2013 WL 10449140 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

David W. SWIFT, Jr., and Lois F. Swift, Plaintiffs-Appellees,
v.
Catherine SWIFT and Jay Nelson, Defendants-Appellants.

No. 12-0000603.
January 15, 2013.

First Circuit Court
The Honorable Karen T. Nakasone, Judge
Appeal from: Amended Final Judgment, entered on June 13, 2012

Defendants-Appellants/cross-Appellee's Answering Brief Certificate of Service

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***1** I. INTRODUCTION

Defendant-AppellantCross-Appellees CATHERINE SWIFT ("Catherine") and JAY NELSON ("Jay") (collectively "Cross-Appellee Defendants) hereby respond to the Opening Brief of Plaintiffs-Appellees/Cross-Appellants DAVID W. SWIFT, JR. ("David") and LOIS SWIFT ("Lois") (collectively "Cross-Appellant Plaintiffs"). Cross-Appellant Plaintiffs failed to present sufficient evidence of any conduct which would warrant the submission of their request for punitive damages to the jury. While they attempt to portray Catherine as having been physically **abusive**, Lois admits that she instigated the cup incident, by threatening to throw water on Catherine, and the jury obviously did not agree with counsel's characterization of Catherine as an **abuser**, having returned a finding that Lois was 40 percent at fault for her injuries.

Despite the claims of financial exploitation and alleged breach of fiduciary duty against Catherine and Jay, for not immediately reconveying the 412 Hao Street property once the debt secured by the mortgage was refinanced, the indisputable evidence showed that Catherine and ***2** Jay, who believed they were being gifted the property, nonetheless promised to pay David and Lois, by signing the March 2006 Agreement to repay, as an accommodation to David and Lois, after David and Lois already had spent the money which they claimed to have been defrauded out of and after they already had transferred the property to them. Cross-Appellant Plaintiffs' failure to file their claims within six years of the conveyance is an indication that even they did not expect to receive back the property. In other words, there was no detrimental reliance by David and Lois on any promises or conduct from Catherine and Jay, and any claim for failure to reconvey should have been barred as untimely filed. Thus there was no viable underlying claim which could serve as the basis for punitive damages.

The trial court correctly did not allow the Cross-Appellant Plaintiffs' claims for punitive damages to be submitted to the jury in a case in which Cross-Appellant Plaintiffs had shown nothing more than a disagreement between family members over financial matters that had not been adequately documented to reflect what either side thought was their agreements.

II. STANDARDS OF REVIEW

A trial court's ruling on a motion for directed verdict is reviewed de novo. In deciding a motion for directed verdict, the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the nonmoving party

and may be granted where there can be but one reasonable conclusion as to the proper judgment. Nelson v. Univ. of Hawaii, 97 Hawai'i 376, 393, 38 P.3d 95, 112 (2001).

The chief object of the jury instructions is to explain the law of the case, to point out the essentials to be proved on one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved. McKeague v. Talbert, 3 Haw App. 646, 657, 658 P.2d 898, 906 (Haw. App. 1983), overruled on other grounds by Roxas v. Marcos, 89 Haw. 91, 969 P.2d 1096 (Haw. 1998).

***3** It is not reversible error to refuse to give an instruction on a claim that is properly disposed of through a directed verdict. Mahoney v. Mitchell, 4 Haw App. 410, 418, 668 P.2d 35, 41 (Haw. App. 1983).

III. ARGUMENT

A. Cross-Appellee Defendants Challenged The Sufficiency of the Evidence To Support The Punitive Damages Claim.

Contrary to Cross-Appellant Plaintiffs' argument that Cross-Appellee Defendants failed to challenge the sufficiency of the evidence on the punitive damages claim, Cross-Appellee Defendants challenged the sufficiency of the evidence twice, once in the form of a motion summary judgment prior to trial, and again with a renewed request for judgment as a matter of law on the punitive damages claim at the conclusion of the presentation of Cross-Appellant Plaintiffs' case.

On January 30, 2012, Cross-Appellee Defendants moved for summary judgment on the punitive damages claim. See ROA Dkt 27, pp. 779-818. The court granted the motion for summary judgment in part, ruling that Cross-Appellant Plaintiffs could not recover punitive damages for breach of contract. See ROA Dkt. 27, pp. 11-12.

At the conclusion of the presentation of Cross-Appellant Plaintiffs' case, after Gary Grimmer, moved for judgment as a matter of law on all the claims, Randall Chung, one of the attorneys for Cross-Appellee Defendants, made an additional motion for judgment as a matter of law on the assault and battery and negligence claims against Catherine, and specifically mentioned the request for punitive damages, which is a derivative claim:
MR. CHUNG: May I make a Rule 50 motion with respect to Counts 4 and 5 as well? That involves the cup incident, so-called cup incident.

THE COURT: Okay.

***4** MR. CHUNG: There is not sufficient evidence for them to make a prima facie case of negligence against Ms. Swift. At best, Mrs. Swift said I don't know what happened. Dr. Swift, likewise, was not in a position to see....A cup's in evidence about Ms. Swift's state of mind that it was intentional misconduct. There was not even evidence that she was not doing what she said she was doing, which is basically trying to get the cup out of the way. So certainly there is no ground for the intentional alleged and for the punitive damages, assuming that the Court denies the negligence claim.

Transcript 3/23/2012, at p. 208:7-10; 18-25.

Cross-Appellant Plaintiffs misstate the record when they assert that Cross-Appellee Defendants did not challenge the sufficiency of the evidence on the punitive damages claim. Having moved for summary judgment on the punitive damages claim even prior to the commencement of the trial, the trial judge had inherent authority to revisit her decision on that request at any time prior to a final judgment being entered. Cho v. State, 115 Haw. 373, 168 P.3d 17 (2007) (trial court has inherent authority to revisit interlocutory orders). Aside from being authorized to revisit the denial of summary judgment on the punitive damages claims as an exercise of the court's inherent authority, the court also was authorized to revisit the claim for punitive damages

because Cross-Appellee Defendants also had moved for judgment as a matter of law at the conclusion of the presentation of the Cross-Appellant Plaintiffs' case.

B. The Trial Court Correctly Determined That Cross-Appellant Plaintiffs Did Not Present Sufficient Evidence To Allow The Punitive Damages Claim To Be Submitted To The Jury.

In refusing to allow the punitive damages claim to be submitted to the jury, the trial court correctly relied upon the law in the State of Hawaii that something more than the commission of a tort is required to sustain a punitive damages claim, and correctly determined that Cross-Appellant Plaintiffs failed to present clear and convincing evidence to allow the claim for punitive damages to be submitted to the jury.

***5** The Hawaii Supreme Court has stated that to justify an award of punitive damages, "a positive element of conscious wrongdoing is always required." See Masaki v. General Motors Corp, 71 Haw. 1 at 7, 780 P.2d 566 at 570-71 (Haw. 1989). "Thus, punitive damages are not awarded for mere inadvertence, mistake, or errors of judgment." Id. "Something more than the mere commission of a tort is always required for punitive damages." Id.; Ditto v. McCurdy, 86 Haw. 84, 91, 947 P.2d 952, 959 (1997)(there must be clear and convincing evidence that, "there has been some wilful misconduct or that entire want of care which would raise presumption of a conscious indifference to consequences"); and Association of Apartment Owners of Newtown Meadows ex rel. its Bd. Of Directors, 115 Hawaii at 297-98, 167 P.3d at 290-91 (strongest evidence fails to show any positive element of conscious wrongdoing, precluding an award of punitive damages).

In Hawaii, the rule of law is that even a finding of fraud does not necessarily entitle a party to punitive damages. Kang v. Harrington, 59 Haw 652, 660-661, 587 P2d 285, 291 (Haw. 1978). In Kang, the Defendant was found to have committed fraud against the Plaintiff by having her erroneously sign a 55 year lease of a residential property, which he prepared and rushed her to sign, without reading, and thereafter making improvements to the property which he cited in support of his contention that he had a valid 55 year lease. The court found that in fact the rental term was to be for one year only, and that Defendant had agreed to make certain improvements in consideration for Plaintiff's agreement to reduce the rent by $50 per month from the rent that she was asking for, and for permitting Defendant to keep his dogs at the property. Notwithstanding that Defendant was found to have committed fraud, the court ordered a remittitur of $17,500 of the $20,000 in punitive damages granted by the trial court and specifically stated:

***6 But even the finding of fraud of appellant on appellee will not necessarily result in an award of punitive damages. Punitive damages are in no way compensatory and are not available as a matter of right. An award of punitive damages is purely incidental to the cause of action. They may be awarded by the grace and gratuity of the law. They also act as a means of punishment to the wrongdoer and as an example and deterrent to others. Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954). Punitive damages may be awarded only in cases where the wrongdoer "'s acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations'; or where there has been 'some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences."' (Citations omitted). Bright v. Quinn, 20 Haw. 504, 512 (1911).**

Kang v. Harrington, 59 Haw 652, 660-661, 587 P2d 285, 291 (Haw. 1978). See also Silver v. Nelson, 610 F.Supp. 505, 523 (E.D. La. 1985) (holding that even if plaintiff had established a claim for fraud, exemplary damages are used to punish and deter, and the award of actual damages was punishment enough); In re Hernandez, 452 B.R. 709, 725 (Bankr. N.D. Ill. 2011) ("While in this case, fraud was clearly established, the court does not find that it was so gross as to warrant punitive damages.... [T]he Court does not find such extraordinary or exceptional circumstances clearly showing malice and intent to injure as would warrant an award of punitive damages, in addition to the compensatory damages awarded herein.").

In this case, Cross-Appellant Plaintiffs did not present sufficient evidence to meet the clear and convincing burden of proof that Cross-Appellee Defendants acted wantonly or oppressively or with malice toward them. Both Cross-Appellant Plaintiffs questioned Catherine's ability to manage her finances, claiming that by initially giving her only a 1 percent interest in the 412 Hao Street property that they wanted to see her demonstrate financial responsibility. Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, at p. 17:3-21; 105:3-testimony of David Swift, Dkt 60, Transcript 3/23/2012, at pp. 109:5-14; 110:25-111:12. When Cross-Appellant Plaintiffs spoke to their financial advisor about whether they should acquire the property, they were aware that their daughter was then unemployed, had ***7** student loans of approximately $18,000 to repay, and that she did not have a financial track record. Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, at pp. 180:19-181:10. Jay Nelson's testimony, that they did not make payments to Cross-Appellant Plaintiffs because they simply did not have the money was unchallenged, and undisputed by Cross-Appellant Plaintiffs. Cross-Appellant Plaintiffs never disputed Cross-Appellee Defendants testimony that they simply could not afford to pay both the mortgage on 412 Hao Street, and Cross-Appellant Plaintiffs' mortgage on 420 Hao Street. See Testimony of Jay Nelson, Dkt. 63, Transcript 3/20/2012, at pp. 74:8-75:2 (March 2006 agreement was entered into in good faith but with two children, both in daycare, he was unable to save money to repay Cross-Appellant Plaintiffs).

Notwithstanding Cross-Appellee Defendants' limited finances, and their belief that they were being gifted the property, both Catherine and Jay signed the March 2006 Agreement promising to repay Cross-Appellant Plaintiffs for the monies which they had invested in the 412 Hao Street property. Plaintiff's Exhibit 9, Dkt. 29 at p. 1631-1632. The March 2006 Agreement to repay was signed by Cross-Appellee Defendants immediately after Cross-Appellant Plaintiffs asked them for repayment and notwithstanding that Cross-Appellee Defendants believed that the property had been gifted to them. Testimony of David Swift, Dkt. 60, Transcript 3/23/2012, p. 173:18-24; 172:16-173:11. The fact that Catherine and Jay signed the March 2066 Agreement to repay negates any finding that they were acting wantonly or oppressively toward Cross-Appellant Plaintiffs. By the time that Cross-Appellant Plaintiffs asked for repayment, the 412 Hao Street property already had been transferred to Cross-Appellee Defendants. By signing the March 2006 Agreement to repay, Cross-Appellee Defendants did not place Cross-Appellant Plaintiffs in any worse position than they were already in, and even though they were ***8** subsequently unable to pay, still conferred a benefit on Cross-Appellant Plaintiffs in that they recognized an obligation to Cross-Appellant Plaintiffs.

Although Cross-Appellant Plaintiffs claimed that Cross-Appellee Defendants breached a fiduciary duty to them to immediately re-convey the 412 Hao Street property once the refinancing was completed, Cross-Appellant Plaintiffs also acknowledged that they were not entitled to both a re-conveyance of the property and payment from Cross-Appellee Defendants for their interest in the property. Their own attorney had Cross-Appellant Plaintiffs clarify that they were presenting alternate theories of recovery and had Lois testify:
Q: And finally, Mr. Chung asked you if you were seeking damages for basically having been tricked out of your 99 percent interest; correct?

A: Correct.

Q: And you responded yes, you are seeking damages for that?

A: Yes.

Q: He asked you if you're seeking damages for basically having been also tricked out of your view easement; correct?

A: Definitely, yes.

Q: And you answered yes; correct?

A: Yes.

Q: Let's clarify for the jury. Those are alternate requests for damages, are they not?

A: Yes.

Q: Because if you had gotten your 99 percent back, you wouldn't need the view easement, correct?

A: That's correct because we would have control over the property.

Q: And if you would have gotten a view easement along with your money, then you wouldn't need the 99 percent back, correct?

A: No, as long as we got the payment.

***9** Q: Okay. So the two requests for damages, 99 percent being - you being tricked out of that, and the view easement, basically being tricked out of that -

A: Yes.

Q: -- are alternate requests to the jury for relief?

A: Yeah, that's correct.

Q: You would want one of those but not both?

A: That's correct.

Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, at pp. 189:12-190:19. Having agreed to repay Cross-Appellant Plaintiffs, Cross-Appellee Defendants were not obligated also to reconvey the property, as Lois acknowledged. Thus, the fact that Cross-Appellant Defendants did not immediately re-convey, after the re-financing was completed, is not evidence of willful and wanton conduct toward Cross-Appellant Plaintiffs, who themselves waited more than six years from when the re-financing was complete before filing suit, a delay which suggests that even they were not expecting a re-conveyance. See Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, at p. 29:5-23 (explaining that the 99 percent interest was transferred when Defendants-Appellants requested it in late 2003/early 2004 for refinancing); testimony of David Swift, Dkt. 60, Transcript 3/23/2012, at pp. 115:2-5; 117:22-118:16(same); Plaintiffs' Exhibit 17, Dkt. 29, pp. 1645-1652, Deed recorded on March 3, 2004.

It also was undisputed that although Cross-Appellee Defendants refused to sign a view easement in Cross-Appellants' favor which could be recorded, that Cross-Appellee Defendants maintained the 412 Hao Street property in such manner that there were no obstructions to Cross-Appellant Plaintiffs' view. The most that Lois was able to say about the way that Catherine and Jay were maintaining the property was that there were trees on 412 Hao Street that were “just about to eclipse part of our view”, and that her neighbors, not her, were having their view ***10** obstructed by a soapberry tree on the 412 Hao Street property. Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, p. 28:15-17; 155:4-156:11. Under cross-examination Lois then attempted to single out a lychee tree as being a problem to her view although she already had acknowledged that there was nothing growing on 412 Hao Street that blocked her view. Under cross-examination, Lois testified:
Q: So we're talking about the view easement. All right?

A: Yes.

Q: Aside from the soapberry tree, which you've admitted blocks the streetlight at night-

A: Yes.

Q: -- and shades your lanai-

A: Yes.

Q: -- during the day, is there anything else growing that blocks your view on 412's back lot?

A: Not at this moment.

Q: Is there anything built on the back lot of 412 -

A: No.

Q: -- that blocks your view?

A: Not at this point.

Q: Okay. You would agree that even though the view easement agreement has not been signed, there's nothing blocking your view except for the soapberry tree, which you like?

A: There's - the lychee tree on the next level is a problem.

Q: The next level meaning?

A: Down the same level as their house.

Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, pp. 161:2-162:7. Lois' identification of the lychee tree as being a problem came after she already testified on direct examination that ***11** there was no present obstruction, that the trees were "just about to eclipse part of our view". Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, p. 28:15-17. There was no testimony or trial exhibits that the requested view easement plane was obstructed in any way by Catherine and Jay's use of 412 Hao Street. This was not a case where having acquired 100 percent of the title to the 412 Hao Street property Cross-Appellee Defendants flat out refused to recognize any rights of Cross-Appellant Plaintiffs. Cross-Appellee Defendants invested significant money and their own labor into the 412 Hao Street property with the expectation that the property was being gifted to them. However, despite the expectation of it being a gift, when Cross-Appellant Plaintiffs asked them for payment, Cross-Appellee Defendants "immediately responded" by signing the March 2006 Agreement to repay. Testimony of David Swift, Dkt. 60, Transcript 3/23/2012, pp. 172:16-173:11. They also maintained the property in such manner so as to not obstruct Cross-Appellant Plaintiffs' view.

The facts of this case are clearly distinguishable from the circumstances in the cases cited by Cross-Appellant Plaintiffs in which punitive damages were allowed. In Kunewa v. Brandt, 83 Haw. 65, 924 P.2d 559 (Haw. App. 1996), after a mother was hospitalized for medical problems, she executed a power of attorney so her son would be able to manage her finances for her. When mother was hospitalized a second time, Defendant transferred her debt-free real property to himself. The court found that punitive damages could properly be assessed against Defendant because he could not use the power of attorney to make a gift to himself. However, it remanded the case for a new trial on punitive damages because the jury had been allowed to consider Defendant's noncompliance with a court order requiring that he reconvey the property to his mother's estate which may have improperly influenced the jury's award on punitive damages. Unlike the Defendant in Kunewa, Cross-Appellee Defendants here did not use a power of ***12** attorney to transfer property to themselves. Cross-Appellant Plaintiffs voluntarily signed the deed conveying the 412 Hao Street property. Although Cross-Appellant Plaintiffs claim that the property was to be immediately re-

conveyed once Cross-Appellee Defendants' refinancing was completed, Cross-Appellant Plaintiffs did not seek reconveyance for more than six years after the property had been transferred. Rather Cross-Appellant Plaintiffs instead sought payment for the transfer, which Cross-Appellee Defendants attempted to oblige by signing the March 2006 Agreement to pay Cross-Appellant Plaintiffs. Cross-Appellant Plaintiffs admitted that they would not be seeking re-conveyance of the property if they were paid. Cross-Appellee Defendants' conduct is lacking of any evidence of malice toward Cross-Appellant Plaintiffs.

In Vasconcellos v. Juarez, 37 Haw 364 (1946), the Hawaii Supreme Court rejected Defendant's argument that an award of $500 in punitive damages was excessive. In Vasconcellos, Defendant committed “an unprovoked and brutal beating” of Plaintiff which caused the Plaintiff's entire body to be bruised, his nose to be broken, both eyes to be blacked and closed, his upper right cheek to be gashed, and the muscle holding his right eye in place to protrude and his right eye to be pushed from its socket. There also was medical evidence that the appellee's right eye became permanently blind 18 months later as a result of the Defendant's attack. In contrast to Vasconcellos, where Plaintiff had done nothing to provoke the assault, Lois Swift admitted to instigating the confrontation with Catherine which resulted in Lois being injured. Lois testified that she was upset at Catherine because Catherine had remarked that she did not want her hiring an inexperienced caregiver for her father, who had his jaw wired shut as a result of an auto accident, and her father being treated like a guinea pig. Upon hearing the guinea pig remark, Lois then threatened Catherine:
Q: When she said that she feared her father was going to be treated like a guinea pig by inadequate medical care, what did you tell her? Tell the jury,

***13** A: I said to my daughter, I'm feeling very angry, and I am so angry I feel like throwing this water at you.

Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, p. 47:12-16.

The remarks which Catherine made which caused Lois to threaten that she was going to throw water on Catherine were remarks demonstrating her concern that a proper caregiver be engaged to care for her father David who had been in an auto accident. Catherine explained the conversation leading up to the incident as follows:
We had - it was actually during the daytime, because it was during business hours, and I had had Mr. Benjamin Yuen of Heaven's Helper Care Agency meeting with my parents to see if his company's services would be a good fit for my parents.

And my - I had been questioning him in some detail about his staff's qualifications to do tube feeding, and I said to him I need assurance that any staff who you will be providing to do my father's tube feeding is properly trained and experienced, and I said I do not want my father used as a guinea pig, and my mother became extremely upset and said that I was being disrespectful to my father. And I tried to explain to my mother that I was not meaning any disrespect to my father for calling him a guinea pig, it was because I didn't want somebody who didn't know what they were doing practicing on him. And my mother got more and more angry, and Mr. Yuen was trying to reassure my mother that neither of us meant any disrespect to my father. And my mother screamed get out, get out to him. He went running out of the house.

And my mother and I continued arguing about what the term “guinea pig” meant. And we ended up in the kitchen, and it looked like things were going to start calming down, so that's why my parents were seated. And then it started up again. And my mother said to me -

***I was starting to back away and she said, “Goddammit Catherine, I'm so pissed at you I could throw this cup at you.” And I kept saying, “But, Mom, I'm just trying to help,” and she lunged out of the chair at me with the water. And I had a few months previously fallen and shatter my wrist, so I had surgery, and I have a metal plate and screws and I had just finished my last physical therapy appointment a few days before, so my wrist didn't work very well, so when my mother came at me with the water, I had the cup like this and we were struggling and I was trying not to get the water thrown in my face, so we kept struggling with it, and it - I pulled to get it away from her and it just went like that. So that's - that's what happened.

***14** Testimony of Catherine Swift, Dkt. 60, Transcript 3/23/2012, pp. 83:3-85:14. It was at that point that Catherine struggled with her mother over the cup resulting in her mother being accidentally hit on the head.

The injuries which Lois suffered were not serious with Lois not seeking medical attention. Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, p. 126:109-12. The jury obviously did not agree with counsel's characterization of the so-called attack by Catherine on Lois as malicious **elderly abuse**. Lois asked the jury to award her between $5,000 and $25,000 for the claimed attack. Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, p. 72:7-16. The jury awarded only $5,000, the lowest amount that had been suggested by Cross-Appellant Plaintiffs, and by finding that Lois was 40 percent contributorily negligent, the amount that Catherine was found legally obligated to pay her mother was reduced to $3,000. See Special Verdict, Dkt. 29, pp. 1121-1129. The evidence was far short of meeting the clear and convincing standard of outrageous or aggravated misconduct required to support an award of punitive damages.

In Bright v. Quinn, 20 Haw 504 (1911), Plaintiff was injured while standing on the running board of an electric street-car when Defendant crashed into it. Plaintiff was rendered unconscious by the fall, remained hospitalized for eight days, received an injury on his head that left a scar two inches long, part of one ear was almost severed, he received bruises about the head and arms, and suffered intense pain for days. For about five months, Plaintiff had trouble chewing and was unable to work. The Supreme Court for the Territory of Hawaii rejected the Defendant's argument that a total award of $1,000 was excessive. Although Defendant claimed that the accident was purely the result of an error in judgment, the jury could have found that the defendant operated his automobile with a reckless indifference to the rights of the Plaintiff or any ***15** others who might be on the street-car, and was not excessive given the extent of Plaintiff's injuries. Kaopuiki v Kealoha, 104 Haw 241, 87 P.3d 910 (Haw. App. 2003) again involved a driver engaged in extremely reckless driving. The driver in Kaopuiki drove while drunk causing a crash that took his life. The Hawaii Intermediate Court of Appeals held that punitive damages could be recovered against the deceased driver's estate.

In contrast to the drivers in Bright and Kaopuiki, Catherine was not engaging in extremely reckless conduct. Instead she made remarks expressing her concern that her mother not hire a caregiver inexperienced with tube feeding to care for her father. Catherine's remarks angered her mother who responded by threatening her. Even her mother Lois admitted that prior to being struck by the cup that she had threatened Catherine. Catherine was simply reacting to her mother's threat and was not intending to hurt her mother, and even the jury found that Lois was 40 percent contributorily negligent for her claimed injury.

C. Punitive Damage Is A Remedy, Not A Separate Claim, And Cannot Be Awarded In The Absence Of A Viable Underlying Claim.

Punitive damages is a remedy. In the absence of a viable underlying tort claim, a punitive damage claim cannot stand alone. See Kang v. Harrington, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978) (“An award of punitive damages is purely incidental to the cause of action.”); see also Bisel v. Matco Tools, 715 F.Supp. 316, 319-320 (D.Kan.1989) (in the absence of any underlying tort, plaintiff's prayer for punitive damages must also fail); Palmer v. Ted Stevens Honda, Inc., 193 Cal.App.3d 530, 238 Cal.Rptr. 363, 366 (Cal. damage award must be based on underlying tort plus a finding of fraud, malice or oppression); Rocanova v. Equitable Life Assurance of the United States, 83 N.Y.2d 603, 612 N.Y.S.2d 339, 634 N.E.2d 940, 945 (N.Y.1994); Schlueter v. Schlueter, 975 S.W.2d 584, 589, reh'g denied, (Tex.1998).

***16** As is set forth more fully in Cross-Appellee Defendants' opening brief on their appeal, the claim for fraud should not have been submitted to the jury. The fraud which Cross-Appellant Plaintiffs claimed was committed was that Cross-Appellee Defendants allegedly never intended to make payments under the March 2006 Agreement. However, Cross-Appellant Plaintiffs did not establish anything more than that Cross-Appellee Defendants failed to pay under the agreement. The March 2006 agreement was less than clear on payment requirements, with the court being unable to resolve on motion the amount due by Cross-Appellee Defendants under the March 2006 agreement, and leaving it to the jury to determine the amounts owed under the

March 2006 Agreement. Moreover, Cross-Appellant Plaintiffs never disputed Cross-Appellee Defendants' testimony that they simply could not afford to pay both the mortgage on 412 Hao Street, and Cross-Appellant Plaintiffs' mortgage on 420 Hao Street.

None of the conduct of Cross-Appellee Defendants which was claimed to be fraudulent caused Cross-Appellant Plaintiffs to suffer any damages. By the time that the March 2006 Agreement was signed by the parties, Cross-Appellant Plaintiffs already had spent the funds they claimed they had put into acquiring and restoring the 412 Hao Street property. Testimony of Lois Swift, Dkt 64, Transcript 3/22/2012 at p. 19:10-22 (by 2002 Plaintiffs-Appellees had put $300,000 into 412 Hao Street); Plaintiffs' Exhibit 9, Dkt. 29 at p. 1192-1193, March 2006 agreement reciting “From 1999 through 2003, David Swift and Lois Swift assisted Catherine Swift and Jay Nelson to purchase and restore a property on 412 Hao Street”). The March 2006 agreement did not put Cross-Appellant Plaintiffs in any worse position, and Cross-Appellant Plaintiffs did not take any action in reliance of the March 2006 agreement. Here, Cross-Appellant Plaintiffs merely asked for the $302,000 they claimed to have invested prior to the alleged fraudulent promise. Thus, they did not show any out of pocket loss or benefit of the ***17** bargain based on the 2006 Agreement To Pay. Cross-Appellant Plaintiffs had no fraud injury or damages from the March 2006 Agreement.

The Cross-Appellant Plaintiffs also failed to present any viable claim for breach of fiduciary duty which could serve as the basis for an award of punitive damages. Cross-Appellant Plaintiffs asserted that Cross-Appellee Defendants breached a fiduciary duty owed to them when they failed to re-convey a 99 percent interest in the 412 Hao Street property once the refinancing of the debt secured by the property was completed. David Swift testified that he expected an immediate re-conveyance of their 99 percent interest in the property once the re-financing was completed. Testimony of David Swift, Jr., Dkt. 60, Transcript 3/23/2012 at pp. 173:18-174:17; 177:4-16. See also Defendants' Exhibit 16 (Dkt. 29, p. 1586) (“Our understanding that title transfer would be TEMPORARY to qualify for improved mortgage rates, and would be almost instantly returned to us. This did not happen for whatever reason or intent, so Lois and I lost 412”.) Despite the professed expectation of an immediate re-conveyance in 2004, Cross-Appellant Plaintiffs waited seven plus years to file suit, the complaint not being filed until March 23, 2011, and even then the complaint did not allege that there was an agreement to re-convey the 99 percent interest. See Dkt. 27, pp. 35-49, Complaint, filed on March 23, 2011; Testimony of Lois Swift, Dkt. 64, Transcript 3/22/2012, at p. 29:5-23 (explaining that the 99 percent interest was transferred when Defendants-Appellants requested it in late 2003/early 2004 for refinancing); testimony of David Swift, Dkt. 60, Transcript 3/23/2012, at pp. 115:2-5; 117:22-118:16(same); Plaintiffs' Exhibit 17, Dkt. 29, pp. 1645-1652, Deed recorded on March 3, 2004. The only explanation offered for the failure to file suit sooner was that David Swift was busy writing a book, which is not a legal basis for tolling the statute of limitations. Testimony of David Swift, Jr., Dkt. 60, Transcript 3/23/2012 at pp. 176:7-180:6. By their own testimony, if ***18** Cross-Appellant Plaintiffs were expecting an immediate re-conveyance of their 99 percent interest, Cross-Appellant Plaintiffs failed to timely file suit by waiting more than seven years, and even then their Complaint did not allege that there was an agreement to re-convey.

In addition to being barred by the Statute of Limitations, the claim for breach of fiduciary duty based on failure to re-convey the 99 percent interest was barred by the statute of frauds because there was no written promise to reconvey. Haw. Rev. Stat. §656-1. Also, as pointed out above, a promise to reconvey was never plead and Cross-Appellee Defendants objected to it being an issue at trial. Dkt. 55 Transcript 3/28/2012 at p. 10:10-15; Dkt. 56 Transcript 3/29/2012 at pp. 7:14-8:6.

Since Cross-Appellant Plaintiffs had no viable fraud or breach of fiduciary duty claim to serve as a basis for an award of punitive damages, the trial court did not err in directing a verdict on the punitive damages claim, and not instructing the jury on punitive damages.

IV. CONCLUSION

The trial court did not err in granting judgment in favor of Cross-Appellee Defendants on the punitive damages claim. There was no clear and convincing evidence of willful and wanton or outrageous misconduct by Cross-Appellee Defendants towards Cross-Appellant Plaintiffs. Being family members, not surprisingly, the parties failed to adequately document what either side thought was their agreement. However, despite their misunderstandings, Cross-Appellee Defendants did not act wantonly or oppressively toward Cross-Appellant Plaintiffs. When Cross-Appellant Plaintiffs made it known that they wanted to be

paid for their investment, Cross-Appellee Defendants, despite their belief that they had been gifted the property, immediately signed the March 2006 Agreement. Cross-Appellee Defendants always made it known to Cross-Appellant Plaintiffs that they objected to a recorded view easement, because the negative impact on the property value, but Cross-Appellee Defendants nonetheless maintained the property in ***19** such a manner that Cross-Appellee Plaintiffs' views were not obstructed. There was no malicious attack by Catherine on Lois. The injury to Lois occurred only after Lois had threatened to throw water on Catherine, and the jury found Lois was 40 percent contributorily negligent for her claimed injury.

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