*** FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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ROGER SCOTT MOYLE, Plaintiff-Appellant-Petitioner,

vs.

Y & Y HYUP SHIN, CORP., and TTJJKK INC., both d/b/a DO RE MI KARAOKE Defendants-Appellees-Respondents.

NO. 26582

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 01-1-2747)

SEPTEMBER 11, 2008

MOON, C.J., LEVINSON, AND DUFFY, JJ., NAKAYAMA, J., CONCURRING AND DISSENTING SEPARATELY, AND ACOBA, J., CONCURRING SEPARATELY

AMENDED OPINION OF THE COURT BY LEVINSON, J.

On February 21, 2008, the plaintiff-appellant-petitioner Roger Scott Moyle, as personal representative of the estate of Richard Todd Moyle (Moyle), deceased,[1] filed an application for a writ of certiorari, urging this court to review the published opinion of the Intermediate Court of Appeals (ICA) in Moyle v. Y & Y Hyup Shin Corp., 116 Hawai'i 388, 173 P.3d 535 (App. 2007). Moyle argues that the ICA gravely erred in affirming the circuit court's March 5, 2004 final judgment, because the circuit court: (1) incorrectly instructed the jury as to the foreseeability of "criminal acts" in a premises liability negligence case; (2) erred in requiring Moyle to lay a

[1] Richard Todd Moyle died on August 31, 2004. Roger Scott Moyle was substituted as plaintiff-appellant by order of this court on December 21, 2004.

foundation prior to admitting certain police reports into evidence; (3) incorrectly instructed the jury as to the duty to obtain police assistance and medical aid for an assaulted club patron in a premises liability negligence case; (4) incorrectly instructed the jury as to liability for selling alcohol to intoxicated customers in a premises liability negligence case "with respect to providing security and aid"; (5) incorrectly instructed the jury as to the foreseeability of a "dangerous condition" in a premises liability case resulting from a "mode of operation"; (6) incorrectly included a non-party on the special verdict form; and (7) erred in "denying a new trial after clear and convincing relevant and material evidence was found[] proving that [the defendants-appellees-respondents Y & Y Hyup Shin Corp., TTJJKK Inc., and unnamed Doe individuals and entities' (collectively, the Respondents')] trial representatives had lied about who actually owned the club at the time [Moyle] was injured."

For the reasons discussed herein, we hold that the ICA erred in concluding (1) that the jury instructions regarding the foreseeability of third-party criminal acts given by the circuit court were not defective and (2) that the circuit court correctly included a non-party on the special verdict form. We therefore vacate the ICA's November 23, 2007 judgment and the circuit court's March 5, 2004 judgment. This matter is remanded to the circuit court for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

On the evening of September 18, 1999, until approximately 4:00 a.m., Moyle patronized the Irish Rose, a club in Waikīkī, where he had "a few drinks." The Irish Rose closed at 4:00 a.m., at which time Moyle moved on to the Do Re Mi Club[2] (the club) by taxi, arriving at approximately 4:20 a.m. Moyle spent roughly two hours in the club, where he drank two to three beers. At the club he met another patron, Simi Tupuola (Tupuola). As Moyle was exiting the back door of the club at about 6:00 a.m., he was tripped by Tupuola at the threshold of the door and fell onto the sidewalk. Tupuola assaulted and robbed Moyle, seriously injuring him. The assault and robbery took place on the sidewalk outside the rear of the club. Moyle called the police on his cellular phone and reported the incident.

B. Procedural Background

On September 19, 2001, Moyle filed a complaint in the circuit court against the Respondents. The complaint sought damages from the Respondents and alleged that his injuries were sustained as a "direct and proximate result" of the Respondents' "negligence, actions and/or omissions."

Nearly two years later, on July 9, 2003, the Respondents filed a motion for leave to file a third-party

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[2] Kyong Suk Son was the owner of TTJJKK, Inc., and owned the club from 1993 until approximately 1999. Karin Hyon Suk Yu was an owner of Y & Y Hyup Shin Corp., which purchased the club at some point between 1999 and September 2000.

complaint against Tupuola, claiming that the facts demonstrated that Tupuola was responsible for Moyle's injuries. The circuit court denied the motion on August 1, 2003, stating:

> This case has been pending since September, 2001. So I think it's rather untimely with an upcoming trial four months away. And also I think there's at least a question about what's the main reason [for the filing of the motion]. But in addition, there's the question of whether there really is a claim for contribution against Mt. Tupuola in light of the manner in which the complaint was drafted.

Jury trial began on February 11, 2004. Moyle testified on his own behalf, describing the events of the night of the incident. Moyle expressed a belief that the club was selling patrons alcohol on the night of the incident. He further testified that he consumed several alcoholic beverages prior to his arrival at the club and "two or three beers" at the club. Moyle next called Kyong Suk Son (Son) to testify, who stated that she sold the club to Karin Hyon Suk Yu (Yu) in 2000 and was not managing the club on the night of the incident. Finally, Moyle called Yu as a witness, who testified that she was one of the owners of the club at the time of the assault.

At the conclusion of the trial, the following jury instructions were given over Moyle's objections:

> Negligence is doing something which a reasonable person would not do or failing to do something which a reasonable person would do. It is the failure to use that care which a reasonable person would use to avoid injury to himself, herself, or other people or damage to property.
>
> In deciding whether a person was negligent, you must consider what was done or not done under the circumstances as shown by the evidence in this case.
>
> In determining whether a person was negligent, it may help to ask whether a reasonable person in the same situation would have foreseen or anticipated that injury or damage could result from that person's action or inaction. If such a result would be foreseeable by a reasonable person and if the conduct

> reasonably could be avoided, then not to avoid it would be negligence.
>
> Business establishments that hold themselves open to the public, such as proprietors of bars and taverns and clubs where liquor is allowed or known to be on the premises, owe their customers a specific duty to exercise reasonable care to protect them from foreseeable injury at the hands of other patrons.
>
> A landholder only has a duty to protect against criminal acts of third persons if such acts are reasonably foreseeable.
>
> Under ordinary circumstances, criminal acts are not reasonably to be expected, and are so unlikely in any particular instance that the burden of taking continual precautions against them almost always exceeds the apparent risks.
>
> There can be no liability for civil damages against a person at the scene of a crime for failure to obtain assistance from law enforcement or medical personnel. Therefore you may not find in favor of the plaintiff and against either or both defendants in this case even if you find that one or both defendants failed to obtain assistance. A person cannot be sued for failure to summon assistance under Hawai[']i law.
>
> 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.

Moyle also objected to Tupuola's name being placed on the special verdict form for purposes of apportioning fault. Upon concluding its deliberations, the jury rendered a verdict in favor of the Respondents, which allocated responsibility for the incident thusly: (1) zero percent responsibility for Y&Y Hyup Shin Corp.; (2) zero percent responsibility for TTJJKK Inc.; (3) five percent responsibility for Moyle; and (4) ninety-five percent responsibility for Tupuola. The jury also found Moyle's damages to be $0.00. Judgment was entered on March 5, 2004.

On May 15, 2004, Moyle filed a motion requesting that the circuit court set aside the judgement, grant a new trial, and impose sanctions on the Respondents. He claimed that the

Respondents perjured themselves in their testimony on material issues in the case and that the circuit court committed reversible error in including Tupuola on the special verdict form. On April 20, 2004, the circuit court denied the motion. On May 19, 2004, Moyle filed a timely notice of appeal.

C. Appellate Proceedings

On appeal before the ICA, Moyle argued that the circuit court erred in: (1) excluding police reports at trial that allegedly would have impeached witness testimony adduced by the Respondents; (2) giving incorrect jury instructions on (a) the foreseeability of criminal acts in a premises liability negligence case, (b) an establishment's duty to obtain law enforcement and/or medical assistance for an injured crime victim who is assaulted on its premises, and (c) the law with respect to the liability of an establishment selling alcohol to intoxicated consumers; (3) refusing to instruct the jury properly as to the liability of a business establishment for premises liability negligence where it adopts a marketing plan or general mode of operation that produces a dangerous condition; (4) including Tupuola's name on the special verdict form; and (5) denying Moyle's motion for, inter alia, a new trial.

On November 8, 2007, the ICA issued a published opinion affirming the circuit court's judgment. See Moyle, 116 Hawai'i at 403, 173 P.3d at 550. The ICA held that (1) the circuit court did not err in excluding the police reports because Moyle "fail[ed] to address all of the alternative bases given by the circuit court for [their] exclusion," id. at 396, 173 P.3d

at 543; (2) although the circuit court's instruction on negligence failed to instruct the jury to evaluate foreseeability in light of the totality of the circumstances, Moyle invited the error, and there was no plain error in giving the instruction because the issue did not pertain to the integrity of the fact-finding process, id. at 397-400, 173 P.3d at 544-47; (3) the circuit court did not err in giving its jury instruction regarding a bystander's duty to assist, id. at 400-01, 173 P.3d at 547-48; (4) the circuit court did not err in declining to give Moyle's proposed jury instruction on a business's mode of operation, id. at 401, 173 P.3d at 548; (5) because Moyle "could have pursued an action for his injuries against Tupuola," but elected not to, the circuit court did not abuse its discretion by including Tupuola's name in the special verdict form, id. at 402, 173 P.3d at 549; and (6) the circuit court did not abuse its discretion in denying Moyle's motion for a new trial, because Moyle "failed to raise any arguments or offer any evidence that indicate fraud on the court ha[d] occurred[,]" id. at 403, 173 P.3d at 550. On November 23, 2007, the ICA filed its judgment on appeal.

On February 21, 2008, Moyle filed a timely application for a writ of certiorari. This court accepted the application on March 4, 2008 and heard oral argument on July 3, 2008.

II. STANDARDS OF REVIEW

A. Application For A Writ Of Certiorari

The acceptance or rejection of an application for a writ of certiorari is discretionary. Hawai'i Revised Statutes (HRS) § 602-59(a) (Supp. 2007). In deciding whether to grant the application, this court considers whether the ICA's decision reflects "(1) [g]rave errors of law or of fact[] or (2) [o]bvious inconsistencies . . . with [decisions] of th[is] court, federal decisions, or [the ICA's] own decision[s]" and whether "the magnitude of those errors or inconsistencies dictat[es] the need for further appeal." HRS § 602-59(b).

B. Admissibility Of Evidence

> As a general rule, this court reviews evidentiary rulings for abuse of discretion. Kealoha v. County of Hawai'i, 74 Haw. 308, 319, 844 P.2d 670, 676 (1993). However, when there can only be one correct answer to the admissibility question, or when reviewing questions of relevance under [Hawai'i Rules of Evidence (HRE)] Rules 401 and 402, this court applies the right/wrong standard of review. Id. at 319, 844 P.2d at 676; State v. White, 92 Hawai'i 192, 204-05, 990 P.2d 90, 102-03 (1999).

Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008).

C. Jury Instructions

"'The standard of review for a trial court's issuance or refusal of a jury instruction is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.'" Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawai'i 286, 297, 141 P.3d 459, 470 (2006) (quoting State v. Haili, 103 Hawai'i 89, 101, 79 P.3d 1263, 1275 (2003)).

III. DISCUSSION

A. The ICA Erred In Holding That The Circuit Court's Jury Instructions Were Not Defective.

Moyle contends that the circuit court instructed the jury improperly on the issues of negligence and foreseeability with inconsistent, confusing, and contradictory instructions. Moyle further argues that, when read together, the instructions not only failed to inform the jury that "foreseeability" should be determined by the "totality of the circumstances" test, but that they also misfocused the jury by instructing it on matters of alleged negligence that were not before it for decision. This court reviews the circuit court's issuance or refusal of a jury instruction on the basis of whether, when read and considered as a whole, the instructions given are "'prejudicially insufficient, erroneous, inconsistent, or misleading.'" Stanford Carr, 111 Hawai'i at 297, 141 P.3d at 470 (quoting Haili, 103 Hawai'i at 101, 79 P.3d at 1275).

1. Instructions regarding foreseeability of third-party criminal acts

Moyle argues that the jury was not correctly instructed regarding the foreseeability of third-party criminal acts. The following instructions were given by the circuit court:

> Business establishments that hold themselves open to the public, such as proprietors of bars and taverns and clubs where liquor is allowed or known to be on the premises, owe their customers a specific duty to exercise reasonable care to protect them from foreseeable injury at the hands of other patrons.
>
> A landholder only has a duty to protect against criminal acts of third persons if such acts are reasonably foreseeable.
>
> Under ordinary circumstances, criminal acts are not reasonably to be expected, and are so unlikely in any particular instance that the burden of taking

> continual precautions against them almost always exceeds the apparent risks.

The instruction in the first paragraph was originally proposed by Moyle as Plaintiff's Proposed Instruction No. 5. The proposed instruction was given by agreement as modified by the circuit court, which removed the second paragraph: "Such a duty is said to arise from a 'special relationship' which such business establishments have with their public invitees, to protect them against unreasonable risk of physical harm, and to give them first aid after they know or have reason to know that they have been injured, and to care for them until they can be cared for by others." The instruction in the second paragraph was proposed by the circuit court as Court's Instruction A and was given by agreement. The instruction in the third paragraph, the Defendants' Requested Jury Instruction No. 3 [hereinafter, the "criminal acts instruction"], was given over Moyle's objection, which he elucidated thusly in the circuit court's chambers:

> [The court]: [The criminal acts instruction] will be given as modified over objection by [Moyle]. The modification is at the beginning[;] we're inserting three words, "under ordinary circumstances."
>
> [Moyle]: The objection here is very clear under the Maguire[v. Hilton Hotels Corp., 79 Hawai'i 110, 113-15, 899 P.2d 393, 396-98 (1995),] case. The way it [is] worded here begs the question. The issue here before the factfinder, the jury, is whether in the circumstances of this case[,] according to Maguire[,] it was reasonably foreseeable that this kind of criminal act might occur. This instruction starts off by assuming the negative of what is supposed to be decided by [the] trier of fact. It says "under ordinary circumstances criminal acts

> are not reasonably to be expected." Well, it's the facts that will determine whether or not it's reasonably to be expected under the Maguire standard, and there is really no such thing as "under ordinary circumstances" now.

The law with respect to a landowner's liability for the criminal acts of third parties is clear in Hawai'i. This court has generally declined to impose a duty on landowners to protect against the criminal acts of a third party, inasmuch as, "under ordinary circumstances, criminal acts are not reasonably to be expected, and are so unlikely in any particular instance that the burden of taking continual precautions against them almost always exceeds the apparent risk." Doe v. Grosvenor Properties (Hawaii) Ltd., 73 Haw. 158, 162, 829 P.2d 512, 515 (1992). However, when there is a "special relationship" between a landowner and someone on its property, the landowner has a duty to protect the person from the criminal acts of third parties if those criminal acts are "reasonably foreseeable." Id. at 163-65, 829 P.2d at 515-16; Maguire, 79 Hawai'i at 113-15, 899 P.2d at 396-98. One such "special relationship" between parties is that of the business visitor, one who "is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Grosvenor Properties, 73 Haw. at 164, 829 P.2d at 515-16 (citing Restatement (Second) of Torts § 332 (1965)).

The Respondents' retort to Moyle's contention that the above sequence of instructions, particularly the criminal acts instruction, were confusing and contradictory is to note that, inter alia, the criminal acts instruction "is a correct statement

of the law." And, in a vacuum, so it is. But, it is also an inapplicable statement of the law in this case, where Moyle was unquestionably a business visitor as defined by this court, and neither party has suggested anything to the contrary. See id.; Maguire, 79 Hawai'i at 113, 899 P.2d at 396. The criminal acts instruction articulates the rationale of the general rule regarding landowner liability for third-party criminal acts as set forth in Grosvenor Properties, which applies when there is no special relationship between the parties. 73 Haw. at 163, 829 P.2d at 515. Grosvenor Properties further held that

> status distinctions remain important in the decision to create exceptions to the general rule that it is unreasonable to impose a duty to anticipate and control the actions of third persons. . . . Exceptions to the general rule that there is no duty to protect may arise when justified by the existence of some special relationship between the parties.

Id. at 163, 829 P.2d at 515 (citing, inter alia, Restatement (Second) of Torts, § 315 (1965)). Because there is no question that a "special relationship" existed between Moyle and the Respondents, the criminal acts instruction is misplaced in the present case insofar as it states the inapplicable "general rule" of Grosvenor Properties, as opposed to the relevant exception for special relationships. Furthermore, although the two instructions preceding the criminal acts instruction correctly articulated the scope of a landowner's duty to protect a business visitor from third persons, they did not cure the inconsistent and misleading criminal acts instruction, because the jury was not apprised that the existence of a special relationship is not an "ordinary circumstance." Id.; Stanford Carr, 111 Hawai'i at 297, 141 P.3d at 470 (quoting Haili, 103 Hawai'i at 101, 79

P.3d at 1275). Accordingly, the instructions regarding the foreseeability of third-party criminal acts were prejudicially erroneous. Stanford Carr, 111 Hawai'i at 297, 141 P.3d at 470 (quoting Haili, 103 Hawai'i at 101, 79 P.3d at 1275), and the ICA erred in approving the circuit court's instructions. We therefore vacate the circuit court's judgment and remand the matter to the circuit court for a new trial. See State v. Eberly, 107 Hawai'i 239, 245, 112 P.3d 725, 731 (2005) (vacating and remanding due to improper jury instructions).[3]

2. Instructions regarding liability of an establishment serving alcohol to intoxicated patrons

Moyle further takes issue with the following instructions:

> 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.

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[3] Moyle argues in the alternative that the foreseeability instructions were in error due to the circuit court's failing to instruct the jury on the "totality of the circumstances" test, as required by Doe v. Grosvenor Center Associates, 104 Hawai'i 500, 511, 92 P.3d 1010, 1021 (App. 2004) ("[W]hen determining the foreseeability of a particular criminal act committed by a third party, we look to the totality of circumstances." (citing, inter alia, Grosvenor Properties, 73 Haw. 158, 829 P.2d 512)). We take note of the ICA's holdings (1) that this argument was waived by Moyle's having proposed and then withdrawn such an instruction and (2) that plain error was not apparent in the circuit court's failure to give such an instruction sua sponte. Moyle, 116 Hawai'i at 398-400, 173 P.3d at 545-47. We decline to address this issue, inasmuch as we have already determined that the circuit court's foreseeability instructions were prejudicially erroneous and that Moyle is entitled to a new trial. However, we note that, with the foreseeability of third-party criminal acts being of paramount importance in this case, upon remand it would be judicious for the circuit court to give a "totality of the circumstances" instruction even if Moyle, through error or stratagem, again requests the instruction's withdrawal.

Moyle contends that he never raised the issue of an establishment's liability for selling alcohol and that these instructions obfuscated the question at hand, namely, whether "the [Respondents were] negligent in not providing adequate security." Moyle did allege in his complaint and in his trial testimony that the Respondents were serving alcoholic beverages; however, Moyle never claimed that "dram shop" liability was the basis of his claim against the Respondents. In considering Moyle's contention that the instructions may have served to "egregiously mis-focus[]" the jury, this court looks to whether, when read and considered as a whole, the instructions were "prejudicially insufficient, erroneous, inconsistent, or misleading." Stanford Carr, 111 Hawai'i at 297, 141 P.3d at 470 (quoting Haili, 103 Hawai'i at 101, 79 P.3d at 1275).

The above instructions were modeled upon our decisions in Bertlemann v. Tass Assoc., 69 Haw. 95, 735 P.2d 930 (1987), and Winters v. Silver Fox Bar, 71 Haw. 524, 797 P.2d 51 (1990), which clarified the scope of Hawai'i's common law "dram shop action," as enunciated by Ono v. Applegate, 62 Haw. 131, 612 P.2d 533 (1980). This court "emphatically reject[ed] the contention that intoxicated liquor consumers can seek recovery from the bar or tavern which sold them alcohol. Drunken persons who harm themselves are solely responsible for their voluntary intoxication and cannot prevail under a common law or statutory basis." Winters, 71 Haw. at 527-28, 797 P.2d at 53 (quoting Bertlemann, 69 Haw. at 100, 735 P.2d at 933).

In this case, it is clear that Moyle in no way asserted that the Respondents were liable to him on the basis of their selling alcohol. While these instructions do not comport with the theory of liability put forth by Moyle, Moyle does not cite, nor have we uncovered, any Hawai'i cases holding that a trial court abuses its discretion by instructing the jury on bases of non-liability, as long as such instructions are not "prejudicially insufficient, erroneous, inconsistent, or misleading," Stanford Carr, 111 Hawai'i at 297, 141 P.3d at 470 (quoting Haili, 103 Hawai'i at 101, 79 P.3d at 1275). These instructions perform the function of identifying for the jury a theory of liability upon which the Respondents could not be found liable. See Winters, 71 Haw. at 528, 797 P.2d at 53 ("[Dram shop legislation was] created to protect the general public from drunk driving accidents, not to reward intoxicated liquor consumers for the consequences of their voluntary inebriation." (Citation omitted.)) In other words, the trial court's decision to give the above instructions over objection by Moyle was a prophylactic act, which clarified the contours of the Respondents' potential liability. Accordingly, these instructions were not "prejudicially insufficient, erroneous, inconsistent, or misleading," Stanford Carr, 111 Hawai'i at 297, 141 P.3d at 470 (quoting Haili, 103 Hawai'i at 101, 79 P.3d at 1275), and the circuit court did not err in providing them to the jury.

3. Instruction regarding the duty to obtain assistance from law enforcement or medical personnel

Moyle next takes issue with the following jury instruction:

> There can be no liability for civil damages against a person at the scene of a crime for failure to obtain assistance from law enforcement or medical personnel. Therefore you may not find in favor of the plaintiff and against either or both defendants in this case even if you find that one or both defendants failed to obtain assistance. A person cannot be sued for failure to summon assistance under Hawai[']i law.

Moyle first argues that the circuit court's instruction misled the jury into focusing on an issue not at hand, namely the "personal duty of the bartender or employee to render assistance," when the correct issue was that of "the duty of the employer . . . to provide adequate security that could have rendered assistance to Moyle . . . pursuant to an innkeeper's and a public club's tort duty to protect its patrons from reasonably foreseeable danger." The ICA disagreed, stating that:

> the individuals who had been working at [the club] elected not to call the police or medical assistance upon becoming aware of the ongoing assault against [Moyle]. Premises liability, and liability of an individual bystander for failure to act, are two separate issues, and this instruction effectively and appropriately explained to the jury that civil liability cannot be based on the latter.

Moyle, 116 Hawai'i at 401, 173 P.3d at 548. The jury instruction was modeled after HRS § 663-1.6 (1993),[4] a "Good Samaritan"

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[4] HRS § 663-1.6 provides in relevant part:

> (a) Any person at the scene of a crime who knows that a victim of the crime is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a

(continued...)

statute. Moyle claims that the issue is not the "duty of an innocent bystander to come to the aid of a crime victim," but the duty of the Respondents, a "business establishment in a 'special relationship' to Moyle," to come to Moyle's aid.

As the ICA noted, Moyle fails to proffer any authority to support this contention, in violation of Hawai'i Rules of Apellate Procedure (HRAP) Rule 28(b)(7).[5] Moyle, 116 Hawai'i at 401, 173 P.3d at 548. Nevertheless, in light of this court's policy of hearing cases on the merits when possible, we exercise our discretion to consider the merits of Moyle's argument. See O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 386, 885 P.2d 361, 364 (1994).

First, Moyle's argument seems to claim that HRS § 663-1.6 only applies to "uninvolved bystander[s]," or, in the alternative, that HRS § 663-1.6 does not apply to "business establishments in a 'special relationship'" to a patron. A plain

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[4](...continued)
petty misdemeanor.

(b) Any person who provides reasonable assistance in compliance with subsection (a) shall not be liable in civil damages unless the person's acts constitute gross negligence or wanton acts or omissions, or unless the person receives or expects to receive remuneration.

(c) Any person who fails to provide reasonable assistance in compliance with subsection (a) shall not be liable for any civil damages.

[5] HRAP Rule 28(b)(7) provides in relevant part:

(b) Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

. . . .

(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.

reading of the statute does nothing to suggest such inclusivity or exclusivity, and, in fact, demonstrates that it clearly applies to the actions of "[a]ny person," see supra note 6, which includes the Respondents.

Moyle also repeatedly raised the issue of whether the Respondents came to his aid. Moyle's complaint stated that

> [t]he incident was observed by management and other employees of [the club] immediately nearby, who nevertheless did nothing, failed to render any aid or assistance to him whatsoever or even to call the police, in violation of its duty to the general public and to its patrons, including Moyle.

Moyle's counsel elicited direct testimony from Moyle that an alleged Club employee, upon seeing Moyle lying on the ground following the assault, "close[d] the door and pulled the curtains." In light of Moyle's having raised the issue of the Respondents' duty to render aid, it was not "an issue not at hand," and it was not error for the circuit court to instruct the jury on the Respondents' liability stemming from a failure to render aid. In addition, the ICA correctly noted that "[p]remises liability, and liability of an individual for failure to act, are two separate issues," and that the circuit court's instruction properly delineated that civil liability "could not be based on the latter." Moyle, 116 Hawai'i at 401, 173 P.3d at 548.

B. The ICA Did Not Gravely Err In Determining That Moyle Had Failed To Demonstrate That The Circuit Court Erred In Excluding The Police Reports, Inasmuch As He Failed To Address Each Alternative Basis Of The Circuit Court's Decision.

Moyle claims that the ICA gravely erred in upholding the circuit court's exclusion of police reports proffered by

Moyle, which he intended to use (1) to impeach Son's likely testimony that there had been no prior assaults at the club and (2) to show that Moyle's assault was foreseeable in light of the prior incidents at the club described in the reports. The circuit court excluded Moyle's use of the police reports on the following grounds: (1) the subpoena directed to the Honolulu Police Department's (HPD) custodian of records was served after the discovery cut-off date; (2) the subpoena was in violation of the circuit court's pretrial order stating that "any and all exhibits need to be marked ahead of time"; (3) the reports' probative value was substantially outweighed by the danger of unfair prejudice and considerations of undue delay pursuant to HRE Rule 403; and (4) Moyle failed to lay a proper foundation for the reports.

Moyle asserted in his opening brief that the circuit court erred in relying on "the so-called Warshaw doctrine (first requiring proof of prior or substantially similar acts) [which] had been discarded by our appellate courts in favor of a broader foreseeability negligence test."

In its published opinion, the ICA noted that:

> Notwithstanding a party's right to appeal, generally there is a presumption that a judgment by a trial court is valid. Stafford v. Dickison, 46 Haw. 52, 62, 374 P.2d 665, 671 (1962). Moreover, [Moyle] bears the burden of demonstrating his "allegations of error against the presumption of correctness and regularity that attend the decision of the lower court." Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967). Where an appealing party fails to raise and argue a point of error, the point may be deemed waived by the reviewing court. HRAP Rule 28(b)(7) (2000). Thus, where alternative bases given by the lower court for a contested decision are left unaddressed by an appealing party, the appealing

> party has failed to demonstrate the existence of an error.

Moyle, 116 Hawai'i at 395, 173 P.3d at 542.

The ICA concluded that, apart from whether Moyle was required to lay a foundation for the police reports, he had not demonstrated the existence of error due to his failure to address the circuit court's three alternative bases for excluding the reports. Id. at 395, 173 P.3d at 542. ("Although [Moyle] contests the first basis, he does not contest the second, third or fourth reasons given by the circuit court for finding the police reports inadmissable.") However, Moyle arguably did address a second basis, the requirement that "any and all exhibits need to be marked ahead of time and everything else," with his assertion that "the issue concerning whether the production of the police records was done too close to trial to permit their use . . . was a totally different issue than using them to prove thereafter that a party was lying at trial."

Nonetheless, even if the ICA failed to recognize Moyle's contravention of the circuit court's second basis for exclusion, Moyle still neglected to address the circuit court's third and fourth bases for exclusion in his opening brief or in his application for a writ of certiorari. First, Moyle never claimed that the circuit court abused its discretion in determining that the police reports' potential prejudice substantially outweighed their probitive value, pursuant to HRE Rule 403. See Ranches v. City and County of Honolulu, 115 Hawai'i 462, 468, 168 P.3d 592, 598 (2007) ("[T]he standard of review for exclusion of evidence under HRE 403 is the abuse of

discretion standard. Evidentiary decisions based on this rule, which require a 'judgment call' on the part of the trial court, are reviewed for an abuse of discretion." (citations and brackets omitted)). Moyle also failed to address the circuit court's ruling that service of the subpoena for the HPD's custodian of records post-dated the discovery cut-off date. Because Moyle failed to raise such "allegations of error against the presumptions of correctness and regularity" inherent in the circuit court's decisions, Ala Moana Boat Owners' Ass'n, 50 Haw. at 158, 434 P.2d at 518, the ICA did not err in upholding the circuit court's exclusion of the police reports.

C. The ICA Did Not Err In Affirming The Circuit Court's Refusal To Give Moyle's Proposed "Mode Of Operation" Jury Instruction.

Moyle argues that the ICA gravely erred in concluding that the circuit court correctly declined to give his proposed jury instruction No. 3, which articulated the "mode of operation" rule that this court adopted in Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 5 P.3d 407 (2000) ("Gump II"). Under the rule, an injured plaintiff need not prove that the defendant had actual notice of the specific instrumentality causing his or her injury, where the commercial establishment should have been aware of the potentially hazardous conditions that arose from its mode of operation. See id. 93 Hawai'i at 420-21, 5 P.3d at 410-11. Moyle asserts that the circuit court should have given his proposed mode of operation instruction, because both Son and Yu testified that they were aware of the need for security, but nevertheless continued to run the club without security as part

of their intended mode of operation. Thus, Moyle implicitly argues that the potentially hazardous condition arising out of the club's operation was violent individuals who injure the club's patrons.

Gump II clarified the scope of the mode of operation rule:

> [T]he application of the rule is limited to circumstances such as those of this case. Wal-Mart chooses, as a marketing strategy, to lease store space to McDonald's in order to attract more customers and encourage them to remain in the store longer. Wal-Mart also chooses, for the most part, not to prevent patrons from carrying their McDonald's food into the Wal-Mart shopping area. This mode of operation gave rise to the hazard that caused Gump's injury.

93 Hawai'i at 421, 5 P.3d at 411 (emphases added). Gump II focused on Wal-Mart's "marketing strategy," which inherently led to a foreseeable risk of danger. See id. In line with this reasoning, the "mode of operation" doctrine has been limited almost entirely to "self-service" and "big box" store slip and fall cases,[6] as the convenience offered to customers through their ability to serve themselves, a marketing strategy, is also fraught with the danger of spills causing hazardous floor conditions. See Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 428,

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[6] Cf., e.g., Chiara v. Fry's Food Stores of Ariz., Inc., 733 P.2d 283 (Ariz. 1987); Rhodes v. El Rancho Markets, 418 P.2d 613 (Ariz. App. 1966); Jasko v. F.W. Woolworth Co., 494 P.2d 839 (Colo. 1972); Smith v. Safeway Stores, Inc., 636 P.2d 1310 (Colo. Ct. App. 1981); Jackson v. K-Mart Corp., 840 P.2d 463 (Kan. 1992); Gonzales v. Winn-Dixie Louisiana, Inc., 326 So.2d 486 (La. 1976); Sheehan v. Roche Bros. Supermarkets, Inc., 863 N.E.2d 1276 (Mass. 2007); Sheil v. T.G. & Y. Stores Company, 781 S.W.2d 778 (Mo. 1989); Wollerman v. Grand Union Stores, Inc., 221 A.2d 513 (N.J. 1966); Lingerfelt v. Winn-Dixie Texas, Inc., 645 P.2d 485 (Okla. 1982); Corbin v. Safeway Stores, Inc., 648 S.W.2d 292 (Tex. 1983); Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah App. 1992); Forcier v. Grand Union Stores, Inc., 264 A.2d 796 (Vt. 1970); Carlyle v. Safeway Stores, Inc., 896 P.2d 750 (Wash. App. 1995).

442-43, 5 P.3d 418, 432-33 (App. 1999) ("Gump I") ("'While the self-service marketing method has economic advantages for the store owner or business proprietor and permits consumers the freedom to browse, examine, and select merchandise that they desire, certain problems are inherent in the method which are infrequently encountered under traditional merchandising methods that involve individual customer assistance.'" (quoting Donald M. Zupanec, Annotation, Store or Business Premises Slip-and-Fall: Modern Status of Rules Requiring Showing of Notice of Proprietor of Transitory Condition Allegedly Causing Plaintiff's Fall, 85 A.L.R.3d 1000, 1004-05 n.14 (1978))); id. at 444, 5 P.3d at 434 (explaining that the mode of operations rule applies "'when the operating methods of a proprietor are such that dangerous conditions are continuous'" (quoting Pimentel v. Roundup Co., 666 P.2d 888, 892 (Wash. 1983))).

By contrast, in the present matter, the Respondents had not chosen, as a marketing strategy or a mode of operation, to invite individuals with criminal tendencies onto their premises in order to generate business. In other words, they did not hold out their lack of security as an enticement to potential patrons. Any ostensibly dangerous condition, particularly the possibility of violent individuals attacking patrons outside the club, was simply not traceable to the defendants. See Gump II, 93 Hawai'i at 421, 5 P.3d at 411 (observing that the mode of operation rule is "consistent with the exception to the notice requirement where the dangerous condition is traceable to the defendant or its agents"). Consequently, we hold that the ICA did not gravely err

when it affirmed the circuit court's decision to refuse to give Moyle's proposed mode of operation jury instruction, because the rule did not apply to the facts of this case.

D. The ICA Erred In Affirming The Circuit Court's Inclusion Of Tupuola On The Special Verdict Form.

Moyle next claims that the inclusion of Tupuola on the special verdict form was contrary to Hawai'i precedent and "highly prejudicial" to Moyle, inasmuch as it took the jury's focus away from the issues at hand, namely the Respondents' failure to provide security at the club and to render assistance. Moyle further asserts 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."

Gump I and Gump II looked to the Uniform Contribution Among Tortfeasors Act (UCATA), HRS §§ 663-11 to 663-17 (1993 & Supp. 2003), to determine whether the trial court erred in declining to include McDonald's restaurant, a nonparty joint tortfeasor under HRS § 663-11,[7] on the special verdict form. See Gump I, 93 Hawai'i at 446, 5 P.3d at 436; Gump II, 93 Hawai'i at 422-23, 5 P.3d at 412-13. The Hawai'i legislature adopted the UCATA for the purpose, inter alia, of "abrogat[ing] the common law rule that the release of one joint tortfeasor released all

[7] HRS § 663-11 defines "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."

other tortfeasors." Saranillio v. Silva, 78 Hawai'i 1, 10, 889 P.2d 685, 694 (1995). HRS § 663-12[8] provides in relevant part that the "relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares, subject to [HRS §] 663-17." HRS § 663-17(c) dictates that, "[a]s among joint tortfeasors who in a single action are adjudged to be such, the last paragraph of [HRS §] 663-12 applies only if the issue of proportionate fault is litigated between them by pleading in that action."

Gump II applied the aforementioned UCATA provisions in concluding that Wal-Mart, although a joint tortfeasor under HRS § 663-11, had failed to cross-claim (i.e., "plead") against McDonald's and had therefore lost its right of contribution under HRS §§ 663-12 and 663-17. 93 Hawai'i at 422, 5 P.3d at 412. This court further noted that, "under appropriate circumstances that did not exist in the present case, non-parties may be included on a special verdict form." Id. Three such "appropriate circumstances" were noted by Gump II, involving non-

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[8] In full, HRS § 663-12 provides:

> 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.
>
> 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.

parties that were, respectively, (1) dismissed because their participation would destroy jurisdiction, see Wheelock v. Sport Kites, Inc., 839 F. Supp. 730, 734 (D. Haw. 1993), (2) not named because of a bankruptcy stay that was effective throughout the course of the proceedings, see Kaiu v. Raymark Indus., Inc., 960 F.2d 806, 819 n.7 (9th Cir. 1992), or (3) released from the case through settlement, but included on the special verdict pursuant to terms of the release, see Nobriga v. Raybestos-Manhattan, Inc., 67 Haw. 157, 160, 683 P.2d 389, 391 (1984).

The foregoing "appropriate circumstances" constituted exceptions to the explicit "pleading" requirement set forth in HRS § 663-17, either because of the infeasibility of pleading the nonparty into the case (Wheelock/Kaiu), or because the nonparties had agreed to be included on the special verdict (Nobriga). In other words, inclusion was approved in these cases because "it precluded prejudice to otherwise vigilant parties." Gump I, 93 Hawai'i 428, 447, 5 P.3d 418, 437 (emphasis added). Wal-Mart, which declined the readily available opportunity to plead in McDonald's through a cross-claim, found itself in none of the three "appropriate circumstances." Accordingly, Gump II held that the trial court did not abuse its discretion in leaving McDonald's off the special verdict form. 93 Hawai'i at 423, 5 P.3d at 413.

Gump II's determination that "[n]on-parties may . . . , in the trial court's sound discretion, . . . be included on a special verdict form," id., begs further elaboration. UCATA, and specifically HRS § 663-17(c)'s unambiguous decree that "the last

paragraph of [HRS §] 663-12 applies only if the issue of proportionate fault is litigated between [joint tortfeasors] by pleading in that action," leads to a singular conclusion: although a trial court has "discretion" to include, or to decline to include, a non-party on a 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 HRS §§ 663-12 and 663-17(c). In this regard, the ICA in Moyle was incorrect when it surmised that, "[c]onsonant with the reasoning in Gump I, the converse of the ICA's holding should also be true: exclusion is not mandated simply because a party has failed to protect its rights." 116 Hawai'i at 402, 173 P.3d at 549. Indeed, as a matter of law, exclusion is mandated when a party fails to protect its rights.

The Respondents did attempt to plead Tupuola into the case by filing a third-party complaint against him.[9] As discussed above, however, the circuit court denied leave to file at a hearing on August 1, 2003, during which the court stated:

> My inclination is to deny the motion. This case has been pending since September, 2001. So I think it's rather untimely with an upcoming trial week four months away. And also I think there's at least a question about what's the main reason. But in addition, there's the question of whether there really is a claim for contribution against Mr. Tupuola in light of the manner in which the complaint was drafted.

(Emphasis added.)

The Respondents' eleventh hour attempt to claim contribution from Tupuola, after declining to do so for two

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[9] For reasons unknown, the ICA identified the third-party complaint as a "cross-claim." See Moyle, 116 Hawai'i at 402, 173 P.3d at 549.

years, was understandably viewed dimly by the circuit court and was well within the circuit court's discretion to deny. The case at hand is distinguishable from the "appropriate circumstances" noted in Gump II. The Respondents were not denied the opportunity to plead in Tupuola, as were the defendants in Wheelock and Kaiu, but instead failed to do so when they had the opportunity, just as Wal-Mart failed in Gump II. Accordingly, we believe that the Respondents failed to litigate the issue of proportionate fault with Tupuola by pleading, and, therefore, under HRS § 663-17(c), the Respondents were barred from having "the relative degrees of fault of the joint tortfeasors . . . considered in determining their pro rata shares." HRS § 663-17(c). Because Tupuola could not have been included on the special verdict form as a matter of law, the ICA erred in concluding to the contrary.

Justice Acoba's concurring opinion takes issue with the foregoing analysis and asserts that "HRS §§ 663-12 and 663-17 apply to the issue of contribution, which is manifestly distinct from the issue of apportioning fault among all culpable parties." Concurring opinion at 14-15 (footnotes omitted). Justice Acoba's assertion misapprehends the purpose of the UCATA. Apart from superceding the old rule that mandated that the release of one joint tortfeasor released all others, see Saranillio, 78 Hawai'i at 10, 889 P.2d at 694, the UCATA was designed to telescope third-party practice claims for contribution into the main action, which increases judicial efficiency by obviating the need for separate actions determining the apportionment of fault and

resultant contribution among joint tortfeasors. HRS § 663-12, and by extension HRS § 663-17, further the goal of settling the issues of apportionment and contribution in tandem. See Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 87 Hawai'i 273, 284, 954 P.2d 652, 663 (App. 1998) [hereinafter, "Ozaki I"] (reciting the Commissioner's Note to UCATA § 4(2), which corresponds to HRS § 663-12, stating that "[UCATA § 4(2)] would permit apportionment of pro rata shares of liability of the joint tortfeasors as among themselves." (citing 1939 UCATA, 9 U.L.A. 153, 159 (1951)) (brackets and emphasis added)); see also Carrozza v. Greenbaum, 916 A.2d 553, 566 n.21 (Pa. 2007) ("[A]pportionment of liability among joint tortfeasors not only is permissible and familiar . . . but indeed it is ultimately necessary in the event of a contribution action brought by one joint tortfeasor against another upon satisfaction of the judgment by the party seeking contribution." (citation omitted)). Justice Acoba's analysis of HRS §§ 663-12 and 663-17's language in a vacuum, concurring opinion at 14-17, fails to take into account the paramount reason for the UCATA's existence. The UCATA was designed to facilitate this very telescoping mechanism for joint tortfeasors who are otherwise severally liable to obtain contribution from one another. If contribution is not possible, the UCATA is simply not implicated. If the UCATA is not implicated, there is no justification for putting joint tortfeasors on the special verdict form, apart from the exceptions noted in Gump II.

The facts of the present case demonstrate the wisdom and efficacy of the UCATA's telescoping mechanism, inasmuch as

any determination of the proper apportionment of fault with respect to Tupuola, a nonparty, via the special verdict would not collaterally estop Tupuola from litigating the claim in a subsequent action for contribution brought by the Respondents against Tupuola. See Kaho'ohanohano v. Department of Human Services, State of Hawai'i, 117 Hawai'i 262, 178 P.3d 538 (2008) (setting forth four requirements for collateral estoppel, including, inter alia, that "'the party against whom [collateral estoppel] is asserted was a party or in privity with a party to the prior adjudication.'" (brackets in original) (quoting Exotics Hawaii-Kona, Inc. v. E.I. DuPont De Nemours & Co., 104 Hawai'i 358, 365, 90 P.3d 250, 257 (2004))).[10]

Justice Nakayama's concurring and dissenting opinion (dissenting opinion) also seems to discount the UCATA's telescoping mechanism. Justice Nakayama maintains that Montalvo v. Lapez, 77 Hawai'i 282, 884 P.2d 345 (1994), offers this court guidance regarding the propriety of the circuit court's inclusion of Tupuola on the special verdict form. Montalvo involved a plaintiff who was injured by the negligent operation of a City of Honolulu refuse truck driver. Id. at 284, 884 P.2d at 347. The plaintiff filed suit for negligence and ultimately received a jury verdict awarding damages. Id. One issue raised by the defense on appeal was whether the circuit court unfairly

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[10] Justice Acoba's assertion that the issue of collateral estoppel is "peripheral to the question at bar," Concurring opinion at 16 n.8, misapprehends our stated purpose for raising it, namely, to demonstrate that the present case illustrates the fundamental policy goal furthered by the UCATA, i.e., increasing judicial efficiency by combining the apportionment and contribution actions.

restricted the scope of the jury's deliberation by asking the jury to determine apportionment of fault via a single question on the special verdict form, instead of through separate interrogatories querying the specific amount of damages attributable to injuries prior to the incident, and the amount attributable to the incident itself. Id. at 292, 884 P.2d at 355. The Montalvo court held the following, upon which Justice Nakayama relies:

> A trial court has "complete discretion" whether to utilize a special or general verdict and to decide on the form of the verdict as well as the interrogatories submitted to the jury "provided that the questions asked are adequate to obtain a jury determination of all factual issues essential to judgment." Although there is "complete discretion" over the type of verdict form, the questions themselves may be so defective that they constitute reversible error.

Id. (citations omitted). This statement of the law is correct as a general proposition, but is not absolute. As discussed supra, while a trial court possesses "complete discretion" over whether or not to employ a special verdict form, and over the "form" that the special verdict form will take, such discretion is limited by HRS §§ 663-12 and 663-17 inasmuch as a trial court does not have discretion to include a nonparty on the special verdict form in the absence of "appropriate circumstances." Gump II, 93 Hawai'i at 422, 5 P.3d at 412; HRS §§ 663-12 and 663-17.

Justice Nakayama further states that, in the present case, Montalvo's framework is more on point than that of Gump II because "the appellant in Montalvo asserted that the chosen contents of the special verdict form constituted an abuse of discretion by the trial court." Dissenting opinion at 3 (citing Montalvo, 77 Hawai'i at 292, 884 P.2d at 335). We disagree and

find Montalvo to be inapposite. Although Montalvo did deal with a special verdict form, that appears to be the extent of the parallel between it and the present case. Montalvo involved neither the issue of apportionment of liability nor whether a nonparty, or in Gump II's case, a former party, should be included on a special verdict form. Gump II, on the other hand, addressed these issues head on. Accordingly, we disagree with Justice Nakayama's reliance on Montalvo instead of Gump II in the present case.

Justice Nakayama also states that, in light of the parties' arguments, the questions on the special verdict form, and the jury's allocation of responsibility,

> one could infer that the jury concluded that the Respondents were not negligent for their lack of security at the . . . Club, and that Tupuola's act was unforeseeable. . . . One could also infer that the jury concluded that, from a legal causation standpoint, responsibility was more appropriately allocated between Tupuola and Moyle.

Dissenting opinion at 6-7. A more likely inference is that the jury found that the Respondents were not negligent due to the erroneous criminal acts instruction, which practically directed the jury to find that Tupuola's acts were unforeseeable because the circumstances were "ordinary," thereby, ostensibly, obviating any duty on the Respondents' part to provide security. See supra section III.A.1. Furthermore, and crucially, it was not within the jury's purview to determine that responsibility was "more appropriately allocated" between Tupuola and Moyle, in light of Moyle's decision not to sue Tupuola but, rather, to limit his claim for relief to the Respondents' allegedly negligent

omission. An assessment of who the ideal defendant is falls outside a jury's dominion.

In supporting his contention that a nonparty may be placed on the special verdict at the discretion of the circuit court, Justice Acoba cites Doe Parents No. 1 v. State of Hawai'i, 100 Hawai'i 34, 58 P.3d 545 (2002), and Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 87 Hawai'i 265, 954 P.2d 644 (1998) [hereinafter, Ozaki II]. A brief review of each will demonstrate that they are inapposite to the present case.

Doe Parents No. 1 involved a lawsuit brought by two elementary school students and their parents (collectively, "the plaintiffs") against the Department of Education (DOE) stemming from the students' alleged sexual assault at the hands of their teacher, Norton. Id. at 41, 52, 58 P.3d at 552, 563. Although Norton was originally named in the complaint as a codefendant, and was subsequently named in a cross-claim by the DOE, he was ultimately dismissed from the case due to an apparent discharge of his debts following a voluntary bankruptcy petition. Id. at 56 n.30, 58 P.3d at 567 n.30. The circuit court ultimately determined that the DOE's degree of fault in causing the plaintiffs' injuries was forty-nine percent. Id. at 57, 58 P.3d at 568.

As Justice Acoba notes, concurring opinion at 21 n.10, Doe Parents No. 1 dealt largely with HRS § 663-10.5 (2001),[11] which altered the common law rule of joint and several liability

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[11] HRS § 663-10.5 was amended in 2006 in respects not pertinent here.

among joint tortfeasors with respect to government entities.[12] The analysis set forth in Doe Parents No. 1, and in particular this court's conclusion that the statute's retroactivity provision did not ultimately shield the DOE from liability, are neither here nor there with respect to the issues confronting us in the present matter. Instead of dealing with the general contours of joint and several liability as provided by the UCATA, Doe Parents No. 1 focused on an exception to the UCATA for government entities. Justice Acoba emphasizes this court's statement, in dictum, that if the DOE had been found liable under the plaintiffs' theory of respondeat superior, it would have been necessary to apportion liability among both the DOE and Norton, who was dismissed from the case. Concurring opinion at 21. Justice Acoba is apparently undertaking to demonstrate an inconsistency with our present holding that, as a matter of law and pursuant to HRS §§ 663-12 and 663-17, a nonparty not pleaded into the case cannot be placed on the special verdict absent the appropriate circumstances set out in Gump II.

There is, however, no such inconsistency. First, Norton, as required by HRS § 663-17(c), had been pleaded into the case via the plaintiffs' complaint. Doe Parents No. 1, 100 Hawai'i at 41, 58 P.3d at 563. Furthermore, 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. 960

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[12] HRS § 663-10.5 provides in relevant part that "in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity."

F.2d at 819 n.7. Accordingly, Doe Parents No. 1 is completely compatible with our analysis in the present matter.

Justice Acoba's reliance on Ozaki II, 87 Hawai'i 265, 954 P.2d 644, a case involving a woman who was murdered in her condominium by her estranged boyfriend, is equally confounding. Justice Acoba first notes that, "[d]espite [the estranged boyfriend's] absence from the proceedings, he was included on the special verdict form." Concurring opinion at 22. This is unremarkable, inasmuch as the estranged boyfriend, like Norton in Doe Parents No. 1, was a party to the case, having been named as a defendant in the complaint by the plaintiffs. Moreover, the crux of Ozaki II was whether HRS § 663-31, which deals with comparative negligence, barred the plaintiffs' recovery from a defendant whose percent of fault was less than that of the victim. Given the immateriality of Tupuola's degree of responsibility for the plaintiff's injuries, HRS § 663-31 is tangential to the issue posed on appeal in the present case.

We must also address the following language of the concurrence:

> Not only is the inclusion of the 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.

Concurring opinion at 11. The relevance of the foregoing statement is a mystery to us, inasmuch as we have nowhere suggested that evidence of Tupuola's conduct could not be

presented to the jury, and such evidence was clearly and correctly offered in the circuit court. Tupuola's conduct was obviously relevant to the plaintiff's claim that the Respondents breached a duty to provide security. Omitting Tupuola's name from the special verdict, as required by law, would not have impeded the jury from its fact-finding objective. Moreover, if the Respondents were concerned that, somehow, Tupuola's absence from the special verdict would obscure the truth as to where the blame properly lay for the plaintiff's injuries, they had ample opportunity to timely plead Tupuola into the matter.

This misunderstanding also infects Justice Acoba's observation that the Ozaki II court "did not intimate that [the estranged boyfriend's] role in causing the plaintiffs' injuries should not have been considered in determining the relative fault of the parties." Concurring opinion at 23-24. 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.

E. The ICA Did Not Err When It Held That The Circuit Court Did Not Abuse Its Discretion In Denying Moyle's Motion For A New Trial.

Finally, Moyle argues that the ICA erred in affirming the circuit court's denial of his motion for a new trial "after clear and convincing relevant and material evidence was found, proving that [the Respondents'] trial representatives had lied

about who actually owned the club" at the time of Moyle's injury.[13]

Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b) states in relevant part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . .

A circuit court's denial of a HRCP Rule 60(b) is reviewed for abuse of discretion. Beneficial Hawaii, Inc. v. Casey, 98 Hawai'i 159, 164, 45 P.3d 359, 364 (2002). The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Id.

Moyle points to this court's holding that "[f]raud, misrepresentation, and circumvention used to obtain a judgment are generally regarded as sufficient cause for the opening or vacating of the judgment." Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 257, 948 P.2d 1055, 1098 (1997) (citation and quotation marks omitted); see also Matsuura v. E.I. du Pont

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[13] The March 15, 2004 motion filed with the circuit court was entitled "[Hawai'i Rules of Civil Procedure (HRCP)] Rule 59(a), Rule 59(e), and Rule 60(b)(3) Motion to Set Aside Jury Verdict and Judgment Entered on March 5, 2004, and for a New Trial, and for Sanctions, Based Upon Defendants' Fraud Upon the Court and Erroneous Jury Instructions and Prejudicial Verdict Form." In reviewing the motion, the ICA determined that, "[w]hile the title of the motion appears to implicate at least three grounds, [Moyle] only reasserts one on appeal, namely that Appellees and their representatives committed perjury and fraud on the court while giving testimony on a material factual issue: who owned the club at the time the incident occurred." Moyle, 116 Hawai'i at 402, 173 P.3d at 549. Moyle's application for a writ of certiorari also raises only the issue of the Respondents' perjury and fraud, and therefore I will only address that issue.

de Nemours & Co., 102 Hawai'i 149, 158, 73 P.3d 687, 696 (2003) ("[T]he relief available under HRCP rules 60(b) and 60(b)(3) reflect the preference for judgments on the merits over the finality of judgments, especially when such judgments are procured through fraud.").

Nevertheless, even assuming that the Respondents somehow misrepresented who owned the club at the time of the incident, the ICA correctly held that Moyle "has not shown how ownership of the [club], by either Y & Y Hyup Shin, Corp. or TTJJKK, Inc., affected the outcome of this case." Moyle, 116 Hawai'i at 403, 173 P.3d at 550. The United States Court of Appeals for the Fourth Circuit, in analyzing Federal Rules of Civil Procedure (FRCP) Rule 60(b),[14] construed fraud as that which "'seriously' affects the integrity of the normal process of adjudication," In re Genesys Data Techs., Inc., 204 F.3d 124, 130 (4th Cir. 2000) (citing 12 James Wm. Moore et al., Moore's Federal Practice § 60.21[4][a] (3d ed. 1999)), and cited as examples of such serious conduct "bribing a judge, . . . tampering with a jury, or fraud by an officer of the court, including an attorney." Id. The misrepresentation Moyle claims the Respondents engaged in does not appear to rise to the level of fraud under HRCP Rule 60(b)(3). Accordingly, the ICA did not err in determining that the circuit court did not commit an abuse of discretion in denying Moyle's HRCP Rule 60(b) motion.

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[14] FRCP Rule 60(b) and HRCP 60(b) are identical. When a Hawai'i rule of procedure is modeled after a federal rule, "the interpretation of [the rule] by the federal courts [is] deemed to be highly persuasive in the reasoning of this court." Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968).

IV. CONCLUSION

For the foregoing reasons, we vacate the circuit court's March 5, 2004 judgment and the ICA's November 23, 2007 judgment, and we remand this case to the circuit court for further proceedings consistent with this opinion.

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for the defendants-appellees-
respondents Y & Y Hyup Shin, Corp.
and TTJJKK Inc., both
d/b/a Do Re Mi Karaoke