DISSENTING OPINION BY ACOBA, J.,
WITH WHOM CIRCUIT JUDGE AUGUST JOINS

I would hold that under the circumstances of this case, a continuance of trial should have been granted.[1]

I.

On August 16, 1990, Plaintiff-Appellant Rose O'Neal[2] (Plaintiff) filed a professional negligence claim against Defendants-Appellees Dr. Henry Hammer, an orthodontist, Dr. Lewis Williamson, an oral surgeon, and Defendant Dr. Ray Berringer, an oral surgeon. Before trial, on January 30, 1995, Dr. Berringer settled with Plaintiff, and the claims against him were dismissed with prejudice.

In July of 1995, Plaintiff's negligence claims against Dr. Hammer and Dr. Williamson were tried by a jury in the first circuit court.[3] Mid-trial, Dr. Hammer's and Dr. Williamson's motions for directed verdict on Plaintiff's claim of lack of informed consent were granted. See O'Neal v. Hammer, 87 Hawai'i 183, 185-86, 953 P.2d 561, 563 (1998).

On July 26, 1995, the jury entered a special verdict in favor of Dr. Hammer and Dr. Williamson. See id. at 186, 953 P.2d at 563. Plaintiff appealed this verdict to this court. In a judgment by this court dated March 18, 1998, the directed

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1 Accordingly, other issues raised in the briefs are not discussed.

2 As of March 10, 1999, the record indicated that Ms. O'Neal resides in Falls Church, Virginia and is not a current Hawai'i resident.

3 The Honorable Judge Kevin S.C. Chang presided over this matter.

verdicts against Plaintiff were vacated and the case remanded to the circuit court (the court). As to Dr. Hammer, the case was remanded to determine whether: (1) Dr. Hammer in fact advised Plaintiff of the inherent risks of the proposed mandibular advancement surgery; or (2) Tripler Hospital physicians or Dr. Williamson obtained her informed consent prior to the removal of Plaintiff's bicuspids, thereby discharging Dr. Hammer of his duty. See O'Neal, 87 Hawai'i at 189, 953 P.2d at 567.

As to Dr. Williamson, the case was remanded

> for a determination as to whether: (1) Dr. Williamson was a consulting doctor (in which case his duty was to advise and make recommendations to Dr. Hammer); or (2) a second opinion physician (in which case his duty was to advise O'Neal of the risks associated with mandibular advancement surgery). If it [was] established that Dr. Williamson [was] a second opinion [physician], then the circuit court [was required to] determine if another physician in fact obtained O'Neal's informed consent before the removal of her bicuspids, thereby breaking the chain of causation leading to Dr. Williamson.

Id. at 190, 953 P.2d at 568.

Following remand, the court convened a status conference[4] on August 13, 1998, and thereafter set trial for the week of April 5, 1999. On January 8, 1999, approximately four months before the trial week, Plaintiff filed a motion to continue trial. In her motion, Plaintiff asked that the trial be postponed until sometime after June 1999 because of her "severe allergic reaction to mango." Plaintiff's counsel, Leslie Fukumoto, in support of the motion to continue trial, included a "Declaration of Counsel" which in pertinent part stated:

> 2. I have been advised that Ms. O'Neal . . . has a severe allergic reaction to mango, and it substantially affects her appearance and her ability to concentrate and testify during mango season.

4 This status conference was convened before the Honorable Allene Suemori.

> 3. Attached . . . is a true, accurate and complete copy of a letter from her treating medical doctor indicating that this problem exists.
> 4. The credibility of the Plaintiff and of the Defendant, are critical in this case, and if Ms. O'Neal's ability to testify and her credibility is affected by this problem, it would cause sever [sic] and substantial prejudice to her. According to the doctor's letter, a postponement until sometime after June of 1999 would be adequate and appropriate, and Plaintiff would so request.

(Emphases added.) Attached to the declaration was a doctor's note on letterhead indicating Plaintiff's aforementioned illness. Plaintiff claimed that her doctor instructed her "not to expose herself to the mango plant during the mango season of March, April, and May." During the hearing, Dr. Hammer's counsel, Mr. Lee, argued that "a consent to continuance by the plaintiff in writing hasn't been done in this case or by her personal appearance and she's obviously not here. So because of the violation of Rule 7e . . . the motion should be denied."

In response, Mr. Fukumoto represented that such a request had been made via his declaration and that the case had previously been continued at the behest of one of the defendants:

> I represented to the Court, that she made that request. It's in my declaration. I can get--if that's the only technical reason for denying it, I can get a declaration to the Court. . . . If that's the condition of continuing trial. But I don't believe that you have to go through that type of situation to do so. . . . I'll resubmit. But it's never been my understanding, you know, as far as continuing trial.
> . . . [T]his case was continued for trial once before just on the fact that [Defendant Williamson] was unavailable because of his business. I mean if you can continue this trial for business reasons but not medical reasons, something is not right.

(Emphases added.)

The court denied the request for continuance, stating that,

> [w]ith regards to the instant motion, the Court finds after considering the written submission to arguments that there

> is no compliance with Rule 7(e)[5] of the Rules of Circuit Court insofar as there is no proof of the plaintiff's consent to the continuance.
>
> Secondly, the Court notes that this matter was scheduled for trial in June of 1998.
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> I further find that the Plaintiff knew or should have known of the plaintiff's alleged allergy and condition and that this motion to continue could have been brought at a much earlier date. There is insufficient evidence presented which established that the allergy condition asserted by plaintiff will be adversely affected in April of '99 by mango season, if any, which may occur at that time. Therefore, the court finds the plaintiff has failed to establish good cause for continuance of this trial date and this motion is denied.

(Emphases added.) On February 18, 1999, the court filed its written order denying Plaintiff's motion for a continuance.

Plaintiff's attorney subsequently moved to withdraw on February 25, 1999, citing "irreconcilable" differences with Plaintiff. During the pendency of the motion to withdraw, on March 17, 1999, nineteen days before trial was scheduled to begin, Plaintiff's counsel filed a motion for reconsideration of the February 18, 1999 order denying her motion to continue trial. In this motion, Plaintiff requested time to obtain new counsel and reiterated her reason for continuance as being an allergic reaction to mangos:

> Plaintiff respectfully requests that her trial date of April 5, 1999 be postponed so that she can seek new counsel and so that her counsel can properly prepare her case. Plaintiff respectfully requests postponement of her trial to a time when mango trees are not in bloom so that she can breathe properly during trial.

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5 Rule 7(e) of the Rules of the Circuit Courts of the State of Hawai'i (RCCH) states in pertinent part:

> **Consent of party to continuance of trial.** A motion for continuance of any assigned trial date, whether or not stipulated to by respective counsel, shall be granted only upon a showing of good cause, which shall include a showing that the client-party has consented to the continuance. Consent may be demonstrated by the client-party's signature on a motion for continuance or by the personal appearance in court of the client-party.

(Emphases added.)

Plaintiff also submitted the following documents: (1) a declaration of counsel stating in pertinent part that, "Ms. O'Neal . . . has a severe allergic reaction to mango, and it substantially affects her appearance and her ability to concentrate and testify during mango season"; (2) a notarized letter from Dr. Fuller Royal; (3) information on Dr. Royal; and (4) a notarized letter from Ms. O'Neal.

Judge Chang, in a minute order on March 30, 1999, denied Plaintiff's motion on the grounds that

> plaintiff presents additional information regarding her alleged allergy to mango pollen and mango plants. This information could have been presented at the time of the hearing on the plaintiff's motion to continue trial and similar information regarding plaintiff's alleged allergy was presented to the court at the time of the hearing on plaintiff's motion to continue trial. Therefore, plaintiff's motion for reconsideration of order denying motion to continue is denied. Amfac. Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85 (1992).

The Order granting the motion to withdraw as counsel was filed on March 31, 1999, and stated that the "[t]rial remains as scheduled for the week of April 5, 1999. Mr. Fukumoto is to advise Plaintiff and/or new counsel, if any, orally and in writing of the trial date and her obligation to prosecute her claims." On the same day, the court issued a Pretrial Order informing the parties that trial was assigned to Judge B. Eden Weil. The Pretrial Order set a pretrial conference for April 5, 1999 at 1:00 p.m. and ordered that "[i]f Plaintiff or her counsel is not present, the case will be dismissed with prejudice at this time. If defense counsel is not present, default will enter at this time." Plaintiff received the Court Order and was informed by telephone by the Clerk of the Court of the trial date.

On April 5, 1999, attorney Jack Schweigert, making a special appearance for Plaintiff, filed another motion to continue trial,[6] along with an *ex parte* motion to advance the hearing date on the motion. The motion to continue filed by Schweigert essentially stated (1) that he could not be present for trial due to prior commitments and that he needed time to prepare for trial and (2) that Plaintiff's key witness, Dr. Sheridan, would not be available for the April 5, 1999 trial. Pursuant to the Pretrial Order of Judge Chang, the court denied the motion to continue, and after confirming that plaintiff's counsel would not appear for trial, the court, sua sponte, dismissed all of Plaintiff's remaining claims with prejudice.[7] Plaintiff's counsel asked if the judge would speak to Plaintiff via telephone but this, too, was denied.

On April 16, 1999, the order denying Plaintiff's motion to continue was filed. On May 7, 1999, the order dismissing Plaintiff's complaint and all remaining claims with prejudice was filed.

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6 According to the Record on Appeal, there were four motions to continue. However, based on Plaintiff's Reply Brief, there were five requests made: "The Opening Brief mentions four efforts to continue trial. . . . After reviewing the settlement letter attached as Exhibit A to Hammer Opening Brief, Ms. O'Neal's counsel now sees that there was a fifth request made."

7 Judge Weil was bound by Judge Kevin S.C. Chang's Pretrial Order which stated that "[i]f Plaintiff or her counsel is not present [for trial], this case will be dismissed with prejudice at th[at] time." See, e.g., Wong v. City and County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983) ("Unless *cogent reasons* support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion." (Citing Greyhound Computer Corp., Inc. v. Int'l Bus. Machs. Corp., 559 F.2d 488, 508 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978); Shreve v. Cheesman, 69 F. 785, 791 (8th Cir. 1895); In re Airport Car Rental Antitrust Litig., 521 F. Supp. 568, 572 (N.D. Cal. 1981), aff'd, 693 F.2d 84 (9th Cir. 1982))). While attorney Jack Schweigert was present for trial on April 5, 1999, he moved for a continuance and informed the court that he could not be present for trial. Based upon these representations and the Pretrial Order, Judge Weil dismissed all of Plaintiff's claims with prejudice.

On May 24, 1999, the Clerk's Taxation of Costs was filed, awarding Dr. Hammer $37,795.75. Similarly, on June 3, 1999, Dr. Williamson was awarded $29,018.48. Plaintiff filed objections to both taxations of costs.

On June 7, 1999, a notice of appeal was filed from the order dismissing the complaint. Thereafter, a judgment was filed in favor of Dr. Hammer and Dr. Williamson on June 18, 1999. Finally, on July 13, 1999, a notice of appeal from the judgment was filed.

II.

On appeal, Plaintiff argues the following: (1) the court abused its discretion in refusing to continue trial based on Plaintiff's medical necessity motion filed January 8, 1999; (2) the court abused its discretion in denying Plaintiff's Motion for Reconsideration of Order Denying Motion to Continue Trial filed March 17, 1999; (3) the court abused its discretion in denying Plaintiff's Motion to Continue Trial Date filed April 5, 1999; (4) the court erred in summarily dismissing the case *sua sponte* with prejudice for Plaintiff's failure to attend a pretrial conference set for April 5, 1999; (5) the Clerk of Court erred in its taxation of costs awarding Dr. Hammer all of his alleged costs and expenses; (6) the court erred in denying Plaintiff's motion to object to Dr. Hammer's taxation of costs; (7) the Clerk of Court erred in its taxation of costs awarding Dr. Wiliamson all of his alleged costs and expenses; (8) the court erred in its denial of Plaintiff's motion to review bill of

costs; (9) the court abused its discretion in issuing an order filed March 30, 1999 precluding evidence of future medical, dental, and/or related travel expenses[8]; (10) the court abused its discretion in granting Dr. Hammer's motion for "Rule 37 discovery."[9]

I believe the only issues required to be addressed are issues (1) through (4). In that light, the remaining issues are prematurely raised and need not be reached by this court.

III.

The first motion for a trial continuance dated January 8, 1999, was based on Plaintiff's ill health. It is generally recognized that a party to a civil action ordinarily has a right to attend the trial and an illness is a legitimate

8 On February 5, 1999, Dr. Williamson filed a motion to exclude any experts who may be called to offer testimony of Ms. O'Neal's future medical, dental and related expenses. On February 18, 1999, Dr. Hammer filed a memorandum in support of Dr. Williamson's February 5 motion. On March 3, 1999 Judge Chang heard arguments and took the matter under advisement. On March 30, 1999, Judge Chang issued an order in favor of Dr. Williamson stating in pertinent part,

> [a]fter considering the written submissions and the arguments of counsel, the Court finds Plaintiff's January 20, 1999 submission of the summary of estimated expenses pertaining to her future care and treatment as untimely, lacks sufficient factual basis, improperly and unfairly expands the scope of testimony of Dr. Sheridan and Dr. Syders, and is unduly prejudicial considering the history of this action and the pending April 5, 1999 trial date.

9 On March 16, 1999, Dr. Hammer filed a motion for Rule 37 sanctions based on the argument that Ms. O'Neal had not complied with an earlier order granting Dr. Hammer's motion to compel. Judge Nakatani stated in the March 22, 1999 hearing that "it appears from these responses that there's nothing new in the past three[-]and[-]a[-]half years, and that is the clear implication to me, and so the plaintiff would be foreclosed from producing any testimony or any documents within the past three[-]and[-]a[-]half years." The court thereby ruled that "for the past three[-]and[-]a[-]half years, there will be basically, and when you go to trial, there will be no evidence, testimonial or documentary evidence with respect to any of the issues at trial including liability, including damages." But, the court denied Defendant's attorney's fees and costs.

ground for asking for a continuance. See Davis v. Operation Amigo, Inc., 378 F.2d 101, 103 (10th Cir. 1967) (court observed that illness of a litigant severe enough to prevent him from appearing in court is always a legitimate ground for asking for a continuance). Courts have noted that "the failure of the plaintiff to appear because of illness is a good cause for continuance and a denial thereof is an abuse of discretion by the trial court." Pollard v. Walsh, 575 P.2d 411, 412, reh'g denied (Colo. 1978) (citing Gallavan v. Hoffner, 390 P.2d 817 (1964); Rausch v. Cozian, 282 P. 251 (1929); Lane v. Gooding, 166 P. 245 (1917)).

Illness, however, does not necessarily require a postponement of the trial of a case. See Siggelkow v. Siggelkow, 643 P.2d 985, 987 (Alaska 1982); see also discussion infra Part IV.B. But, "[i]n such cases the court should be governed by the course which seems most likely to accomplish substantial justice, and it may take into consideration the legal sufficiency of the showing in support of the motion and the good faith of the moving party." McElroy v. McElroy, 198 P.2d 683, 685 (Cal. 1948) (citations omitted). In this case, there was substantial compliance with the consent requirement and good cause for a continuance was established. Plaintiff suffered prejudice because the court's denial of her motion to continue and her subsequent inability to attend trial directly led to her case being dismissed. Clearly, Plaintiff was prejudiced as her case was dismissed with prejudice, and Dr. Hammer and Dr. Williamson were awarded costs.

IV.

As mentioned, RCCH Rule 7(e)[10] was applied by the court. Rule 7(e) requires (1) a showing that the client-party has consented to the continuance and (2) a showing of good cause. Consent may be demonstrated in two ways: (1) a client-party's signature on a motion for continuance; and (2) the personal appearance in court of the client-party. The trial court ruled that Plaintiff failed to demonstrate both consent and good cause pursuant to Rule 7(e).

A.

With respect to consent, the court opined that there was "no proof of the plaintiff's consent to the continuance." RCCH Rule 7(e) provides that consent "may be demonstrated" by a signature or the party's personal appearance. (Emphasis added.) By the use of the term "may," the rule does not render demonstration of consent by such means to the exclusion of all others, but is illustrative of methods evidencing consent.

Mr. Fukumoto, Plaintiff's counsel at that time, argued that, "[a]s far as the consent of the plaintiff, I represented to the Court, that she made that request. It's in my declaration." In addition, attached to Mr. Fukumoto's declaration was Plaintiff's doctor's letter which stated that Plaintiff requested a continuance:

> This patient was evaluated at The Nevada Clinic in the allergy department and found to have a severe hypersensitivity or allergy to Mango pollen and the Mango plant. When exposed to these substances, she develops

10 See supra note 5.

> severe breathing difficulties. The best and only treatment at this time is avoidance of exposure.
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> I have advised Rose not to expose herself to the Mango plant during the Mango season of March[,] April and May. She's undergoing desensitization to this substance, but needs more time in order to respond favorably and reduce her sensitivity. I suggest that she will be ready to visit Hawaii again in June of 1999 therefore, she is requesting a postponement of the trial date.

(Emphases added.)

In his declaration, Fukumoto made reference to the doctor's letter and stated, "[a]ccording to the doctor's letter, a postponement until sometime after June of 1999 would be adequate and appropriate and Plaintiff would so request." (Emphasis added.) Pursuant to RCCH 7(g), "[i]n lieu of an affidavit, an unsworn declaration may be made by a person, in writing, subscribed as true under penalty of law, and dated[.]" Because a declaration may be used in lieu of an affidavit, it should be accorded the same weight and effect as an affidavit. While the doctor's letter was not an affidavit, the rule was substantially complied with because Plaintiff's counsel's declaration stated that "[a]ttached . . . is a true, accurate and complete copy of a letter from her treating medical doctor indicating that this problem exists." Plainly, there was substantial compliance with the rule. Moreover, the doctor's representations were not disputed. Hence, there was an adequate basis in the submitted documents to demonstrate Plaintiff's consent to a trial date continuance and substantial compliance with Rule 7(e).[11]

11 The general rule is that "technical difficulties as to form or verification of affidavits do not mandatorily require denial of continuance motions." 17 Am. Jur. 2d Continuances, § 118, at 721 (1990).

B.

With respect to a showing of good cause, in general terms, it is defined as "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." Black's Law Dictionary 692 (6th ed. 1990); See Miller v. Tanaka, 80 Haw. 358, 364, 910 P.2d 129, 135 (App. 1995) (defining good cause as a "substantial reason; one that affords a legal excuse" (citing State v. Estencion, 63 Haw. 264, 267 (1981)) (citations omitted), superseded by statute on other grounds as stated by Farmer v. Administrative Dir. of the Court, 94 Hawai'i 232, 240 n.9, 11 P.3d 457, 465 n.9 (2000).

Illness is generally recognized as a legitimate ground for requesting a continuance. See Davis, 378 F.2d at 103. Factors that other jurisdictions consider are: 1) "whether the party's presence as a material witness" is necessary; 2) "whether there have been prior continuances or delays"; 3) "the good faith and diligence shown by the applicant"; 4) "the inconvenience or prejudice resulting to the opposing party if the delay is granted"; 5) "the likelihood that the party's health will improve"; and 6) "whether the testimony could have been secured by deposition or other means." 17 Am. Jr. 2d Continuances, supra, § 38, at 658.

Here, Plaintiff asked for a continuance months in advance -- she made the request in January of 1999, and her pretrial conference and trial was not until April of 1999. Thus, there was adequate time for opposing counsel to make arrangements

and adjustments such that prejudice or inconvenience would have been minimal.

Moreover, there were no prior continuances requested by Plaintiff. However, Dr. Williamson had made a previous request for a continuance due to business reasons and it was granted by Judge Chang.

Additionally, Plaintiff resides in Virginia. The doctor's note establishes that Plaintiff has a "severe hypersensitivity or allergy to Mango pollen or the Mango plant" and when "exposed to these substances, she develops severe breathing difficulties." The doctor determined that "[t]he best and only treatment . . . is avoidance of exposure." The doctor also indicated that Plaintiff was in the process of undergoing desensitization to this substance, but needed more time to "respond and reduce her sensitivity." Because Plaintiff is a party in this civil action, an allergy and potential illness -- established by her physician's report and unrebutted by Defendants -- that prevented her attendance at her own trial should have warranted the granting of the continuance.

Defendant Hammer argues that Siggelkow is persuasive. In Siggelkow, Mr. Siggelkow appeared at a pretrial conference on August 8, 1980, three days prior to a final divorce hearing, with no counsel. Id. at 986. The trial was rescheduled due to a recusal, to September 3, 1980. Id. Mr. Siggelkow moved for a continuance on August 18, 1980, alleging that he had been hospitalized in Fairbanks on August 15, 1980, and that he would not be able to "participate in his own trial for quite some

time." Id. A letter from a physician was attached to the motion. Id. The motion was denied on September 3, 1980, and the divorce hearing proceeded that same day with Mr. Siggelkow present. Id. Mr. Siggelkow appealed, asserting the denial of his motion for a continuance prejudiced his case because ill health limited his opportunity to discuss his case with counsel and hampered preparation for the divorce hearing. Id. at 987.

The Alaska Supreme Court upheld the trial court's denial of the motion for continuance stating that "illness of a party does not *ipso facto* require the granting of a continuance[,]" id. at 987 (citation omitted), and "denial of a continuance requested on the ground of ill health will be held reversible error only when the applicant suffered prejudice as a result of the denial." Id. The Alaska court noted that "following the denial of the motion for continuance, Mr. Siggelkow was present at the trial." Id. at 987 n.3 (comparing Siggelkow with Pollard, 575 P.2d at 412 (party suffered prejudice when unable to appear at trial due to illness and Doctor order prescribing bed rest)). Thus, prejudice was not found because Mr. Siggelkow was present at trial. The appellate court also determined that the prejudice Mr. Siggelkow suffered "stem[med] not from his illness, but from his late retention of counsel." Id.

The facts from Siggelkow are thus distinguishable. In this case, Plaintiff requested a continuance months prior to the date of trial. Her claim of illness was not rebutted. Plaintiff

did not have a trial. Her case was dismissed with prejudice without the benefit of any trial.

V.

It must be concluded that the court erred in refusing to continue trial based on Plaintiff's medical necessity motion filed January 8, 1999. Because the court erred in denying Plaintiff's motion for continuance, the subsequent orders of the court following from such denial should not have been granted. Accordingly, the court's order of February 18, 1999 is vacated, as well as the resulting orders of April 16, 1999 and May 7, 1999.

It follows that the clerk's May 24, 1999 and June 3, 1999 taxations of costs in favor of Dr. Hammer and Dr. Williamson, respectively, must similarly be vacated inasmuch as they rest on the judgment entered on behalf of the defendants following dismissal of the case. Likewise, it would be premature to decide issues regarding preclusion of evidence of future expenses and Rule 37 discovery sanctions as those points relate to pretrial rulings. Accordingly, I would remanded the case for disposition consistent with this opinion.