
NO. 25832

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

SANDRA JEAN DELMONTE, Plaintiff-Appellant

vs.

STATE FARM FIRE AND CASUALTY COMPANY,
an Illinois corporation, Defendant-Appellee

and

WATANABE ING & KAWASHIMA, a Hawai'i corporation,
and DOES 1-50, Defendants

JAMES RICHARD DELMONTE, Plaintiff-Appellant

vs.

STATE FARM FIRE AND CASUALTY COMPANY,
an Illinois corporation, Defendant-Appellee

and

WATANABE ING & KAWASHIMA, a Hawai'i corporation,
and DOES 1-50, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-0434)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, JJ., and
Circuit Judge Border, Assigned in Place of Duffy, J., Recused)

Plaintiffs-Appellants Sandra Delmonte and James
Delmonte (collectively, the Delmontes) appeal from (1) an
April 15, 2003 order of the first circuit court (the court)¹

¹ The Honorable Dan T. Kochi presided over the hearing involving the
April 15, 2003 order and the Honorable David Lo presided over the hearing
involving the July 9, 2001 order.

directing them to immediately pay a sanction of \$250 to Defendant-Appellee State Farm Fire and Casualty Company (State Farm) and (2) a July 9, 2001 order directing further deposition of a witness. The \$250 sanction was intended to cover the cancellation costs incurred by State Farm when the Delmontes' attorney refused to allow the videotape deposition of a witness.

In the present case, we have jurisdiction to review both the July 9, 2001 order and the April 15, 2003 order. As to the April 15, 2003 order, immediate appeal is allowed as to a sanction order against a party that is immediately enforceable through contempt proceedings and that places the sanctioned party in immediate jeopardy of being found in contempt of court for failure to comply. *Harada v. Ellis*, 60 Haw. 467, 480, 691 P.2d 1060, 1070 (1979) (allowing an appeal of an order sanctioning defendants to pay plaintiffs \$145.60 for failure to appear at a deposition). The July 9, 2001 order is reviewable on appeal of the April 15, 2003 order. Cf. *Pioneer Mill Co. v. Ward*, 34 Haw. 686, 694 (1938) (an appeal from a final judgment "brings up for review all interlocutory orders not appealable as of right which deal with issues in the case").

On appeal, the Delmontes argue that (1) State Farm failed to follow procedural rules that required a written stipulation or leave of the court to videotape the deposition, (2) there existed no credible reason for the videotaping of the

deposition, and (3) the court abused its discretion by ordering a further deposition of the witness because she had been previously deposed by State Farm's counsel in unrelated cases on similar subject matter, had already been deposed for the scheduled two days, and any mismanagement of time was the fault of State Farm's counsel.

The court's imposition of discovery abuse sanctions is reviewed under an abuse of discretion standard. Stender v. Vincent, 92 Hawai'i 355, 362, 992 P.2d 50, 57 (2000). "A trial court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." Id.

In pertinent part, Hawai'i Rules of Civil Procedure (HRCP) Rule 29 provides that, "[u]nless the court orders otherwise, the parties may by written stipulation . . . provide that depositions may be taken . . . in any manner"

(Emphasis added.) Furthermore, HRCP Rule 30(b)(4) provides that

[t]he parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

(Emphases added.)

As to the Delmontes' first argument, the use of the term "may" instead of "shall" suggests that the actions referenced in HRCP Rules 29 and 30, obtaining a written

stipulation or court order, are not mandatory. See Metcalf v. Voluntary Employees' Benefit Assoc. Of Hawaii, 99 Hawai'i 53, 67, 52 P.3d 823, 837 (2002); Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 149, 931 P.2d 580, 591 (1997). There was sufficient evidence in the record for the court to find that State Farm was "led to believe" that there were no objections to the videography. Approximately two months prior to the deposition, there was a telephone conversation between counsel discussing the deposition of the witness. One month prior to the deposition date, State Farm's counsel sent a letter to the Delmontes' counsel which confirmed that the deposition would be recorded by a videographer in addition to stenographic recording. On that same date, State Farm's counsel filed an amended notice of deposition entitled "First Amended Notice of Taking Deposition Upon Oral Examination and by Videotape." Therefore, in light of State Farm's actions and the apparent lack of a prior objection, the court did not abuse its discretion by awarding sanctions. Cf. Fujimoto v. Au, 95 Hawai'i 116, 145, 19 P.3d 699, 728 (2001).

As to the Delmontes' second argument, State Farm had a credible reason to believe that the witness might not be able to travel to Hawai'i and, thus, to testify at the trial. The witness's deposition was scheduled to take place in California and the witness was unable to travel due to injuries resulting from an automobile accident. State Farm reasonably sought to

preserve the witness's testimony in video format such that the trier of fact could "evaluate [the witness'] bodily [sic] language and overall demeanor in assessing the veracity of her statements." Second, while State Farm has presented evidence as to the need to videotape, there is no evidence in support of the Delmontes' claim that the sole reason of the videography was to harass or intimidate. Therefore, the court did not abuse its discretion in awarding sanctions. See Stender, 92 Hawai'i at 362, 992 P.2d at 57.

As to their third argument, the Delmontes cite no authority which supports the proposition that in situations where counsel has previously deposed the same witness in other, unrelated cases, extending a deposition is an abuse of discretion. Next, the deposition notice explicitly provided for the possibility that the deposition would extend beyond the originally scheduled two days. Finally, the number of objections made by the Delmontes' counsel, 465 in thirteen hours, support the court's order. In light of the circumstances, the court did not abuse its discretion by ordering a further deposition of the witness. See id. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's July 9, 2001 order allowing further deposition of the witness and its April 15, 2003 order requiring immediate payment of sanctions are affirmed.

DATED: Honolulu, Hawai'i, August 11, 2004.

On the briefs:

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