

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

GEORGE K. YOUNG, JR.

Plaintiff-Appellant,

vs.

STATE OF HAWAI'I and NEIL
ABERCROMBIE in his capacity as
Governor of the State of Hawai'i;
DAVID M. LOUIE in his capacity as
State Attorney General; COUNTY OF
HAWAI'I, as a sub-agency of the State
of Hawai'i and WILLIAM P. KENOI in
his capacity as Mayor of the County of
Hawai'i; and the Hilo County Police
Department, as a sub-agency of the
County of Hawai'i and HARRY S.
KUBOJIRI in his capacity as Chief of
Police; JOHN DOES 1-25; JANE DOES
1-25; CORPORATIONS 1-5, AND DOE
ENTITIES 1-5.

Defendants-Appellees.

No. 12-17808

D.C. No. 1:12-cv-00336-HG-BMK

APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
HAWAI'I

HONORABLE HELEN GILLMOR

**DEFENDANTS-APPELLEES COUNTY OF HAWAI'I, WILLIAM P.
KENOI AND HARRY S. KUBOJIRI'S REPLY TO RESPONSE TO
MOTION TO STRIKE AND MEMORANDUM TO SUPPLEMENT
OPENING BRIEF FILED APRIL 10, 2013**

CERTIFICATE OF SERVICE

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DEFENDANTS-APPELLEES COUNTY OF HAWAI‘I, WILLIAM P. KENOI AND HARRY S. KUBOJIRI’S REPLY TO RESPONSE TO MOTION TO STRIKE AND MEMORANDUM TO SUPPLEMENT OPENING BRIEF FILED APRIL 10, 2013

Defendants-Appellees County of Hawai‘i, William P. Kenoi and Harry S. Kubojiri (hereinafter “Appellees”) hereby submit their reply to Plaintiff-Appellant’s Response to Motion to Strike and memorandum to supplement his Opening Brief filed April 10, 2013.

This appeal comes to the United States Court of Appeals for the Ninth Circuit on appeal from an Order Granting County of Hawai‘i Official Defendants’ Motion to Dismiss and State of Hawai‘i Defendants’ Motion to Dismiss filed on November 29, 2012 in the United States District Court for the District of Hawai‘i, pursuant to Federal Rules of Civil Procedure (“FRCP”) Rule 12(b)(6). Any record the Court of Appeals considers in their review of a Rule 12(b)(6) motion is a review of the record used by the District Court judge and is a *de novo* review. *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); *Knieval v ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

The purpose of a motion under Rule 12(b)(6), FRCP, is to enable the defendants to challenge the legal sufficiency of the complaint. *Whittlestone, Inc. v Handi-Craft Co.*, 618 F.3d 970 (2010). Rule 12(b)(6), FRCP, requires the court to consider, in a motion for dismissal, only the matters in the pleadings.

Any attempt to present additional evidence in the guise of a supplemental authority or additional argument is improper. Thus, the Court of Appeals is limited to conducting a *de novo* review of the same pleadings as the District Court judge reviewed in rendering her decision. *See Kahle v. Gonzalez*, 487 F.3 697, 699 (9th Cir. 2007). Appellant cannot now convert a motion to dismiss under Rule 12(b)(6) to a Motion for Summary Judgment at the Court of Appeals.

Appellant's request to file supplemental authority should also be denied by this Court. A review of the applicable case law shows supplemental briefs are permitted when requested by the Court directing counsel to brief specific issues after argument, and briefs filed by pro se litigants after the filing of *Anders*¹ briefs by counsel.

The Ninth Circuit has adhered to precedent which states, "It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned." *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir.1988); *Rystad v. Boyd*, 246 F.2d 246, 248 (9th Cir.1957). Appellant's request to provide supplemental briefing after having filed his opening brief and making

¹ *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), where counsel has filed a brief stating there are no grounds for relief, along with a motion to withdraw as counsel of record. The Court provides the appellant the opportunity to file a pro se supplemental brief raising issues the litigant wishes the Court to consider.

new argument flies in the face of well established authority deeming any argument not addressed in his opening brief as having been abandoned.

For the foregoing reasons, Appellees urge this Court to strike Appellant's filings of supplemental authorities and deny his request to file a supplemental brief.

Dated: Hilo, Hawai'i, April 12, 2013.

COUNTY OF HAWAI'I, WILLIAM
P. KENOI AND HARRY S. KUBOJIRI,
Defendants-Appellees

By /s/ Michael J. Udovic
MICHAEL J. UDOVIC
Deputy Corporation Counsel
Their Attorney

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Defendants-Appellees.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that the foregoing document was served upon the following, on the date and by the method of service noted below:

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April 12, 2013

Attorney for Plaintiff
GEORGE K. YOUNG, JR.

/s/ Michael J. Udovic
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Deputy Corporation Counsel