

NO. 22514

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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JERRY FUKIDA, Plaintiff-Appellee-Petitioner,

vs.

HON/HAWAII SERVICE AND REPAIR, BEVERLY ENDRIZAL,  
HON/HAWAII SERVICES, INC., a Hawai'i corporation,  
JOHN DOES 1-10, DOE CORPORATIONS 2-10,  
DOE PARTNERSHIPS 1-10, and DOE GOVERNMENTAL ENTITIES 1-10,  
Defendants-Appellants-Respondents.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CIVIL CASE NO. 1RC 96-7232)

ORDER GRANTING APPLICATION FOR WRIT OF CERTIORARI, AFFIRMING IN  
PART, VACATING IN PART, AND REMANDING THE DECISION OF THE  
INTERMEDIATE COURT OF APPEALS

(By: Moon, C.J., Levinson, Nakayama, and Ramil, JJ., and Circuit  
Court Judge Hirai, in place of Acoba, J., recused)

Upon consideration of the application for a writ of certiorari filed on May 30, 2001 by the plaintiff-appellee-petitioner Jerry Fukida, the same is hereby granted. Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 2 (2000), and in the interest of expediting a decision, we hereby suspend HRAP Rule 40.1(i) (2000), insofar as it provides that a party may move in this court for permission to file a supplemental brief in the event that certiorari is granted, and, in light of the following discussion, vacate parts A.1 (holding that Fukida could not maintain a claim for relief in replevin without tendering payment for repair services and materials), A.3 (holding that Fukida was not entitled to damages for "loss of use"), B (holding that the point of error raised on appeal concerning mitigation of damages

need not be addressed), and C (vacating the district court's award of attorney's fees and costs to Fukida in connection with the dismissal of the defendants' counterclaim) of the "Discussion" section of the Intermediate Court of Appeals' (ICA's) memorandum opinion in Fukida v. Hon/Hawaii Service and Repair, et. al., No. 22514 (Haw. Ct. App. Apr. 30, 2001) [hereinafter, the "ICA's opinion"].

Upon careful review of the ICA's opinion, Fukida's petition for a writ of certiorari, and the briefs filed by the parties on appeal, it appears that the ICA gravely erred in failing to address all but one of the points of error raised on appeal by the defendants-appellants-respondents Hon/Hawaii Services, Inc., (HHS), Hon/Hawaii Services and Repair (HHSR), and Beverly Endrizal (collectively, "the defendants"). For purposes of this order, we assume arguendo that the ICA's analysis regarding Fukida's claim for relief in replevin, brought pursuant to HRS § 654-1 (1993), in part A.1 of the "Discussion" section of its opinion is correct. In other words, we assume, as the ICA held sua sponte, that the district court erred in holding that the lien imposed by the defendants on Fukida's vehicle pending payment for repair services and materials was unlawful, inasmuch as HHS was registered pursuant to HRS chapter 437B, Fukida impliedly contracted with HHS to install a rebuilt transmission in his vehicle by directly contracting with HHSR to do so, and Fukida refused to pay for the costs associated with installing the transmission.

Be that as it may, the district court provided an alternative factual basis for its conclusion that the lien was unlawfully imposed upon Fukida's vehicle and, therefore, that the defendants' possession of it was unlawful and that Fukida was

entitled to its "immediate possession," see HRS § 654-1. Inasmuch as this factual basis rests upon the district court's determination that Fukida's claim that he conditioned his authorization for the installation of a rebuilt transmission of his vehicle upon two contingencies that the defendants failed to fulfill was credible, it is not subject to appellate review. See, e.g., In re Jane Doe, Born on June 25, 1995, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001). Moreover, insofar as the defendants did not challenge the district court's finding of fact in connection with this determination, they have waived their right to contest it on appeal. See, e.g., Taylor-Rice v. State, 91 Hawai'i 60, 64-65, 979 P.2d 1086, 1090-91 (1999). Thus, even if the lien was not unlawful on the basis that the ICA identified, the lien was nonetheless unlawful by virtue of the non-fulfillment of the conditions precedent to Fukida's authorization of the repairs, and, therefore, Fukida cannot be deemed to have "requested," for purposes of HRS § 507-18 (1993), that HHS install the rebuilt transmission in his vehicle. See HRS § 507-18 ("[a] person who . . . repairs any article of personal property at the request of the owner of the property, shall have a lien on the property for the reasonable charges for the work done and materials furnished . . . and may retain possession of the property until the charges are paid").

That being the case, the ICA prematurely and erroneously held that, inasmuch as Fukida had not shown that he was entitled to immediate possession of the repaired vehicle, he could not maintain a claim for relief in replevin and, therefore, was not entitled to damages for "loss of use" for the period during which HHS retained his vehicle. Accordingly, we vacate parts A.1, A.3, and B of the "Discussion" section of the ICA's

opinion and remand this matter to the ICA for consideration of the points of error raised by the defendants with respect to the district court's judgment awarding Fukida damages for "loss of use." In this connection, we observe that, on appeal, the defendants have challenged neither the district court's determination that Fukida was entitled to replevin of his vehicle nor its determination that Fukida was not required to tender payment for the rebuilt transmission or the cost of installing it. Rather, the defendants' points of error in this regard are limited to whether the award (1) was unsupported by the evidence, insofar as (a) Fukida did not establish with sufficient definiteness the amount of damages and (b) the district court failed expressly to set forth the measure employed to calculate "loss of use" damages, (2) was excessive, and (3) was subject to mitigation.

Moreover, inasmuch as the district court's judgment awarded Fukida attorney's fees and costs in connection with the dismissal of the defendants' counterclaim and not in connection with Fukida's claim for relief in replevin, the ICA further erred in holding that its resolution of Fukida's replevin action was dispositive of the defendants' point of error in connection with the award of attorney's fees costs to Fukida. The defendants did not appeal the district court's dismissal of their counterclaim but, rather, limited their point of error challenging the award of attorney's fees and costs to Fukida, as the "prevailing party" on the counterclaim, to the assertion that the award was excessive because it exceeded the twenty-five percent cap set forth in HRS § 607-14 (1993 & Supp. 2000). That being the case, we vacate part C of the "Discussion" section of the ICA's opinion and remand this matter to the ICA for consideration of the

defendants' relevant point of error.

We affirm part A.2 of the "Discussion" section of the ICA's opinion, which held that Endrizal, insofar as she was acting solely as the general manager and employee of HHS in her dealings with Fukida, was not jointly and severally liable to Fukida with HHS and HHSR.

DATED: Honolulu, Hawai'i, June 12, 2001.

Matthew K. Chung, for  
plaintiff-appellee-  
petitioner, Jerry Fukida,  
on the writ