NO. 25284

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

TOSHIO UCHIMA, Individually and as Guardian Prochein Ami for HERMAN UCHIDA and DUSTIN UCHIMA, minors; and YOKO UCHIMA, Plaintiffs-Appellees,

vs.

DURST CORP., Defendant-Appellant,

ERECT-A-TUBE, INC., and ROTOR WING HAWAII, INC., Defendants-Appellees,

and

JOHN DOES 1-10 and DOE ENTITIES 1-10, Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 98-2949)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Defendant-appellant Durst Corporation (Durst) appeals from the first circuit court's August 5, 2002 second amended final judgment.[1] As points of error, Durst contends that the circuit court erred when it: (1) issued its October 13, 2000 Order granting in part and denying in part the July 28, 2000 motion for sanctions filed by plaintiffs-appellees Toshio Uchima (individually and as Guardian Prochien Ami for Herman Uchima and Dustin Uchima, minors) and Yoko Uchima; and (2) issued its October 13, 2000 Order granting the plaintiffs' July 28, 2000 request for taxation of costs. Specifically, Durst argues that

[1] The Honorable Eden Elizabeth Hifo presided over this matter.

the circuit court: (1) abused its discretion by sanctioning Durst, rather than sanctioning Durst's counsel (Gale Ching); (2) abused its discretion and violated the United States and Hawai‘i Constitutions by setting the amount of the sanction at $100,000; and (3) erred in awarding the plaintiffs $33,240.28 in expert witness fees as part of the cost order against Durst.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we vacate the circuit court's judgment and remand with instructions that the circuit court enter a new judgment that excludes expert witness fees. Specifically, we hold as follows: (1) we decline to consider Durst's arguments that the sanction was excessive and that the sanction should have been imposed on Durst's counsel (rather than Durst) because Durst failed to raise these arguments before the circuit court. See Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai‘i 97, 107, 58 P.3d 608, 618 (2002) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal."). Furthermore, we decline to apply plain error analysis to the circuit court's ruling because the circuit court's ruling neither affects the integrity of the trial court's findings of fact nor is of great public import. See State v. Fox, 70 Haw. 46, 56 n.2, 760 P.2d 670, 676 n.2 (1988) (stating that, "[i]n civil cases, the plain

error rule is only invoked when 'justice so requires'" (citation omitted)); (2) Durst's argument that it did not engage in a pattern of contumacious conduct is simply a reformulation of its argument that sanctions should be imposed on Mr. Ching rather than on Durst. Durst argues that the circuit court abused its discretion in awarding sanctions because the only conduct for which Durst could have been sanctioned is the allegedly improper testimony given by its employee, Robert Brandemuehl. Durst contends that there is no other evidence that Durst itself engaged in bad faith conduct, and further contends that Brandemuehl's conduct, taken alone, does not represent a "pattern" of contumacious conduct. Durst's argument on this point is simply a reformulation of its argument that any sanctions should have been imposed on Mr. Ching rather than Durst, however. The circuit court concluded that the conduct of Durst's representatives (including counsel, Mr. Ching, and witnesses, Robert Brandemuehl and Donald Berman) constituted a pattern of contumacious conduct.[2] Although Durst believes that Mr. Ching should bear responsibility for this conduct, Durst failed to raise this argument before the circuit court and it is

[2] Durst does not argue on appeal that the circuit court abused its discretion in ruling that Mr. Ching's conduct and Mr. Berman's conduct was sanctionable. In other words, Durst does not argue that sanctions were inappropriate; it simply argues that the sanctions were excessive and that the sanctions should have been imposed on Mr. Ching rather than Durst itself. As discussed, both arguments are deemed waived on appeal.

therefore deemed waived on appeal; (3) Durst's argument that the sanctions were improper because the plaintiffs failed to demonstrate actual harm is without merit. A demonstration of prejudice is not a prerequisite to the imposition of sanctions. See Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 242, 948 P.2d 1055, 1083 (1997) ("[I]f the trial court has the inherent power to level the ultimate sanction of dismissal, it necessarily has the power to take all reasonable steps short of dismissal, depending on the equities of the case." (Quoting Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994).) (Block quote formatting omitted.)); and (4) the circuit court abused its discretion in ruling that the plaintiffs could recover expert witness fees pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d). See Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 307, 972 P.2d 295, 310 (1999) ("[T]his court has reaffirmed the proposition that expert witness fees are normally not allowed."). Therefore,

IT IS HEREBY ORDERED that the circuit court's August 5, 2002 second amended judgment is vacated. We remand this case to the circuit court with instructions that the circuit court enter a new judgment that is identical to the previous judgment except that the new judgment shall award only $7,404.49, rather than

$40,644.77, in costs to the plaintiffs (for a total of $115,503.49 in sanctions, costs, and prejudgment interest).

DATED: Honolulu, Hawai‘i, December 17, 2004.

On the briefs:

Jeffrey H. K. Sia
and Gary S. Miyamoto
(of Ayabe, Chong, Nishimoto,
Sia & Nakamura) for
defendant-appellant
Durst Corp.

Richard Turbin,
Rai Saint Chu, and
Carl D. Soto for
plaintiffs-appellees