*****FOR PUBLICATION*****

AMENDED OPINION BY ACOBA, J.,

CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority's determination that the request for attorney's fees and costs by defendant-appellant Skydive Academy of Hawai‘i (Skydive) should be denied pursuant to the plain language of Hawai‘i Revised Statutes (HRS) §§ 431:10-242 (1993) and 632-3 (1993).[1] See majority opinion at 15-16. I respectfully disagree, however, with the majority's conclusion that Skydive is the "prevailing party" for the purpose of awarding attorney's fees and costs under HRS § 607-14 (Supp. 2002) and Hawai‘i Rules of Civil Procedure (HRCP) Rule 54(d), simply because the plaintiff-appellee, Ranger Insurance Company (Ranger), voluntarily dismissed its case with prejudice. See majority opinion at 10-11. I would hold that to obtain prevailing party status in cases involving dismissals, "a defendant must be able to point to a judicial declaration [redounding] to its benefit," Marquart v. Lodge 837, 26 F.3d 842, 852 (8th Cir. 1994). In the absence of such a declaration, the defendant may obtain prevailing party status if it "can

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[1] HRS § 431:10-242 states that "[w]here an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder . . . shall be awarded reasonable attorney's fees and the costs." (Emphasis added.) The majority concluded that Ranger was not ordered by the court to pay any benefits thereunder and, thus, Skydive is not entitled to attorney's fees and costs. See majority opinion at 15-16.

HRS § 632-3 states that "[f]urther relief based on declaratory judgment may be granted whenever necessary or proper, after reasonable notice and hearing, against any adverse party whose rights have been adjudicated by the judgment." The majority concluded that since the declaratory judgment was voluntarily dismissed, the court did not adjudicate the rights of any party. See majority opinion at 16.

demonstrate that the plaintiff [voluntarily] withdrew to avoid a disfavorable judgment on the merits."[2] Dean v. Riser, 240 F.3d 505, 511 (5th Cir. 2001). Because the grounds on which the court denied Skydive an award of attorney's fees and costs are unclear, I would vacate the order and remand with instructions to the court to determine, under the foregoing test, whether Skydive was a "prevailing party" for the purposes of attorney's fees and costs.

I.

Under the "American Rule," we follow the well-accepted general practice of prohibiting an award of attorney's fees absent explicit statutory authority, stipulation, or agreement. Hamada v. Westcott, 102 Hawai'i 210, 218, 74 P.3d 33, 41 (2003); See also S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 76 Hawai'i 396, 399, 879 P.2d 501, 503 (1994); Smothers v. Renander,

[2] The majority suggests that "to determine whether the voluntary dismissal was to avoid a favorable judgment a plaintiff would require the court to conduct 'mini-trials.'" Majority opinion at 11. (quoting Troyer v. Adams, 102 Hawai'i 399, 426, 77 p.3d 83, 109 (2003)). The majority's reliance on Troyer is inapposite, inasmuch Troyer did not concern the issue of attorney's fees. Id. Rather, the question in Troyer involved settlement procedures "associated with claims involving joint tortfeasors." Id. (quoting Hse. Stand. Comm. Rep. No. 1230, in 2001 House Journal, at 1599).

Both HRS § 607-14 and HRCP Rule 54(d) provide for an award of attorneys fees or costs to the "prevailing party." Applying HRS § 607-14 and HRCP Rule 54(d), our trial courts regularly make determinations of whether attorney's fees are justified. As to the burden on the trial courts, it is in the normal course for judges to resolve questions of attorney's fees. The quantum of proof necessary to determine if a plaintiff withdrew to avoid a disfavorable judgment on the merits would be no more than what the court regularly applies to determine attorneys fees. Moreover, consideration of such a question is compatible with a trial court's evaluation of the circumstances in each case, in resolving whether attorney's fees should be imposed.

2 Haw. App 400, 404, 633 P.2d 556, 560 (1981); Yokochi v. Yoshimoto, 44 Haw. 297, 307, 353 P.2d 820, 826 (1960). In discussing the policies underlying the American Rule, the United States Supreme Court explained that because of the uncertainties of litigation, "one should not be penalized for merely defending or prosecuting a lawsuit," for "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." Fleisheman Distilling Corp v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

Statutory authority exists in this case for an award of attorneys fees and costs. HRS § 607-14 provides that the "losing party" pay the attorney's fees in all "actions in the nature of assumpsit," provided that the "prevailing party" submit an affidavit requesting fees. HRCP Rule 54(d) directs that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" Thus, Skydive could be entitled to attorney's fees and costs if it qualified as the prevailing party.

In the present case, the majority primarily relies on Wong v. Takeuchi, 88 Hawai'i 46, 961 P.2d 611 (1988), and Blair v. Ing, 96 Hawai'i 327, 31 P.3d 184 (2001), to conclude that a voluntary dismissal by a plaintiff results in a defendant being treated as a "prevailing party." See majority opinion at 9-11. In Wong, this court explained that "usually the litigant

in whose favor judgment is rendered is the prevailing party." 88 Hawai'i at 49, 961 P.2d at 614. But this court went on to say that "a dismissal of the action, whether on the merits or not, generally means the defendant is the prevailing party." Id. (emphasis added) (quoting Wright & Miller, Federal Practice and Procedure: Civil 2d § 2667 (1983)). Blair, relying on Wong, also declared that "a defendant who succeeds in obtaining a judgment of dismissal is a prevailing party for the purpose of fees under HRS § 607-14." Blair, 96 Hawai'i at 331, 31 P.3d at 189 (citing Wong, 88 Hawai'i at 49, 961 P.2d at 614.

Both of these cases however, are distinguishable from the instant case, for they were terminated by a judicial declaration benefitting the defendant. In Wong, this court held that a defendant was the prevailing party under HRS § 607-14 when the trial court granted summary judgment pursuant to HRCP Rule 56(b) on both laches and statute of limitations grounds. 88 Hawai'i at 49, 961 P.2d at 614. In Blair, this court held the defendant was a prevailing party under HRS § 607-14 when the trial court entered a dismissal based on the plaintiff's failure to state a claim. 96 Hawai'i at 331, 31 P.3d at 188.

In the case at hand, however, there was no judicial declaration to the benefit of Skydive which prompted the dismissal. On the contrary, Ranger voluntarily filed a motion

for leave to dismiss the case pursuant to HRCP Rule 41(a)(2).[3] [RA vol. 6 at 290]. As such, the holdings of Wong and Blair are inapplicable to the present case.

The majority also relies on Kona Enters. v. Estate of Bernice Pauahi Bishop,[4] where the Ninth Circuit Court of Appeals declared that it has "held that a voluntary dismissal of a diversity action with prejudice is 'tantamount to a judgment on the merits' for the purposes of attorney's fees." 229 F.3d 877, 889 (9th Cir. 2000) (quoting Zenith Ins. Co. v. Breslaw, 108 F.3d 205, 207 (9th Cir. 1997)). The Ninth Circuit erroneously interpreted our decision in Wong as "unequivocally [holding] that any dismissal that results in [a] judgment is sufficient to support an award of attorney's fees under Hawai'i law." Id. (emphasis added). On the contrary, Wong did not state anywhere that any dismissal, such as a voluntary dismissal, would suffice

[3] HRCP 41(a)(2) states as follows:

> (a) Voluntary Dismissal: Effect Thereof.
> (2) *By Order of the Court*, Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless specified in the order, a dismissal under this paragraph is without prejudice.

[4] In Kona Enters., the district court permitted the non-diverse plaintiffs, Tach One, Balanced Value Fund, and Montrose Nationwide Limited Partnerships, to voluntarily dismiss their claims with prejudice provided they waive all claims against defendants. 229 F.3d at 882. Although the court did not expressly state so, it appears these non-diverse plaintiffs were allowed to voluntarily dismiss their claims so as to preserve complete diversity among the remaining plaintiffs. Id. at 882.

as a basis for prevailing party status. Wong 88 Hawai'i at 49, 961 P.2d at 614. Rather, Wong merely established that "[t]here is no requirement that the judgment in favor of the prevailing party be a ruling on the merits of the claim." Id. Indeed, this court has not previously held that a voluntary termination of a case is tantamount to a prevailing judgment on the merits.

II.

Moreover, recent changes to the federal case law, upon which Wong relied, appear to have undermined Wong's viability. As the majority explains "[b]ecause HRCP Rule 54(d) is patterned after the Federal Rules of Civil Porcedure (FRCP) Rule 54(d), 'interpretations of the rule by the federal courts are highly persuasive in the reasoning of this court.'" Majority opinion at 10-11 (quoting Molinar v. Schweizer, 95 Hawai'i 331, 336, 22 P.3d 978, 983 (2001)). Similarly, the majority relies on Wong in interpreting HRS § 607-14. Majority opinion at 9. Wong based its holding on Wright & Miller, Federal Practice and Procedure: Civil 2d § 2667 (1983), which summarizes federal law. See majority opinion at 9 (quoting Wong, 88 Hawai'i at 49, 961 P.2d at 614 (1988)). At the very least, reexamination of Wong is required in light of the recent interpretation of the term "prevailing party" by the Supreme Court. Under the federal cases, most circuit courts of appeals had awarded attorney's fees pursuant to various federal statues under the "catalyst theory." Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of

Health, 532 U.S. 601-02 (2001). Under the catalyst theory, a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. Id. Other circuits had rejected this definition of "prevailing party." Id. In Buckhannon, the Court set out to resolve the disagreement among the courts of appeals by clarifying the meaning of "prevailing party" as used in "numerous federal statutes."[5] Id.

In that case the petitioner brought suit against the respondent opposing the enforcement of West Virginia's "self preservation" laws.[6] Id. at 600-601. Thereafter, the Virginia legislature enacted two bills eliminating the "self preservation" requirements. Id. at 601. The United States District Court granted the respondent's motion to dismiss the case as moot. Id. The petitioner requested attorneys fees as the "prevailing party." Id.

The Court applied the plain meaning of the term "prevailing party". Id. at 602-03. Consulting Black's Law Dictionary 1145 (7th ed. 1999) the Court noted prevailing party was defined as "[a] party in whose favor a judgment is rendered,

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[5] The Buckhannon case involved awarding attorney's fees to the "prevailing party" as expressly provided by the Fair Housing Amendments Act, 42 U.S.C. § 3613(c)(2) (1988) and the American Disabilities Act, § 505, 42 U.S.C.A § 1205 (1990). Buckhannon, 532 U.S. at 600.

[6] See West Virginia Code §§ 16-5H-1 and 16-5H-2 (1988) (requiring that all residents of residential board and care homes be capable of "self preservation," or capable of moving themselves "from situations involving imminent danger, such as fire"); See also West Virginia Code of State Rules, tit. 87, sec. 1, § 14.07(1) (1995).

regardless of the amount awarded <in certain cases, the court will award attorney's fees to the prevailing party>. -- Also termed *successful party*." Id. at 603. The Court concluded that "a defendant's voluntary change in conduct, although accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." Id. at 605. Explaining that it had never awarded attorney's for a nonjudicial alteration of actual circumstances, the Court rejected an "award where there is no judicially sanctioned change in the legal relationship of the party." Id. at 605-06. Thus, the Court held that a party is not a "prevailing party" if it failed to secure a judgment on the merits or a court-ordered consent decree, even if the party achieved the desired result. Id. at 600, 606.

In Dean, the Fifth Circuit was faced with the question of whether the plaintiffs' voluntary dismissal of their civil rights action against the defendant warranted attorney's fees under 42 U.S.C.A. § 1988.[7] Dean, 240 F.3d at 506. In examining that statute, which allowed such fees for the prevailing party, the Fifth Circuit explained that Congress intended that attorneys fees be awarded to "'make it easier for a plaintiff of limited means to bring a meritorious suit,'" and "to protect defendants from burdensome litigation having no legal or factual basis."

[7] Under § 1988, a court "in its discretion may allow the prevailing party . . . a reasonable attorney's fee as a part of the costs" for proceedings in the vindication of civil rights. Dean, 240 F.3d at 505, (quoting 42.U.S.C.A. § 1988).

Id. at 508 (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420, (1978)). The appeals court noted that the Eighth Circuit had adopted a bright-line rule with respect to determining whether a defendant had prevailed, requiring that the "defendant must be able to point to a judicial declaration to its benefit." Id. at 511 (quoting Marquart, 26 F.3d at 852).

The Fifth Circuit had previously concluded that a plaintiff's involuntary "dismissal with prejudice *is deemed an adjudication on the merits* . . . [;] as such, the [defendant] has *clearly prevailed in this litigation*." Id. at 509. (quoting Anthony v. Marion County General Hospital, 617 F.2d 1164 (5th Cir. (1995)(emphasis in original)). But, the Fifth Circuit reasoned that a "critical distinguishing point" existed between "the instant plaintiffs' voluntary dismissal of their suit with prejudice and the involuntary dismissal of [a] plaintiff's action [.] " Id. It pointed out that "many circumstances may influence a plaintiff to voluntarily dismiss his claim[8] . . .[which do] not warrant a conclusion that a defendant in such a case has prevailed." Id. at 510.

The circuit court of appeals recognized also that a calculating plaintiff could voluntarily withdraw a complaint "to escape a disfavorable judicial determination on the merits." Id.

[8] For example, the circuit court of appeals indicated that a party may voluntarily dismiss his [or her] claim to "withdraw a complaint in federal court to pursue exclusively a state law cause of action" Dean, 240 F.3d at 509. Also, a "plaintiff whose claim appeared meritorious at the onset may encounter various changes in his [or her] litigation posture during the unpredictable course of litigation" and thus "voluntarily withdrawing the complaint with prejudice would be the prudent thing to do." Id.

Accordingly, in interpreting § 1988, the court held that a defendant is not a prevailing party when a "plaintiff voluntarily dismisses his [or her] claim, unless the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits."[9] Id. at 511.

III.

Although Buckhannon is not binding on this court, the holding in that case alters the definition of "prevailing party" previously applied in the lower federal courts and upon which Wong had relied. As such, we should not hold that a party "prevailed" merely because the opposing party entered a voluntary dismissal of the case. In Buckhannon, however, the Court adopted a stricter approach than envisioned in Wong and Blair, holding that attorney's fees should only be awarded where a party prevailed by obtaining a judgment on the merits or a court ordered consent decree. Buckhannon, 532 U.S. at 600-02, 605-606; see also S-1 and S-2 v. State Bd. of Educ. of N.C., 21 F.3d 49, 51 (1994) (en banc) ("A person may not be a 'prevailing party' . . . except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought.").

[9] Ultimately the Fifth Circuit held that the test to be applied was as follows: "Upon the defendant's motion, the U.S. district court must determine that the plaintiff's case was voluntarily dismissed to avoid judgment on the merits. Once this affirmative determination has been made, the defendant must then establish that the plaintiff's suit was frivolous, groundless, or without merit." Dean, 240 f.3d at 511. The dual requirements were justified by the policies underlying the civil rights statutes. Id.

A more flexible approach is exemplified in the considerations set forth in Dean. Dean properly noted that many circumstances influence a plaintiff's decision to voluntarily dismiss a claim, some of which have nothing to do with the defendant's position or the merits of the case. Thus, more in line with the plain language definition of "prevailing party," and taking the considerations in Dean into account, I would hold a defendant would acquire prevailing party status based only on some judicial declaration to the defendant's benefit, unless the defendant shows that the plaintiff's "voluntary" dismissal was to avoid a disfavorable judgment on the merits.

IV.

For the foregoing reasons, I would vacate the court's order denying attorneys fees and costs as provided in HRS § 607-14 and HRCP Rule 54(d) and remand with instructions to apply the test referred to above to determine if Skydive was a "prevailing party."