*** NOT FOR PUBLICATION ***

NO. 24146

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STEVEN M. ROGERS, SUSII HEARST and RETIREMENT RESOURCES, INC., fna PRECISION PRESS, INC., Respondents-Appellees,

vs.

MANECK B. MINOO, GASPARIAN & MINOO, LTD., fka HUFFMAN & MINOO, LTD., and PALMER GRAPHICS & PRINTING, Petitioners-Appellants,

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 00-1-2265)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, and, Nakayama JJ., Circuit Judge Cardoza, assigned by reason of vacancy, and Acoba, J., concurring separately)

We granted the application for writ of certiorari filed by the petitioners-appellants Maneck B. Minoo, Gasparian & Minoo, Ltd., fka Huffman & Minoo, Ltd., and Palmer Graphics & Printing [hereinafter, "Minoo"] in order to review the memorandum opinion of the Intermediate Court of Appeals (ICA) in Rogers v. Minoo, No. 24146 (Haw. App. Nov. 27, 2002) [hereinafter, "the ICA opinion"]. The ICA opinion affirmed the circuit court's order denying Minoo's motion to vacate the order granting in part and denying in part without prejudice Minoo's motion to (1) quash garnishee summons issued August 2, 2000, (2) set aside consent judgment filed July 21, 2000, and (3) stay further proceedings pending arbitration, filed August 8, 2000 (which order was filed on October 10, 2000), and to substitute Minoo's proposed order, filed on October 17, 2000.

In Minoo's application for writ of certiorari, he contends that the ICA "erred in holding, without briefing, that a

judgment in one civil case number may implicitly vacate the judgment in an earlier case number when the judgment in the earlier case is a final judgment from which no appeal was taken and no HRCP Rule 60(b) motion was ever filed." Because Minoo failed to raise the affirmative defense of issue preclusion during the circuit court proceedings, the ICA properly affirmed the circuit court's order denying Minoo's motion to vacate. Moreover, even if Minoo did raise issue preclusion, the issue of the Man Roland debt in Rogers I is "one of law and . . . a new determination is warranted in order to . . . avoid inequitable administration of the laws[,]" and thus the relitigation of the Man Roland debt is not precluded in Rogers II. Restatement (Second) Judgments § 28 (1980). Therefore, we affirm the ICA's holding, but, for different reasons than those set forth in the ICA's opinion.

I. BACKGROUND

A. Factual Background

1. Prior to the current litigation

Respondents-appellees Steven Rogers, Susii Hearst, and Retirement Resources, Inc. [hereinafter, "Rogers"] sold the assets of Precision Press, Inc. to Minoo. The sale was memorialized in an Agreement to Purchase Certain Assets of Precision Press, Inc. [hereinafter, "the Purchase Agreement"], dated June 29, 1996. A dispute arose between Rogers and Minoo concerning the Purchase Agreement, but this dispute was resolved in a Settlement Agreement, Mutual Release, Joint Tortfeasor Release and Indemnity [hereinafter, "the Settlement Agreement"], dated March 15, 1999.

In the Settlement Agreement, Minoo agreed "to pay and reaffirms that he has undertaken to pay the debts listed in Exhibit 'D' . . ." of the Purchase Agreement. Included in the Settlement Agreement as Exhibit E, was Exhibit D of the Purchase Agreement. Both exhibits were identical and listed the accounts payable balances as of the end of business on June 28, 1996. Included in Exhibit D of the Purchase Agreement and Exhibit E of the Settlement Agreement was a $177,237.86 debt owed to Man Roland for the purchase of a printing press. Additionally, the Settlement Agreement contained an arbitration clause, section X, that required arbitration for "[a]ll matters at issue and all questions concerning the interpretation of this Agreement . . ."[1]

Following the Settlement Agreement, a dispute arose regarding the debt owed to Man Roland. More than $60,000 of interest accrued on the $177,237.86 debt. Each party maintained that the other party was responsible for this interest.

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[1] The merger clause in the Settlement Agreement provided:

> This Agreement contains the entire agreement between and among THE SETTLING PARTIES. The terms of this Agreement are contractual and not a mere recital. THE SETTLING PARTIES will each bear their own costs and attorneys' fees incurred to date relative to the Litigation, the mediation and this Agreement. However, should any dispute arise between the parties as to the enforcement or validity of this Agreement, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees and costs incurred in such dispute. All matters at issue and all questions concerning the interpretation of this Agreement shall be decided and construed in accordance with Hawaii law, by binding arbitration before Ellen Godbey Carson. The nonprevailing party shall pay all the fees and costs of any such proceedings, and the arbitrator shall have the right to award such fees and costs.

2. Rogers I - special proceeding for petition to compel arbitration

Rogers contended, inter alia, that Minoo failed to assume and pay the Man Roland debt as required by the Settlement Agreement and, thus, that Minoo breached the Settlement Agreement. Particularly, Rogers argued that by agreeing to assume and pay the Man Roland debt, Minoo also agreed to pay any interest that accrued on the debt beyond the pay-off amount of $177,237.86 listed in Exhibit D of the Purchase Agreement and Exhibit E of the Settlement Agreement. Rogers demanded arbitration pursuant to section X of the Settlement Agreement, which provides that "[a]ll matters at issue and all questions concerning the interpretation of this Agreement shall be decided and construed in accordance with Hawaii law, by binding arbitration before Ellen Godbey Carson." Minoo refused the demand to arbitrate because he contended that the issue raised was not subject to arbitration.

As a result of Minoo's refusal to arbitrate, Rogers filed a Verified Petition for Order Compelling Arbitration in the circuit court of the first circuit on May 25, 2000, Special Proceeding No. 00-01-0278 [hereinafter, "Rogers I"]. Rogers again argued that Minoo was in breach of the Settlement Agreement. Minoo argued that the Man Roland interest was not subject to arbitration because it was not bargained for in either the Purchase Agreement or the Settlement Agreement. In its July 17, 2000 order denying the verified petition, the circuit court of the first circuit, the Honorable Kevin S.C. Chang presiding, ruled that "the words of the agreement to arbitrate limit the arbitration clause 'to the enforcement or validity of

this Agreement[]' [and t]he existing dispute between the parties does not involve a matter which is subject to arbitration as set forth above." The record does not indicate that either party appealed.

3. Rogers II - complaint alleging breach of the settlement agreement

After Minoo paid the $177,237.86 principal owed to Man Roland, he continued to pay Man Roland for the interest to prevent Man Roland from repossessing the equipment. However, Minoo subtracted the amount paid to Man Roland from the monthly payments owed to Rogers. On July 21, 2000, Rogers filed a complaint against Minoo, Civil No. 00-01-2265 [hereinafter, "Rogers II"], alleging breach of the Settlement Agreement for failing to pay Rogers the scheduled payments. On the same day, pursuant to the Settlement Agreement, Rogers then filed a consent judgment awarding him $181,000 reduced by payments made after the February 1999 payment. On August 2, 2000, Rogers filed an ex parte motion for issuance of garnishee summons after judgment. On August 8, 2000, Minoo filed a motion to quash the garnishee summons issued August 2, 2000, set aside the consent judgment filed July 21, 2000, and stay further proceedings pending arbitration. Minoo argued that all proceedings must be stayed until an arbitrator determines whether Minoo breached the Settlement Agreement.

In its October 10, 2000 order, the circuit court vacated the garnishment proceedings, denied Minoo's request to set aside the July 21, 2000 judgment, stayed further proceedings pending arbitration, and directed the parties to bear their own costs and fees. On October 17, 2000, Minoo filed a motion to

vacate the circuit court's October 10, 2000 order, arguing, inter alia, that the wording of the order would make it possible for Rogers to argue that the Man Roland debt was now subject to arbitration. On February 22, 2001, the circuit court denied Minoo's motion to vacate the October 10, 2000 order. On March 13, 2001, Minoo filed a notice of appeal.

B. The ICA's Memorandum Opinion

On appeal, Minoo argued, inter alia,[2] that "the circuit court erred in denying Minoo's motion to vacate its final order that . . . specifies that the order in a related case is unaffected by the circuit court's order in the instant case." Minoo further argued that he should not be required to relitigate this issue because the doctrine of res judicata applied. Rogers argued, inter alia,[3] that the circuit court's order in Rogers I was not res judicata. In its memorandum opinion, filed November 27, 2002, the ICA affirmed the circuit court's denial of Minoo's motion to vacate the October 10, 2000 order. The ICA held that the circuit court did not err when it reconsidered its order denying the petition compelling arbitration in Rogers I

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[2] Minoo asserts that the circuit court erred in denying Minoo's motion to set aside its final order and enter a new order that (1) omits any award of attorney fees and costs, (2) clarifies when the completion of arbitration will occur, and (3) specifies that the order in a related case is unaffected by the circuit court's order in the instant case. However, only the third assertion is of concern in the present application for writ of certiorari.

[3] Rogers asserts that (1) this case is not ripe for appeal, because the order compelling arbitration is not a final order, (2) the circuit court's order of July 17, 2000 is not res judicata barring the same court's order of October 10, 2000, (3) the circuit court did not abuse its discretion by refusing to modify the earlier October 10, 2000 order to clarify what it meant by completion of the arbitration, and (4) the third issue is now moot due to the arbitrator's definition of completeness of the arbitration. However, only the second assertion is of concern in the present application for a writ of certiorari.

because Minoo presented an argument that was inconsistent with Rogers I, and the circuit court realized during arguments that the Man Roland debt was subject to arbitration pursuant to the arbitration clause in the Settlement Agreement. Minoo timely petitioned this court for a writ of certiorari.

II. STANDARDS OF REVIEW

A. ICA

> Appeals from the ICA are governed by HRS § 602-59(b) (1993), which prescribes that an application for writ of certiorari shall tersely state its grounds which must include (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.

In re Doe, 95 Hawai‘i 183, 190, 20 P.3d 616, 622 (2001).

B. Conclusions of Law

A trial court's conclusions of law are reviewed de novo, under the right/wrong standard. State v. Ah Loo, 94 Hawai‘i 207, 209, 10 P.3d 728, 730 (2000).

III. DISCUSSION

In his application for writ of certiorari, Minoo argues that the ICA "erred in holding, without briefing, that a judgment in one civil case number may implicitly vacate the judgment in an earlier case number when the judgment in the earlier case is a final judgment from which no appeal was taken and no HRCP Rule 60(b) motion was ever filed." Minoo further argues that "[t]he matter of the interest on the Man Roland debt had previously been adjudicated as not subject to arbitration in case 1 and the judgment in that case is final and res judicata."

Because Minoo failed to raise the affirmative defense

of issue preclusion in the circuit court proceedings of Rogers II, the ICA properly affirmed the circuit court's denial of Minoo's motion to vacate the October 10, 2000 order. Moreover, even if Minoo had raised and met his burden of establishing issue preclusion, the particular circumstances of this case would warrant the application of an exception to the issue preclusion doctrine.[4] Therefore, we affirm the ICA's holding, but, for different reasons than those set forth in the ICA's opinion.

A. Claim Preclusion and Issue Preclusion

Minoo argues that the issue of the Man Roland debt is barred from litigation by res judicata. However, he misapplies the doctrine of res judicata to the circumstances of this case. Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion,[5] are doctrines that limit a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy. Dorrance v. Lee, 90 Hawai'i 143, 148-49, 976 P.2d 904, 909-10 (1999). However, claim preclusion and issue preclusion are separate doctrines that "involve[] distinct questions of law." Id. at 148, 976 P.2d at 909.

Claim preclusion "prohibits a party from relitigating a

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[4] On December 7, 2001, Minoo filed a motion to vacate the November 28, 2001 arbitration award in the circuit court of the first circuit, Civil No. 01-1-0487 [hereinafter, "Rogers III"]. Minoo properly raises preclusion in Rogers III, currently on appeal to this court, and thus we explore the application of an exception to issue preclusion in this case as a matter of judicial efficiency.

[5] In previous decisions, this court has used the term res judicata to refer to preclusion in general and claim preclusion specifically. To prevent confusion resulting from the two uses of the term res judicata, this opinion will employ the term "claim preclusion" instead of res judicata and "issue preclusion" instead of collateral estoppel.

previously adjudicated cause of action." Id. "[T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[6] Restatement (Second) Judgments § 24(1) (1980). The party asserting claim preclusion has the burden of establishing that (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim decided in the original suit is identical with the one presented in the action in question.

On the other hand, issue preclusion "applies to a subsequent suit . . . on a *different* cause of action and prevents the parties or their privies [who lost in the earlier suit] from relitigating *any issue* that was actually litigated and finally decided in the earlier action." Dorrance, 90 Hawai'i at 148, 976 P.2d at 910 (emphasis in original). The party asserting issue preclusion must establish that:

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom [issue preclusion] is asserted was a party or in privity with a party to the prior adjudication.

Id. As to the fourth requirement, it is not necessary that the party asserting issue preclusion in the second suit was a party in the first suit. Morneau v. Stark Enterprises, Ltd., 56 Haw.

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[6] For example, if a plaintiff with a single claim (e.g., damages for a car accident) splits his claim, litigating one part (e.g., property damage) in the original suit, he will be precluded from litigating any other part of the claim (e.g., personal injury) in a subsequent suit. Dill v. Avery, 305 Md. 206, 209, 502 A.2d 1051, 1053 (1986); see also Kauhane v. Acutron Co., Inc., 71 Haw. 458, 464, 795 P.2d 276, 279 (1990) (applying this principle to a wrongful dismissal case).

420, 423, 539 P.2d 472, 475 (1975).

Although Minoo argues generally that "res judicata" applies, this court assumes that he means "issue preclusion" because the facts of this case meet the four criteria set forth in Dorrance.[7] First, the issue of whether Minoo is liable for the interest on the Man Roland debt is identical in Rogers I and Rogers II. Second, the order by the court in Rogers I was final and on the merits inasmuch as both parties filed motions, a hearing was held specifically discussing the interest on the Man Roland debt, and the order ended the proceeding leaving nothing further to be determined. Casumpang v. ILWU Local 142, 91 Hawai'i 425, 426, 984 P.2d 1251, 1252 (1999). Third, the issue was essential to the judge's order inasmuch as the judge denied the motion to compel arbitration because he ruled that the interest on the Man Roland debt was not subject to arbitration. Finally, both parties are identical. Therefore, Minoo could have raised issue preclusion as an affirmative defense in Rogers II.

B. The ICA properly affirmed the circuit court's order because Minoo failed to raise the affirmative defense of issue preclusion during the circuit court proceedings.

The ICA properly affirmed the circuit court's order. In its memorandum opinion, the ICA stated that,

> [a]lthough the circuit court did not expressly state that the amount of Defendants' liability for the Man Roland debt was subject to arbitration, it is clear from the record that in entering the Order to Arbitrate, the circuit court expected that the amount of the Man Roland debt would have to be determined by the arbitrator prior to determining whether Defendants had breached the Settlement Agreement. The circuit court thus reconsidered its Order Denying

[7] Claim preclusion does not apply to the circumstances in this case because the claim in Rogers II, breach of the Settlement Agreement for failing to pay Rogers arising from the Man Roland debt, did not arise until after Rogers I. Thus, claim preclusion will not be further addressed.

Arbitration in Case 1.

However, because Rogers I and Rogers II were two separate cases, the circuit court could not, in Rogers II, reconsider its final order in Rogers I. See Metcalf v. Voluntary Employees' Benefit Association of Hawai'i, 99 Hawai'i 53, 58, 52 P.3d 823, 828 (2002).

As an affirmative defense, issue preclusion must be pled at the trial level or the defense is considered waived. See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 350 (1971); In Re Keamo, 3 Haw. App. 360, 363, 650 P.2d 1365, 1368 (1982). Hawai'i Rules of Civil Procedure (HRCP) Rule 8(c) states that, "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . res judicata, . . . and any other matter constituting an avoidance or affirmative defense." Hawai'i Rules of Civil Procedure (HRCP) Rule 8(c).[8] "The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate." Blonder-Tongue Laboratories, Inc., 402 U.S. at 350. Thus, because Rogers I and

[8] Hawai'i Rules of Civil Procedure (HRCP) Rule 8(c) provides:

> *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rogers II were two separate cases and a final order was issued in Rogers I, Minoo could have raised the affirmative defense of issue preclusion.

However, Minoo failed to raise issue preclusion at the circuit court level during Rogers II, and the record is devoid of any evidence that Minoo attempted to meet his burden of establishing issue preclusion. Instead of raising issue preclusion in Rogers II, Minoo argued that the issue of the breach was subject to arbitration pursuant to the Settlement Agreement. By contrast, in Rogers I, Minoo had argued that the issue of breach was not subject to arbitration pursuant to the Settlement Agreement. Minoo's argument in Rogers II is the antithesis of his argument in Rogers I despite the fact that both issues concerned breach of the Settlement Agreement and arose from the controversy of whether Minoo was liable for the Man Roland interest.

Although Minoo attempted to distinguish Rogers II from Rogers I and disputed the language used in the order denying his motion to vacate the October 10, 2000 order, this is insufficient to raise the affirmative defense of issue preclusion. In summary, having failed to raise issue preclusion during the circuit court proceedings and raising it on appeal only, the defense is considered waived, and thus the ICA properly affirmed the circuit court's order denying Minoo's motion to vacate the October 10, 2000 order. In re Keamo, 3 Haw. App. at 363, 650 P.2d at 1368 (1982).

C. Even if Minoo had properly raised and met his burden of establishing issue preclusion, the circumstances of this case would warrant the application of an exception to the doctrine of issue preclusion.

Assuming arguendo that Minoo had raised and met his burden of establishing issue preclusion, the circumstances of this case would warrant the application of an exception to the doctrine of issue preclusion. The Restatement (Second) Judgments § 28 (1980) states that,

> [a]lthough an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between parties is not precluded [if] . . . [t]he issue is one of law and . . . a new determination is warranted in order to . . . avoid inequitable administration of the laws[.]

Restatement (Second) Judgments § 28 (1980). Thus, we must first inquire whether the issue is a question of law. If so, we must next inquire whether a new determination is warranted to avoid inequitable administration of laws. We answer both inquiries in the affirmative.

The issue of whether the interest of the Man Roland debt was arbitrable pursuant to the Settlement Agreement is a question of law. "As a general rule, the construction and legal effect to be given a contract is a question of law freely reviewable by an appellate court." Cho Mark Oriental Food, Ltd. v. K&K Intern., 73 Haw. 509, 519, 836 P.2d 1057, 1063 (1992). Additionally, "a question like that of the meaning of a written contract may be a question of 'law' in the sense that it is decided by the judge rather than the jury." Restatement (Second) Judgments § 28 comment b (1980). In Rogers I, the issue of whether the interest on the Man Roland debt was arbitrable was

decided solely by the judge who determined the legal effect to be given the Settlement Agreement. Thus, the issue was a question of law and we must now inquire whether a new determination is warranted to avoid inequitable administration of the law.

In Marsland v. International Society for Krishna Consciousness, 66 Haw. 119, 123, 657 P.2d 1035, 1038 (1983), the district court found the International Society for Krishna Consciousness (ISKCON) not guilty of violating a provision of the City and County of Honolulu Comprehensive Zoning Code (CZC); however, the circuit court subsequently held that ISKCON was in violation of the same provision. ISKCON argued that the district court's acquittal precluded relitigation in the second action. Id. at 123-124, 657 P.2d at 1038. This court held that the district court's acquittal did not preclude the action in the circuit court because the issue was a question of law and "a new determination [was] warranted . . . to avoid inequitable administration of the laws . . . ." Id. at 125, 657 P.2d 1039 (quoting Restatement (Second) Judgments § 28 (1980)). This court stated that

> the district court erred in its interpretation and application of the provisions of the CZC. In applying the doctrine of res judicata as ISKCON would have us do, would be permitting it to continue to violate the ordinance without fear of governmental sanctions while at the same time warning other parties that the same ordinance would be enforced against them. This would be an absurd and unreasonable application of the doctrine.

Id.

Similarly, in the instant case, the interpretation of the Settlement Agreement in Rogers I was clearly erroneous. In Rogers I, the judge ruled that the Man Roland debt was not arbitrable, despite the uncontroverted fact that the Settlement

Agreement clearly provided that "[a]ll matters at issue and all questions concerning the interpretation of this Agreement shall be decided and construed in accordance with Hawaii law, by binding arbitration before Ellen Godbey Carson." The Man Roland debt was part of the Settlement Agreement, and the issue of whether Minoo was liable for the interest on that debt was a question concerning the interpretation of the Settlement Agreement. Thus, the judge should have ruled that liability for the interest on the Man Roland debt was arbitrable. If this court were to apply issue preclusion, we would be allowing Minoo to violate the terms of the Settlement Agreement. Applying the doctrine of issue preclusion, under these circumstances, would be absurd and unjust.

We hold (1) that the ICA properly affirmed the circuit court's denial of Minoo's motion to vacate the October 10, 2000 order, inasmuch as Minoo failed to raise the affirmative defense of issue preclusion and (2) that, even if he had properly raised issue preclusion, the circumstances of this case would warrant the application of an exception to the doctrine of issue preclusion.

IV. CONCLUSION

In light of the foregoing, we affirm the ICA's holding in its memorandum opinion, issued on November 27, 2002.

DATED: Honolulu, Hawai'i, May 20, 2003.

Earle A. Partington
for petitioners-appellants
on the writ

CONCURRING OPINION BY ACOBA, J.

I concur in the result.