NO. CAAP-13-0004947

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

PATRICIA NAKAMOTO, Plaintiff-Appellant,
v.
JAMAE KAWAUCHI, in her individual and official capacity as County Clerk, DOMINIC YAGONG, in his individual and official capacity as Chairman, Hawaiʻi County Council, County of Hawaiʻi, CORPORATE SPECIALIZED INTELLIGENCE AND INVESTIGATIONS LLC, Defendants-Appellees, and DOE PERSONS 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 110, ROE "NON-PROFIT" CORPORATIONS 1-10, AND ROE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 12-1-0466)

SHYLA M. AYAU, Plaintiff-Appellant, v.
JAMAE KAWAUCHI, in her individual and official capacity as County Clerk, DOMINIC YAGONG, in his individual and official capacity as Chairman, Hawaiʻi County Council, County of Hawaiʻi, CORPORATE SPECIALIZED INTELLIGENCE AND INVESTIGATIONS LLC, Defendants-Appellees, and DOE PERSONS 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, ROE "NON-PROFIT" CORPORATIONS 1-10, AND ROE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 12-1-0467)

MEMORANDUM OPINION
(By: Nakamura, C.J., Leonard and Ginoza, JJ.)

Plaintiffs-Appellants Patricia Nakamoto (**Nakamoto**) and Shyla M. Ayau (**Ayau**) (collectively **Plaintiffs**) assert claims against the defendants in this case arising out of, *inter alia*,

an investigation of Plaintiffs' alleged misconduct in their employment with the County of Hawaiʻi Elections Division, the termination of Plaintiffs from their employment (they were later reinstated), public statements made by some of the defendants regarding the investigation and terminations, and the alleged improper release of certain information about the investigation.

The Plaintiffs filed separate actions, later consolidated, against: Defendant-Appellee Jamae Kawauchi (**Kawauchi**), individually and in her official capacity as County Clerk; Defendant-Appellee Dominic Yagong (**Yagong**), individually and in his official capacity as Chairman of the Hawaiʻi County Council; Defendant-Appellee County of Hawaiʻi (**County**); and Defendant-Appellee Corporate Specialized Intelligence and Investigations, LLC (**CSII**).[1]

Plaintiffs appeal from a Judgment filed on October 3, 2013, in the Circuit Court of the Third Circuit (**circuit court**),[2] which was entered in favor of all defendants and against Plaintiffs. The Judgment was based on the following five orders: (1) "Order Granting Defendant County of Hawaiʻi Motion to Dismiss Filed October 23, 2012" (**Order Dismissing Nakamoto's Complaint Against County Defendants**), filed on December 24, 2012; (2) "Order Granting Defendant County of Hawaiʻi Motion to Dismiss Filed October 23, 2012" (**Order Dismissing Ayau's Complaint Against County Defendants**), filed on March 8, 2013; (3) "Order Granting Defendants Jamae Kawauchi and Dominic Yagong, in Their Individual Capacities,' Motion For Summary Judgment Filed March 22, 2013" (**Order Granting Summary Judgment for Kawauchi and Yagong Individually**), filed on June 4, 2013; (4) "Order Granting Corporate Specialized Intelligence and Investigations, LLC's

[1] In the circuit court and in this court, the parties have grouped themselves as follows: Kawauchi and Yagong, in their individual capacities (referred to herein as **Kawauchi and Yagong Individually**); the County, Kawauchi in her official capacity, and Yagong in his official capacity (referred to herein as **County Defendants**); and CSII.

[2] The Honorable Elizabeth A. Strance presided.

Motion for Summary Judgment (Filed on March 22, 2013)" (**Order Granting Summary Judgment for CSII**), filed on June 4, 2013; and (5) "*Sua Sponte* Amended Order Granting Defendants Jamae Kawauchi and Dominic Yagong, in Their Individual Capacities', Motion For Summary Judgment Filed March 22, 2013, Filed June 4, 2013" (**Sua Sponte Amended Order Granting Summary Judgment for Kawauchi and Yagong Individually**), filed on June 25, 2013.

In their opening brief on appeal, the Plaintiffs appear to contend that the circuit court erred when it: (1) dismissed defamation claims against the County Defendants; (2) granted summary judgment for CSII on a negligent investigation claim; and (3) dismissed false light claims.[3] In their reply brief, the Plaintiffs also argue that the circuit court erred in granting summary judgment for Kawauchi and Yagong Individually on the defamation claims.[4]

For the reasons discussed below, we affirm the Judgment in this case.

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[3] Nakamoto and Ayau's opening brief does not comply with Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4) because their asserted points of error are set forth as general questions and do not specify: the alleged error committed by the circuit court; where in the record the alleged error occurred; and where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the circuit court. The points of error also do not reference in any way the circuit court's summary judgment ruling in favor of CSII or the orders that dismissed the false light claim, however, Nakamoto and Ayau apparently challenge these orders in the argument section of their opening brief. Because we seek to address cases on the merits where possible, we address Nakamoto and Ayau's arguments to the extent they are discernable and with respect to the specific claims they address. See Marvin v. Pflueger, 127 Hawaiʻi 490, 496, 280 P.3d 88, 94 (2012); Bettencourt v. Bettencourt, 80 Hawaiʻi 225, 230, 909 P.2d 553, 558 (1995).

Nakamoto and Ayau's opening brief also does not comply with HRAP Rule 28(a) because it exceeds thirty-five (35) pages. This court issued an order on March 12, 2014 denying Nakamoto and Ayau's Motion for Leave to Allow Appellants to File an Overlength Opening Brief, and therefore we do not consider the opening brief beyond page thirty-five. Counsel for Nakamoto and Ayau is cautioned to comply with the HRAP in the future.

[4] As addressed more fully *infra*, Nakamoto and Ayau's challenge to the circuit court's summary judgment ruling in favor of Kawauchi and Yagong Individually are waived. Moreover, even if we consider that ruling, the circuit court properly granted summary judgment.

I. Background

On September 5, 2012, Nakamoto filed her Complaint in Civil No. 12-1-0466, and Ayau filed her Complaint in Civil No. 12-1-0467. Nakamoto alleged that she has been employed with the County of Hawaiʻi Elections Division for approximately twenty-five years. Ayau alleged that she had been employed with the County of Hawaiʻi Elections Division for approximately seven and a half years. Both Nakamoto and Ayau assert that they were terminated from their positions for alleged violations of County policies after CSII conducted an investigation. Both Complaints asserted causes of action against all defendants for: (1) Defamation "Per Se"; (2) Defamation "Per Quod"; (3) False Light; (4) Negligent Investigation; and (5) Negligent Infliction of Emotional Distress.

On October 23, 2012, the County Defendants filed separate motions to dismiss Nakamoto's Complaint and Ayau's Complaint, respectively, pursuant to Hawaiʻi Rules of Civil Procedure (**HRCP**) Rule 12(b)(6). The County Defendants argued, *inter alia*, that the Plaintiffs' claims were preempted by Hawaii's Workers' Compensation Law (**WCL**) under the exclusive remedy provision in Hawaii Revised Statutes (**HRS**) § 386-5 (2015).

On November 19, 2012, Nakamoto filed an opposition to the County Defendants' motion to dismiss. Nakamoto argued, *inter alia*, that the claims in her Complaint were not preempted by the WCL and the WCL does not cover post-termination defamation.

At a hearing on November 26, 2012, the circuit court orally granted the County Defendants' motion to dismiss Nakamoto's Complaint "finding that the allegations alleged fall within the exclusive province of the workers' compensation statute, and therefore action in this Court is improper."

On December 24, 2012, Ayau filed an opposition to the County Defendants' motion to dismiss. Ayau also argued, *inter alia*, that the claims in her Complaint were not preempted by the WCL and the WCL does not cover post-termination defamation.

On December 24, 2012, the circuit court filed the Order Dismissing Nakamoto's Complaint Against County Defendants.

On January 25, 2013, the circuit court filed an order consolidating Civil Nos. 12-1-0466 (Nakamoto) and 12-1-0467 (Ayau).

At a February 15, 2013 hearing, the circuit court orally stated that it would grant the County Defendants' motion to dismiss Ayau's Complaint consistent with its ruling as to Nakamoto's Complaint, that is, the allegations against the County Defendants are barred by the WCL. On March 8, 2013, the circuit court filed the Order Dismissing Ayau's Complaint Against County Defendants.

On March 22, 2013, Kawauchi and Yagong Individually filed a motion for summary judgment. They argued, *inter alia*, that there was no genuine issue of material fact that they acted with just cause and did not engage in wilful and wanton conduct, and that the claims against them should thus be barred by the WCL. Kawauchi and Yagong Individually also argued that the Plaintiffs failed to establish any false statements made by Kawauchi and/or Yagong.

On March 22, 2013, CSII filed a motion for summary judgment arguing, *inter alia*, that no defamatory statements attributable to CSII are alleged in either the Plaintiffs' Complaints; and that CSII did not owe a duty to Nakamoto and Ayau and, even if it did, there was no breach of duty.

On April 19, 2013, the Plaintiffs filed an opposition to Kawauchi and Yagong Individually's motion for summary judgment. The Plaintiffs argued that a genuine issue of material fact existed as to "[w]hether Kawauchi and Yagong, in their individual capacities, acted with malicious, willful and wanton intent to harm Nakamoto and/or Ayau" and "[w]hether Kawauchi and Yagong acted without just cause and willfully and wantonly defamed and intentionally inflicted emotional distress upon Nakamoto and Ayau by knowingly making false statements concerning

the basis for their termination as employees of the County of Hawaii Elections Division."

On April 19, 2013, the Plaintiffs also filed an opposition to CSII's motion for summary judgment. Plaintiffs argued that there were genuine issues of material fact as to whether "CSII conducted its investigation in a negligent and reckless manner by misrepresenting the extent of witness's statements and/or intentionally ignoring and/or failing to ask, obtain or seek out any exculpatory evidence[,]" and as to whether "there was a reasonably close causal connection between the negligent investigation and the resulting injury to Plaintiffs."

On June 4, 2013, the circuit court filed the Order Granting Summary Judgment for CSII. The court held that "Plaintiffs failed to present any admissible evidence to demonstrate that any defamatory statement was published by CSII that was unprivileged and concerned the Plaintiffs[,]" and thus dismissed the defamation and false light claims. The circuit court also held that "Plaintiffs have failed to produce facts supporting the existence of any duty owed by CSII to Plaintiffs in connection with CSII's investigation of unauthorized activities at the election warehouse[,]" and thus dismissed the negligent investigation claims. Given its ruling on the other claims, the circuit court also dismissed the negligent infliction of emotional distress claim against CSII.

On June 4, 2013, the circuit court also filed the Order Granting Summary Judgment for Kawauchi and Yagong Individually. In this order, the circuit court determined that based upon the admissible evidence presented by Kawauchi and Yagong Individually, and the lack of evidence presented by Plaintiffs, Kawauchi and Yagong negated the "willful and wanton" elements of the Plaintiffs' claims and the Plaintiffs failed to provide clear and convincing evidence supporting their claims demonstrating they would be unable to carry their burden of proof at trial. The circuit court also determined that absent evidence of false and/or defamatory statements attributable to Kawauchi and/or

Yagong, the claims for defamation, false light, and infliction of emotional distress must be dismissed.

On June 25, 2013, the circuit court filed the *Sua Sponte* Amended Order Granting Summary Judgement for Kawauchi and Yagong Individually. In this order, the circuit court stated it was correcting oversights contained in its Order Granting Summary Judgment for Kawauchi and Yagong Individually. In the amended order, the circuit court held that "[b]ased upon the admissible evidence presented, there exists an absence of evidence that Defendants Kawauchi and Yagong made false statements about [Plaintiffs]. As such, Defendants Kawauchi and Yagong have demonstrated that Plaintiffs will be unable to carry their burden of proof at trial."

On October 3, 2013, the circuit court filed the Judgment in favor of all defendants. On November 1, 2013, the Plaintiffs timely filed their Notice of Appeal.

II. Standards of Review

A. Motion to Dismiss

> A trial court's ruling on a motion to dismiss is reviewed *de novo*. The court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff; dismissal is proper only if it appears beyond doubt that the plaintiff "can prove no set of facts in support of his or her claim that would entitle him or her to relief."

AFL Hotel & Rest. Workers Health & Welfare Tr. Fund v. Bosque, 110 Hawaiʻi 318, 321, 132 P.3d 1229, 1232 (2006) (citations omitted).

B. Motion for Summary Judgment

The grant or denial of summary judgment is reviewed *de novo*. Tri-S Corp. v. W. World Ins. Co., 110 Hawaiʻi 473, 487, 135 P.3d 82, 96 (2006) (citation omitted).

> [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the

> non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Id. (citation omitted, block format altered). Further,

> The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.
>
> First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the nonmoving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.
>
> Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law.
>
> Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her burden of proof at trial.

Ralston v. Yim, 129 Hawaiʻi 46, 56-57, 292 P.3d 1276, 1286-87 (2013) (citation omitted, block format altered).

An appellate court "may affirm a grant of summary judgment on any ground appearing in the record, even if the circuit court did not rely on it." Reyes v. Kuboyama, 76 Hawaiʻi 137, 140, 870 P.2d 1281, 1284 (1994) (citation omitted).

III. Discussion

A. Defamation and False Light Claims Against County Defendants

The Plaintiffs apparently contend that the circuit court erred in holding that their claims for post-termination defamation and false light were barred by the WCL.[5] Plaintiffs

[5] The Plaintiffs do not directly refer to the orders they seek to challenge, and therefore we must infer which orders they challenge when (continued...)

primarily focus on their defamation claim, although we note that there is overlap between the two claims.

Defamation requires:

> (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher [actual malice where the plaintiff is a public figure]; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Gonsalves v. Nissan Motor Corp. in Hawaiʻi, 100 Hawaiʻi 149, 171, 58 P.3d 1196, 1218 (2002) (citations omitted). "[T]ruth is an absolute defense to defamation." Id. at 173, 58 P.3d at 1220 (internal quotation marks omitted).

Under the WCL, a "work injury" is "a personal injury suffered under the conditions specified in section 386-3." HRS § 386-1 (2015). HRS § 386-3(a) (2015) provides:

> **§ 386-3 Injuries covered**. (a) If an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter.

Further, "[a]s a general rule in Hawaiʻi, workers' compensation is an injured employee's exclusive remedy for an injury arising out of and in the course of employment." Iddings v. Mee Lee, 82 Hawaiʻi 1, 5, 919 P.2d 263, 267 (1996). The WCL exclusive remedy provision provides:

> The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought.

HRS § 386-5 (2015) (emphasis added).

[5](...continued)
reviewing the arguments in their appellate briefs.

The circuit court in this case determined that the WCL exclusivity provision barred the Plaintiffs' defamation and false light claims against the County Defendants.

Nakamoto and Ayau first contend the WCL exclusivity provision does not bar a defamation claim because it is an intentional tort and therefore not a personal injury defined under HRS § 386-3. However, even assuming defamation is an intentional tort, "the WCL does not provide a general exception to allow intentional tort claims against an employer." Adams v. Dole Food Co. Inc., 132 Hawaiʻi 478, 484, 323 P.3d 122, 128 (App. 2014).

In Yang v. Abercrombie & Fitch Stores, 128 Hawaiʻi 173, 284 P.3d 946 (App. 2012), this court held that an employee's claim for defamation was barred by the WCL exclusivity provision. The employee, Yang, was employed by Abercrombie & Fitch Stores, Inc. (**A & F**) and alleged she "was suspended and then terminated for abusing A & F's discount policy, without any factual or legal basis." Id. at 175, 284 P.3d at 948. Yang filed a complaint which alleged, *inter alia*, defamation and/or defamation *per se*. Id. A & F filed a motion to dismiss asserting the claim was barred under the WCL. Id. On appeal from the circuit court's denial of the motion, this court stated that the "Hawaiʻi Supreme Court has demonstrated great reluctance to narrow the scope of the exclusivity provision, recognizing the pros and cons of doing so, but maintaining its deference to the Legislature's domain." Id. at 178, 284 P.3d at 951. This court held:

> The plain language of HRS § 386–5, and the harmonious reading of the Workers' Compensation Law as a whole, mandates the conclusion that the workers' compensation remedies granted to Yang exclude all other liabilities of A & F to Yang on account of the personal injuries she allegedly suffered arising out of and in the course of her employment.

Id. at 181, 284 P.3d at 954. This court concluded:

> (1) the exclusivity provision in HRS § 386–5 bars Yang's suit against A & F for alleged injuries suffered because of her employment, which were caused by the alleged willful acts of her co-employees acting in the course and scope of their employment; (2) [Furukawa v. Honolulu Zoological Society, 85 Hawaiʻi 7, 936 P.2d 643 (1997)] does not create

> an exception to the exclusive remedy provision under HRS § 386–5 for all intentional torts; (3) an intentional tort committed by a co-employee acting in the course and scope of his or her employment may be considered an "accident," as defined in the HRS § 386–3, if the intentional act was directed against the employee because of the employee's employment; and (4) a co-employee may be considered a "third person" as used in HRS § 386–3(a).

Id. at 183, 284 P.3d at 956.

Given Yang, the Plaintiffs' defamation claims are barred by the WCL exclusive remedy provision so long as the alleged defamatory statements were made in the course and scope of employment.

The Plaintiffs also contend, however, that the defamation claims in this case are not barred by the WCL because the alleged defamatory statements were made *post-termination*.

"The essential prerequisite for coverage under Hawaii's Workers' Compensation Law is the existence of an employer-employee relationship." Chung v. Animal Clinic, Inc. 63 Haw. 642, 644, 636 P.2d 721, 723 (1981); see also Evanson v. Univ. of Haw., 52 Haw. 595, 598, 483 P.2d 187, 190 (1971) ("Since liability is made dependent on a nexus to the job, the essential prerequisite for coverage under [workers'] compensation acts is the existence of an employer-employee relationship."). Under the WCL, "'Employee' means any individual in the employment of another person." HRS § 386-1. "'Employer' means any person having one or more persons in the person's employment." Id. "'Employment' means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into." Id.

In this case, because the question is whether the circuit court properly decided a motion to dismiss, we must accept as true the allegations in the Complaints filed by the Plaintiffs. See Bosque, 110 Hawaiʻi at 321, 132 P.3d at 1232. Nakamoto's Complaint alleges that: she "has been employed with the County of Hawaii Elections Division for approximately twenty-five (25) years[;]" through the mail, Kawauchi sent Nakamoto a

Notice of Termination dated January 5, 2012, that was postmarked on January 10, 2012, and received by Nakamoto on January 11, 2012; and that Kawauchi instructed Nakamoto not to report for work as of January 6, 2012. Nakamoto's Complaint refers to and attaches the January 5, 2012 letter, which states: "The County Clerk is discharging you from your employment . . . effective January 6, 2012 close of business[.]" (Emphasis added.) Nakamoto's Complaint further alleges, *inter alia*, that "[o]n or about January 12, 2012, the Hawaii Tribune Herald published an article with the title, 'County elections workers fired.'" Nakamoto's Complaint also alleges that, on or about June 21, 2012, Nakamoto accepted a conditional reinstatement of her employment subject to a ten (10) day suspension.

Ayau's Complaint alleges she "was employed with the County of Hawaii Elections Division for approximately seven and a half (7½) years[.]" On or about January 5, 2012, Kawauchi signed Ayau's Termination Letter but mailed it on January 9, 2012. Ayau's Complaint refers to and attaches the January 5, 2012 letter, which states: "The County Clerk is discharging you from your employment . . . effective January 6, 2012 close of business[.]" (Emphasis added.) Ayau's Complaint further alleges that "[o]n or about January 12, 2012, the Hawaii Tribune Herald published an article with the title, 'County elections workers fired.'" On or about September 4, 2012, the County agreed to reinstate Ayau's employment and transfer her employment status to the County of Kauai.[6]

In both Nakamoto and Ayau's Complaints, their respective causes of action for "defamation per se" do not specify the dates that alleged defamatory statements were published. The "Facts" sections in both Complaints identify the

[6] The Complaints do not contain allegations related to any grievance process by Nakamoto or Ayau challenging their respective terminations. Further, the parties do not address whether any grievance process would affect the analysis as to whether Nakamoto or Ayau were employed when the alleged defamatory statements were made. We do not address this issue.

Hawaii Tribune Herald article, published on January 12, 2012, as the earliest publication of alleged statements. With regard to the Plaintiffs' respective causes of action for "defamation per quod" and "false light," their Complaints state those claims are based on allegedly false statements starting from January 5, 2012, but in identifying the alleged publications, it appears the earliest is the Hawaii Tribune Herald article.

Based on the allegations in each of the Complaints and viewing those allegations in the light most favorable to the Plaintiffs, as required for a motion to dismiss, the Plaintiffs were terminated effective January 6, 2012, close of business. To the extent the Plaintiffs' claims are based on allegedly false or defamatory statements made *prior* to their termination, the WCL exclusivity provision would bar their claims because they were still employed.

However, to the extent their claims are based on statements made *after* their termination, including the statements published in the Hawaii Tribune Herald on January 12, 2012, their claims are *not* barred by the WCL. That is, for any alleged post-termination statements, an essential prerequisite for coverage under the WCL -- the existence of an employer-employee relationship -- did not exist at the time of those claimed false or defamatory statements.

We agree with Plaintiffs that Anderson v. Hebert, 798 N.W.2d 275 (Wis. Ct. App. 2011), is relevant to our consideration. There, the Wisconsin Court of Appeals recognized that a defamation claim was not barred by a workers' compensation exclusive remedy provision where the alleged defamatory statements were made *after* the plaintiff-employee had resigned from employment. The court explained:

> As relevant here, an injury is only covered if, at the time of the injury: (1) both the employer and employee are subject to the provisions of the Act; and (2) the employee is performing service growing out of and incidental to his or her employment. It is undisputed that the injury to Anderson—the alleged defamation—did not occur until after Anderson resigned. Thus, at the time of the injury, Anderson was not the County's employee and was not subject

> to the provisions of the Act. . . . Anderson's injury therefore is not covered by the Act. Consequently, the Act's exclusive remedy provision does not bar his defamation claim.

Id. at 278 (citations omitted). See also Davaris v. Cubaleski, 12 Cal. Rptr.2d 330, 335 (Cal. Ct. App. 1993) ("We note, initially, that certain of the allegedly defamatory statements made by respondent . . . were made after appellant was terminated and can, by no stretch, be deemed to have occurred in the course and scope of appellant's employment.").

In sum, to the extent the Plaintiffs' Complaints allege that defamatory statements were made *after* they were terminated from employment, the circuit court erred in ruling that their defamation and false light claims were barred by the WCL exclusivity provision and in granting the County Defendants' motions to dismiss these claims.

B. Summary Judgment Ruling For Kawauchi and Yagong Individually

As noted earlier, the circuit court resolved the claims against Kawauchi and Yagong Individually by granting their motion for summary judgment. In their opening brief on appeal, the Plaintiffs do not challenge the summary judgment ruling as a point of error, only make passing reference to the summary judgment ruling in other parts of their brief, and do not present any substantive argument as to why this summary judgment ruling was in error. It is only in their reply brief that the Plaintiffs present any substantive argument related to the summary judgment ruling for Kawauchi and Yagong Individually. Given this circumstance, Nakamoto and Ayau have waived any challenge to the circuit court's summary judgment ruling in favor of Kawauchi and Yagong Individually. See HRAP Rule 28(b)(4) and (7); Tauese v. Dep't of Labor & Indust. Relations, 113 Hawaiʻi 1, 29, 147 P.3d 785, 813 (2006)(appellant waived issue by failing to provide any discernable argument in the opening brief).

Even assuming *arguendo* that the Plaintiffs have properly raised an issue on appeal contesting the circuit court's

summary judgment ruling, they only address at most the defamation and false light claims against Kawauchi and Yagong Individually. We conclude the circuit court properly granted summary judgment on these claims, because Kawauchi and Yagong established there is no genuine issue of material fact that the statements challenged by Plaintiffs were true.

With regard to the Plaintiffs' defamation claims, truth is an absolute defense. Gonsalves, 100 Hawaiʻi at 171, 58 P.3d at 1218.

Further, with regard to the Plaintiffs' false light claims:

> The false-light tort is defined in the Restatement (Second) of Torts as follows:
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Wilson v. Freitas, 121 Hawaiʻi 120, 130, 214 P.3d 1110, 1120 (App. 2009) (quoting Restatement (Second) of Torts § 652E (1977)). Moreover, "[a]lthough false-light and defamation claims are not identical, there is a substantial overlap between the claims. Courts have held that where . . . a false-light claim is based on the same statements as a defamation claim, the false-light claim must be dismissed if the defamation claim is dismissed." Id. (citation omitted). We note that in their opposition to Kawauchi and Yagong Individually's summary judgment motion, the Plaintiffs' articulated that their defamation and false light claims were based on the same challenged statements that were published on January 12, 2012, in the Hawaii Tribune Herald.

The Hawaii Tribune Herald newspaper article, entitled "County elections workers fired," was originally attached to both Nakamoto and Kawauchi's Complaints. The article states that "Hawaii County has fired four elections workers, including the

program administrator, following an investigation into alcohol storage and private business activities allegedly conducted at a Hilo elections warehouse." The article quotes Yagong as saying, *inter alia*: "They have received termination notices already"; "The infractions dealt with 'violations of county policy'"; "I don't want to go into details and jeopardize the process"; and the "final decision (to terminate the employees) is made by the county clerk, but I was involved in the decision-making process[.]" The article further states that "Kawauchi confirmed four employees have 'separated' from the county, but she couldn't divulge why. However she identified the employees as Pat Nakamoto, a longtime elections program administrator, Glen Shikuma, warehouse manager, Shyla Ayau, and Elton Nakagawa."

Kawauchi and Yagong attached admissible evidence to their motion for summary judgment showing that the statements in question were true. For example, Kawauchi and Yagong each submitted extensive declarations in which they attested to, among other things, receiving an investigative report by CSII that was attached to the declarations and which noted violations of County of Hawaii policy, including liquor and safety violations. Kawauchi's declaration also states that on January 5, 2012, seven days before the newspaper article was published, she sent a Notice of Termination to both Nakamoto and Ayau. Yagong's declaration states that he received a copy of Nakamoto and Ayau's Notices of Termination. The Notices of Termination were attached to the declarations. Kawauchi signed both termination letters and both letters stated that the County Clerk was discharging Nakamoto and Ayau as of January 6, 2012 for the stated reasons, which included violation of the County's alcohol-free workplace policy. Both letters also indicate that Yagong was copied on the letters. Thus, the undisputed evidence and the letters show that Nakamoto and Ayau were in fact terminated from employment with the County at the time the January 12, 2012 Hawaii Tribune Herald article was published, and that violations of County policy were involved.

In their opposition to Kawauchi and Yagong's motion for summary judgment, the Plaintiffs did not present any specific argument disputing the truth of the statements in the Hawaii Tribune Herald article. On May 6, 2013, at the hearing on the motion for summary judgment, in addressing the statements in the Hawaii Tribune Herald article, counsel for Nakamoto and Ayau argued:

> All the statements highlighted by [counsel for Kawauchi and Yagong], we contend, are false. And you only have to look at Exhibit 4 to our memorandum in opposition, Mr. Shikuma's declaration, about when those events, in terms of the sign-making -- when the business, conducting the business, was done. All those statements are directly refuted by Mr. Shikuma when he made that declaration.

Glen Shikuma's (**Shikuma**) declaration, attached to the Plaintiffs' opposition memo, does not refute the truth of the statements published in the Hawaii Tribune Herald article about Plaintiffs. Rather, Shikuma's declaration addresses, *inter alia*, his personal sign making business. Shikuma's declaration does not address the truth or falsity of whether employees had received termination notices dealing with violations of County policy or who was terminated from the County, which were the subjects of the challenged statements in the Hawaii Tribune Herald article.

Given the evidence adduced related to Kawauchi and Yagong Individually's motion for summary judgment, the circuit court properly granted summary judgment on the defamation and false light claims because the challenged statements by Kawauchi and Yagong were not false.

C. Summary Judgment Rulings for CSII

Although not set out in any point of error, the Plaintiffs argue in their opening brief that CSII's investigation was negligent and that CSII generally cast the Plaintiffs in a false light.

1. Negligent Investigation Claim Against CSII

The parties do not dispute that CSII was hired by the County to conduct an independent investigation into unauthorized activities at the County's Election Warehouse. The circuit court

ruled that CSII did not owe a duty to the Plaintiffs in connection with the investigation. The Plaintiffs contend on appeal that the circuit court erred in granting summary judgment for CSII on the negligent investigation claim because CSII owed them a duty of reasonable care and conducted an inadequate investigation. In particular, the Plaintiffs claim that "CSII failed or ignored to interview or properly interview critical witnesses," and violated best practices in conducting the investigation. The Plaintiffs further contend that "[i]t was highly foreseeable that if the investigation unjustly implicated the Plaintiffs, they would be fired and their reputations damaged."

CSII responds that summary judgment was properly granted in its favor because, *inter alia*, the Plaintiffs did not establish that CSII owed the Plaintiffs a duty that would support a negligence claim.

A negligent investigation claim is construed as a common law negligence claim. Tseu ex rel. Hobbs v. Jeyte, 88 Hawaiʻi 85, 91, 962 P.2d 344, 350 (1998).

> [T]he elements of a cause of action founded on negligence are:
> 1. A duty or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
> 2. A failure on the defendant's part to conform to the standard required: a breach of the duty;
> 3. A reasonably close causal connection between the conduct and the resulting injury and[;]
> 4. Actual loss or damage resulting to the interests of another.

Id. (emphasis added) (citation omitted). Thus, "a negligence action lies only where there is a duty owed by the defendant to the plaintiff." Birmingham v. Fodor's Travel Publ'ns, Inc., 73 Haw. 359, 366, 833 P.2d 70, 74 (1992) (citation omitted); McKenzie v. Haw. Permenente Med. Grp., Inc., 98 Hawaiʻi 296, 298, 47 P.3d 1209, 1211 (2002) ("A prerequisite to any negligence action is the existence of a duty owed by the defendant to the plaintiff that requires the defendant to conform to a certain

standard of conduct for the protection of the plaintiff against unreasonable risks.").

> The existence of a duty, that is, whether such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other-or, more simply, whether the interest of a plaintiff who has suffered invasion is entitled to legal protection at the expense of a defendant-is entirely a question of law.

Birmingham, 73 Haw. at 366, 833 P.2d at 74 (citation omitted).

"The question of whether one owes a duty to another must be decided on a case-by-case basis." Blair v. Ing, 95 Hawaiʻi 247, 260, 21 P.3d 452, 465 (2001) (citation omitted). Factors relevant in determining whether to impose a duty include:

> whether a special relationship exists ..., the foreseeability of harm to the injured party, the degree of certainty that the injured party suffered injury, the closeness of the connection between the defendants' conduct and the injury suffered, the moral blame attached to the defendants, the policy of preventing harm, the extent of the burden to the defendants and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. (block format altered) (quoting Lee v. Corregedore, 83 Hawaiʻi 154, 164, 925 P.2d 324, 334, 336 (1996)).

The Plaintiffs point to the Restatement (Second) of Torts § 302A (1965), comments *c* and *d,* to support their contention that CSII was negligent. Restatement (Second) of Torts § 302A provides:

> An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

(Emphasis added.)[7]

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[7] Section 302A is "a special application of the rule stated in § 302(b)." Restatement (Second) of Torts § 302A, cmt *a*. In turn, Section 302 provides:

> A negligent act or omission may be one which involves an unreasonable risk of harm to another through either
> (a) the continuous operation of a force started or continued by the act or omission, or
> (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

(continued...)

Comment *c* to Restatement (Second) of Torts § 302A provides:

> As stated in § 290, the actor is required to know the common qualities and habits of human beings, in so far as they are a matter of common knowledge in the community. The actor may have special knowledge of the qualities and habits of a particular individual, over and above the minimum he is required to know, or he may have special warning that the individual is or is about to be negligent or reckless in the particular case. Even without such special knowledge, the actor is required to know that there is a certain amount of negligence in the world, and that some human beings will fail on occasion to behave as a reasonable man would behave. Where the possibility of such negligence involves an unreasonable risk of harm, either to the person who is to be negligent or to another, the actor, as a reasonable man, is required to take it into account and to govern his conduct accordingly.

Restatement (Second) of Torts § 302A, cmt *c*.

In turn, Comment *d* to Restatement (Second) of Torts § 302A provides:

> As stated in § 291, negligence is determined by weighing the magnitude of the risk involved against the utility of the actor's conduct. If the probability of the negligent conduct of another is relatively slight, or if the harm to be expected from it is relatively slight, and the utility of the actor's conduct is relatively great in proportion, the actor may be entitled to ignore the risk, and proceed on the assumption that others will act in a reasonable manner. On the other hand, if the actor knows or should realize that there is a serious chance of grave harm to valuable interests of others, and the utility of his own conduct is less than the risk, he is required to take precautions against the negligence of others which a reasonable man would take under like circumstances.

Restatement (Second) of Torts § 302A, cmt *d*.

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[7](...continued)
Restatement (Second) of Torts § 302 (1965). Comment *b* to Section 302 notes that: "A special application of Clause (b) of this Section, involving the risk of harm through the negligent or reckless conduct of others, is stated in § 302A." (Emphasis added.)

Given that Section 302A is a special application of Section 302, it appears doubtful that Plaintiffs' reliance on Section 302A creates a legal duty for establishing a negligence claim. In McKenzie, the Hawaiʻi Supreme Court stated, "Restatement (Second) § 302 by itself does not create or establish a legal duty; it merely *describes* a type of negligent act." 98 Hawaiʻi at 300, 47 P.3d at 1213. The supreme court further stated that "the fact that [the defendant's] negligent conduct falls under the rubric of Restatement § 302 does not establish per se that he owes a duty to the [plaintiffs]; it only describes the *manner* in which he may be negligent *if* [the defendant] owed a duty to the [plaintiffs]." Id. at 301, 47 P.3d at 1214.

By relying on Section 302A, the Plaintiffs apparently suggest that CSII realized or should have realized that its investigation involved an unreasonable risk of harm to the Plaintiffs "through the negligent or reckless conduct of . . . a third person," *i.e*, Kawauchi and/or Yagong. Restatement (Second) of Torts § 302A; See also Touchette v. Ganal, 82 Hawaiʻi 293, 303-04, 922 P.2d 347, 357-58 (1996)(discussing that wife of a man who killed and injured others might have an actionable duty to those killed or injured based on Restatement (Second) of Torts §§ 302, 302A and/or 302B, where she was alleged to have had an extra-marital affair, taunted and humiliated her husband with respect to the affair, causing husband to suffer severe and extreme emotional and mental distress and depression); McKenzie, 98 Hawaiʻi at 301 n.5, 47 P.3d at 1214 n.5.

In this case, the undisputed evidence is that CSII was retained by the County in connection with information that unauthorized activities were being conducted at the County Election Warehouse. CSII was one of two investigation companies listed on the County Procurement List. There is no evidence in the record to suggest that CSII realized or should have realized that its investigation involved an unreasonable risk of harm to the Plaintiffs "through the negligent or reckless conduct" of Kawauchi, Yagong, or any other third party. The declarations in the record by Kevin Antony (**Antony**), a member of CSII who conducted the investigation, and Kawauchi and Yagong, detail the actions taken related to the investigation and reflect a legitimate concern involving the use of the County Election Warehouse. Moreover, the declarations of Kawauchi and Yagong expressly state that they never held any personal animosity toward Nakamoto or Ayau, that they never intended to inflict any unreasonable harm upon Nakamoto or Ayau, and that they made it clear to Antony that they required a fair and impartial investigation.

The Plaintiffs did not submit any evidence to suggest that CSII realized or should have realized that its investigation

posed an unreasonable risk of harm to Plaintiffs through the negligent or reckless conduct of Kawauchi, Yagong, or any other third party.

We therefore conclude that, given the undisputed material circumstances in this case, the Plaintiffs' reliance on Restatement (Second) of Torts § 302A, comments *c* and *d*, is misplaced. These provisions do not establish that CSII owed a legal duty to the Plaintiffs.

The Plaintiffs also point to the Restatement (Second) of Torts § 500 (1965) to support their contention that CSII was negligent. Section 500, entitled "Reckless Disregard of Safety Defined," provides:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (emphasis added).

Section 500 merely provides a definition for the reckless disregard of the safety of others. Further, Section 500 applies when a duty already exits. Thus, this section does not provide support for establishing that CSII owed a duty to the Plaintiffs as an investigator retained by the County to conduct an independent investigation.

The Plaintiffs also contend that Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287 (11th Cir. 2007) supports their contention that CSII is liable for negligently conducting its investigation. However, Baldwin is distinguishable. In Baldwin, the Court of Appeals of the Eleventh Circuit analyzed whether pursuant to two United States Supreme Court cases, Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), the employer "exercised reasonable care to . . . correct promptly any sexually harassing behavior," once the plaintiff,

Baldwin, complained. Baldwin, 480 F.3d at 1303. Baldwin challenged the reasonableness of the investigation of her discrimination claim. Id. at 1304. Baldwin does not involve whether a retained investigation company owed an actionable duty to the potential subjects of the investigation, and thus we conclude it is inapposite to the instant case.

Based on the above, we conclude that CSII did not owe a legal duty to the Plaintiffs that would support their claim for negligence against CSII. Given the undisputed record, as discussed above, we decline to extend a duty as a matter of law in this case. See Ishmael v. Andrew, 137 P.3d 1271, 1274-75 (Okla. Civ. App. 2006) (stating that the plaintiff, a former employee, failed to present authority supporting a ruling that defendant, an attorney hired by the employer to investigate an incident at the workplace, owed a duty to the former employee).

Therefore, the circuit court properly granted CSII's motion for summary judgment on the negligent investigation claim.

2. False Light Claim Against CSII

In the Order Granting CSII's Motion for Summary Judgment, the circuit court concluded that the Plaintiffs "failed to present any admissible evidence to demonstrate that any defamatory statement[s] [were] published by CSII" and because the Plaintiffs' defamation claims were dismissed the false light claim was also dismissed.

The Hawaii Tribune Herald article published on January 12, 2012, in which the alleged defamation and false light occurred, does not contain any statements from CSII. Further, in their opposition to CSII's motion for summary judgment, Nakamoto and Ayau only made conclusory arguments about the false light claim, but did not adduce any evidence creating a genuine issue of material fact as to whether CSII gave publicity to any matter concerning Nakamoto and/or Ayau where CSII had knowledge or acted in reckless disregard to the falsity of the publicized matter.

The circuit court properly granted summary judgment for CSII on the false light claim.

D. Law of the Case

Based on the above, the circuit court erred only in its ruling that the Plaintiffs' claims for defamation and false light against the County Defendants were barred entirely by the WCL exclusivity provision. Rather, to the extent that the Complaints alleged defamatory and false light statements occurred *after* the Plaintiffs' were terminated, the WCL exclusivity provision does *not* apply to bar those claims.

However, with respect to the defamation and false light claims, we have upheld the summary judgment ruling in favor of Kawauchi and Yagong Individually. That is, we have determined that Plaintiffs waived their challenge to the summary judgment ruling in favor of Kawauchi and Yagong Individually, and even considering the merits of that ruling, summary judgment was proper.

Given these circumstances, we conclude that the "law of the case" doctrine applies, such that Plaintiffs are foreclosed from re-litigating the defamation and false light claims against the County Defendants (*i.e.* Kawauchi and Yagong, in their official capacities, and the County of Hawaiʻi). The allegations against Kawauchi and Yagong for the defamation and false light claims are identical, regardless of their individual or official capacities. That is, Plaintiffs do not assert any different allegations or facts related to Kawauchi and Yagong based on their status as individuals or in their official capacities. Moreover, the claims against the County are based only on the doctrine of *respondeat superior*, or in other words, the "doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Respondeat superior*, Black's Law Dictionary (10th ed. 2014).

The Hawaiʻi Supreme Court has explained "law of the case" doctrine as follows:

> The "law of the case" doctrine holds that "a determination of a question of law made by an appellate court in the course of an action becomes the law of the case and may not

> be disputed by a reopening of the question at a later stage of litigation." *Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 352 n.8, 944 P.2d 1279, 1295 n.8 (1997). Thus, as the United States Supreme Court held, the "law of the case" doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided." [*Christianson v. Colt Indust. Operating Corp.*, 486 U.S. 800, 802, 108 S.Ct. 2166 (1988)].

Hussey v. Say, 139 Hawaiʻi 181, 186, 384 P.3d 1282, 1287 (2016) (format altered).

In Ditto v. McCurdy, the supreme court affirmatively relied on a case which described the law of the case doctrine as "a form of issue preclusion within the same case." 98 Hawaiʻi 123, 128 n.6, 44 P.3d 274, 279 n.6 (2002)(citing Overseas Shipholding Grp., Inc. v. Skinner, 767 F. Supp. 287, 296 (D.D.C 1991)). Moreover, the court in Ditto stated:

> "the law of the case concept applies to single proceedings, and operates to foreclose re-examination of decided issues either on remand or on a subsequent appeal but does not encompass issues presented for decision but left unanswered by the appellate court." [*Weinberg v. Mauch*, 78 Hawaiʻi 40, 47, 890 P.2d 277, 284 (1995)] (citing *Pegues v. Morehouse Par. Sch. Bd.*, 706 F.2d 735, 736 (5th Cir.1983)) (internal quotation marks, brackets, and ellipses omitted).

98 Hawaiʻi at 128, 44 P.3d at 279 (emphasis added).

Here, the Plaintiffs have already litigated their defamation and false light claims against Kawauchi and Yagong in their individual capacities. The law of the case doctrine precludes further litigation of these claims against the County Defendants because: the Plaintiffs assert identical allegations against Kawauchi and Yagong for defamation and false light, whether in their individual or official capacities; the claims against the County are only for respondeat superior liability related to Kawauchi and Yagong's alleged conduct; and we have determined in this appeal that the circuit court properly granted summary judgment to Kawauchi and Yagong Individually on these claims.

IV. Conclusion

Based on the foregoing, the Judgment filed on October 3, 2013 in the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawaiʻi, March 14, 2017.

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