribution Among Tortfeasors Act (UCATA) defined joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Id. at 446, 5 P.3d at 436 (quoting Hawai'i Revised Statutes (HRS) § 663-11 (1993)) (emphasis added) (internal quotation marks omitted). It concluded that "[i]mplicit in these definitions is the notion that party status is not a prerequisite to joint tortfeasor status." Id. (emphasis added).

The ICA held that joint tortfeasors wishing to demand contribution from each other must litigate "the issue of proportionate fault" among themselves "by pleading in that action." Id. at 447, 5 P.3d at 437 (quoting HRS § 663-17(c)) (emphasis omitted). Thus, because Wal-Mart had failed to cross-claim against McDonald's, it had "failed to invoke its statutory right to contribution under the UCATA." Id. The ICA went on to explain that the trial courts have discretion to include non-parties on special verdict forms, but no obligation to do so. Id. (explaining that "whether the court takes such action [apportioning fault to a non-party joint tortfeasor] is a decision within the discretion, not the obligation, of the court"). It noted several cases in which the courts had

exercised that discretion.[1] The ICA distinguished those cases because they did not involve defendants that had "simply failed to assert [their] right to contribution." Id.

C.

On certiorari, in Gump II, this court affirmed the ICA's holding that because Wal-Mart had not filed a cross-claim for contribution against McDonald's, the circuit court did not err in excluding McDonald's from the special verdict form. 93 Hawai'i at 422, 5 P.3d at 412. This court also affirmed the ICA's holding that, "under appropriate circumstances[,] . . . non-parties may be included on a special verdict form." Id. (emphasis added). As to the liability of non-parties, this court reiterated that "[n]on-parties may be considered joint tortfeasors under the UCATA[.]" Id. (emphasis added). Specifically, this court said, "A party is liable within the meaning of [HRS §] 663-11 if the injured person could have recovered damages in a direct action against that party, had the injured person chosen to pursue such an action." Id. (emphasis added) (internal quotation marks and citations omitted). Elaborating on the "appropriate circumstances" for including non-

[1] In Kaiu v. Raymark Indus., Inc., 906 F.2d 806, 819 n.7 (9th Cir. 1992), the nonparty defendant was insulated from judgment by a stay imposed by a bankruptcy court. In Wheelock v. Sport Kites, Inc., 839 F. Supp. 730, 734 (D.Haw. 1993), the plaintiff had dismissed the included nonparty to preserve diversity jurisdiction. The ICA determined that Kaiu and Wheelock did not mandate that nonparty joint tortfeasors be included on special verdict forms. See Gump I, 93 Hawai'i at 447, 5 P.3d at 437. That court reasoned that the Kaiu and Wheelock courts had exercised their discretion to do so because "[i]nclusion in both cases . . . precluded prejudice to otherwise vigilant parties." Id. (emphasis added).

party joint tortfeasors on special verdict forms, this court pointed to (1) the bankruptcy stay in Kaiu, (2) the dismissal to preserve diversity jurisdiction in Wheelock, and (3) the acquiescence of the settling defendants in Nobriga v. Raybestos-Manhattan, Inc., 67 Haw. 157, 683 P.2d 389 (1984). Id. at 422-23, 5 P.3d at 412-13. However, nowhere did this court indicate that the foregoing were the only circumstances in which it would be appropriate to include a non-party defendant on a special verdict form.

IV.

In this case, as stated in Gump II, the filing of a cross claim is not a condition precedent to apportionment. See id. at 422, 5 P.3d at 412. Although Tupuola was not named as a party to this action, it is not disputed that had Petitioner brought suit against Tupuola, Petitioner could have recovered damages from him. See Troyer v. Adams, 102 Hawai'i 399, 402 n.1, 77 P.3d 83, 86 n.1 (2003) (holding that, in defining joint tortfeasors, "the basis of liability is not relevant, nor is the relationship among those liable for the tort" but rather, "[t]he point is that both tortfeasors are (at least) severally liable for the same injury to the plaintiff" (emphasis added) (citations, internal quotation marks, and brackets omitted)); Gump I, 93 Hawai'i at 446, 5 P.3d at 436 (holding that "party

status is not a prerequisite to joint tortfeasor status").[2] Thus, Tupuola was a potential joint tortfeasor with Respondents, and including him on the special verdict form was a matter within the court's discretion.

The contrary rule adopted by the majority, that the court was required, as a matter of law, to exclude Tupuola from the verdict form because he was not named as a party in the pleadings, would unnecessarily deprive the trial courts of their discretion in dealing with varied factual circumstances. In this case, Petitioner chose not to name Tupuola in his civil suit. Additionally, Respondents delayed filing a third-party complaint against Tupuola for approximately two years. The court declined to make Tupuola a party after such a prolonged delay, in part because Tupuola's actions were unrelated to Petitioner's theory of liability against Respondents, but then reversed itself by placing Tupuola on the verdict form. Based on these facts, I would hold that the court abused its discretion because, as discussed supra, the reversal of its earlier position unfairly prejudiced Petitioner.

V.

A.

As noted, in Gump II, this court listed circumstances in which it would be appropriate to include a nonparty on a jury

[2] Insofar as the majority interprets statutes relating explicitly to joint tortfeasors, see majority opinion at 24-27, it appears that the majority also concludes that Tupuola and Respondents were joint tortfeasors.

verdict form. The majority concludes that these circumstances were adopted as "exceptions" to the so-called "pleading requirement set forth in HRS § 663-17[3] either because of the infeasibility of pleading the nonparty into the case," majority opinion at 26 (citing Wheelock, 839 F. Supp. at 734 (plaintiff dismissed defendant to preserve diversity jurisdiction); Kaiu, 906 F.2d at 819 n.7 (nonparty defendant was insulated from judgment by a stay imposed by a bankruptcy court)), or "because the nonparties had agreed to be included on the special verdict [form,]" id. at 25-26 (citing Nobriga, 67 Haw. 157, 683 P.2d 389 (settling defendants were included on the special verdict form pursuant to the terms of their releases). Thus, except for these three "exceptions," Petitioner and the majority essentially treat interpleading the joint tortfeasor as a "condition precedent" to apportionment, a position that was expressly rejected in Gump II by this court. See 93 Hawai'i at 422, 5 P.3d at 412.

Nothing in Gump II indicates that the foregoing circumstances are to be treated as an exhaustive list of situations under which a non-party may be included on a special verdict. In fact, where the non-party joint tortfeasor committed an intentional tort and, therefore, would likely be apportioned a substantially greater percentage of fault than a negligent joint tortfeasor but is not amenable to judgment, the court could, within its discretion, include the intentional tortfeasor on the

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[3] HRS § 663-17 is quoted infra at note 7.

special verdict form. See, e.g., Doe Parents No. 1, 100 Hawai'i at 87, 58 P.3d at 598 (explaining, in dictum, that, if the negligent tortfeasor had been found liable for the conduct of the intentional tortfeasor under the theory of respondeat superior, liability would have to be apportioned, even though the intentional tortfeasor was judgment-proof); Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 87 Hawai'i 273, 278, 954 P.2d 652, 657 (App. 1998) [hereinafter, "Ozaki I"] (noting that the intentional tortfeasor was included on the special verdict form even though plaintiffs had received a default judgment against him).

Not only is the inclusion of non-party joint (intentional) tortfeasors consistent with precedent, it also comports with underlying judicial policies. Allowing the finder of fact to consider the role of a nonparty joint tortfeasor serves the truth-finding function of the litigation process. In that connection, precluding the fact-finder from considering a non-party joint tortfeasor's actions could obscure the truth of which entities contributed to the plaintiff's injuries and to what degree.[4] Thus, exclusion of a nonparty joint tortfeasor

[4] The majority claims the discussion of these policy considerations is a "mystery" to it. See majority opinion at 35. However, what is mystifying is the majority's abandonment of the express grant of discretion to trial courts this court so recently made in Gump II. The concern with the integrity of the truth-finding mission of litigation is no less relevant than the policy of promoting judicial efficiency, which the majority discusses at length. The importance of allowing the fact-finder to consider relevant information in reaching a verdict underscores the necessity of allowing trial courts broad discretion in determining the content of special verdict forms. Restricting that discretion, as the majority does here, directly contravenes (continued...)

> effectively denies the finder of fact the opportunity to determine legal causation -- that is, to determine which party's act or omission was a substantial fact in causing the plaintiff's injuries, a crucial element in determining liability in any tort cause of action. This is also crucial in the fairness of a system of civil fault . . . . By allowing the "empty chair" argument during the [remaining] joint tortfeasor's trial, the court will facilitate the determination of causal negligence, not liability, and enable the trier of fact to decide the degree of each actor's negligence or other fault. This way, the "empty chair" argument lessens the likelihood of prejudice to the [remaining] tortfeasor[.]

Marion L. Reyes-Burke, Recent Development, Keeping the (Good) Faith: Hawai'i's [sic] Good Faith Settlement After HRS Section [663-]15.5 and *Troyer v. Adams*, 26 U. Haw. L. Rev. 275, 304-05 (Winter 2003) (emphases added) (footnotes and some internal quotation marks omitted). Given the importance of the fact-finding function, leeway must be given the trial courts to formulate appropriate special verdict forms.[5]

Related to this point, the majority maintains that (1) excluding Tupuola from the special verdict form "would not have impeded the jury from its fact-finding objective[,]" and (2) "if the Respondents were concerned that, somehow, Tupuola's absence . . . would obscure the truth as to where the blame properly lay for [Petitioner's] injuries," their remedy was to

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[4](...continued)
this court's precedent in Gump II and the judicial policies discussed above.

[5] In this connection, the majority objects to the conclusion that excluding Tupuola from the verdict form as a matter of law could obscure the truth-finding mission of the jury. See majority opinion at 36 ("While a fact-finder, where relevant, can certainly take into account the 'role' of a nonparty in determining the liability of parties to an action, it does not follow that the nonparty should be included on the special verdict.") The point, of course, is that the question of whether the nonparty should be placed on the verdict forms is factually-laden, and appropriate discretion therefore must be afforded the trial judge, a proposition the majority apparently eschews.

properly plead him into the action. Majority opinion at 36 (emphasis added). Respectfully, these are straw arguments apparently intended to bolster the majority's position, and are not responsive to this opinion.

As to the first point, it is not disputed that, under the facts of this case, Tupuola's exclusion would not have prevented the jury from determining whether Respondents were negligent in failing to provide security or in failing to assist Petitioner. In fact, the majority simply ignores the statement herein that Tupuola's exclusion was necessary under the particular facts of this case, especially the court's prior ruling that Tupuola's actions were irrelevant to Petitioner's theory of liability. See supra at 9. The critical consideration is that, under different circumstances, the exclusion of a nonparty joint tortfeasor might impede the truth-finding function, and therefore, the inflexible rule crafted by the majority in this case is inappropriate.

As to the second point, the majority's criticism simply misstates the issue. It is evident that, pursuant to the Gump cases, the Respondents could have guaranteed Tupuola's presence by interpleading him. However, Respondents are not appealing a decision to exclude Tupuola on the grounds that it somehow prejudiced a verdict against them. To the contrary, it is Petitioner who contends that including Tupuola on the special verdict form obscured the issue of whether Respondents were

negligent in failing to provide adequate security and in failing to render aid when he was assaulted.

Petitioner attempted to avoid that confusion by (1) excluding Tupuola as a defendant in his complaint, and (2) objecting to Tupuola's inclusion on the special verdict form. Thus, Petitioner, unlike Wal-Mart in Gump and Respondents herein, took steps to protect his position. Based on the foregoing, the "misunderstanding" which the majority claims "infects" the analysis of Doe Parents No. 1 and Ozaki, see majority opinion at 36, is of its own creation.

B.

1.

As to this point, the majority declares that, pursuant to HRS §§ 663-12 (1993) and -17, "although a trial court has 'discretion' to include, or to decline to include, a non-party on the special verdict form, it does not, as a matter of law, have the authority to include a non-party who has not been brought into the case by pleading pursuant to" those statutes. Majority opinion at 27 (emphasis added). Respectfully, HRS §§ 663-12[6] and

[6] HRS § 663-12, entitled "Right of contribution; accrual; pro rata share[,]" provides that:

> The right of contribution exists among joint tortfeasors.
>
> A joint tortfeasor is not entitled to a money judgment for contribution until the joint tortfeasor has by payment discharged the common liability or has paid more than the joint tortfeasor's pro rata share thereof.
>
> A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(continued...)

663-17[7] apply to the issue of contribution, which is manifestly distinct from the issue of apportioning fault among all culpable parties. Thus, those statutes are inapposite to the issue of apportionment. Apportionment is related to the relative fault of the parties, whereas contribution concerns the relative liability of joint tortfeasors to each other. Thus, while HRS § 663-17 may require a joint tortfeasor to cross claim against his or her codefendants in order to obtain contribution, those statutes do not require that a person be named as a party in order to be considered a legal cause of the plaintiff's injury.

The plain language of those statutes indicates that they speak solely to the relationship of joint tortfeasors to each other. HRS § 663-12 first preserves the right of

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[6](...continued)

> When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares, subject to section 663-17.

(Emphases added.)

[7] HRS § 663-17 (1993 & Supp. 2007), entitled "Third-party practice; enforcement of right to contribution; unnamed defendants and third party defendants[,]" provides in relevant part that:

> (a) A pleader may, as provided by the rules of court, bring in as a third-party defendant a person not a party to the action who is or may be liable to the pleader or to the person claiming against the pleader, for all or part of the claim asserted against the pleader in the action . . . .
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> . . . .
>
> (c) As among joint tortfeasors who in a single action are adjudged to be such, the last paragraph of section 663-12 applies only if the issue of proportionate fault is litigated between them by pleading in that action.
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> . . . .

(Emphases added.)

contribution "among joint tortfeasors." (Emphasis added.) It then sets forth the circumstances under which one joint tortfeasor may demand contribution from another, and when the joint tortfeasor may not seek contribution. Id. Finally, the statute provides that if the joint tortfeasors are determined to have significantly disparate degrees of fault such that "equal distribution . . . of the common liability" among them would be "inequitable[,]" they will be required to pay their pro rata shares of the damages as determined by the apportionment of fault. Id.

Thus, HRS § 663-12 does not control when the fault of a joint tortfeasor may be considered in determining the legal cause(s) of a plaintiff's injuries. Rather, it speaks to the relationship between defendants who are determined to be legal causes of the plaintiff's injuries. In that connection, HRS § 663-17 provides that joint tortfeasors will be required to pay pro rata shares of the damages "only if the proportionate fault [of the joint tortfeasors] is litigated between them by pleading in that action." (Emphasis added.) Again, that statute does not concern whether the tortfeasor was a legal cause of the plaintiff's damages, but rather, whether the joint tortfeasors will be equally liable for those damages.[8]

[8] Relatedly, the majority's argument that including Tupuola on the special verdict form would not collaterally estop him from relitigating his proportion of fault in a subsequent action for contribution appears to be peripheral to the question at bar. Majority opinion at 29-30. Manifestly, this court is not faced with an action by Respondents attempting to recover pro rata contribution from Tupuola. Thus, the question of whether Respondents (continued...)

As applied to this case, HRS § 663-12 would instruct that, had Respondents and Tupuola each been found liable for Petitioner's injuries, either liable party could seek contribution from the other, provided that the party seeking contribution had paid more than its share of the damages. However, because Respondents did not successfully interplead Tupuola, the relative degree of fault between Respondents and Tupuola was not actually litigated in the pertinent action. Thus, HRS § 663-17 would operate to make Respondents equally liable with Tupuola as joint tortfeasors. Manifestly, then, HRS §§ 663-12 and -17 are not relevant to the issue of Tupuola's inclusion on the special verdict form.

2.

The majority takes issue with the foregoing analysis, deeming it necessary to relate the history of the UCATA. Majority opinion at 28-29. Respectfully, while this is interesting background, it has no bearing on the disposition of this case. It is true that the aforementioned statutes require a determination of apportionment before the right to pro rata

[8](...continued)
would hypothetically be permitted to pursue contribution under the UCATA is immaterial to whether the court had discretion to include Tupuola on the special verdict form and has no bearing on the question of whether it abused that discretion.

Although the majority implies otherwise, it has never been disputed that the UCATA's directive that the issues of proportionate fault and pro rata contribution be litigated in the same action promotes judicial efficiency. See id. at 30 n.10. However, what the majority posits as a concern is simply not relevant to Petitioner's argument that the court abused its discretion in including Tupuola on the special verdict form. Manifestly, this case does not involve joint tortfeasors seeking pro rata contribution from each other, therefore, the concerns about duplicative litigation are not pertinent here.

contribution may be enforced. Thus, where the rules governing contribution apply, so must the rules governing apportionment. However, the converse is not true. As demonstrated in Doe Parents No. 1 and the Ozaki cases, apportionment may be relevant even where contribution is unavailable. Thus, the majority's insistence that the UCATA provisions related to contribution govern the question of whether Tupuola could be included on the special verdict form at the court's discretion is logically unsound.

The majority charges that this opinion construes the language of HRS §§ 663-12 and -17 "in a vacuum" and "fails to take into account the paramount reason for the UCATA's existence." Majority opinion at 29. With all due respect, the analysis comports with the mandate that "[w]hen construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Paul v. Dep't of Transp., 115 Hawai'i 416, 426, 168 P.3d 546, 556 (2007) (quoting Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997)). As to the purpose of the UCATA, which is also pertinent to the construction of its language, see id., the title of the statute -- the Uniform Contribution Among Tortfeasors Act -- clearly indicates to whom it is applicable. Furthermore, the majority's emphasis on a so-called "telescoping mechanism," majority opinion at 29-30, is misplaced inasmuch as,

to the extent it can be discerned, "telescoping" the proper apportionment of liability and the corresponding pro rata contribution for Petitioner's damages among Respondents and Tupuola is not at issue in this case.

Ironically, although the majority asserts that this opinion's analysis of the UCATA provisions is inapt because "[i]f contribution is not possible, the UCATA is simply not implicated[,]" id. at 29, it is the majority that relies on those very provisions to support its contention that Tupuola's exclusion from the special verdict form was required as a matter of law. See id. at 28 (concluding that because "Respondents failed to litigate the issue of proportionate fault[,]" Tupuola "could not have been included on the special verdict form as a matter of law" pursuant to HRS § 663-17(c) (emphasis added)). Because the majority agrees that "[t]he UCATA was designed to facilitate" joint tortfeasors "obtain[ing] contribution from one another," id. at 29, it apparently concedes that the UCATA is not applicable in the instant case, given that Respondents are not seeking pro rata contribution from Tupuola. Accordingly, it follows that the majority's reliance on the UCATA, as the law which purportedly mandates the exclusion of nonparty joint tortfeasors generally, is misapplied.

Furthermore, the case law of this jurisdiction indicates that, in cases involving an intentional tortfeasor and a negligent tortfeasor, it is acceptable to include the

intentional tortfeasor on the verdict form, regardless of whether the plaintiff may actually recover any damages from the intentional tortfeasor, i.e., whether the intentional tortfeasor is a party to the action. The cases discussed below, although not dispositive of the outcome here, demonstrate that the decision to include a non-party joint tortfeasor is a matter for the court's discretion.[9] Moreover, allowing the fact finder to consider the fault of all joint tortfeasors, whether or not judgment may be entered against them, serves the underlying policy of assigning tort liability in proportion to fault.

VI.

In Doe Parents No. 1, two elementary school students [collectively, the girls] and their parents [collectively, the plaintiffs] sued, inter alia, the Department of Education (DOE) and Lawrence Norton (Norton), the girls' teacher, after Norton allegedly molested the girls. 100 Hawai'i at 41, 52, 58 P.3d at 552, 563. After finding the DOE liable for its own negligent

[9] Respectfully, the majority's heightened response to the analysis of Doe Parents No. 1 and Ozaki II, see majority opinion at 33-35, is wrongly directed. Specifically, this opinion does not obscure (1) the fact that the intentional tortfeasors in those cases were initially named as defendants, and thus, "pleaded in" to the proceedings although they were subsequently rendered immune from judgment, (2) that the language in Doe Parents No. 1 relied upon is dictum, or (3) that the central holding in Ozaki II is inapplicable to the instant case, the main objections raised by the majority. See majority at 34-35.

The majority's position is that unless a party has pled against a joint tortfeasor, a non-party joint tortfeasor cannot be included on the verdict form. See majority opinion at 27 (holding that "as a matter of law, exclusion is mandated when a party fails to protect its rights"). As discussed infra, this is plainly contrary to the directive in Gump II that the content of the special verdict form is a matter for the trial court's discretion. See Gump II, 93 Hawai'i at 422, 5 P.3d at 412 (explaining that "[n]on-parties may be considered joint tortfeasors under the UCATA and, in the trial court's sound discretion, may be included on a special verdict form" (emphasis added)).

actions, the circuit court, in assessing damages, considered the "substantial factor" of Norton's intentional conduct despite the fact that it had previously dismissed all claims against Norton "[b]ecause of a contemporaneous voluntary bankruptcy proceeding involving [him.]" Id. at 56, 58 P.3d at 567.

On appeal, this court stated, in dictum, that if the DOE had been found liable under the plaintiffs' alternative theory of liability (respondeat superior), then the DOE would have been liable only for its pro rata share of the plaintiffs' damages, i.e., it would have been necessary to apportion liability among the joint tortfeasors.[10] Id. at 87, 58 P.3d at 598. Accordingly, the circuit court would have had to consider Norton's degree of fault, even though plaintiffs could not recover damages from him, to determine the DOE's pro rata share.[11] Id.

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[10] The central holding in Doe Parents No. 1 was based on the non-retroactivity clause of HRS § 663-10.5, which made the apportionment between governmental tortfeasors and other tortfeasors applicable only to "causes of action based upon acts or omissions occurring on or after June 22, 1994[.]" 100 Hawai'i at 86, 58 P.3d at 597 (quoting 1994 Haw. Sess. L. Act 214, § 4 at 517) (internal quotation marks and emphasis omitted). Inasmuch as the negligent retention and supervision of Norton occurred before June 22, 1994, the DOE was not protected from full joint and several liability under HRS § 663-10.5. Id. at 87, 58 P.3d 598. Thus, the majority held that the circuit court had erred in apportioning liability between the DOE and Norton. Id. at 88, 58 P.3d at 599. Inasmuch as HRS § 663-10.5 is not implicated in the instant case, that analysis is inapplicable here.

[11] The majority takes issue with this analysis, apparently believing that this opinion means to distinguish the facts of Doe Parents No. 1 from the majority's resolution of the instant case. See majority opinion at 34-35. The majority is mistaken. As noted before, Doe Parents No. 1 is cited as an example where, under the circumstances, the court did not abuse its discretion in including a joint tortfeasor on the special verdict form despite the fact that the individual was judgment-proof. It appears that the majority's objection to this reliance on Doe Parents No. 1 is that it falls under the "exceptions to the explicit 'pleading' requirement," majority opinion at 26,

(continued...)

Similarly, Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 87 Hawai'i 265, 954 P.2d 644 (1998) [hereinafter, "Ozaki II"], considered the proper application of Hawaii's joint and several liability statutes where the potentially liable parties had differing levels of culpability. In that case, Cynthia Dennis (Cynthia) was murdered by her estranged boyfriend, Peter Sataraka (Sataraka), in her apartment in the Discovery Bay condominium (Discovery Bay). Id. at 266, 954 P.2d at 645.

Cynthia's estate and her mother, Teruko Dennis (Teruko) [collectively, the plaintiffs] filed suit against Sataraka, the intentional tortfeasor, and Discovery Bay, the negligent tortfeasor. Id. at 267, 954 P.2d at 646. The plaintiffs obtained default judgments against Sataraka, the intentional tortfeasor. Ozaki I, 87 Hawai'i at 277, 954 P.2d at 656. Despite Sataraka's absence from the proceedings, he was included on the special verdict form. Id. at 278, 954 P.2d at 657. The jury attributed ninety-two percent of the fault to Sataraka's intentional conduct, five percent to Cynthia's negligent conduct,

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[11](...continued)
imposed by that majority in that Norton, similar to the defendant in Kaiu, was immune from judgment pursuant to an order of the bankruptcy court, id. at 34.

However, because, in my view, the "exceptions" enumerated by the majority, id. at 26, are not exceptions to a bright line rule but, rather, examples of circumstances in which the court would not abuse its discretion by including a non-party joint tortfeasor on a special verdict form, the majority's assertion that Doe Parents No. 1 is consistent with its opinion is inapposite to this concurrence's discussion of that case. It is reiterated that the disagreement is not concerned with whether the inclusion of Norton on the special verdict form is compatible with the result under the majority's rule here, but whether the majority's categorical approach is compatible with the discretion afforded the trial courts in formulating the content of special verdict forms.

and three percent to Discovery Bay's negligent conduct. Id. The circuit court ruled that because "[Cynthia's] negligence was greater than" Discovery Bay's, the plaintiffs had not prevailed against Discovery Bay. Id.

On appeal, the ICA disagreed, holding that, pursuant to the UCATA, as adopted by the Hawai'i Legislature, "joint tortfeasors are defined by HRS § 663-11 as 'two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.'" Id. at 284, 954 P.2d at 663 (emphasis added). "Applying [that] definition of joint tortfeasors[,]" the ICA concluded that "Discovery Bay and Sataraka [were] joint tortfeasors." Id.

On writ of certiorari, this court held that HRS § 663-31 (1993), the comparative negligence statute, did apply to Discovery Bay, because "negligence was the sole theory advanced against it[.]" Ozaki II, 87 Hawai'i at 270, 954 P.2d at 649 (emphasis omitted). Thus, this court concluded that, because Cynthia's conduct was more negligent than Discovery Bay's conduct, she could not recover any damages from Discovery Bay. Id. However, because Discovery Bay and Sataraka could have been joint tortfeasors under HRS § 663-11 -- if the jury had determined that Discovery Bay's percent of fault was greater than Cynthia's, id. -- this court did not intimate that Sataraka's

role in causing the plaintiffs' injuries should not have been considered in determining the relative fault of the parties.[12]

VII.

Doe Parents No. 1 and Ozaki II are examples of precedent in which the fault of the intentional tortfeasor was included in the special verdict form, although any finding of liability against the individual would not result in a judgment against him. Thus, these cases demonstrate that there may be circumstances in which a determination of the proportional fault of a nonparty joint tortfeasor may be appropriately considered. Given this opinion's position that the content of special verdict forms are within the province of the court's discretion and the majority's rejection of that proposition, it is difficult to discern why the majority claims to be "confound[ed]" by reliance on cases where the courts properly exercised that discretion. See majority opinion at 35.

In that connection, the majority asserts that this opinion "undertak[es] to demonstrate an inconsistency with our present holding that, as a matter of law and pursuant to HRS §§ 663-12 and -17, a nonparty not pleaded into the case cannot be

[12] In focusing on the Ozaki II court's reliance on HRS § 663-31 to distinguish the Ozaki cases from the instant case, see majority opinion at 35, for some unknown reason, the majority attempts to discount the analysis herein by emphasizing distinctions which have already been acknowledged, see supra note 8. Despite that fact that the central holding of Ozaki II is not dispositive of the instant case, it aptly demonstrates that the specific circumstances of any particular case are of paramount importance to a court's exercise of its discretion to consider the proportionate fault of a non-party joint tortfeasor.

placed on the special verdict [form] absent the appropriate circumstances set out in Gump II." Id. at 34. The majority resolves this perceived inconsistency by noting that "Norton's discharge of debt through bankruptcy proceedings is akin to the nonparty in Kaiu, who was not named as a party due to a bankruptcy stay." Id. (citation omitted). To reiterate, the essential critique of the majority's position is that Gump II held that the inclusion of nonparty joint tortfeasors on a special verdict form falls within the court's discretion and Doe Parents No. 1 and Ozaki are examples of cases where the circumstances supported the trial court's decision to exercise its discretion to consider the fault of such a tortfeasor. Accordingly, assuming, arguendo, that the facts of those cases are "compatible with [the majority's] analysis" in this case, id. at 35, insofar as the nonparty joint tortfeasors in Doe Parents No. 1 and Ozaki were named as parties at some point during the proceedings, the fact remains that the inclusion of Norton and Sataraka on the respective verdict forms remained within the court's discretion. In my view, the decision in this case to limit the court's discretion regarding the content of special verdict forms is patently inconsistent with Gump II, regardless of whether the facts of Doe Parents No. 1 and Ozaki fall within the "exceptions" identified by the majority.

The majority reiterates Petitioner's argument that "according to Gump I and Gump II, although placing nonparties on

the special verdict form is a matter within the trial court's discretion, it is an abuse of discretion to do so where the defendant inordinately delays naming the nonparty as an additional party for tactical reasons and assumes the risk of non-inclusion." Id. at 24 (citation and internal quotation marks omitted). In my view the court abused its discretion under the circumstances of this case, not because Tupuola had never been made a party, but because the court had previously ruled that Tupuola's fault was not relevant to Petitioner's theory of liability against Respondents and Petitioner relied on that ruling in presenting his case. However, there can be circumstances where a joint tortfeasor has never been made a party, but it would nevertheless be within the court's discretion to include him or her on the verdict form. The Gump cases and those cases discussed supra expressly allow for the inclusion of nonparty joint tortfeasors on special verdict forms.

VIII.

A.

As to point (3) above, I agree that the improperly given instruction on the foreseeability of criminal acts under ordinary circumstances, necessarily infected the jury's verdict.[13] However, I would also hold that the dram shop

[13] The improper foreseeability instruction, as the majority notes, "was prejudicially erroneous" in that it was "inconsistent and misleading" because it instructed the jury as to liability for criminal acts under "ordinary circumstance[s]." Majority opinion at 12-13 (citations and internal quotation marks omitted). Contrarily, this case involved liability for criminal acts where Respondents had a "special relationship" with Petitioner,

(continued...)

liability instructions were misleading and prejudicial because they were unrelated to the issues presented to the jury. Thus, on remand, I would exclude those instructions.

Related to the dram shop liability instructions, in Ono v. Applegate, 62 Haw. 131, 136, 612 P.2d 533, 538 (1980), this court established that "a person injured by an inebriated tavern customer [may] recover from the tavern that provided liquor to the customer." (Footnote omitted.) In Bertelmann v. Taas Assocs., 69 Haw. 95, 100, 735 P.2d 930, 933 (1987), this court clarified that such relief did not extend to the intoxicated client (adopting the majority view and "reject[ing] the contention that intoxicated liquor consumers can seek recovery from the bar or tavern which sold them alcohol"). Rather, "[d]runken persons who harm themselves are solely responsible for their voluntary intoxication and cannot prevail under a common law or statutory basis." Id. (citation omitted).

Thus, this court declared that "in the absence of harm to an innocent third party, merely serving liquor to an already intoxicated customer and allowing said customer to leave the premises, of itself, does not constitute actionable negligence." Id. at 101, 735 P.2d at 934 (citation and footnote omitted). The underlying rationale of this limitation on dram shop liability was that the statutes prohibiting the sale of alcohol to persons

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[13](...continued)
and therefore, the circumstances of the assault on Petitioner were not "ordinary." Id. at 12 (citations and internal quotation marks omitted).

who were already intoxicated was "to protect the general public from drunk driving accidents, not to reward intoxicated liquor consumers for the consequences of their voluntary inebriation." Winters v. Silver Fox Bar, 71 Haw. 524, 528, 797 P.2d 51, 53 (1990) (emphasis added).[14]

B.

Manifestly, the doctrine of dram shop liability is not relevant. Petitioner claims that the lack of security and Respondents' failure to render aid were a legal cause of his injuries. Significantly, he does not claim that those injuries were the result of Respondents selling or serving alcohol to either him or Tupuola.[15] Thus, even assuming, arguendo, that the dram shop liability instructions were given to clarify the contours of Respondents' potential liability, the instructions

[14] Thus, it is not surprising that this state's cases brought on the theory of dram shop liability (or arguing for an extension of that doctrine) arise from drunk driving accidents. Reyes v. Kuboyama, 76 Hawai'i 137, 139, 870 P.2d 1281, 1283 (1994) (plaintiff was injured in car accident caused by intoxicated minor who was served alcohol which the defendant had sold to another minor); Winters, 71 Haw. at 526, 797 P.2d at 52 (plaintiff's decedent was killed in a car accident after being sold alcohol by defendant); Feliciano v. Waikiki Deep Water, Inc., 69 Haw. 605, 606, 752 P.2d 1076, 1077 (1988) (plaintiff, who was rendered quadriplegic when he drove his truck off the road, argued that defendant's aggressive sales policy "constituted a breach of the duty of a bar or tavern to avoid affirmative acts that increase the peril to an intoxicated customer"); Bertelmann, 69 Haw. at 96, 735 P.2d at 931 (plaintiffs' decedent was killed in a single-car crash after being served alcohol by defendant); Ono, 62 Haw. at 132, 612 P.2d at 536 (defendant sold alcohol to already-intoxicated customer who subsequently caused an automobile accident in which plaintiffs were injured); Faulk v. Suzuki Motor Co., 9 Haw. App. 490, 495, 851 P.2d 332, 333 (1993) (holding that defendant, "a social host server of alcoholic beverages, . . . was not liable for injuries his intoxicated guest . . . negligently caused to [plaintiff] in an automobile accident").

[15] In this regard, the majority's reliance on the fact that Petitioner asserted that the club was selling or serving alcohol on the night of the incident is misplaced. See majority opinion at 14. The critical point is that Petitioner did not assert this as a theory under which Respondents would be liable for his injuries.

were so disconnected from Petitioner's theory of the case and the evidence presented to the jury, that it must be concluded that they were prejudicially misleading. See State v. Schmidt, 886 A.2d 854, 863 (Conn. App. 2005) (upholding trial court's decision not to give defendant's requested instruction because the instruction "did not logically relate to the issues to be determined by the jury"); Cole v. Raut, 663 S.E.2d 30, 33 (S.C. 2008) (holding that "[a] jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial" (emphasis added) (citation omitted)).

Admittedly, testimony about the club's sale of alcohol was presented. In that connection, (1) during Petitioner's opening statement, he stated that the evidence would show that (a) Respondents were "allowing the sale of alcohol on their premises," and (b) Respondents had "knowledge of drinking and . . . the problems that would occur," but, to save money, did not hire security; (2) during Petitioner's direct examination, he testified that (a) the cab driver asserted that he could drink at the club after hours, and (b) that he "was asked for money to get more alcohol"; (3) during Respondent's cross-examination of Petitioner, he testified that he thought the club "was a regular bar where beer was regularly sold"; (4) during Petitioner's redirect examination, he confirmed his earlier statement to police that he was "not sure if they were selling [alcohol], they

must have been, it was in a beer cooler"; (5) during Petitioner's direct examination of Kyong Suk Son (Son),[16] who owned the Club from 1993 to 2000, he questioned her about whether people could purchase alcohol at the club; (6) during Respondent's cross examination of Yu, she denied having "sold or given away alcoholic beverages to customers" in the club; (7) during Petitioner's closing argument, he posited that the club "was a business establishment that made money catering to members of the drinking public after-hours."

However, both parties emphasized that the issue of the club selling or serving alcohol was tangential to the issues before the jury. During closing argument, Petitioner first stated that "[w]e're not here to enforce the liquor laws for the City and County of Honolulu. We're here to determine whether or not it was foreseeable that [Petitioner] or anybody else could well meet a customer who was either inebriated or looking for trouble between 4:00 and 6:00 a.m." (Emphasis added.) Respondents countered that it was unclear "why there was all this testimony about whether beers were served, [and] where they came from. There's no connection to [the club]. . . . I suggest to you that evidence was brought up just to try to smear the club . . . ." (Emphasis added). In his rebuttal, Petitioner addressed this contention, informing the jury that "[t]he reason [he] brought in testimony about serving liquor was because

[16] Son and Karin Hyon Suk Yu (Yu), who started managing the Club in 1999 and purchased it in 2000, were called by Petitioner as adverse witnesses.

[Respondents] had a dangerous operation going. They had drinking people after hours, they were taking the spillover from the bars at night." (Emphasis added.)

However, rather than a basis for liability, the question was whether the alleged practice of selling alcohol created a dangerous situation from which Respondents were obligated to protect Petitioner. Accordingly, I respectfully disagree with the majority's holding that the dram shop liability jury instructions[17] were "a prophylactic act, which clarified the contours of the Respondents' potential liability." Majority opinion at 15. Because Respondents' liability was not premised on injuries resulting from a patron's intoxication, dram shop liability was not germane to the issues before the jury.

IX.

For the reasons stated above, I concur that the court's March 5, 2004 judgment should be vacated and the case remanded for a new trial, but on the grounds specified.

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[17] The instructions complained of informed the jury that:

> Intoxicated liquor consumers may not seek recovery from the establishment which sold them alcohol; they are solely responsible for their own voluntary intoxication.
>
> In the absence of harm to an innocent third party, merely serving liquor to an already intoxicated customer and allowing said customer to leave the premises does not constitute actionable negligence.

(Emphasis added.)