NO. 22052

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

CHARLES L. RAPOZA, as Special Administrator of the Estate of CHARLES L. RAPOZA, JR., Deceased; CHARLA PUA LINDSEY, as Next Friend of CHAE-LYNN KEALAPUA LINDSEY; CHARLES RAPOZA, SR.; THERESA HOLICEK; and CASEY SOUZA, Plaintiffs-Appellants

vs.

WILLOCKS CONSTRUCTION CORPORATION, a Hawaiʻi corporation, Defendants-Appellees

and

JOHN DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants
(CIV. NO. 96-026K)

CHARLES L. RAPOZA, as Special Administrator of the Estate of CHARLES L. RAPOZA, JR., Deceased; CHARLA PUA LINDSEY, as Next Friend of CHAE-LYNN KEALAPUA LINDSEY; CHARLES RAPOZA, SR.; THERESA HOLICEK; and CASEY SOUZA, Plaintiffs-Appellants

vs.

KARL MILTON TAFT; JON GOMES; JON GOMES & ASSOCIATES, INC., a Hawaiʻi corporation; ABRAHAM LEE; ABE LEE DEVELOPMENT, INC., a Hawaiʻi corporation; KALAOA DEVELOPMENT, INC., a Hawaiʻi corporation; KALAOA JOINT VENTURE, a Hawaiʻi General Partnership in Dissolution; KALAOA PARTNERS, INC., a Hawaiʻi corporation; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawaiʻi corporation, Defendants-Appellees

and

JOHN DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants

and

JON GOMES, JON GOMES & ASSOCIATES, INC., ABRAHAM LEE, ABE LEE DEVELOPMENT, INC., KALAOA DEVELOPMENT, INC., KALAOA JOINT VENTURE, DBA KALAOA PARTNERS, Third-Party Plaintiffs-Appellees

vs.

WILLOCKS CONSTRUCTION CORPORATION, a Hawaiʻi corporation,
Third-Party Defendant-Appellee

and

JOHN DOES 1-10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; and DOE ENTITIES 1-10,
Third-Party Defendants
(CIV. NO. 96-286K)

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NOS. 96-026K & 96-286K)

MEMORANDUM OPINION
(By: Acoba, J.; With Moon, C.J., Levinson,
Nakayama, and Duffy, JJ., Concurring)

Plaintiffs-Appellants Charles L. Rapoza, as Special Administrator of the Estate of Charles L. Rapoza, Jr., Deceased, Charla Pua Lindsey, as next of Friend of Chae-Lynn Kealapua Lindsey, Charles Rapoza, Sr., Theresa Holicek, and Casey Souza (Plaintiffs) appeal from: (1) the final judgement filed on October 14, 1998; (2) the judgment filed on April 14, 1998; (3) the February 13, 1998 order granting the motion for summary judgment filed by Defendant-Appellee Karl Milton Taft (Taft) on November 20, 1997; (4) the March 27, 1998 findings of fact, conclusions of law and order granting the motion for summary judgment of the complaint filed by Third-Party Plaintiff-Appellee Abraham Lee on November 15, 1996; (5) the October 16, 1998 order granting the motion for costs against Plaintiffs filed by Defendant-Appellee Willocks Construction Corporation (Willocks);[1]

[1] No party addresses the appeal from this order. As no discernible argument was presented, this issue is not addressed.

(6) the December 23, 1998 order granting in part and denying in part the motions for costs filed June 12, 1998, by Defendant-Appellee Jon Gomes (Gomes) (decision rendered by court on July 1, 1998);[2] and (7) the July 1, 1998 stipulation and order regarding the taxation of costs[3] against Plaintiffs and in favor of Taft.[4]

For the reasons stated herein, the February 13, 1998 order granting defendant Taft's motion for summary judgment and the October 14, 1998 final judgment of the third circuit court (the court)[5] are vacated and the case is remanded in accordance with this decision.

I.

This wrongful death action arose from the death by electrocution on November 16, 1994 of Charles Rapoza, Jr. (Rapoza), a nineteen-year-old construction worker employed by Tri-S Corporation (Tri-S). Tri-S was a drilling subcontractor to Willocks, the general contractor for construction of a subdivision in North Kona, Hawai'i. The property was owned by

[2] No party addresses the appeal from this order. As no discernible argument was presented, this issue is not addressed.

[3] No party addresses the appeal from this order. As no discernible argument was presented, this issue is not addressed.

[4] On August 18, 2003, Willocks filed a Notice of Order Granting Ex Parte Petition for Omnibus Order Staying All Proceedings. Therefore, pursuant to the order granting the stay by the third circuit court in S.P. No. 03-1-0029, "all actions or proceedings in which The Home Insurance Company, (including Home Indemnity Company and City Insurance Company), was a party or obligated to defend a party, [were] stayed for six (6) months from the date of said Order." A notice of waiver of stay of proceedings was filed on December 5, 2003.

[5] The Honorable Riki May Amano presided over the case.

Gomes.

Gomes entered into a contract with Willocks for construction of the subdivision improvements. Willocks had subcontracted with Tri-S to drill ten dry wells with a drill rig in the subdivision for a fixed price per dry well.

Tri-S's drill rig, a Watson 3000, was mounted on the rear of a large truck. Attached to the turntable on the truck was a boom which the operator (who was seated on the rig) could move by hydraulics both vertically and horizontally. During actual drilling, the operator maintained the boom in the vertical position. In its vertical position, the top of the boom was forty-five-plus feet above ground. The rig also included a clamshell type device called a "grabber," which was attached to the boom's lower end. The grabber was used at intervals to remove dirt and rocks from the dry well being drilled, and to place the material on the ground near the well.

During this phase, it was necessary for the operator to position the boom out of the vertical position in order to place the dirt and rocks at an appropriate location on the ground. It was also necessary to position the boom out of the vertical position when the drill bit ("core barrel") was removed from the dry well to discharge dirt and rock from the inside of the core barrel.

The horizontal distance between the 7200 volt lines of Defendant-Appellee Hawaii Electric Light Company (HELCO) and dry

wells 2, 3 and 10 were 6’4”, 7’4”, and 17.9’, respectively. Because of this proximity, the boom length, the height of the wires of thirty-four feet, and the drill rig dimensions, Plaintiffs contend that it was not possible to drill any of these three dry wells unless the drill rig was positioned such that its boom, when out of the vertical position, could contact adjoining power wires during grabber operations.

At and before the accident, Hawaii’s Occupational Safety Health Act (HOSHA) and the federal Occupational Safety Health Act (OSHA)[6] regulations prohibited the operation of machinery, any part of which was capable, in operation, of coming within ten feet of high voltage wires, unless the wires were de-energized or insulated. Hawaiʻi Administrative Rules (HAR) § 12-141-3(d)(6)(C).[7] The HOSHA regulations also required that the “owners of the lines or their authorized representatives be notified and provided with all pertinent information.” HAR § 12-

[6] Although subsequent quotations from transcripts or briefs may refer to OSHA violations, all incidents related to the November 16, 1994 accident fall within the purview of HOSHA, HRS chapter 396.

[7] HAR § 12-141-3(d)(6)(C) states in relevant part:

> **Safety-related work practices** . . . . (d) Special precautions against electric shock. (6) Proximity of high-voltage lines. (C) The operation, erection, or transportation of any tools, machinery, or equipment[,] any part of which is capable of vertical, lateral, or winging motion shall not be performed if, at any time, it is possible to bring the tools, machinery, or equipment within 10 feet of high-voltage lines unless the procedures of subparagraph (F) below are followed. (F) Accidental contact with high-voltage lines shall be guarded against either by (i) The erection of mechanical barriers to prevent physical contact with high-voltage conductors; or (ii) Deenergizing the high-voltage conductors, and grounding where necessary.

136-2(o)(14)(C)(15).[8]

Neither Willocks nor Tri-S notified HELCO prior to drilling dry wells 2, 3 and 10. The 7200 volt wires next to the wells were neither de-energized nor insulated during Tri-S's drilling of the dry wells. The HOSHA regulation required a warning plate on the drill-rig stating that it was prohibited from operating the machinery if any part of the drill rig could come within ten feet of high-voltage wires. No such warning plate was installed on the drill rig. See HAR § 12-136-2(o)(9).[9]

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[8] HAR § 12-136-2(o)(14)(C)(15) states in relevant part:

> Before the commencement of operations near electrical lines, the owners of the lines or their authorized representative shall be notified and provided with all pertinent information. The cooperation of the owner shall be requested.

In their opening brief, Plaintiffs quote HAR § 12-136-2(C)(15) which does not seem to exist as cited, but the HAR language is substantially similar to HAR § 12-136-2(o)(14)(C)(15). The opening brief quotes HAR § 12-136-2(C)(15) as follows:

> Before the commencement of operations with a derrick near electrical lines, the employer shall notify the owners of the lines or their authorized representative and provide it with all pertinent information. The cooperation of the owner shall be requested.

In their opening brief, Plaintiffs interpret this regulation to require that "the OSHA 'employers,' before drilling near electrical lines, notify the line owner, and provide it with pertinent information."

[9] HAR § 12-136-2(o)(9) states in relevant part:

> The owner, agent, or employer responsible for the operation of equipment shall post and maintain in plain view of the operator on each crane, derrick . . . [or] drilling-rig . . . durable warning signs legible at 12 feet. One sign shall read: "This Equipment Shall be Positioned, Equipped, or Protected So That No Part Shall Be Capable of Coming Within Ten Feet of High-Voltage Lines."

Tri-S began drilling operations sometime during 1989-1990. To the knowledge of Taft, Tri-S's president, during the four to five years of Tri-S's operation prior to the accident, Tri-S's drill rigs, on numerous occasions, drilled within ten feet of energized, uninsulated high voltage wires. To the knowledge of Taft and his senior operator, Robert Delima (Delima), no one at Tri-S during this period ever requested HELCO to de-energize or insulate its high voltage wires.

Glenn Ermitano (Ermitano) and his groundman (assistant), Rapoza, were instructed to work on the dry wells in question. After observing HELCO's 7200 volt wires and the proximity of some dry wells, Rapoza recommended to Ermitano that HELCO be contacted to have the wires de-energized. It was, however, a decision to be made by Ermitano.

Willocks' general superintendent, Robert Hons (Hons), instructed Ermitano and the Willocks foreman that Ermitano had two options -- (1) drill next to the energized, uninsulated wires, or (2) Willocks would dig the dry wells with its backhoe. Ermitano elected the first option at dry wells 2, 3 and 10.

On November 16, 1994, when the operator of the rig at well 10 leaned the boom to discharge the dirt, a cable on the boom contacted a wire or came close enough to the wire to cause an arc, causing Rapoza to be electrocuted.

HOSHA issued eight citations to Tri-S for violations of the OSHA regulations (five related to electrical safety

violations in connection with Rapoza's electrocution).

On February 12, 1996, Plaintiffs filed a wrongful death complaint (Civil No. 96-026K) against Willocks for negligence. On November 15, 1996, Plaintiffs filed a complaint (Civil No. 96-0286K) against Taft, Jon Gomes,[10] Abraham Lee,[11] Kalaoa Development,[12] and HELCO for negligence. [The defendants in these two proceedings are collectively referred to herein as "Defendants."] Civil Nos. 96-026K and 96-0286K were consolidated for discovery and trial. Additionally, some of the claims were resolved by summary judgment, by voluntary dismissal, and by settlement. On December 29, 1997, the court orally granted Taft's motion for summary judgment, finding that Taft was the employer of Rapoza and not a co-employee, therefore he was immunized from liability for wilfull and wanton misconduct under Hawaiʻi Revised Statutes (HRS) § 386-8 91993).[13] After a jury trial, the claims against Willocks and the Gomes defendants were decided by special verdict, finding that Willocks and the Gomes defendants were not negligent.

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[10] The complaint was also filed against Jon Gomes & Associates.

[11] The complaint was also filed against Lee Abe Development, Inc.

[12] The complaint was also filed against Kalaoa joint Venture, Kalaoa Partners, and Kalaoa Partners, Inc.

[13] HRS 386-8 (1993) states in relevant part: "[a]nother employee of the same employer shall not be relieved of his liability as a third party, if the personal injury is caused by his wilful and wanton misconduct."

II.

On appeal Plaintiffs contend that the court erred when: (1) the court granted Taft's motion for summary judgment; (2) the court refused to permit Plaintiffs to introduce evidence of Tri-S' HOSHA citations by limiting the testimony of Melvin Han (Han), HOSHA's compliance officer; (3) the court admitted hearsay evidence by Willocks' general superintendent that HOSHA did not cite Willocks for the accident; (4) the court refused to permit Plaintiffs to impeach Taft with evidence that HOSHA had not determined Tri-S' drill rig was operated in compliance with HOSHA regulations; (5) the court abused its discretion when it denied Plaintiffs' motion for mistrial; (6) the court refused to give jury instructions regarding (a) arguments made by Gomes based on Hons' testimony (Plaintiffs' instruction 43), (b) ultrahazardous activity, and (c) the force and effect of law of OSHA regulations; and (7) the court gave instructions (a) that violation of the law was insufficient to find negligence, (b) that complete control over their work by Tri-S or Willocks would relieve Willocks and Gomes of liability, and (c) that Plaintiffs were required to prove Defendants had a duty to Rapoza.

III.

The court improperly granted Taft's motion for summary judgment. As mentioned, the case against Taft was dismissed by summary judgment entered on February 13, 1999, therefore Taft did

not participate as a defendant at trial. Taft moved for summary judgment on the ground that as sole owner of Tri-S, he was an employer[14] of Rapoza and not a co-employee[15] of Rapoza and the "undisputed fact [is] that Defendant Taft was not at the job site on the day of the accident nor did he direct Ermitano's or Rapoza's work on that fateful day." The court found that, based on Taft's affidavit, he was the sole shareholder and owned 100% of Tri-S and was its president and chief officer, and, that, "all of the allegations made against [Taft], even if deemed to be true, are made against him with respect to his duties as the employer of [Rapoza]." The court thus concluded that Taft was the employer and therefore immune from suit under HRS § 386-5 (1993).[16]

The court inter alia made the following conclusions of

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[14] HRS § 386-1 (1993) states in relevant part as follows:

> "Employee" means any individual in the employment of another person.
> . . . .
> "Employment" does not include the following service:
> . . . .
> (8) Service performed by an individual for a corporation if the individual owns at least fifty per cent [sic] of the corporation[.]"

[15] See supra note 12.

[16] HRS § 386-5 (1993) states in relevant part that

> [t]he 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.

(Emphasis added).

law:

> 6. All of the allegations made against Defendant Karl Milton Taft, even if deemed to be true, are made against him with respect to his duties as the employer of the Decedent. The Court concludes that within the workers' compensation context, Defendant Karl Milton Taft is deemed the employer in this suit brought against him by the Plaintiffs and is therefore immune from suit for Decedent's work accident death.
>
> 7. Under Hawaii's workers' compensation law, an "employee" means any individual in the employment of another person. Hawaiʻi Revised Statutes Section 386-1.
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> 8. Under Hawaii Revised Statutes Section 386-1(8), employment does not include service performed by an individual for a corporation if the individual owns at least fifty per cent [sic] of the corporation.
>
> 9. Accordingly, for purposes of Hawaii's workers compensation law, Defendant Karl Milton Taft is not an employee of Tri-S Corporation and not a co-employee of the Decedent, and those claiming under him cannot bring an action against Defendant Karl Milton Taft for wilful and wanton misconduct pursuant to Hawaii Revised Statutes Section 386-8 under the co-employee immunity exception.
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> 10. The Court has considered the case of Iddings v. Mee-Lee, 82 Haw. 1 (1996) and concludes that it is distinguishable from the case against Defendant Karl Milton Taft in that: (a) the defendant in Iddings did not own the employer entity unlike the case at bar where Defendant Taft had complete ownership and control of the employer entity and was its President; (b) the defendant in Iddings was a supervisory co-employee of the injured employee unlike the case at bar where Defendant Taft is not an employee of Tri-S Corporation for purposes of Hawaii's workers' compensation law; and (c) the defendant in Iddings had supervisory control for only one area of the employer's workplace unlike the case at bar where Defendant Taft had total control over the employer entity of Tri-S Corporation and therefore was the only person responsible for carrying out the duty of the employer to provide a safe workplace for every aspect of Tri-S Corporation, and therefore, in the context of this action brought by Plaintiffs, Defendant Taft was the employer and is immune from suit.

(Emphases added).

"Summary 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 a judgment as a matter of law." Konno v. County

of Haw., 85 Hawai‘i 61, 70, 937 P.2d 397, 406 (1997) (citations and internal quotation marks omitted); see also Hawai‘i Rules of Civil Procedure (HRCP) Rule 56(c) (2003).

On appeal Plaintiffs argue: (1) that Tri-S and not Taft was Rapoza's employer under HRS § 386-5 because (a) Taft admitted he was an employee of Tri-S, (b) Taft was the principal supervisory person at Tri-S responsible for providing a safe work place for Rapoza, and (c) under Iddings v. Mee-Lee, 82 Hawai‘i 1, 919 P.2d 263 (1996), HRS § 386-5 does not extend to an employee; (2) Taft was a co-employee of Rapoza because (a) at trial Taft stated that his wife owned all the Tri-S stock at the time of the accident, (b) the HRS § 386-1 exclusion of owners of corporate stocks from the definition of "employment" was to permit corporate owners to opt out of mandatory workers' compensation insurance coverage, but not to immunize them, and (c) at the time of the incident Taft was a covered employee under Tri-S workers' compensation policy.

In response, Taft maintains that, as to item (1)(a), in its answer it admitted Taft was the president and manager of Tri-S, and a fellow employee of Rapoza, but denied allegations of wilful and wanton conduct under HRS § 386-8, and raised as a defense the exclusive remedy powers of HRS chapter 386. Taft argued below that he was an employee in the "general sense of corporate tax and labor laws."

With respect to Plaintiffs' arguments to 1(b), 1(c) and 2(b) and 2(c), the following applies. To reiterate, HRS § 386-1

(1993) states in relevant part that "'[e]mployee' means any individual in the employment of another person." (Emphasis added.) HRS §§ 386-1 and 386-1(8) (1993) state that employment is

> 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. It includes service of public officials, whether elected or under any appointment or contract of hire express or implied.
>
> "Employment" does not include the following service:
>
> . . . .
>
> (8) Service performed by an individual for a corporation if the individual owns at least fifty per cent [sic] of the corporation; provided that no employer shall require an employee to incorporate as a condition of employment."

(Emphasis added.)

Focusing on these statutes alone, Taft was not engaged in "employment" as defined in HRS § 386-1 and therefore would not appear to fall within the definition of "employee." However, in determining whether a person is an employer so as to be immune from suit, this court indicated in Iddings that resort must be had to the definition of an "employer."

> Under the dissent's position, Dr. Mee-Lee, as a "supervisory" employee, would be entitled to immunity under HRS § 386-5 and would therefore be immune from Iddings's action against him. The dissent's position, however, is in conflict with the plain meaning of the language of HRS § 386-5 because the immunity accorded by HRS § 386-5 extends only to "employers." HRS § 386-5 provides in pertinent part that "[t]he rights and remedies herein granted to an employee . . . on account of a work injury suffered by the employee shall exclude all other liability of the *employer* to the employee" (emphasis added). "Employer" is defined in HRS § 386-1 (1993) as "any person having one or more person in the person's *employment*." (Emphasis added.) "Employment" is defined in HRS § 386-1 as "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." (Emphasis added.) Therefore, under the definitional scheme set out in HRS § 386-1, in order to qualify as an employer, a person must be the recipient of services pursuant to a "contract of hire or apprenticeship.

82 Hawai'i at 15, 919 P.2d at 277 (Underscored emphases added.) (Italicized emphases in original.) Therefore, in order to be considered an employer under chapter 386, "a person must be the recipient of services pursuant to a 'contract of hire or apprenticeship.'" Id. Here, there is no evidence that Taft was the employer of Rapoza within the foregoing definition. Rather, the uncontroverted fact in the record is that "[a]t the time of his death, RAPOZA was employed by Tri-S Corporation." Therefore, on the record, Tri-S and not Taft was the employer of Rapoza. On the other hand, Iddings held that a co-employee in a supervisory capacity may be subject to HRS § 386-8 liability for wilful and wanton misconduct. Id.

Morever, the legislative history comports with this interpretation of HRS § 386-1. Plaintiffs maintain that the purpose of HRS § 386-1 was to permit certain shareholders to choose to avoid coverage under a workers' compensation policy. The relevant legislative history states that

> [t]he purpose of this bill is to exclude the following from the definition of "employment" as it applies to worker's compensation coverage: . . . Service by an individual for a corporation if the individual owns at least 51 percent of that corporation and elects to waive coverage . . . . This measure would relieve majority owners of corporations from the cost burden of workers' compensation, consistent with the exclusion of other businesses [sic] owners, such as sole proprietors and partners. It is not the intent of your committee to create a loophole for employers to exempt themselves from protecting their employees from work-related accidents and fatalities."

Stand. Comm. Rep. No. 305, in 1993 House Journal, at 1087 (emphases added). Hence, the legislature clarified that the fifty percent ownership exception from the definition of "employment" under HRS § 386-1(8) allows majority stockholders to exclude themselves from otherwise mandatory workers' compensation coverage, and not "for employers to exempt themselves from protecting their employees from work-related injuries and fatalities." Stand. Comm. Rep. No. 305, in 1993 House Journal, at 1087. Because the record on summary judgment failed to establish that Taft was the employer of Rapoza, Taft was not immunized under HRS § 386-5, and summary judgment should not have been granted on that ground.

Under the circumstances, the other points raised by Plaintiffs need not be addressed. Accordingly, is is concluded that the court erred in granting Taft's motion for summary judgment.

IV.

A.

The court properly refused to permit Han to testify to certain safety matters. Prior to Han testifying, the court ruled on motions in limine filed by Defendants. The court granted Willocks' motion in limine to prevent the trial testimony of Han

(motion in limine 2)[17] "on a limited way." The basis of the court's ruling was that evidence relating to "any OSHA violation" is "expressly prohibited by [HRS § 396-14]."[18] The court permitted Plaintiffs to ask Han questions regarding "his knowledge and[,] based upon what he does[,] . . . whether certain laws were in effect at the time of the accident," if the proper foundation was laid. The court, however prohibited Han from "hypothesiz[ing] about anything relating to the facts of this case." The court instructed Han "not to get into the area of any OSHA violation[]" and stated, "It is my opinion and I am ruling that they are expressly prohibited by statute."

Han testified that he was employed as a compliance officer for eleven years by the Department of Labor and

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[17] Willocks argued in its motion in limine that (1) Han was prohibited from testifying under HRS § 396-14 (1993)

> "with respect to any knowledge that he may have obtained during his Department's investigation of any matter associated with the litigation at hand . . . [and] with respect to **any** investigation that anyone from his Department may have conducted with respect to this litigation and events discovered during his Department's investigation that are, in any way, connected to the subject matter of the instant industrial accident[,]"

(boldfaced emphasis in original), and (2) Han was prohibited from testifying as to his interpretation of what the law is or should be because he was a lay witness.

[18] According to HRS § 396-14,

> [n]o record or determination of any administrative proceeding under this chapter or any statement or report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of any matter mentioned in the record, determination, statement, or report other than an action for enforcement or review under this chapter.

(Quotation marks omitted.)

Industrial Relations Division of Occupational Safety and Health. He also testified that he served as a manager for the division for a period of time, three or four years prior to 1998. Han testified to his prior work history and education. He also testified that the HOSHA was established in 1970 and as to its purpose. Han explained minimal requirements for employers as to HOSHA safety and training programs. The court ruled that the "only thing" Plaintiffs could elicit from Han was "the law" and that Han could not "testify about investigations" or "hypothesize" about "information . . . for which foundation has not properly been laid" and Plaintiffs "cannot lay the foundation[.]" "The law" referred to the HOSHA safety standards and regulations.

Plaintiffs argue that, if the court had allowed Han to testify, Han would have testified to the following safety matters concerning drilling in proximity to high voltage wires when both a general contractor and a subcontractor are on the job site: (1) how a Task Hazard Analysis[19] should be performed by Willocks and Tri-S regarding electrical safety;[20] (2) the purpose of

[19] According to Han, a task hazard analysis is an assessment of the work to be performed in relation to the hazard. The analysis is intended to identify the hazards on the job site and to advise the employees as to the proper precautions to be taken.

[20] The objectionable question was, "Can you describe in some detail for the jury how the . . . general contractor go[es] about performing the task hazard analysis to determine whether it's safe to operate the machinery by the wires?

performing a Task Hazard Analysis;[21] (3) what should be analyzed in performing the Task Hazard Analysis;[22] (4) information required to carry out the Task Hazard Analysis;[23] (5) whether knowledge of the radius of a drill rig's boom is required to carry out the Task Hazard Analysis;[24] (6) what is to be determined in carrying out the Task Hazard Analysis;[25] (7) the machinery proximity to wires to de-energize or insulate them;[26] (8) in applying the Task Hazard Analysis, the fail-safe distance for operation of machinery next to wires;[27] (9) the HOSHA Administrator's application of regulations regarding proximity to

[21] Plaintiffs asked Han, "Now in the context of operating machinery on a construction site, what end is to be sought in carrying out the task hazard analysis to see if the machinery's too close to the wires?"

[22] Plaintiffs' question to Han was, "In carrying out the task hazard analysis in connection with machinery next to high voltage wires[,] what is it that's required to be analyzed? In other words what should [sic] a general contractor suppose to find out as a result of his analysis?"

[23] Plaintiffs' question to Han was, "[C]an you tell the jury what type or kinds of information are required . . . in order for the general contractor to carry out the task hazard analysis?"

[24] Plaintiffs asked, "[H]ave you had occasion in your investigations and your compliance work to determine whether or not certain employers have gained the necessary experience before an accident, the necessary information to carry out a proper task hazard analysis?"

[25] Plaintiffs inquired, "[W]hat would I have determined with my proper task hazard analysis?" The court sustained the objection by Willocks.

[26] The question to Han that was objected to was, "[C]an you tell the jury, in performing the task hazard analysis, how close you can put machinery next to high-voltage wires without being required to de-energize or insulate the wires?" The court sustained Willocks' objection.

[27] Plaintiffs asked whether "in doing the task [hazard] analysis, . . . there is involved in any of the regulations relating to electrical safety a fail safety distance for operating machinery next to wires[.]" The court sustained Willocks' objection to the form and substance of the question (i.e., calls for legal conclusion, irrelevant, overly broad, calls for speculation; improper hypothetical).

wires;[28] and (10) whether placement of a drill rig capable, in operation, of contacting high voltage wires complies with HOSHA standards.[29]

Willocks' attorney objected to a question posed to Han by Plaintiffs' attorney, and the subsequent colloquy was taken outside the presence of the jury.[30] Willocks' attorney objected to the question stating that the question was "irrelevant, beyond the scope, and in violation of 396-14." The court excused the jury and asked Plaintiffs' attorney for his offer of proof. Plaintiffs' attorney responded, inter alia, that he intended to

[28] Plaintiff asked, "Now does this section[, chapter 10-141 of Exhibit number 109, HOSHA electrical regulations,] deal with how close you can place machinery next to high-voltage wires without having to de-energize or insulate wires?" The court held that the question was leading. When Plaintiff attempted to rephrase by asking Han whether he "[w]ould . . . please advise the jury of your office's administrative interpretation and application of the section in 141-3 relating to how close you can place machinery to high-voltage wires without having to de-energize or insulate the wires," the court sustained objections by all Defendants, stating that "the question call[ed] for hearsay, lack[ed] foundation and call[ed] for a legal conclusion."

[29] Plaintiff asked,

> If I were a general contractor and I had a sub about to operate a drill rig – in proximity to high-voltage wires, if the drill rig were positioned on the ground so that its boom could possibly come in contact with . . . high-voltage wires, and I didn't de-energize and I didn't insulate, would I be in compliance with the Hawai‘i OSHA laws?

The court sustained Willocks' objection that the question was an improper hypothetical and called for a legal conclusion and interpretation of the statute.

[30] Plaintiffs' attorney asked:

> Q: Are you generally familiar with the, uh, Watson 3000 drill rig?
> A: Yes.
> Q: How?
> A: In a number of my inspections, uh - -
> [Willocks' attorney]: Objection - -
> A: - - I have seen - -
> [Willocks' attorney]: [Y]our Honor; irrelevant, beyond the scope, and in violation of 396-14.

pose a hypothetical to Han and ask him "questions concerning whether or not the general contractor, whether the subcontractor, and whether the injured employee substantially complied with his understanding of the laws, OSHA laws, which he has been enforcing for eleven years." The court permitted Plaintiffs to make an offer of proof.

Willocks and Gomes argued that because Han was not designated as an expert witness, he was not permitted to give opinion testimony. See Hawai‘i Rules of Evidence (HRE) Rule 701. Gomes also argued that Plaintiffs' question called for "improper lay testimony[.]" The court ruled that Han had not been offered as an expert witness, therefore it had sustained the objections.

After the court ruled, Plaintiffs were allowed to make a further offer of proof. For example, Plaintiffs indicated that they intended to have Han testify that Willocks and Tri-S (1) failed to insure that the drill rig had the required warning sign placed in plain view of the operator, (2) failed to comply with HOSHA standards for cranes, as the drill rig could function as a crane, (3) failed to comply with HOSHA's fail-safe ten feet requirement in drilling wells 2, 3, and 10, (4) failed to inquire whether Rapoza's work might bring him into contact with high voltage circuits, and (5) failed to perform a task hazard analysis. Plaintiffs stated that Han was to testify that,

> under Hawaii's OSHA law[,] . . . it was illegal for the subcontractor [and] general contractor to require or permit the operation of the Watson 3000 <u>on dry wells 2, 3, and 10</u> because not only was it possible for any part of the boom to come within ten feet, the beam [sic] could touch the wire in

> all three cases, and he is gonna say that that was not a substantial compliance.

(Emphases added.) Defendants reiterated their objections.

B.

"Admission of opinion evidence is a matter largely within the discretion of the trial court, and only an abuse of that discretion can result in possible reversal." Sherry v. Asing, 56 Haw. 135, 149, 531 P.2d 648, 658 (1975) (quoting Unitec Corp. v. Beatty Safway Scaffold Co. of Or., 358 F.2d 470, 477-78 (9th Cir. 1966)). Han's testimony was properly limited by the court. Plaintiffs did not designate Han as a potential expert witness in their final naming of witnesses. Moreover, Plaintiffs did not identify Han as a potential expert witness or disclose any of his expected opinions.

Additionally, as a result of an order granting a motion to compel answers to interrogatories, Plaintiffs were required to disclose each person whom they intended to call as an expert witness at the trial and disclose their respective opinions by the close of business on October 13, 1997. Plaintiffs never supplemented their disclosure of expert witnesses' identities and opinions, as required by HRCP Rule 26(e)(1)(B), nor did they move the court to add Han as an expert witness pursuant to Rules of the Circuit Court of the State of Hawaiʻi Rule 12(o) regarding adding additional witnesses. Consequently, Han's testimony was

properly limited to testimony as a lay witness. Plaintiffs did not properly designate Han as an expert witness and, as such, Han could not testify as to his opinions of the HOSHA regulations and hypothetical situations.

Although Han was allowed to testify as a lay person, the court again properly limited his testimony. As a lay witness, Han's testimony was limited under HRE Rule 701. HRE Rule 701 states that a non-expert witness's testimony in the form of opinions or inferences are limited to those opinions or inferences that are: (1) rationally based on the perception of the witness; and (2) helpful to the clear understanding of the witness's testimony or the determination of a fact in issue. But, Plaintiffs failed to establish that Han's testimony was rationally based on any perception of Willocks' or Tri-S's actions in connection with the accident.

The lengthy offer of proof demonstrated that Han would be asked to "hypothesize about . . . the facts of this case." The plain language of HRS § 396-14 would not bar a hypothetical question concerning the case. But, Han was not designated as an expert and therefore could not render an opinion with respect to any hypothetical. Accordingly, the court did not abuse its discretion in limiting Han's testimony.

V.

The court did err in admitting testimony by Hons to the

effect that HOSHA did not cite Willocks for the accident. During trial,[31] the court excluded evidence, based on HRS § 396-14, (1) that Tri-S had violated HOSHA regulations related to electrical safety in connection with the accident, (2) that HOSHA had cited Tri-S for these violations, and (3) that Tri-S had agreed to pay fines for certain of these violations. At trial, however, the court overruled Plaintiffs' hearsay objection and permitted Hons to testify that Willocks had not been cited by HOSHA for violations of OSHA regulations. The direct examination of Hons in relevant part proceeded accordingly,

> Q: Was Willocks ever cited by OSHA on this project?
> [Plaintiffs' attorney]: Objection. Calling for hearsay, Your Honor.
> The Court: Overruled.
> [Willocks' attorney]: Q: Let me restate the question. Was Willocks Construction Company ever cited by OSHA for any violations of OSHA regulations on this project?
> A: No.
> Q: For this accident?
> A: No.

Plaintiffs argue that Hons' testimony that Willocks was not cited by OSHA was inadmissible hearsay because the jury could infer from Hons' testimony that Willocks had not violated any OSHA regulations. Plaintiffs contend that (1) the testimony supports a false and prejudicial "inference" that in the view of HOSHA no

[31] Plaintiffs state that prior to trial the court limited evidence relating to the OSHA citations based on HRS § 396-14. However this statement is inaccurate. Prior to trial, the court granted Willocks' Motion in Limine prohibiting introduction of and reference to citations issued to Tri-S based on relevancy (motion in limine 1) pursuant to HRE Rules 401 and 402. It was only during trial, upon Willocks' motion in limine to prevent the trial testimony of Han (motion in limine 2) that the court, "on a limited way," granted the motion based on HRS § 396-14.

violation took place, and that (2) such testimony involved a "hearsay 'determination' under HRS § 396-14 not to cite Willocks." Defendant Gomes asserts that Hons' response that Willocks was not "cited by OSHA for any violations" was not hearsay because Hons, as general superintendent of the project, testified that if Willocks were cited by OSHA he would become aware of the citation.[32] Therefore, Willocks argues, the disputed question sought information based upon Mr. Hons' personal knowledge.

When determining whether Hons' testimony was hearsay or not,

> [d]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard.

State v. Crisostomo, 94 Hawaiʻi 282, 287, 12 P.3d 873, 878 (2000); see also Kealoha v. County of Hawaii, 74 Haw. 308, 319, 844 P.2d 670, 676 (1993). The requirements of the rules dealing with hearsay are such that application of the particular rules can yield only one correct result. Crisostomo, 94 Hawaiʻi at

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[32] Willocks attorney asked Hons:

> Q: If an OSHA citation is issued to your company, would you become aware of it?
> A: Yes.
> Q: How?
> A: Uh, Jack [Willocks, shareholder of Willocks Construction,] would call me or I would receive the -- the citation at the project or Norman [Sakai, foreman,] would receive it on the project and would refer it to me.

(Emphasis added.)

287, 12 P.3d at 878; see also HRE Rule 802 (1993) (providing in pertinent part that "[h]earsay is not admissible except as provided by these rules"). Thus, where the admissibility of evidence is determined by application of the hearsay rule, there can be only one correct result, and "the appropriate standard for appellate review is the right/wrong standard." Crisostomo, 94 Hawaiʻi at 287, 12 P.3d at 878 (quoting State v. Moore, 82 Hawaiʻi 202, 217, 921 P.2d 122, 37 (1996)).

Hons testimony was not hearsay. Generally, hearsay is not admissible. HRE Rule 802. Hearsay, according to HRE Rule 801(3), is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Specifically, a statement is defined as "(A) an oral or written assertion, or (B) a nonverbal conduct of a person, if it is intended by the person as an assertion." HRE Rule 801(1) (emphasis added). It is not evident from the question whether hearsay was being elicited. There is no evidence of an oral or written assertion. If what was sought to be elicited was "nonverbal conduct" of HOSHA, there is no indication of such conduct by HOSHA or that, if it existed, such "conduct" was intended by HOSHA as an assertion that Willocks had not committed a violation.

Plaintiffs objected to Hons' testimony based on HRS § 396-14 the day after Hons had completed his testimony.

Plaintiffs' attorney stated,

> I would also move for curative instruction relating to Mr. Bobby Hons' answer yesterday when in a leading question. . . . [Willocks' attorney] asked him, did you get cited by OHSA, and he said no. You recall that I made an objection. The answer was permitted over my objection. And the reason I'm asking for this curative instruction is <u>in light of Section 396-14</u>, no determination of OSHA is to be used in any respect in a civil matter. A determination to cite or not to cite.

(Emphasis added.) The court denied Plaintiffs' request for the curative instruction. To reiterate, HRS § 396-14 provides that

> [n]o record or determination of any administrative proceeding under this chapter <u>or any statement</u> or report <u>of any kind obtained, received, or prepared</u> in <u>connection with the administration or</u> enforcement <u>of this chapter shall be admitted or used</u>, whether as <u>evidence</u> or as discovery, <u>in any civil action</u> growing out of any matter mentioned in the record, determination, statement, or report other than an action for enforcement or review under this chapter.

(Emphases added.) "The interpretation of a statute is a question of law reviewable de novo." <u>Sato v. Tawata</u>, 79 Hawai‘i 14, 17, 897 P.3d 941, 945 (1995). In <u>Richardson v. City & County of Honolulu</u>, 76 Hawai‘i 46, 68-69, 868 P.2d 1193, 1215-16 (1994), this court held that

> [o]ur primary duty in interpreting and applying statutes is to ascertain and give effect to the legislature's intention to the fullest degree. Although the intention of the legislature is to be obtained primarily from the language of the statute itself, we have rejected an approach to statutory construction which limits us to the words of a statute[,] . . . for when aid to construction of the meaning of words as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.
>
> <u>Thus, the plain language rule of statutory construction, does not preclude an examination of sources other than the language of the statute itself</u> even when the language appears clear upon perfunctory review. Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

(Emphasis added.) (Citations omitted.) According to the legislative history of the pertinent language in HRS § 396-14,[33]

> [t]he purpose of this bill is to prohibit the use of any statement, report or record prepared or obtained by the labor department in the course of its administration of the industrial safety law in any civil suit arising out of any accident or incident mentioned in the statement, report or record except in cases involving the enforcement or review of the safety law.
>
> Effective enforcement of the industrial safety law requires a thorough and exhaustive investigation of each industrial accident. Such an investigation is difficult to attain unless witnesses are assured that information and statement given to the department of labor will be held confidential and not be disclosed in any civil suit arising out of the accident involved.
>
> This proposal, if adopted will encourage workers and other witnesses to candidly report on any accident and in turn assist the labor department in achieving better safety measures.

Sen. Stand. Comm. Rep. No. 970, in 1969 Senate Journal, at 1254 (emphases added).

The non-issuance of a citation does not fall within the express prohibitions of HRS § 396-14. However, the question of whether HOSHA cited Willocks or not was irrelevant to whether Willocks was or was not negligent in the civil case. Given the legislative intent of insulating HOSHA investigatory matters from disclosure in civil cases, both the issuance of a citation or lack of issuance must be excluded. In the civil case the failure

[33] HRS § 396-14 was enacted in 1972 when it was codified within the HOSHA, HRS chapter 396. Prior to 1972, however, the language prohibiting evidence obtained in an administrative proceeding already existed within chapter 96, section 1 of the Hawaiʻi Revised Statutes. Specifically, "[n]o record or determination of any administrative proceedings under this chapter [Chapter 96, Industrial Safety] or any statement or report of any kind obtained or received in connection with the administration or enforcement of this chapter shall be admitted or used as evidence in any civil action growing out of any matter mentioned in the record[,]" was enacted within chapter 96 relating to industrial safety in 1969. 1969 Haw. Sess. L. Act 70.

to adhere to HOSHA regulations was to be determined by the jury. It was therefore error to admit evidence that no citation was issued, as it would have been to admit evidence of HOSHA citations imposed on Tri-S.

Admission of such evidence allowed Defendants to argue, in effect that because no citation had been issued, there had been no violation of the regulations.[34] During closing argument Willocks' attorney argued to the jury that "OSHA did their investigation and Willocks wasn't cited . . . if there is a violation, OSHA will cite. They didn't do it." (Emphasis added.) Gomes' attorney also argued to the jury that "[t]hey [(OSHA)] did not cite Willocks. Now how can that be if the law is as the Plaintiffs suggest?" In light of HRS § 396-14, no evidence, argument, or instruction regarding the HOSHA investigation or HOSHA actions should have been allowed at trial.

Therefore, the court erred in admitting Hons' testimony

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[34] Plaintiffs state in their opening brief that "the trial court permitted . . . Hons, to testify, over Plaintiffs' objection, that Willocks had not been cited by HOSHA for violation of OSHA regulations in connection with its investigation of the accident." (Emphasis added). Willocks, however, states that "[t]here is no evidence that an administrative proceeding was ever conducted to decide whether Willocks violated any of OSHA's regulations." Still, Plaintiffs argue in their reply brief that "the obvious purpose in Willocks' counsel's eliciting the above testimony from the answer implied statements that (1) the OSHA administrators did not interpret OSHA's failsafe 10' rule in accordance with its plain meaning, and (2) after its investigation of the accident, OSHA determined that no violation of its 10' rule was involved in the accident."

Moreover, the admission of this statement enabled Willocks' attorney to argue, as noted above, that "OSHA did their investigation and Willocks wasn't cited[;] . . . if there is a violation, OSHA will cite. They didn't do it." (Emphasis added). Statements made in court bind parties as judicial admissions. HRE Rule 803(a)(1); see also Myers v. Cohen, 67 Haw. 389, 394, 688 P.2d 1145, 1149 (1984). Because Willocks' attorney stated that the citations were not issued to Willocks following an investigation, Willocks is bound by the representation that an investigation took place.

that Willocks was not cited for HOSHA violations.

VI.

The court did not err when it barred impeachment of Taft by prohibiting the introduction of HOSHA citations issued to Tri-S, but it should have stricken Taft's reference to the HOSHA investigation. Plaintiffs asked Taft:

> Q: [Y]ou were generally familiar in November of 1994 with the OSHA regulations that related to electrical safety having to do with the operation of machinery next to power wires?
> A: Yes.
> Q: And based upon your having gone out to the site on November 18th and the conversations you have had with Glenn Ermitano, did you determine that the rig was placed at the site where the accident happened in violation of the OSHA electrical safety regulation?
> A: The OSHA inspector at that time said it was all right.

(Emphasis added.) Although Taft's answer was nonresponsive and volunteered information, Plaintiffs did not object to Taft's answer, nor did they move to strike it. The day after Taft's alleged non-responsive answer was given, but still during Taft's cross-examination, Plaintiffs orally moved to reconsider the court's prior ruling on Defendant's motion in limine 1 to exclude at trial any evidence of OSHA citations issued to Tri-S. Ultimately, the court reaffirmed its earlier ruling on the motion in limine 1 prohibiting evidence of the Tri-S OSHA citations, thus the proposed impeachment evidence was still barred.

Plaintiffs argue that the result of Taft's non-

responsive answer resulted in several improper inferences by the jury which were: (1) that "the OSHA inspector did not interpret the OSHA regulations to prohibit the accident placement of the drill rig to violate OSHA's fail-safe 10' rule"; and (2) that "the OSHA inspector probably interpreted the OSHA 10' [regulation] in a manner consistent with Mr. Hons' interpretation of the OSHA rule – that the machinery capable of contact with high voltage wires could be operated as long as the operator did not come within 10' of the wires." Thus, they contend that the court erred in refusing to permit them to impeach Taft with evidence of the OSHA citation because Taft's response was non-responsive, prejudicial, and at variance with his pretrial deposition testimony and the truth.

As Plaintiffs did not object to Taft's response or move to strike the response, this point of error may "be disregarded[.]" HRAP Rule 28(b)(4). Plain error may be recognized at the discretion of the court. HRAP Rule 28(b)(4); see also State v. Fox, 70 Haw. 46, 54, 760 P.2d 670, 675 (1988). However, because this case is remanded on other grounds, it is sufficient to note that no reference should have been made to the HOSHA investigation and the court should have stricken such testimony.

VII.

It follows from the analysis of Hons' testimony, see supra, that the court abused its discretion when it denied

Plaintiffs' motion for mistrial. Plaintiffs argue that the combined effect of the grounds asserted, at the time of the motion for mistrial, was that the jury would likely be permitted to decide the negligence issue against Willocks based upon a combination of false suggestions and inferences provided to them.

"A motion for mistrial should be granted when there is an occurrence of such character and magnitude that a party is denied the right to a fair trial." Kawamata Farms, Inc. v. United Agri Prods., 86 Hawaiʻi 214, 246, 948 P.2d 1055, 1086 (1997) (quoting Aga v. Hundahl, 78 Hawaiʻi 230, 245, 891 P.2d 1022, 1037 (1995)). "Appellate review of a trial court's ruling on a motion for mistrial is under the abuse of discretion standard." Id. Furthermore, "[a]s in all actions involving discretion . . . [the a]ppellant must show that the trial court's decision clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Johnson v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 179, 664 P.2d 262, 266 (1983) (internal quotation marks omitted).

Plaintiffs claim that the court's following actions were prejudicial and denied Plaintiffs a fair trial: (1) Plaintiffs' principal basis for its claim of negligence against Willocks was the failure of Willocks and its subcontractor, Tri-S, to comply with the OSHA electrical safety regulation; (2) the heart of Plaintiffs' and Defendents' case of

negligence turned on the meaning and interpretation of the HOSHA electrical safety regulations; (3) the court's refusal to permit Han to testify to Willocks' and Tri-S's violations of electrical safety regulations; (4) the court's refusal to permit the jury to view relevant OSHA electrical safety regulations (Plaintiffs' exhibits 109 and 150), which were admitted into evidence but the jury was not permitted to view; (5) the court's allowance of Hons' testimony that HOSHA did not cite Willocks for a violation of OSHA regulations in connection with the accident, raising an inference that HOSHA did not consider operation of the drill rig to violate the ten-foot fail safe rule and that HOSHA did not interpret its fail-safe rule in accordance with its plain meaning; (6) the court's failure to reconsider its prohibition of Plaintiffs' exhibits 119 and 120 (Tri-S's OSHA citations and stipulation/settlement agreement), and the court's refusal to permit Plaintffs to impeach Taft with evidence that the OSHA inspector considered placement of the drill rig to violate the fail safe rule; and (7) the court's use of HRS § 396-14 to exclude HOSHA's determination that Tri-S violated OSHA regulations, and permitting testimonial evidence that HOSHA did not cite Willocks for violations. Plaintiffs fail to present discernable arguments as to items (1), (2) and (4) or facts to show prejudice therefor. The remaining grounds have essentially been discussed supra.

As mentioned, the court erred with respect to

permitting Hons' to testify that Willocks had not received any citation. The substance of Plaintiffs' claim of negligence was that Willocks failed to "conform to certain standards of conduct for protection of others against unforeseeable risks[.]" Evidence that Willocks was not issued a HOSHA citation was error. Because of the inference that Willocks had not violated the regulation which might be drawn from such testimony, such testimony resulted in "substantial detriment" to Plaintiffs. Johnson, 4 Haw. App. At 179, 664 P.2d at 266. Thus, by allowing Hons to so testify, the court "denied [Plaintiffs] the right to a fair trial." Kawamata Farms, 86 Hawai'i at 245, 948 P.3d at 1086.

VIII.

Plaintiffs argue that the court erred when it refused to give Plaintiffs' instruction no. 43.[35] "When jury

[35] Plaintiff's instruction no. 43 stated as follows:

> In his final argument, Mr. Robert Crudele[, counsel for Gomes,] argued: (1) The OSHA inspector, in his investigation of the accident giving rise to this case, determined that the Watson 3000 was not placed too close to the high voltage wires when drilling next to the dry well number 10, and (2) that the OSHA inspector, by not citing Willocks, in effect, did not interpret the section 12-141-3(d)(6)(C) to mean that the Watson 3000 could not be operated if any part of it could possibly come within 10' of high voltage wires.
>
> Both of these arguments were based upon a false premise. <u>In fact, the OSHA inspector made no such determination or interpretation of section 12-141-3(d)(6)(C)</u>, and you are to disregard both such arguments of Mr. Crudele.

(Emphasis added.)

instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 350, 944 P.2d 1279, 1293 (1997). "Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." Id. (citing State v. Arceo, 84 Hawai'i 1, 11, 928 P.2d 843, 853 (1996)). As discussed earlier, reference to the HOSHA investigation would be barred by HRS § 396-14, therefore reference to the investigation in closing argument would also be barred. The day after Hons had completed his testimony, Plaintiffs orally requested a curative instruction relating to Hons' testimony that HOSHA did not cite Willocks. The court denied the motion for a curative instruction. While the court did not err in rejecting proposed instruction no. 43, it should have given a curative instruction as had been requested the day after Hon testified.

IX.

The court did not err when it refused to give the jury instructions on ultrahazardous activity. Plaintiffs contend that the evidence demonstrated at trial that drilling in proximity to energized, uninsulated wires was an ultrahazardous activity.

Specifically, Plaintiffs argue that due to the (1) proximity of the three dry wells to HELCO's wires, (2) the respective heights of the boom and wires, (3) the drill rig's dimensions, and (4) the boom radius, when the boom leaned out of the vertical position during operation, it was capable of contact with the wires on all three dry wells, thus creating an ultrahazardous activity. They maintain that under section 519 of Restatement (2d) of Torts (1977) (Restatement), the activity was abnormally dangerous and ultrahazardous, subjecting Defendants to strict liability. Therefore, Plaintiffs contend that the court erred by refusing to instruct the jury on ultrahazardous activity.

Whether or not an activity constitutes an "abnormally dangerous" or "ultrahazardous" activity is purely a question of law for the court and not the jury to decide. Restatement § 520, comment l. When applying the standard of review for jury instructions as stated above, the denial of the ultrahazardous instruction was not error.[36] Specifically, the instructions would not have been proper as the drilling of dry wells was not an ultrahazardous activity within the meaning of the Restatement § 519. The Restatement provides:

[36] Gomes contends that Plaintiffs failed to "reference any activity characterized as constituting an "ultrahazardous" activity. Therefore, Gomes argues that Plaintiffs failed to notify him of such a claim. Takaki v. Allied Mach. Corp., 87 Hawai'i 57, 65, 951 P.2d 507, 515 (1998). As such, Plaintiffs should be barred from asserting this claim against Gomes. As notice pleading should be liberally construed, however, Plaintiffs were not required to "set out in detail the facts upon which [they] base[] [their] claim." Hall v. Kim, 53 Haw. 215, 219, 491 P.2d 541, 544 (1971) (internal quotation marks omitted) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattel or another resulting form the activity, <u>although he has exercised the utmost care to prevent the harm</u>.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

(Emphasis added). The rule is applicable only to activities that are <u>carried out with all reasonable care</u> and that are of such a utility that the risk involved cannot be regarded as so great or so unreasonable as to make the activity an act of negligence merely to carry on the activity. Restatement § 520, comment b.

When determining whether an activity is abnormally dangerous, the following factors are to be considered; however it is not necessary that each of the factors be present.

> (1) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (2) likelihood that the harm that results from it will be great;
> (3) <u>inability to eliminate the risk by the exercise of reasonable care</u>;
> (4) extent to which the activity is not a matter of common usage;
> (5) inappropriateness of the activity to the place where it is carried on; and
> (6) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement § 520, comment f (emphasis added).

Most ordinary activities can be made entirely safe through the exercise of reasonable care and when safety cannot be attained by the exercise of due care there is reason to regard the danger as an abnormal one. Restatement § 520, comment h. Because the hazard from high voltage lines may be avoided in

several ways, the drilling of dry wells near high voltage power lines, in and of itself, cannot be deemed an activity that would be abnormally dangerous when "carried out with all reasonable care." Restatement § 520, comment b. Therefore, the court did not err in refusing this instruction.

X.

The court erred by failing to instruct the jury that the HOSHA regulations had the force and effect of law. Plaintiffs contend that the trial court erred in refusing to instruct the jury that HOSHA regulations have the force and effect of law. Specifically, the court deleted the words "under Hawaii law" from Plaintiffs' instructions nos. 19-22 and 27-29. The court also refused Plaintiffs' instruction no. 23 which stated, "Hawaii's OSHA Regulations promulgated by the Department of Labor and Industrial Relations of the State of Hawaii have the force and effect of law throughout the State." The jury, however, was given the Court's instruction no. 4.4,[37] which stated that a violation of the law may be evidence of negligence. Plaintiffs contend that although that instruction was given, it

[37] Court's jury instruction no. 4.4 stated as follows:

> The violation of a law may be evidence of negligence, but the fact the law was violated is not sufficient, by itself, to establish negligence. The violation of the law must be considered along with all the other evidence in this case in deciding the issue of negligence.
> Whether there was a violation of a law is for you to determine.

did not advise the jury that the violation of HOSHA regulations could be considered evidence of negligence. The court deleted the words "under Hawaii law" in order to be consistent with other instructions which also articulate Hawai'i law but are not prefaced with the words "under Hawai'i law".

As Plaintiffs objected to the omission of the words "under Hawaii law," this court is obligated to determine whether error occurred based on whether the "instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. Tabieros, 85 Hawai'i at 350, 944 P.2d at 1293. The court's giving of court's instruction no. 4.4, which stated that the a "violation of law may be evidence of negligence[,]" necessitated a designation of what the "law" was. It is not reasonable to assume that the jury would be able to distinguish which jury instructions were "laws" that would be evidence of negligence. Therefore, the court erred in omitting modifying language in instructions no. 19, 20, 21, 22, 27, 28 and 29 because the omission of "under Hawaii law" rendered those instructions "prejudicially insufficient . . . [and] misleading." See Tabieros, 85 Hawai'i at 350, 944 P.2d at 1293.

XI.

The court did not err in instructing the jury that a violation of law was insufficient, by itself, to establish negligence. Plaintiffs argue that Court's instruction no. 4.4,

as modified, see supra n.36, was erroneous and highly prejudicial, mandating reversal. Plaintiffs submit that a violation of law, by itself, is sufficient to establish negligence. Although Plaintiffs state that instruction no. 4.4, as modified, was given over Plaintiffs' objection, nowhere during settlement of instruction 4.4. (modified) is Plaintiffs' objection noted. Therefore, because Plaintiffs failed to raise the argument at trial, it is deemed to have been waived on appeal. State v. Moses, 102 Hawai'i 449, 456, 77 P.2d 940, 947, reconsideration denied, Oct. 23, 2003 (document not yet available). In any event, instruction no. 4.4 is a correct statement of the law.[38]

XII.

The court gave Willocks' instruction no. 11 (instruction no. 11) over Plaintiffs' objections. Instruction no. 11 states, "One who hires an independent contractor to perform work is not liable for injuries to the independent contractor's employees resulting from the work where the

[38] Hawai'i case law does not state that a violation of law, by itself, is sufficient to establish all the elements of negligence. See State v. Tabigne, 88 Hawai'i 296, 304, 966 P.2d 608, 616 (1998) (holding that juries may consider violations of statutory standards as evidence of negligence); see also Michel v. Valdastri, Ltd., 59 Haw. 53, 55, 575 P.2d 1299, 1301 (1978) (holding that defendant's failure to conform to standards established by law . . . is admissible as evidence of negligence)"; Sherry v. Asing, 56 Haw. 135, 149, 531 P.2d 648, 658 (1975) (holding that violation of an ordinance was an "appropriate question of fact for the jury to decide in connection with the issue of negligence"); Young v. Honolulu Constr. & Draying Co., Ltd., 34 Haw. 426, 435 (1938) (holding that the violation of an ordinance prescribing duty "is evidence of negligence sufficient to require the question of negligence to be submitted to the jury"). Moreover, the cases cited by Plaintiffs do not support their proposition that the law is that "a violation of law, by itself, is sufficient to establish negligence."

independent contractor exercised complete direction and control over the performance of the work." Plaintiffs argue that instruction no. 11 was contrary to the holding in Makaneole v. Gampon, 70 Haw. 501, 777 P.2d 1183 (1989) [hereinafter "Makaneole II"], and the instruction conflicted with Plaintiffs' instruction no. 5, the Peculiar Risk instruction (instruction no. 5), given by the court. Instruction no. 5 states that

> [o]ne who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Plaintiffs also argue in their reply brief that 1) "[t]he jury was not told which was the controlling instruction or which instruction was the general rule and which the exception; nor were they told whether Willocks' [instruction n]o. 11 controlled or the negligent instructions given[,]" and (2) "the jury may very well have decided both the negligence claim and special precaution claims against Willocks based on Instruction No. 11, which was heavily stressed by Willocks' counsel in closing argument." Both Willocks and Gomes assert that Willocks instruction no. 11 did not conflict with Makaneole.[39]

In Makaneole, an employee of a subcontractor, Dillingham Construction Corp. (Dillingham), was struck and

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[39] Both Willocks and Gomes argue that the jury determined that the risk presented under the facts of this case did not rise to the level of a "peculiar risk." Therefore, "there could be no peculiar risk liability [under instruction 11,] absent the presence of a peculiar risk [under instruction 5]."

injured by a clamp designed to transport plywood attached to a crane that was maneuvered by a fellow employee at a hotel job site. Makaneole sued, inter alia, the owner of the hotel, Kauai Development Corp. (KDC) and his fellow employee, Drake Gampon (Gampon), who operated the crane. In Makaneole v. Gampom, 7 Haw. App. 448, 776 P.2d 402 (1989) [hereinafter "Makaneole I"], the Intermediate Court of Appeals (ICA) cited to Taira v. Oahu Sugar Co., 1 Haw. App. 208, 616 P.2d 1026 (1980), which "held that one who hires an independent contractor to perform work is not liable for injuries to the independent contractor's employee resulting from that work where the independent contractor exercised complete direction and control over the performance of the work." 7 Haw. App. at 454, 776 P.2d at 407. The ICA indicated that the question of control was at issue in Makaneole I, and that the ICA had previously held that the employers on the jobsite to oversee the contractor's performance was sufficient to raise a genuine issue of fact as to control for summary judgment purposes.

In part III.C. of the opinion, the ICA considered Makaneole's argument that KDC was vicariously liable for Dillingham's negligence under Restatement §§ 416 and 427 which represented "the same general rule, that the employer remains liable for injuries resulting from dangers which he should contemplate at the time that he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them." Id. at 459, 776 P.2d at 409-10 (quoting Restatement, § 416 comment a) (citing Jones v. Chevron U.S.A., Inc., 718 P.2d 890, 898 (Wyo. 1986)).

The ICA noted that "[t]he principles expressed by Restatement §§ 416 and 427 represent exceptions to the general rule that one who employs an independent contractor is not liable for the negligence of the independent contractor or the independent contractor's employees." Id. (emphasis added); see also Van Arsdale v. Hollinger, 437 P.2d 508 (Cal. 1968).[40] However, the ICA observed that "most of the courts that have considered the question whether the exception applies to the independent contractor's employee who is injured on the job have refused to apply it in those circumstances." Makaneole I, 7 Haw. App. at 459, 776 P.2d at 410 (citing Jones, 718 P.2d at 899). The rationale for not applying the exception was that, inter alia, "[t]he owner should not have to pay for injuries caused by the contractor when the worker's compensation system already covers those injuries." Id. at 460, 776 P.2d at 410.

In Makaneole II, this court indicated that under HRS § 386-5 the "owner of the premises is not an employer[,]" thus, "the owner does not fall within the provisions of HRS § 386-5 which exempts employers from liability to employees." Makaneole II, 70 Haw. at 508, 777 P.2d at 1187. Thus, this court concluded that "statutes in the State of Hawaii provide no basis for disregarding the legal principles laid down in §§ 416 and 427 of 2 RESTATEMENT (SECOND) of TORTS" and reversed part III.C. of

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[40] Van Arsdale's holding regarding the peculiar risk doctrine has been overruled in Privette v. Superior Court, 854 P.2d 721, 726 (Cal. 1993). The California Supreme Court, applying the California labor code, stated that "[e]ven when work performed by an independent contractor poses a special or peculiar risk of harm . . . the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's 'collateral' or 'casual' negligence." Id. at 726.

Makaneole I. Id.

Hence, §§ 416 and 427 of the Restatement apply in Hawaiʻi and are viewed as "exceptions" to the otherwise "general rule" expressed in Taira. On remand it is not certain whether the evidence will warrant an instruction on the peculiar risk doctrine, but in the event similar instructions are proposed, the foregoing analysis applies.

XIII.

Plaintiffs argue that the court erred in giving Defendant Gomes' instruction no. 2 because it may have given the jury the mistaken impression that Plaintiffs were obliged to prove to them certain facts which would create a duty or obligation. Gomes instruction no. 2 states in relevant part that "[t]o prevail in a negligence claim, Plaintiffs must prove the necessary elements of negligence which are as follows: (1) Duty, or obligation, recognized by law, requiring defendant to conform to certain standards of conduct for protection of others against unforeseeable risks." (Emphasis added.) Apparently, Gomes misstated a quotation from W. Prosser, Handbook of the Law of Torts, § 30 (4th ed. 1971), by substituting the word "unforeseeable" in place of "unreasonable." On remand, the instruction, if used, must be corrected. Otherwise, other instructions, such as Willocks' instruction no. 1 and Gomes' instructions no. 15 and 18, clarified what "duty" meant. There were other jury instructions which informed the jury of the duty

defendants owed to Rapoza. Specifically, Willocks' proposed jury instruction no. 1, as modified, stated that "Defendants had a duty to provide a reasonably safe place to work. This duty runs to whomever the Defendants require or permit to perform work on the premises." Gomes' proposed instruction no. 18, given over Plaintiffs' objection, also instructed the jury that "[a]n owner or occupier of land is not under a general duty to warn of the presence of known or obvious dangers which are not extreme and which a reasonable person exercising ordinary attention, perception and intelligence can be expected to avoid." The court also instructed the jury that "[a]n owner or occupier of the property owes a duty of reasonable care to all persons anticipated to be on the premises."

XIV.

Based on the foregoing, the February 13, 1998 order granting Defendant Taft's motion for summary judgment and the October 14, 1998 final judgment are vacated and the case remanded in accordance with this decision.

DATED: Honolulu, Hawai'i, January 2, 2004.

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I concur in the result.