***** NOT FOR PUBLICATION *****

NO. 23826

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

EDWARD FA,
Plaintiff-Appellant,

vs.

BRIGHAM YOUNG UNIVERSITY-HAWAI'I, a Utah non-profit corporation; ERIC B. SHUMWAY, in his official capacity as President of Brigham Young University-Hawai'i; GAYLENE NIKORA, individually and in her official capacity as Director of Human Resource Services,
Defendants-Appellees,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESS ENTITIES 1-10; DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-10; DOE UNINCORPORATED ORGANIZATIONS 1-10; and DOE GOVERNMENTAL AGENCIES 1-10,
Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 98-3154)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

The plaintiff-appellant Edward Fa appeals from the final judgment of the first circuit court, the Honorable Karen N. Blondin presiding, filed on December 1, 2000.

On appeal, Fa contends that the circuit court erred in granting various motions for summary judgment in favor of the defendant-appellee Brigham Young University-Hawai'i (BYUH), BYUH President Eric B. Shumway, and Gaylene Nikora, BYUH Director of Human Resource Services [collectively hereinafter, "the Appellees"] because, inter alia: (1) there were genuine issues of material fact as to Fa's contract claim, which was predicated on Kinoshita v. Canadian Pac. Airlines, Ltd., 68 Haw. 594, 724

P.2d 110 (1986); (2) the Appellees did not address Fa's Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982), claim "in any relevant manner in [their] motion for partial summary judgment" such that they did "not demonstrate[] the absence of disputed issues of material fact"; and (3) Fa's claim for intentional infliction of emotional distress (IIED) was not preempted by Hawai'i Revised Statutes (HRS) § 386-3 (Supp. 2003) because Fa alleged that causation was intentional. Fa also maintains as follows: (4) that the circuit court abused its discretion by appointing a Discovery Master, over his objection, to supervise the discovery process; (5) that the circuit court "abused its discretion by imposing monetary sanctions in discovery disputes because such disputes encompassed novel questions of law"; (6) that the Appellees should not have recovered any attorneys' fees or costs attributable to Fa's IIED claim; and (7) that the circuit court erred in awarding attorneys' fees and costs that were "not permitted by law."

The Appellees respond as follows: (1) Fa's opening brief fails to address the dismissal of various claims; (2) the circuit court did not err in granting summary judgment in favor of the Appellees and against Fa as to his claim for breach of implied contract, inasmuch as, inter alia, this court's decisions in Kinoshita, Calleon v. Miyagi, 76 Hawai'i 310, 876 P.2d 1278 (1994), and Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 14 P.3d 1049 (2000), require an analysis different than that proposed by Fa; (3) the circuit court did not err in granting summary judgment as to Fa's Parnar claim for discharge in violation of public policy; (4) the circuit court did not err in

granting summary judgment in favor of the Appellees and against Fa on Fa's IIED claim because, inter alia, termination of employment without cause is not sufficient to sustain an IIED claim and Fa has not challenged, neither before the circuit court nor on appeal, that ground for summary judgment; (5) the circuit court did not err in appointing a Discovery Master; (6) the circuit court did not err in allowing the scope of discovery to include Fa's IIED claims and did not abuse its discretion in assessing sanctions against Fa for discovery abuses; and (7) Fa has not raised the issue of attorneys' fees and costs in a manner reviewable by this court.

Fa replies, inter alia, as follows: (1) extrajurisdictional authority supports Fa's argument "that the BYUH handbook disclaimer[,] when taken in juxtaposition with other handbook statements and actions taken [by BYUH], indicate[s] that a question of fact exists as to the formation of a Kinoshita contract"; (2) "the BYUH handbook . . . avers 'honesty in all behavior' by all employees as a condition of employment," which creates "a genuine issue of material fact as to whether 'fairness' in the termination procedures is a promise of specific treatment in specific circumstances"; (3) Fa "made proper and timely objection on [the] record to the appointment of the Discovery Master"; (4) "[d]iscovery sanctions imposed on [Fa constituted] an abuse of discretion because the trial court failed . . . or refused to [determine] whether 'other circumstances' made imposition of such sanctions 'unjust within the meaning of [Hawai'i Rules of Civil Procedure (HRCP)] Rule 37(d) (2004)".

As a preliminary matter, it is noteworthy that Fa does not challenge all of the circuit court's orders granting summary judgment in favor of the Appellees, but rather argues only that the circuit court erred in entering the following orders, which were incorporated into the December 1, 2000 final judgment: (1) the September 5, 2000 order granting BYUH's and Nikora's motion for partial summary judgment as to Count II of Fa's first amended complaint (i.e., Fa's Kinoshita claim of breach of implied employment contract); (2) the September 20, 2000 order granting BYUH's and Nikora's motion for partial summary judgment as to Count I of Fa's first amended complaint (i.e., Fa's Parnar claim of termination in violation of public policy); and (3) the September 20, 2000 order granting BYUH's and Nikora's motion for partial summary judgment as to Counts IV, V, and VI of Fa's first amended complaint (i.e., specifically Count VI, Fa's IIED claim).

Calleon v. Miyagi, 76 Hawai‘i 310, 317-18, 876 P.2d 1278, 1285-86 (1994), expressly rejected Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 116 Cal. App. 3d 311 (Cal. Ct. App. 1981), which underlies the entire line of California cases upon which Fa relies in arguing that there are genuine issues of material fact as to whether a Kinoshita contract was formed. In his reply brief, Fa appears to concede that the California authorities he cited in his opening brief are inapposite to the present matter as a result of this court's ruling in Calleon. Although Fa refers to other extrajurisdictional authority supportive of his argument, in Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd., 100 Hawai‘i 149, 58 P.3d 1196 (2002), we squarely dealt with the issue of disclaimers and implied contracts and

held that a disclaimer is valid if it is: "(1) . . . clear, conspicuous, and understandable; (2) [does not] contradict language in the [employee] manual; [and] (3) [does not] contradict subsequent oral or written statements by the employer." 100 Hawai'i at 167-68, 58 P.3d at 1214-15.

The "Introduction" to BYUH's "Employee Handbook" provides a "clear, conspicuous, and understandable" disclaimer as follows:

> This booklet is not a contract and it is not meant to impose any legal obligation upon either the employee or the University. BYU-H may amend or terminate at any time the policies, plans and benefits described in this book as University needs change and experience dictates. . . .

(Emphasis added.) Moreover, the section entitled "Employment at Will" reiterated the disclaimer:

> Except in the case of faculty who hold continuing status, employment at [BYUH] is at will, which means employment exists at the will of either party. Termination may result at any time. It may be for any cause or no cause, unless prohibited by law. Employment at will covers all aspects of the relationship.
>
> The employee acknowledges that [BYUH] personnel policies and procedures constitute neither a contract nor an implied contract and that these policies and procedures may be changed or withdrawn according to the need or discretion of [BYUH] administration.
>
> Inasmuch as employment is at will, the employee understands that no employee or officer of [BYUH], other than the president or his designate, can make a commitment to a person in an administrative or staff position for a specified period of time.

(Emphases added.) BYUH's Employee Handbook further describes, in unambiguous terms, the at-will status of staff employees under the heading "Termination by the University":

> [u]nfortunately, conditions may arise which will lead either the employee or [BYUH] to terminate the employment relationship without prior notice or corrective discipline. Remember that the employer or [BYUH] may terminate the employment relationship at any time with or without cause . . . .

The disclaimer in the present matter is therefore analogous to Nissan's disclaimer in Gonsalves, in that it is "clear, conspicuous, and understandable." Gonsalves, 100 Hawai'i at 167, 58 P.3d at 1214.

Although Fa claims that his knowledge of the "policy purpose" of BYUH's grievance procedure, as well as other "promises" (e.g, rest periods, lunch breaks, overtime, salary increases, vacation benefits, un/paid and sick leave benefits, termination policy and procedures, and retirement program), led him to believe that there was some contractual relationship between himself and BYUH, the disclaimer "contradict[ed neither] language in the manual" nor "subsequent oral or written statements by the employer." Gonsalves, 100 Hawai'i at 167-68, 58 P.3d at 1214-15. In that connection, Gonsalves is instructive because it distinguishes between "general, optional language" -- which the Gonsalves court found did not contradict Nissan's disclaimer -- and "mandatory language." Id. at 169-70, 58 P.3d at 1216-17. The "Grievance Procedure" described in the "Employee Handbook" employed such "general, optional language":

> An employee's immediate supervisor or division/department chair will be available to discuss complaints or problems which may arise during the course of employment. Employees may discuss problems with him or her to help resolve any conflicts. It is recommended that the employee submit his complaint in writing.
>
> If the department supervisor or chair cannot resolve the problem, the employee should take the problem in writing to the . . . Personnel Director in the case of a staff employee. If the administrator is not able to resolve the problem, the grievance may be submitted to the President's Council using the procedure outlined in Personnel Policies and Procedures, Number 209, and the University Handbook.
>
> For problems involving alleged discrimination, employees may contact the Personnel Director at extension 3713. This step may be taken if the problem cannot be resolved with the

employee's supervisor or the supervisor's supervisor.

(Emphases added.) Even the "policy purpose" underlying the "Grievance Procedure" cited by Fa is not written by way of "mandatory language," stating only BYUH's desire "[t]o provide an effective and fair process for receiving and resolving employee grievances[,]" and the "inten[tion] to cover all employee grievances such as[,] but not limited to[,] charges of unfairness, discrimination, poor working conditions or relationships, etc." Moreover, Fa does not describe with particularity the other "promises" (e.g, rest periods, lunch breaks, overtime, salary increases, vacation benefits, un/paid and sick leave benefits, termination policy and procedures, and retirement program) that BYUH made to him, and his citation to the record refers only to (1) his statement of facts in opposition to the Appellees' motions for partial summary judgment, (2) a letter he wrote to BYUH's "Executive Council" alleging various failures by BYUH to "ma[ke] good on . . . promise[s]," and (3) the correspondence and documentation concerning his termination.

Thus, because Gonsalves confirms that the issue of the effectiveness of handbook disclaimers is susceptible to summary judgment, 100 Hawai'i at 170, 58 P.3d at 1217, and inasmuch as BYUH's disclaimer is as effective as Nissan's in that it does not run afoul of the three Gonsalves factors, id. at 167-68, 58 P.3d at 1214-15, we hold that the circuit court did not err in granting summary judgment in favor of the Appellees on Fa's Kinoshita claim for breach of implied contract.

Fa's argument that the Appellees did not address Fa's Parnar claim "in any relevant manner in [their] motion for partial summary judgment" such that they did "not demonstrate[] the absence of disputed issues of material fact" is blatantly false and therefore without merit. In their memorandum in support of their September 7, 1999 motion for partial summary judgment as to Fa's discrimination claim, the Appellees asserted that Fa could not "proceed on a discrimination claim under the guise of a Parnar claim." In Parnar, this court "recognized an exception to the judicially created 'employment at-will' doctrine, holding that 'an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy.'" Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., Inc., 76 Hawai'i 454, 879 P.2d 1037 (1994) (citing Parnar, 65 Haw. at 380, 652 P.2d at 631). In their memorandum, however, the Appellees cited this court's decision in Ross, supra, which observed as follows:

> If . . . the statutory or regulatory provisions which evidence the public policy themselves provide a remedy for the wrongful discharge, provision of a further remedy under the public policy exception is unnecessary. If the legislature has considered the effect of wrongful discharge on the policies which they are promoting, provision by the courts of a further remedy goes beyond what the legislature itself thought was necessary to effectuate that public policy.

Id. at 464, 879 P.2d at 1047 (internal quotation signals and citations omitted). The Appellees argued that "Hawaii's Fair Employment Practices Law[, HRS § 378-2(1) (Supp. 2003)] and Title VII of the Civil Rights Act of 1965, [29 United States Code (U.S.C.) § 2000e,] which expressly prohibit discrimination, bar Fa's violation of public policy claim based upon discrimination."

On January 13, 2000, the circuit court entered an order granting the Appellees' motion for partial summary judgment as to Fa's discrimination claim.

On August 4, 2000, the Appellees filed a motion for partial summary judgment as to Count I of Fa's first amended complaint (i.e., Fa's Parnar claim). In their memorandum in support of the motion, the Appellees again discussed the Parnar decision and maintained (1) that Parnar created only a "narrow exception" to the at-will doctrine and (2) that Fa is unable to sustain his burden of proving that his discharge violates a clear mandate of public policy. Moreover, the Appellees referred to the January 13, 2000 order granting the Appellee's motion for partial summary judgment as to Fa's discrimination claim in arguing that Fa could not maintain a Parnar claim because, based on the record, the only possible claim Fa could assert was "gone from [the] case and [could] not now be reopened." It is noteworthy that Fa did not appeal the January 13, 2000 order granting partial summary judgment in favor of the Appellees. Thus, because the Appellees clearly did address Fa's Parnar claim in two motions for summary judgment and sufficiently demonstrated the absence of any disputed issues of material fact, we hold that the circuit court did not err in granting partial summary judgment in favor of the Appellees on Fa's Parnar claim.

The circuit court did not err in granting summary judgment in favor of the Appellees and against Fa on Fa's IIED claim because, inter alia, the circuit court did not specify the basis upon which it granted summary judgment and Fa has not argued, either before the circuit court or on appeal, that all of

the grounds for summary judgment alleged by the Appellees were erroneous. Among the contentions submitted by the Appellees in their memorandum in support of the August 4, 2000 motion for summary judgment as to Counts IV, V, and VI (i.e., Fa's IIED claim) of Fa's first amended complaint was that Fa was "unable to establish an essential element of his claim for [IIED,]" particularly "unreasonable conduct in [Fa's] discharge[.]" The Appellees cited this court's decision in Ross, supra, which reasoned as follows:

> Recovery for intentional infliction of emotional distress is permitted only if the alleged tortfeasor's acts were "unreasonable." Calleon v. Miyagi, 76 Hawai'i 310, 321 n.7, 876 P.2d 1278, 1289 [n.7] (Sup.1994), as amended, 76 Hawai'i 453, 879 P.2d 558 (Sup[p]. 1994); Chedester v. Stecker, 64 Haw. 464, 467, 643 P.2d 532, 535 (1982); Marshall v. University of Hawai['i], 9 Haw. App. 21, 38, 821 P.2d 937, 947 (1991). An act is "unreasonable" if it is "'without just cause or excuse and beyond all bounds of decency [.]'" Chedester, 64 Haw. at 468, 643 P.2d at 535 (quoting Fraser v. Blue Cross Animal Hosp., 39 Haw. 370, 375 (1952)). In other words, the act complained of must be "outrageous," as that term is employed in the Restatement (Second) of Torts § 46 (1965).[] Id.

76 Hawai'i at 465, 879 P.2d at 1048 (emphasis added) (footnote omitted). The Appellees noted that, "[d]uring his deposition, when asked if [BYUH] did anything toward him that he felt was outrageous (defined by [Fa] as really terrible), the only thing that [Fa] could cite was that he was terminated without cause." Based on Ross, the Appellees "submit[ted] that termination without cause is not sufficient to support a claim for [IIED]." The September 20, 2000 order granting BYUH's and Nikora's motion for partial summary judgment as to Counts IV, V and VI of Fa's first amended complaint (i.e., Fa's IIED claim) did not specify the grounds upon which it granted the Appellee's motion.

Thus, insofar as the Appellee's contention that Fa's claim for IIED fails pursuant to Ross is sufficient to support summary judgment in their favor, and because Fa waived any argument as to that ground for summary judgment by failing to challenge it either before the circuit court or on appeal, see Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (2004) ("Points not argued may be deemed waived."), we hold that the circuit court did not err in granting partial summary judgment in favor of the Appellees on Fa's IIED claim.

Fa's assertion that the circuit court abused its discretion by appointing a Discovery Master is barred by HRAP Rule 28(b)(4) (2004). HRS § 641-2 (1993) provides that "[e]very appeal shall be taken on the record and no new evidence shall be introduced in the supreme court." As Fa concedes in his reply brief, HRAP Rule 10 omits minute orders from its description of the record on appeal. Thus, insofar as HRAP Rule 10 excludes minute orders from the record on appeal and HRS § 641-2 allows appellate review only upon the record, Fa has not complied with the following mandate of HRAP Rule 28(b)(4) (2004):

> [Opening briefs must contain a] concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) 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 court or agency.
> . . . .
> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.

(Emphases added.) Although HRAP Rule 28(b)(4) does allow this court to notice plain error, this court only invokes the plain error rule "when justice so requires." Doe v. Grosvenor Center

Associates, 104 Hawai‘i 500, 515, 92 P.3d 1010, 1025 (App. 2004) (internal quotation signals omitted). Moreover, although the first two factors cited in Doe for evaluating plain error are not applicable to the present matter (i.e., consideration of additional facts and effect on the integrity of circuit court findings of fact), it is clear that the appointment of the discovery master in this case is not an "issue of great import." Id. (internal quotation signals omitted). Thus, we hold that Fa's argument that the circuit court abused its discretion in appointing a discovery master is barred by his failure to properly cite his objection in the record on appeal.

In arguing that the circuit court abused its discretion by imposing discovery sanctions, Fa misapprehends this court's reasoning in Fujimoto v. Au, 95 Hawai‘i 116, 137, 19 P.3d 699, 720 (2001), and attempts to conflate mere discussion into a holding, insofar as Fujimoto does not expressly require trial courts to state their consideration of "other circumstances" that would make the award of sanctions unjust. Id. at 168-69, 19 P.3d at 751-52. Moreover, contrary to Fa's interpretation, HRCP Rule 37(d) only confirms that the award of sanctions is soundly within the discretion of the circuit court. Upon review of the Appellees' recitation of the factual and legal bases for the discovery sanctions, we hold that the circuit court did not abuse its discretion in sanctioning Fa for his failure to attend the Independent Medical Examination.

Although Fa raise several arguments that the circuit court erred in awarding attorneys' fees and costs to an extent not permitted by law, he provides no citation, either in his

opening brief or his reply brief, to the circuit court's order granting attorneys' fees and costs to the Appellees. HRAP Rule 28(b)(4) requires that appellants include in their opening briefs "where in the record the alleged error occurred." Notwithstanding the Intermediate Court of Appeals's holding in Doe and the fact that HRAP Rule 28(b)(4) allows this court, at its discretion, to "notice a plain error not presented[,]" the circuit court's order granting attorneys' fees and costs to the Appellees is not part of the record. Thus, insofar as Fa has not complied with the requirements of HRAP Rule 28(b)(4), and because we could not, even if we desired to do so, notice plain error by nature of the incompleteness of the record on appeal, we deem Fa's argument as to attorneys' fees and costs as barred. Therefore,

IT IS HEREBY ORDERED that the circuit court's December 1, 2000 final judgment against Fa and in favor of BYUH from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, October 6, 2004.

On the briefs:

William Tagupa,
for the plaintiff-appellant
Edward Fa

John R. Lacy, Barbara Petrus,
Carol A. Eblen (Goodsill
Anderson Quinn & Stifel)
for the defendant-
appellee Brigham Young
University-Hawai'i