NO. 23295

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HAMAMOTO CORPORATION, a Hawaii Corporation, and SHINSUKE HAMAMOTO, individually and as President of Hamamoto Corporation, Plaintiffs-Appellants, v. INTERNATIONAL SAVINGS AND LOAN ASSOCIATION, LIMITED, a Hawai'i Corporation, NATIONAL MORTGAGE AND FINANCE CO., LTD., a Hawai'i Corporation, I.S.L. SERVICES, INC., a Hawai'i Corporation, C.B. BANCSHARES, INC., a Hawai'i Corporation, RICHARD C. LIM, FRANKLIN M. TOKIOKA, RON MELCHIN, MELCHIN REALTY, INC., a Hawai'i Corporation, UNITEK ENVIRONMENTAL SERVICES, INC., a Hawai'i Corporation, Defendants-Appellees; and DRI REALTY, INC., a Hawai'i Corporation, LESLIE HARAKAWA, JOHN DOES 1-25, DOE CORPORATION 1-25, DOE PARTNERSHIP 1-25; DOE ENTITY 1-25, Defendants; and UNITEK ENVIRONMENTAL SERVICES, INC., Third-Party Plaintiff, v. ROYAL COAST REALTY, INC., AND EUGENE MCCAIN, Third-Party Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIVIL NO. 96-0403)

MEMORANDUM OPINION
(By: Lim, Acting C.J., Foley, J., and Circuit Judge Wong, in place of Burns, C.J., recused)

Plaintiffs-Appellants Hamamoto Corporation (Hamamoto Corp.) and Shinsuke Hamamoto (Hamamoto) (collectively, Plaintiffs) appeal the circuit court of the first circuit's February 23, 2000 first amended final judgment. The first amended final judgment was entered in a contract action Plaintiffs brought for rescission and special, general and punitive damages arising out of Hamamoto Corp.'s purchase of the

International Savings and Loan Building (the Building or the ISL Building), a leasehold commercial property located at 1111 Bishop Street in Honolulu, Hawai‘i.

Plaintiffs’ second amended complaint alleged that Defendants-Appellees International Savings and Loan Association, Limited (ISL), International Savings and Loan Services, Limited (ISL Services), CB Bancshares, Inc. (CB), Richard C. Lim (Lim) (the foregoing sometimes collectively referred to as the ISL Defendants), National Mortgage and Finance Co., Limited (NMFC), Franklin M. Tokioka (Tokioka), Ron Melchin (Melchin), Melchin Realty, Inc. (Melchin Realty) and Unitek Environmental Services, Inc. (Unitek) (all of the foregoing collectively referred to as the Defendants) negligently or intentionally misrepresented, and/or fraudulently failed to disclose, information material to the sale of the Building. In particular, Plaintiffs alleged “that the [Defendants] represented that a new ground lease could be renegotiated, that the fee simple interest could be purchased from the fee simple owner, and that the Seller failed to disclose there was asbestos in the ISL Building.”

Plaintiffs brought a total of fourteen claims,[1]

[1] Shinsuke Hamamoto’s (Hamamoto) and Hamamoto Corporation’s (Hamamoto Corp.) (collectively, Plaintiffs) second amended complaint alleged fourteen claims for relief, as follows: (1) fraudulent non-disclosure and fraudulent inducement against International Savings and Loan Association, Limited (ISL), International Savings and Loan Services, Limited (ISL Services), Richard C. Lim (Lim), National Mortgage and Finance Co., Limited (NMFC), Franklin M. Tokioka (Tokioka), Leslie Harakawa (Harakawa), Ron Melchin (Melchin) and Melchin Realty, Inc. (Melchin Realty) (collectively, Defendants), for Defendants’ alleged failure to disclose to Plaintiffs, prior

to Plaintiffs' purchase of the ISL Building, (a) that Defendants had been actively negotiating with fee owner The James Steiner Estate (the Estate) a new ground lease, and/or negotiating the purchase of the fee simple interest, and that the negotiations were unsuccessful because of the unreasonable demands and conditions requested by the Estate, (b) that the fee simple interest was not for sale, and (c) that the plumbing fixtures, air conditioning, pipes, walls and ceiling contained asbestos; (2) intentional or negligent misrepresentation, for Defendants' alleged failure to disclose to Plaintiffs (a) that the Estate unreasonably demanded a new ground rent higher than the prevailing downtown commercial rents, (b) that Defendant ISL had unsuccessfully marketed the ISL Building for many years and had only recently marketed the ISL Building through Melchin Realty, and (c) that real estate appraisals had been done on the ISL Building; intentional or negligent misrepresentation, for Defendants' alleged misrepresentation to Plaintiffs (a) that the fee simple purchase was negotiable, (b) that the Estate was reasonable in its rent demands and (c) that the Estate would not make unreasonable demands for a new ground rent in July 1991; Defendants' alleged misrepresentation and prohibition that Plaintiffs or their agents were prohibited from negotiating the ground lease with the Estate; and Defendants' non-disclosure and misrepresentation regarding asbestos in the plumbing fixtures, pipes, air conditioning, walls and ceiling tiles of the Building; (3) breach of fiduciary duty by Defendant Melchin, for intentionally failing to disclose material facts in order to fraudulently induce Plaintiffs to purchase the ISL Building; (4) constructive fraud, for Defendants' alleged non-disclosure of material facts, fraudulent inducement, intentional or negligent misrepresentation and breach of fiduciary duty, as claimed in (1) through (3) above; (5) breach of contract by Defendants, (a) by allegedly breaching the express or implied covenant of good faith and fair dealing, and (b) by allegedly failing to disclose that the Estate maintained unreasonable demands for a new ground rent, that the fee simple interest could not be purchased from the Estate, that real estate appraisals were performed on the ISL Building by the Estate and Defendants ISL and ISL Services, that Defendant Melchin represented Plaintiffs, that asbestos was present in the Building and that the sublease between Plaintiffs and Defendant ISL would not be affected by the July 1991 new ground rent; (6) intentional or negligent misrepresentation by Defendant Unitek Environmental Services, Inc. (Unitek), for allegedly failing to fully investigate and prepare a written report that the ISL Building was free from asbestos or toxic chemical agents; (7) negligence of Defendant Unitek, for allegedly failing to detect asbestos in its investigation of the ISL Building; (8) intentional or negligent non-disclosure by Defendant CB Bancshares, Inc. (CB), for the alleged fraudulent non-disclosures, fraudulent inducement, negligent or intentional misrepresentations, breach of fiduciary duty and concealment of asbestos by Defendant ISL after CB acquired ISL; (9) intentional or negligent infliction of emotional distress upon Hamamoto, individually, for Defendant CB's decision to have Defendant ISL vacate the ISL Building, which allegedly caused substantial financial harm to Hamamoto; (10) rescission of the contract, due to Defendants' fraudulent inducement and non-disclosures, intentional or negligent misrepresentations and breach of contract; (11) punitive damages; (12) treble damages, for Defendants' alleged violations of Hawaii Revised Statutes (HRS) Chapter 480 (1993 & Supp. 2001); (13) interference with contract, for the alleged collusion between Defendants ISL and CB to cancel ISL's sublease with Plaintiffs for the purpose of placing Plaintiffs in a position of financial dire straits, wherein it would be unable to make its rent obligation to the Estate to sustain the ISL Building; and (14) fraud, for

several of which were resolved by summary judgments, voluntary dismissals and directed verdicts at trial.[2] Plaintiffs' remaining claims and Defendants' counterclaims proceeded through trial, and the jury decided against Plaintiffs via special verdicts on all claims and counterclaims submitted to the jury.

Plaintiffs appeal the directed verdicts and raise various evidentiary issues and issues arising out of the jury's special verdict. We affirm in part and reverse in part for the following reasons.

I. Background.

The James Steiner Estate (the Estate) owned the fee simple interest in the Building. In 1961, the Estate entered into a lease with Investors Finance, Inc. for a term of sixty years, from July 21, 1961 to July 20, 2021. Investors Finance, Inc. assigned the lease to ISL Services on November 22, 1982.

ISL Services renovated the five-story building before

Defendants ISL's and CB's alleged agreement and collusion to vacate the ISL Building, after having been advised of the presence of asbestos and the amount it would cost to clean up the asbestos, allegedly knowing that Plaintiffs could not rent the space ISL vacated until the asbestos was cleaned up, and causing Plaintiffs to default in payment of the new ground rent established in July 1991 with the Estate.

[2] Plaintiffs' second amended complaint named DRI Realty, Inc. (DRI) and Harakawa as defendants. DRI was a real estate brokerage corporation. It was owned by the same holding company that had previously owned ISL. It was dissolved on November 24, 1992. On June 17, 1998, the court granted DRI's motion for summary judgment, dismissing all of Plaintiffs' claims against DRI. Harakawa was corporate counsel for Defendant ISL. Plaintiffs voluntarily dismissed, with prejudice, all of their claims against Harakawa. The court dismissed Plaintiffs' eighth claim, and Plaintiffs' twelfth claim, on summary judgment. Plaintiffs voluntarily dismissed their ninth claim for emotional distress and their tenth claim for rescission.

it moved in. Iris Toguchi (Toguchi) of ISL Services was selected to oversee the renovation. She reported directly to Lim, who, in the early 1980s, headed ISL Services. Wally Omori (Omori) was the principal architect for the renovation. Omori testified that the materials he used for the renovation met current building code standards and environmental regulations.

On March 6, 1987, ISL Services assigned the lease to ISL. ISL and ISL Services were both owned by the same holding company. ISL occupied approximately sixty percent of the space in the Building. Lim was the president of ISL. Toguchi moved from ISL Services to ISL. She became ISL's senior vice-president.

ISL and Hawaiian Trust Co., Limited (Hawaiian Trust), one of the Estate's trustees, were engaged in on-again, off-again negotiations for an extension of the ground lease. Various people under Lim worked on the lease renegotiations from time to time in the mid-1980s, including Toguchi, and Gary Yamashiro (Yamashiro). There was not one continuous negotiation over the ground lease between ISL and the Estate.

Yamashiro, a licensed real estate agent, was employed by ISL as an accounting manager. Yamashiro was also the principal broker and president of DRI Realty, Inc. (DRI), a real estate brokerage corporation owned by the same holding company that owned ISL. Toguchi also worked for DRI as a real estate

agent. Yamashiro's 1985 negotiations with Keith Steiner (Steiner), another Estate trustee, yielded an Estate proposal to amend the master ground lease, but ISL rejected that proposal.

It was also sometime in 1985 that a fact sheet was prepared for the ISL Building. Yamashiro assisted in the preparation of this fact sheet. The fact sheet was prepared because a number of inquiries had been made about the Building. Fact sheets were sent out to those who requested information about the Building. Yamashiro testified that, although ISL was not aggressively seeking to sell its leasehold interest in the property, the Building could be sold if a potential buyer offered ISL a reasonable price for it. Toguchi testified that ISL entertained all offers for the Building.

The fact sheet contained a floor-by-floor description of the Building. The fact sheet also provided information about the composition of certain materials present in the Building, and included a statement that the Building contained vinyl asbestos tile flooring. Yamashiro testified that asbestos was an item used in construction products, while Toguchi testified that the word asbestos was added into the fact sheet because asbestos was a type of material that was commonly used in buildings.

Derek Kimura (Kimura), a real estate licensee, was NMFC's vice-president. Kimura reported to Tokioka, NMFC's director. Kimura testified that he assisted Yamashiro in

preparing the fact sheet. Kimura, Yamashiro and Tokioka received information from ISL about the Building, which they fashioned into the fact sheet to market the property. Kimura testified that, other than the statement in the fact sheet that the Building contained vinyl asbestos tile flooring, he did not know whether the Building included materials containing asbestos. NMFC assisted ISL by sending out fact sheets to various people in downtown Honolulu.

NMFC and ISL had been one company in the 1970s. The two companies maintained a close business relationship after their split. At one point in time, NMFC managed the ISL Building. Historically, NMFC's business dealings with ISL included buying and selling realty for ISL. During NMFC's business relationship with ISL, NMFC was never involved in the on-again, off-again negotiations between ISL and the Estate for an extension of the ground lease. Tokioka testified that he was not personally aware that ISL and the Estate were engaged in negotiations to extend the ground lease.

Melchin, the principal broker and owner of Melchin Realty, received one of the fact sheets. Kimura had given Melchin the fact sheet. Melchin testified that Kimura informed him the ISL Building was not officially on the market, but that a fact sheet had been generated in response to inquiries made about the Building. Melchin had a business relationship with NMFC. He

had worked on several real estate transactions with Kimura and Tokioka. Kimura testified that Melchin shared the fact sheet with Royal Coast Realty Corporation (Royal Coast). Eugene McCain (McCain) operated and was the principal broker for Royal Coast.

Royal Coast operated out of Kona, on the Big Island of Hawai‘i. Sometime in December 1987, McCain approached Melchin for information about available commercial real estate properties on O‘ahu, especially those in downtown Honolulu. Melchin shared his knowledge about the Honolulu real estate market with McCain. Then, sometime in early January 1988, Melchin provided McCain with the ISL Building fact sheet. In late January or early February 1988, McCain introduced Hamamoto to Melchin during a meeting at Melchin’s office. Kimura was present at this meeting, at Melchin’s request. Melchin testified that it was represented to him that McCain was Hamamoto’s real estate broker. Hamamoto and McCain were accompanied by another real estate agent, Lauren Robin (Robin).

Hamamoto was a Japanese National. In Japan, Hamamoto worked for his family, which operated a successful catering and wedding business. Hamamoto testified that his dream was to reside in the United States, because he wanted his children to be educated here. He testified that one way to accomplish this dream was to own commercial real estate in Hawai‘i. He wanted to become a landlord because, to Hamamoto, owning a commercial

building appeared to be an easy yet lucrative business venture. Hamamoto considered himself a sophisticated businessman.

Hamamoto looked at several real estate properties in the Honolulu area. In his search for commercial real estate, Hamamoto visited a local real estate agency, where he was introduced to Robin, who in turn introduced him to McCain. McCain faxed Hamamoto information introducing himself and his company, Royal Coast, and provided Hamamoto with information about two available commercial real estate properties in Honolulu. One of these commercial properties was the ISL Building. Included in the materials McCain faxed to Hamamoto was the fact sheet, which contained the information that there was vinyl asbestos tile flooring in the ISL Building.

McCain brought Hamamoto to meet with Melchin and Kimura at Melchin's office. After this meeting, McCain, Melchin and Kimura accompanied Hamamoto to the ISL Building to view the Building. Hamamoto testified that Melchin informed him the ISL Building was not formally on the market. Because of this, not very many people knew the Building could be purchased. Melchin knew the ISL Building could be purchased because he knew Tokioka of NMFC. Hamamoto testified that he was provided with several pieces of information about the ISL Building, including the fact that it had been renovated. Hamamoto also testified that, during his initial visit to the ISL Building, the asking price for the

Building was discussed, and that he expressed his concern to McCain, Melchin and Kimura about purchasing a leasehold property. Hamamoto testified that he was not really interested in purchasing a leasehold property, but that this concern was alleviated when, he claimed, McCain, Melchin and Kimura informed him that he could purchase the fee simple interest.

Hamamoto testified that McCain told him the ISL Building was an excellent leasehold property in a good location, that ISL occupied sixty-one percent of the Building, and that maintaining ISL as a tenant would be beneficial for Hamamoto because he would not have to worry about finding new tenants. At McCain's prompting, Hamamoto retained attorney Randy Brooks (Brooks) of the law firm Cades, Schutte, Fleming and Wright (Cades). Hamamoto testified that McCain and Brooks encouraged him to make an offer on the Building because, the two believed, hesitation might result in another buyer intervening. Hamamoto testified that he ultimately followed McCain's and Brooks's advice and made an offer on the Building.

Hamamoto testified that Brooks held himself out as an expert in real estate, including real estate property values. Because Hamamoto relied on Brooks's representations about his expertise, he did not procure a study or an appraisal of the ISL Building. Together, McCain and Brooks represented Hamamoto in preparing and submitting an offer on the ISL Building. According

to Hamamoto, sometime after his initial meeting with McCain, Melchin and Kimura, and after he had hired Brooks, he had one telephone conversation with Kimura about asbestos wherein, Hamamoto claimed, Kimura informed him that he had no knowledge about asbestos in the Building. Hamamoto testified, however, that he did not rely on anything Kimura had to say about asbestos, because Brooks had informed him that they would have to test the Building for asbestos in any event.

On February 22, 1988, Hamamoto submitted a $7,000,000 offer on the ISL Building via a deposit, receipt, offer and acceptance (DROA). Before Hamamoto submitted his offer, he was informed by McCain and Brooks that the ground lease would have to be renegotiated in 1991, and that the rent would likely increase, but that even if the rent did increase, the Building would still be profitable. Hamamoto testified that he had confidence in McCain and in Brooks, that he relied on their representations concerning the Building’s financial outlook, and that he took their word as a guaranty. Hamamoto also testified that Brooks repeatedly told him not to worry about the rent renegotiations. Brooks had informed Hamamoto that he felt confident he would be able to negotiate a favorable new ground lease with the Estate because a member of the Steiner family, Keith Steiner, belonged to his law firm. Hamamoto testified repeatedly that he trusted McCain and Brooks to protect his interests.

Hamamoto's initial DROA gave Hamamoto the right to renegotiate the terms and conditions of the ground lease with the Estate during the pendency of the DROA. Before receiving Hamamoto's offer, ISL had been attempting to reopen a previous lease renegotiation proposal from the Estate.[3] ISL had not entered into any formal agreement with the Estate on the new ground lease at the time Hamamoto's offer came in.

With authority from Lim, Yamashiro negotiated the DROA with Hamamoto. Yamashiro needed Lim's approval for any major decisions concerning the deal. ISL rejected Hamamoto's initial DROA, partly because it was not interested in a deal in which a potential buyer had the right to renegotiate the existing ground lease while ISL still owned it. Conceivably, the buyer could walk away before the sale closed but after having renegotiated the lease, thus undermining ISL's on-again, off-again negotiating posture with the Estate. ISL's position was simply to sell its leasehold as is. On March 1, 1988, ISL counteroffered, deleting the provision giving the buyer the right to renegotiate the lease and increasing the selling price to $7,450,000.

NMFC was ISL's broker for the deal with Hamamoto. NMFC did not act as ISL's broker in all of ISL's real estate

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[3] In December 1985, the Estate offered to extend the lease for an additional twenty years and to fix the ground rent through the year 1996. ISL did not respond to this offer until 1987, when it contacted the Estate's co-trustee, Hawaiian Trust Co., Limited (Hawaiian Trust), and asked to reopen the proposal. Hawaiian Trust informed ISL that the Estate was willing to renegotiate the lease, but at 1987 land values and conditions.

transactions. There was no contract between NMFC and ISL that stated that NMFC was ISL's exclusive real estate broker. NMFC's role during the sale of the ISL Building was limited to transmitting information between Hamamoto Corp. and ISL. It was made very clear to Tokioka that negotiations would be done primarily among Hamamoto Corp., ISL and their respective consultants. Neither NMFC nor Tokioka had any involvement with the counteroffer DROA presented by ISL to Hamamoto Corp. Neither NMFC nor Tokioka had knowledge of ISL's attempt to renegotiate the ground lease or the availability of the fee simple interest in the property. Melchin provided services to both Hamamoto and ISL. Melchin acted as a cooperating broker. Tokioka testified that Melchin worked more with Hamamoto and McCain than with ISL and NMFC.

Lim presented the DROA to the ISL board of directors for approval. Lim testified that he provided the ISL board with the pros and cons of selling the ISL Building, including the possible risks involved in the 1991 ground lease renegotiation with the Estate. Lim further testified that the ISL board, in arriving at its decision to sell the ISL Building, took into consideration the possibility that the Estate would likely ask for a higher ground rent because real estate values were then on the rise. But the ISL Board also considered that an increase in rent would mean an increase in the value of the Building.

Yamashiro testified that On March 10, 1988, Hamamoto, as president of Hamamoto Corp., and Lim, as director of ISL, signed a DROA for the purchase of the Building. Hamamoto agreed to purchase the Building for the price ISL offered. He relinquished the renegotiation provision.

On March 16, 1988, the parties amended the DROA. The final DROA provided, *inter alia*, for a due diligence period, and included the following paragraph (the indemnification provision):

> Structural and Toxic Substances Report. Within two (2) weeks after Seller's acceptance, Buyer shall, at Buyer's expense, have obtained a report prepared by an engineer of Buyer's choice, that the Building and all of its component parts are structurally sound and free of asbestos and other toxic substances. Buyer shall indemnify and defend, and hold Seller and its affiliates harmless from any expense, loss or damage caused or suffered as a result of any entry onto the Property related to this transaction, or any subsequent finding of structural deficiencies or toxic substances. Buyer's duty to indemnify and defend Seller shall survive cancellation, termination, or superceding of this DROA.

Hamamoto had fourteen days from the date of signing (the due diligence period) to perform certain tasks under the DROA. As is typical of large commercial transactions, the potential buyer, Hamamoto, requested specifically that his experts perform the required tests, including the testing for asbestos. Upon Hamamoto's request, ISL acquiesced in an extension of the due diligence period from the end of March to sometime in April 1988. By April 5, 1988, the due diligence period had been extended.

During the due diligence period, and as required by the DROA, ISL provided Hamamoto with documents, including the master ground lease, which explicitly stated that the lessee would have to renegotiate rent with the Estate in July 1991. Hamamoto testified that he relied on Brooks for review and approval of the master ground lease.

The amended DROA also afforded Hamamoto the right to cancel the DROA. The added provision stated, in pertinent part:

> Right to Cancel DROA . . . this DROA shall cease, if upon the inspection of the Property or the review of the Ground Lease, and proposed sublease, Operating Statements, Commercial Leases . . . structural and toxic substances reports, or title report, Buyer disapproves of same within the time periods specified for review and approval herein.

This provision gave Hamamoto the right to cancel the sale if, after having performed his due diligence, the reports prepared by his consultants, his inspection of the property, and the ground lease and proposed sublease to ISL were not to his satisfaction. NMFC's role during the due diligence period was to pass on documentation, as required under the DROA, between ISL and Plaintiffs. NMFC was not responsible for securing consultants or obtaining any type of report for either party.

On March 18, 1988, McCain hired Unitek, a hazardous waste management corporation, to perform a preliminary site assessment of the property, which Unitek performed on March 21, 1988. The preliminary site assessment was a phase one

assessment, meaning it was a limited survey involving visual site investigation and a limited sampling analysis to determine the potential presence of asbestos-containing materials. The survey also included a cursory inspection for underground storage tanks and other hazardous materials.

Unitek produced a preliminary site assessment report on March 30, 1988, in which it delineated the scope of the asbestos survey it had performed. For its survey, Unitek took twenty-five bulk samples of suspect material and analyzed each for asbestos. Each tested negative. The report also stated:

> Each sample tested negative for the presence of asbestos. It should be noted that the scope of this asbestos survey was very limited and the observations should not be interpreted to mean that no asbestos containing materials existed in the building. Inaccessible asbestos containing materials could be present behind walls, ceilings, or in piping, duct work, insulation, or as part of the sewer system in the form of transite piping. Except for those areas actually sampled which tested negative for asbestos, it is best to consider all fibrous material as potentially containing asbestos and handled accordingly until laboratory analysis proves otherwise.

The report further warned that

> [t]he scope of this report is limited to visual observations. And laboratory analysis is only for asbestos concentrations in selected bulk samples. It should not be construed as a comprehensive evaluation of all possible environmental liabilities. Unitek Environmental Services, Inc. expressly disclaims any and all liability from representations, express or implied, contained in, or omissions from this report, or any other written or oral communication transmitted to any party in

> the course of this investigation which might be interpreted as establishing the total extent of all environmental liability present in the subject matter.

Hamamoto received a copy of Unitek's report during the due diligence period and reviewed it with Brooks.

Lim testified that he was not aware of the presence of asbestos in the Building prior to the sale of the Building to Plaintiffs. Lim also stated that he did not receive any information from the Building's previous property manager, Chaney Brooks, about the presence of asbestos in the Building. Yamashiro testified that he did not ask anyone whether there was asbestos in the building.

During the due diligence period, Brooks told Hawaiian Trust, an Estate co-trustee, that the ISL Building had been sold. Apparently, Hamamoto's representatives had been in contact with the Estate and were attempting to renegotiate the lease with the Estate before the sale closed.[4] On March 24, 1988, Tokioka, on behalf of ISL, sent a letter to Melchin notifying Melchin, Hamamoto Corp. and Hamamoto's representatives that ISL did not authorize them to renegotiate the ground lease with the Estate before the consummation of the sale. This letter did not,

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[4] Hamamoto's broker, Eugene McCain (McCain), informed Derek Kimura (Kimura), who was one of NMFC's brokers, that McCain was going to speak to Keith Steiner (Steiner), an Estate co-trustee, about renegotiating the lease. Gary Yamashiro (Yamashiro), ISL's representative, informed Kimura that neither McCain nor any of Hamamoto's other representatives were authorized to talk to Steiner to renegotiate the lease -- they could talk to Steiner, but not for the purpose of renegotiating the lease.

however, prevent Hamamoto or his representatives from speaking to the trustees of the Estate, something they had already been doing.[5]

It was some time before the due diligence period commenced that Brooks determined that the fee simple interest in the Building was not for sale, or at least that the Estate was averse to the idea of selling the fee interest. McCain had the same information as Brooks. Brooks informed Hamamoto of this fact. Brooks was privy to this information because Steiner, an Estate co-trustee, was Brooks's colleague at Cades. Yamashiro testified that it was his understanding that, for a price, the Estate would be willing to sell the fee simple interest in the ISL Building. Yamashiro testified, however, that no one, not even McCain or Brooks, ever asked him whether the fee simple interest could be purchased from the Estate.

During the negotiations for purchase of the Building, ISL made no promises to Hamamoto or to any of his representatives about what Hamamoto might receive in the way of a renegotiated ground lease with the Estate. Yamashiro testified that McCain

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[5] Yamashiro spoke with Reuben Wong (Wong), an attorney for ISL, and asked him if there was any means by which Yamashiro could prevent Hamamoto from meeting with the Estate. Wong advised Yamashiro that he could not stop the buyers from talking to the trustees. Yamashiro was concerned that Hamamoto would renegotiate the lease, but end up not purchasing the Building, leaving ISL at a disadvantage. Because of Brooks's contact with the Estate, Hawaiian Trust sent a letter to ISL on March 29, 1988, stating that it was then inappropriate for the Estate and ISL to discuss the possibility of an extended lease term and a new rent amount. This was precisely the kind of situation ISL had anticipated and wanted to avoid.

never asked him what he thought the Estate might demand in 1991 in terms of a new ground rent. And even if McCain had asked, Yamashiro would not have been able to answer him because Yamashiro had no inkling as to what the Estate would ask for in new ground rent. Neither Lim nor Yamashiro made representations about ISL's previous ground lease negotiations with the Estate, because the bargain between ISL and Hamamoto was not contingent upon the renegotiation of the lease. Moreover, Lim testified that it might have been misleading if ISL had told Hamamoto what ISL's previous lease negotiations with the Estate had been like, because it would have given an overly favorable spin on the negotiations between ISL and the Estate, a picture ISL did not want to paint. In addition, Lim testified that he did not know what the Estate would be asking for in new ground rent, because ground rent is based on the value of the land, and ISL did not know what the value of the land would be in 1991.

After Hamamoto completed his due diligence, ISL assigned the lease of the Building to Hamamoto Corp., on April 20, 1988.[6] Thereafter, Hamamoto Corp. and ISL entered into a lease-back agreement, wherein ISL leased space in the Building for a fixed period of five years with fixed annual rent escalations. At the end of the five-year period, there were five

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[6] The Estate's consent to the assignment of lease required Hamamoto Corp. to acknowledge its primary liability under the lease, but specifically reserved the Estate's rights against ISL in the event of default by Hamamoto Corp.

successive one-year option periods on all or any portion of the leased premises. In order to exercise the options, ISL was required to give thirty days notice. Yamashiro testified that Plaintiffs anticipated the ground rent would increase, as was reflected in the lease-back agreement between Hamamoto Corp. and ISL, through the fixed annual rent escalations. Neither NMFC nor Tokioka, personally, had any involvement in the lease-back agreement between ISL and Hamamoto Corp.

Escrow closed in May 1988. The commission on the sale was $450,000. The commission was paid to NMFC, which then split the commission with the various agents who had worked on the deal.[7]

Three years after the purchase of the Building, Hamamoto Corp. and the Estate attempted a renegotiation of the terms and conditions of the ground lease, but to no avail. Ultimately, in October 1991, an arbitration panel determined the new ground rent, setting it at $784,000 per annum. Hamamoto sued his real estate agent, McCain, in May 1992, amending the complaint in January 1993 to add his attorney, Brooks, as a defendant. In this lawsuit, Hamamoto claimed that McCain and Brooks failed to inform him of certain information that would

[7] NMFC received $110,000 and Melchin Realty received $340,000. Melchin was responsible for splitting the commission received with Plaintiffs' real estate agent, Royal Coast. Hamamoto received $35,000 of this commission as a "gift" from McCain, after McCain received his share from Melchin. Hamamoto testified that he knew he could not receive the money as a commission because he was not a licensed real estate agent.

have led him to decline to purchase the Building.[8]

In April 1994, CB acquired ISL through CB's acquisition of ISL's holding company, International Holding Capital Corporation. On January 10, 1995, ISL sent Hamamoto Corp. a letter noticing its intent to move out of the Building.

In November 1995, during a repair of the air conditioning system, Hamamoto Corp. discovered asbestos in the Building. It hired Aina Environmental Group, Inc. (Aina) to conduct a preliminary study. Aina performed a more in-depth survey in May 1997. On January 2, 1996, Plaintiffs' current legal counsel, Ronald G.S. Au (Au), sent ISL a letter seeking, under threat of lawsuit, rescission of the contract for purchase of the Building and return of the $7,450,000 purchase price.

On February 28, 1997, after several extensions of its sublease and a month-to-month tenancy with Hamamoto Corp., ISL gave notice to Hamamoto Corp. that it would vacate the Building and terminate its month-to-month tenancy, which it did on March 31, 1997. CB had decided to move ISL out of the Building. It relocated its ISL staff to two of its other offices in the downtown Honolulu area. Lim testified that he understood there were at least two basic reasons for the move. First, ISL had

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[8] Hamamoto sued his real estate agent and attorney in Hamamoto v. Royal Coast Realty Corp., Civil No. 92-1591-05, claiming that they knew but failed to inform him of the potential for a negative cash flow situation arising out of the ground lease renegotiations in 1991. The parties settled out of court for $950,000.

been recently acquired by CB and, second, CB wanted to have its ISL staff commingled with its City Bank staff. It was as early as November 1994 that CB had determined it would move ISL out of the Building. Caryn Morita of CB testified that ISL's move was a necessary part of CB's cost-saving measures, as well as a measure to increase efficiency in communication by combining staff and personnel.

In the same year that ISL vacated the Building, Hamamoto Corp. defaulted on its ground lease by failing to pay rent and real property taxes. On April 10, 1997, the Estate filed suit against Hamamoto Corp., ISL and others for payment of delinquent rent, taxes and other amounts due and owing by Hamamoto Corp. In May 1997, as part of a settlement of the Estate's lawsuit, Hamamoto Corp. assigned its rights under the ground lease to ISL. ISL and Hamamoto entered into mutual releases with the Estate, but Hamamoto Corp. and ISL preserved all claims against one another.

Plaintiffs instituted this action on January 30, 1996, eight years after the purchase of the Building. The ISL Defendants filed a counterclaim alleging, *inter alia*, Hamamoto Corp.'s failure to pay lease rent and taxes, breach of contract indemnification by reason of Plaintiffs' asbestos claim, tortious breach of contract, frivolous lawsuit, abuse of process and punitive damages. Tokioka counterclaimed as well, alleging

Plaintiffs had brought a frivolous lawsuit.

Jury trial commenced on August 3, 1998. At the close of Plaintiffs' case on September 18, 1998, the court granted directed verdicts in favor of ISL Services, CB and Lim on all claims brought against them by Plaintiffs. The court granted a directed verdict in favor of ISL on Plaintiffs' fourth and fourteenth claims, but denied ISL's motion for a directed verdict on Plaintiffs' fifth claim. The court granted a directed verdict in favor of Tokioka on all of Plaintiffs' claims. The court granted NMFC's directed verdict as to Plaintiffs' fourth claim, but denied NMFC's motion for directed verdicts on Plaintiffs' first, second and fifth claims. The court granted Unitek's motion for a directed verdict as to Plaintiffs' seventh and eleventh claims, but denied Unitek's motion as to Plaintiffs' sixth claim. The court also granted a directed verdict in favor of Melchin and Melchin Realty as to Plaintiffs' fourth claim. Plaintiffs' ninth and tenth claims were dismissed with prejudice by stipulation.

The jury started deliberations on October 1, 1998. It returned a special verdict, which the court received on October 9, 1998. Ten out of the twelve jurors found for Defendants on all of Plaintiffs' remaining claims and most of Defendants' counterclaims. The jury awarded Defendants damages in accordance with the special verdict, including attorneys' fees and costs.

Plaintiffs moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial, on December 18, 1998. On December 30, 1998, the court denied Plaintiffs' motion for JNOV or a new trial. The court entered a final judgment on December 18, 1998. Plaintiffs filed a notice of appeal on January 28, 1999. On July 16, 1999, the Hawai'i Supreme Court dismissed the appeal, finding that the December 18, 1998 judgment was not final because it did not specifically identify and dispose of all of the claims and counterclaims in favor of, or against, all of the parties. On February 23, 2000, the court entered its first amended final judgment, which was a final disposition of all claims, counterclaims and parties. Plaintiffs filed a timely notice of this appeal on March 22, 2000.

II. Issues Presented.

Plaintiffs present the following questions on appeal, quoted here verbatim:

> A. Whether the trial court erred by granting directed verdicts in favor of Appellees ISL, CB Bancshares, ISL Services, Franklin Tokioka, Richard Lim and Hamamoto's negligence claim against Unitek?
>
> B. Whether the trial court abused its discretion by refusing to allow Hamamoto's expert, Kenneth Chong, to testify about the real estate licensees' violation of their duty of care under Hawai'i's statutes and administrative rules governing the conduct of real estate licensees, failing to allow Kenneth Chong to testify on evidence adduced at trial, and for failing to admit into evidence, Keith Steiner's notes which had been used at trial to refresh his recollection?

C. Whether the trial court erred by failing to take judicial notice of relevant statutes on the conduct of real estate licensees?

D. Whether the trial court erred by allowing testimony by Paul Chun and Daniel Motohiro, on "damages" when they lacked any personal knowledge and based their testimony entirely on hearsay evidence produced by another employee?

E. Whether the jury's verdict was inconsistent as to Hamamoto's performance under the contract and did the trial court err in failing to grant a new trial after being advised that there were fewer than the statutory requirement of at least ten jurors in agreement, for there to be a valid jury verdict?

The gravamen of Plaintiffs' appeal of the directed verdicts is, (1) that Defendants failed to disclose previous lease negotiations between ISL and the Estate to extend the lease or to obtain a new ground lease, and that ISL had been in negotiations with the Estate since it purchased the Building from Investors Finance, Inc. in 1982; (2) that Defendants misrepresented the Estate's reasonableness in negotiating the ground lease, and failed to disclose that the fee simple interest in the property was not for sale; and (3) that Defendants failed to disclose, prior to Plaintiffs' purchase of the ISL Building, that the Building contained asbestos.

III. Standards of Review.

A. Directed Verdict.

"It is well settled that a trial court's rulings on directed verdict . . . are reviewed *de novo*." In re Estate of

Herbert, 90 Hawaiʻi 443, 454, 979 P.2d 39, 50 (1999) (citation, internal block quote format and brackets omitted). "In deciding a motion for directed verdict . . . , the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the nonmoving party and [the] motion may be granted only where there can be but one reasonable conclusion as to the proper judgment." O'Neal v. Hammer, 87 Hawaiʻi 183, 186, 953 P.2d 561, 564 (1998) (citation and internal block quote format omitted).

B. Admissibility of Expert Testimony.

"In Hawaiʻi, admission of opinion testimony is a matter within the discretion of the trial court, and only an abuse of that discretion can result in reversal. Generally, to constitute an abuse of discretion, it must appear that the trial court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Yip, 92 Hawaiʻi 98, 104, 987 P.2d 992, 1002 (App. 1999) (brackets, citations and internal quotation marks omitted).

C. Evidentiary Rulings.

"We apply two different standards of review in addressing evidentiary issues. Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the

right/wrong standard." <u>State v. Ortiz</u>, 91 Hawaiʻi 181, 189, 981 P.2d 1127, 1135 (1999) (citations and internal quotation marks omitted).

D. Jury Instructions.

"When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." <u>State v. Opupele</u>, 88 Hawaiʻi 433, 438, 967 P.2d 265, 270 (1998) (citation and internal quotation marks omitted). "It is prejudicial error for the court to refuse to give an instruction relevant under the evidence which correctly states the law unless the point is adequately and fully covered by other instructions given by the court. Correlatively, jury instructions must be considered as a whole. Moreover, a refusal to give an instruction that correctly states the law is not error if another expressing a substantially similar principle is given." <u>Herbert</u>, 90 Hawaiʻi at 467, 979 P.2d at 63 (brackets, ellipsis, citations and internal quotation marks and block quote format omitted).

E. Hearsay.

"[W]here the admissibility of evidence is determined by application of the hearsay rule, there can be only one correct result, and the appropriate standard for appellate review is the right/wrong standard." <u>State v. Moore</u>, 82 Hawaiʻi 202, 217, 921

P.2d 122, 137 (1996) (citation and internal quotation marks omitted).

F. Motion for a New Trial.

"Both the grant and the denial of a motion for new trial is within the trial court's discretion, and we will not reverse that decision absent a clear abuse of discretion." Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 251, 948 P.2d 1055, 1092 (1997) (citation and internal quotation marks omitted).

IV. Discussion.

A. The Directed Verdicts.

At the close of Plaintiffs' case, the court granted several directed verdicts on Plaintiffs' claims for fraudulent non-disclosure and fraudulent inducement, intentional or negligent misrepresentation, and negligence.

To prevail on a fraudulent non-disclosure claim, Plaintiffs were required to prove by clear and convincing evidence that: (1) the particular Defendant failed to disclose a known past or existing material fact; (2) the particular Defendant withheld the material fact with intent to defraud Plaintiffs, that is, for the purpose of inducing Plaintiffs to rely upon it; (3) the particular Defendant owed a duty to Plaintiffs to disclose the information; (4) Plaintiffs relied upon the lack of disclosure; and (5) Plaintiffs sustained damages

as a result of said reliance. National Consumer Co-op. Bank v. Madden, 737 F.Supp. 1108, 1112-13 (D. Hawaiʻi 1990); Matsuda v. Wada, 101 F.Supp.2d 1315, 1324 (D. Hawaiʻi 1999).

To prevail on a fraudulent inducement claim, Plaintiffs were required to show by clear and convincing evidence that there was: (1) a representation of a material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false but reasonably believed true by the other party, (4) upon which the other party relied and acted to his or her damage. Hawaii Federal Community Credit Union v. Keka, 94 Hawaiʻi 213, 230, 11 P.3d 1, 18 (2000).

To prevail on a claim of intentional misrepresentation, Plaintiffs were required to show by clear and convincing evidence that: (1) the particular Defendant made a representation as to a material fact; (2) the representation was untrue; (3) the particular Defendant knew that the representation was false when it was made, or the representation was made recklessly without knowledge of whether it was true or false; (4) the particular Defendant made the representation for the purpose of inducing Plaintiffs to rely upon it; (5) Plaintiffs were unaware of the falsity of the representation; (6) Plaintiffs acted in reliance upon the truth of the representation and were justified in relying upon the representation; and (7) as a result of their reliance upon the truth of the representation, Plaintiffs

sustained damage. <u>Wolfer v. Mutual Life Insurance Co. of New York</u>, 3 Haw. App. 65, 70, 641 P.2d 1349, 1353 (1982).

To prevail on a negligent misrepresentation claim, Plaintiffs were required show that: (1) the particular Defendant made a representation as to a material fact; (2) the representation was untrue; (3) the particular Defendant made the representation without any reasonable grounds for believing it to be true; (4) the particular Defendant made the representation for the purpose of inducing Plaintiffs to rely upon it; (5) Plaintiffs were unaware of the falsity of the representation, acted in reliance upon the truth of the representation and were justified in relying upon the representation; and (6) as a result of Plaintiffs' reliance upon the truth of the representation, Plaintiffs sustained damages. <u>Shaffer v. Earl Thacker Co., Ltd.</u>, 6 Haw. App. 188, 191-92, 716 P.2d 163, 165 (1986).

To prevail on a negligence claim, Plaintiffs were required to show: (1) a duty, or obligation, recognized by law, requiring the particular Defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (2) failure on the part of the particular Defendant to conform to the standard required (a breach of duty); (3) a reasonably close causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of Plaintiffs. <u>Takayama v. Kaiser Foundation</u>

Hosp., 82 Hawai‘i 486, 498-99, 923 P.2d 903, 915-16 (1996).

1. The Presence of Asbestos.

On the asbestos issue, Plaintiffs claim that the court erred: (1) in directing a verdict in favor of Unitek on Plaintiffs' negligence claim "when there was disputed evidence before the jury" that "Unitek was negligent for failing to discover asbestos when they surveyed the ISL Building prior to [the] sale"; (2) in directing verdicts in favor Tokioka, individually, and NMFC, as ISL's broker, because Tokioka and NMFC "failed to discover and disclose [the] material fact that the ISL Building contained asbestos"; and (3) in directing verdicts in favor of the ISL Defendants, where the "[ISL Defendants] were in the best position to know of the presence of asbestos in the renovations to the ISL Building," and the ISL Defendants had a "duty to disclose [the presence of asbestos] rather than remain silent."

a. Defendant Unitek.

The court properly granted a directed verdict in favor of Unitek on Plaintiffs' negligence claim. Putting to one side the question of a negligence claim arising out of the performance of contractual duties, and even after viewing the evidence in the light most favorable to Plaintiffs, we conclude Plaintiffs adduced no evidence that Unitek was negligent in conducting its preliminary site assessment.

At trial, there was no evidence presented that Unitek's limited sampling was negligent, nor was there evidence presented that Unitek negligently, or even incorrectly, failed to detect asbestos in the samples it took. Plaintiffs' experts, Dr. Araman[9] and Dr. Albrecht, could not opine that Unitek's testing was performed negligently. All they could provide was their disbelief that none of the samples taken by Unitek tested positive for asbestos.

At trial, Dr. Araman of Aina testified about Aina's preliminary and comprehensive surveys, the procedures Aina followed in conducting each survey and the results of each survey. When Au asked him for his opinion about Unitek's preliminary site assessment report, Dr. Araman compared Unitek's preliminary survey to that of Aina's and testified that, "based on the report or the results of [Aina's] survey and subsequent results, it's kind of very hard to understand how [Unitek's twenty-five samples] were all non-detect, that they did not contain any asbestos."

We first observe that the results of Unitek's and Aina's preliminary reports, where comparable, were not inconsistent. Unitek's and Aina's preliminary reports reveal that there were several samples taken by each company from the

[9] Dr. Araman's PhD is in entomology, or the study of insects. He was certified as an asbestos inspector in 1994.

same locations which yielded the same finding of no asbestos.[10] Furthermore, the samples taken by Aina were taken from specific locations suspected of containing asbestos, as requested by Hamamoto Corp., increasing the probability that Aina would detect asbestos in the Building. The samples taken by Unitek seven years earlier where taken from randomly selected locations within the Building.[11] In any event, there was no evidence adduced at trial that Unitek's testing of its samples was defective in any way or erroneous in result.

Dr. Araman further testified that, "if [Unitek's] report was done by Aina Environmental, and if on page 57 we say it should not be interpreted to mean that no asbestos containing materials exist in the building, it would be our moral and professional obligation to recommend to the client to further ascertain if there is asbestos containing material in the

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[10] Unitek took twenty-five bulk samples from different locations within the Building. Seven years later, Aina took forty-three samples, also from different locations within the Building. Aina took samples from specific locations that were requested by Hamamoto Corp., while Unitek took a random sampling. Several of the samples taken from each survey were taken from the same location and in both reports, Unitek and Aina reported detecting no asbestos in those samples. In Unitek's preliminary report, Unitek reported testing the fifth floor air handler room (sample no. 0321-13), the north wing of the roof (sample no. 0321-16), the south wing of the roof (sample no. 0321-17) and the third floor air handler room (sample nos. 0321-21 & 0321-24), and detected no asbestos in any of these samples. In comparison, Aina took samples from the following locations and, like Unitek, detected no asbestos: the fifth floor air handler room (sample no. 09), the north wing of the roof (sample nos. 40 & 42), the south wing of the roof (sample nos. 42 & 43) and the third floor air handler room (sample nos. 20 & 21).

[11] Of the forty-three samples taken by Aina, thirty-one samples tested negative for asbestos, as compared to the twenty-five samples taken by Unitek, each of which tested negative for asbestos.

Building." The preliminary site assessment Unitek conducted was precisely that, preliminary. There was no pretense as to the limited work performed. Like Aina, Unitek provided Hamamoto with ample warning about the possibility of asbestos in the Building: "[I]naccessible asbestos containing materials could be present behind walls[,] ceilings, or in piping duct work[,] insulation[,] or as part of the sewer system . . . [and] it is best to consider all fibrous material as potentially containing asbestos and handled accordingly until laboratory analysis proves otherwise." And contrary to Plaintiffs' assertions, Unitek, through its preliminary report, did suggest the need for further laboratory analysis of those materials not readily accessible during Unitek's limited testing.

Dr. Albrecht's opinion about Unitek's preliminary survey was essentially confined to the following testimony: "I find it incredulous that absolutely no asbestos was reported[.]" And although Dr. Albrecht opined that "[i]t's either gross incompetence on the part of the microscopist, or it was purposely not reported[,]" he never testified as to how or why Unitek was incompetent in performing its survey, just that it was. In the legal sense, the most that Dr. Albrecht's opinion can amount to is a rough assertion of *res ipsa loquitur*, a doctrine not applicable here.

Plaintiffs simply were not able to adduce any evidence

that Unitek was negligent in its performance.[12] "[W]here the facts are undisputed or are susceptible of only one reasonable interpretation, the trial court is under a duty to pass upon the question of negligence or proximate cause as a matter of law." Cordeiro v. Burns, 7 Haw. App. 463, 466, 776 P.2d 411, 414 (1989) (citation and internal quotation marks omitted) (NB: affirming summary judgment against the plaintiff).

Since the directed verdict in favor of Unitek was proper as to Plaintiffs' underlying negligence claim, so was the court's directed verdict in favor of Unitek as to Plaintiffs' punitive damages claim. At any rate, Plaintiffs did not adduce any evidence tending to prove by clear and convincing evidence that Unitek acted in such a wilful, wanton or reckless manner as to result in a tortious injury, that would merit submitting Plaintiffs' punitive damages claim to the jury. See, Iddings v. Mee-Lee, 82 Hawai'i 1, 8, 919 P.2d 263, 270 (1996) ("In order to recover punitive damages based on a breach of a contract, one must show that the contract was breached in such a *wilful, wanton, or reckless manner* as to result in a tortious injury." (Citation and internal quotation marks omitted; emphasis in the original.)).

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[12] We further note that Unitek limited its liability through an express disclaimer in the preliminary site assessment report. Cf. City Exp., Inc. v. Express Partners, 87 Hawai'i 466, 470, 959 P.2d 836, 840 (1998) (design professionals have the right to limit their exposure to tort liability through contract).

Plaintiffs further argue that "when the trial court directed a verdict in favor of Unitek, the jury was incorrectly compelled to find that ISL and National Mortgage had no duty to disclose the presence of asbestos in the ISL Building to Hamamoto." This contention lacks merit. First, it is a logical *non sequitur*. Second, although the court directed a verdict in favor of Unitek on Plaintiffs' negligence claim, Plaintiffs' sixth claim against Unitek survived, and was presented to and rejected by the jury. This claim was couched in terms of intentional or negligent misrepresentation, for Unitek's alleged failure to fully investigate and report that the ISL Building was free from asbestos or other toxic chemical agents.

b. Defendant Tokioka.

On appeal, Plaintiffs claim that Tokioka, as NMFC's principal broker, "failed to discover and disclose asbestos in the Building's renovations." Viewing the evidence in the light most favorable to Plaintiffs, we conclude the court did not err when it directed a verdict, as a matter of law, in favor of Tokioka.

On the issue of affirmative misrepresentation, we note that Hamamoto testified that he neither met Tokioka nor spoke with him over the phone before the closing of the ISL transaction. If Hamamoto neither met nor spoke with Tokioka before the purchase, Tokioka could not have made a material

misrepresentation to Hamamoto, in Tokioka's individual capacity, or for that matter, in Tokioka's official capacity, about the presence of asbestos in the Building. There was no evidence at trial that Tokioka made any misrepresentation regarding asbestos to Hamamoto or any of his representatives. Hamamoto testified that no one had ever indicated to him that Tokioka was personally aware of the presence of asbestos in the Building. Tokioka never personally met Hamamoto's representatives, nor did he have business dealings with any of the Estate's trustees.

On the issue of non-disclosure, we note that Plaintiffs expressly undertook to do their own due diligence, to include an expert survey of the Building for the presence of asbestos. Hence, Plaintiffs could not have justifiably relied upon any alleged non-disclosure on the part of Tokioka. By the same token, Tokioka could not have hoped to induce such reliance by his silence.

But all of this is essentially academic, for Plaintiffs knew, well before the purchase, that the Building contained asbestos. Plaintiffs knew at the outset that the Building contained vinyl asbestos tile flooring. Plaintiffs' real estate agent, McCain, was a recipient of the ISL Building fact sheet, given to him by Melchin, which Melchin obtained from NMFC. McCain gave the fact sheet to Plaintiffs. This fact sheet disclosed that the Building contained vinyl asbestos tile

flooring. And in fact, Aina's November 1997 report on its comprehensive survey of the ISL Building showed that, of the samples that tested positive for asbestos, two-thirds were taken from the Building's floor tiles. At trial, Hamamoto confirmed that he was made aware of the presence of asbestos via the first materials about the Building he received from McCain. He further testified that his knowledge of the presence of asbestos was reinforced through a talk with his attorney Brooks. And there was no evidence or allegation at trial that any of the Defendants misled Plaintiffs on this score after Plaintiffs received Unitek's preliminary site assessment report. Indeed, Plaintiffs were advised by Unitek in its report to treat all fibrous materials as potentially containing asbestos, to be handled accordingly until laboratory analysis proved otherwise.

c. Defendant NMFC.

With respect to NMFC, Plaintiffs claim that NMFC failed to disclose the presence of asbestos in the Building. Viewing the evidence in the light most favorable to Plaintiffs, we conclude the court properly a directed verdict in NMFC's favor as to this claim.

First, Tokioka, principal broker for NMFC, made no representations to Plaintiffs about the presence of asbestos in the Building. Second, even assuming it is true that Kimura, NMFC's broker and Tokioka's subordinate, did have a telephone

conversation with Hamamoto concerning asbestos, Hamamato nevertheless testified that he did not rely on anything Kimura had to say on the subject. Finally, and in any event, we again note that Plaintiffs knew of the presence of asbestos in the Building and expressly undertook their own due diligence with respect to asbestos, and thus could not have justifiably relied upon any misrepresentation or non-disclosure by NMFC regarding asbestos.

d. The ISL Defendants.

Plaintiffs claim that the ISL Defendants also failed to disclose the presence of asbestos on the property. Viewing the evidence in the light most favorable to Plaintiffs, the court properly granted directed verdicts in favor of the ISL Defendants on this claim.

On this claim as well, the material element of justifiable reliance was negated by the fact that Plaintiffs knew of the presence of asbestos in the Building and undertook their own due diligence with respect to asbestos. We also observe that, with respect to ISL, Hamamoto Corp. not only expressly undertook the asbestos survey, but the indemnification provision as well. Cf. Niecko v. Emro Marketing Co., 973 F.2d 1296, 1303 (6th Cir. 1992) (real estate purchase agreement contractually allocated risk for any damages caused by the petrochemicals on the property to plaintiff purchasers upon transfer of title, precluding recovery from defendant seller).

Plaintiffs also claim that "because the trial court had directed verdicts in favor of Lim and Tokioka, the jury could not find that the corporate entities [were] liable for the breach of [the] duty to disclose." We disagree. A dismissal of the claims against Lim and Tokioka was not tantamount to a dismissal of the claims against their respective corporate entities. Although Lim and Tokioka were in effect dismissed as parties, ISL and NMFC were not *ipso facto* shielded from liability for corporate acts or those of their agents, including, as the case may be, Lim and Tokioka. See, e.g., Imperial Fin. Corp. v. Finance Factors, 53 Haw. 203, 206, 490 P.2d 662, 664 (1971) (the general rule is that an agent's knowledge is imputed to the principal). In this respect, the jury was instructed that

> [a]s a general rule, the knowledge of the officers and agents of a corporation is deemed to be the knowledge of the corporation. If you find that an agent of the Plaintiffs or the Defendants had knowledge of a fact, that fact is deemed to have been known by the particular Plaintiffs or Defendants.

2. Defendant CB and Interference with Contract.

As a preliminary matter, we acknowledge the ISL Defendants' jurisdictional challenge to any appeal of the summary judgment in favor of CB and against Plaintiffs on their eighth claim, for intentional or negligent non-disclosure. Plaintiffs are not appealing, however, the court's August 25, 1998 grant of partial summary judgment dismissing Plaintiffs' eighth claim. Thus, the ISL Defendants' jurisdictional challenge is moot. The

only other claims against CB to be considered on appeal are Plaintiffs' eleventh, thirteenth and fourteenth claims.

Plaintiffs' thirteenth claim against CB asserted interference with contract, for alleged collusion between ISL and CB to cancel ISL's sublease with Plaintiffs in order to place Plaintiffs in a dire financial position, wherein they would be unable to fulfill their ground lease obligations to the Estate. We conclude the court properly granted a directed verdict in favor of CB as to this claim.

First, CB was not a stranger or a third party to ISL's lease-back contract with Plaintiffs. CB became ISL's parent company and ISL its subsidiary when CB acquired ISL's holding company. In the context of an interference-with-contract claim, they were one and the same, and hence such a claim could not lie: "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." Koret, Inc. v. Christian Dior, S.A., 554 N.Y.S.2d 867, 869 (N.Y. App. Div. 1990) (vacating an award against a parent corporation for tortious interference with a subsidiary's contract with the plaintiff).

Second, ISL had the legal right to terminate its month-to-month tenancy with Hamamoto Corp. under the lease-back agreement. In Burgess v. Arita, 5 Haw. App. 581, 704 P.2d 930 (1985), we stated that "we cannot find tortious interference

where a corporation is legally permitted to exercise such right." Id. at 594, 704 P.2d at 940 (involving alleged tortious interference by an officer of a contracting party corporation). In Burgess, we set out the material elements of a claim of tortious interference with contractual relations: (1) a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach the contract; (4) the absence of justification on the defendant's part; (5) the subsequent breach of the contract by the third party; and (6) damages to the plaintiff. Id. at 594, 704 P.2d at 939.

Here, even if CB and ISL colluded to terminate ISL's lease-back agreement with Plaintiffs, they had every legal right to do so.[13] Even Au conceded that ISL had the legal right to terminate its tenancy:

> THE COURT: Answer my question. [ISL] exercised their legal options under the contract?
> MR. AU: I can't question that, Your Honor, they did.

Therefore, the court properly directed a verdict in favor of CB on Plaintiffs' tortious interference with contract claim.

Plaintiffs also aver that the court erred in directing a verdict in favor of CB on Plaintiffs' fourteenth claim, that alleged fraud for CB's and ISL's alleged agreement and collusion

[13] ISL's month-to-month tenancy required only thirty days notice to terminate.

to vacate the ISL Building after having been advised of the presence of asbestos and the amount it would cost to clean it up. Upon the preceding discussion, we conclude Plaintiffs' fraud claim also could not be maintained because, again, ISL had the legal right to terminate ISL's lease-back contract with Plaintiffs, even if the termination of the month-to-month lease appeared to have been a result of collusion between CB and ISL, and even if termination of the lease-back contract was done with knowledge of the asbestos contamination, the necessary remediation and the cost of the remediation.[14]

It follows, then, that Plaintiffs' eleventh claim, for punitive damages against CB, fails as well for lack of an underlying wrongful breach of contract by ISL. See Masaki v. General Motors Corp., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) ("Punitive or exemplary damages are generally defined as those damages assessed in addition to compensatory damages for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future." (Citation omitted.)).

3. The Availability of the Fee Simple Interest.

Plaintiffs claim that Defendants wrongfully failed to disclose that the fee simple interest in the property was not for sale. A common material element among Plaintiffs' claims of

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[14] In this connection, we observe that it was as early as November 1994 when CB determined that it would move ISL out of the Building.

fraudulent non-disclosure, fraudulent inducement, and intentional or negligent misrepresentation is the plaintiff's justifiable reliance on the defendant's misrepresentation or lack of disclosure of a material fact. In the instant case, Plaintiffs' claim fails because Plaintiffs' representatives admitted that they knew the fee simple interest was not for sale. This being so, Plaintiffs could not prove the material element of justifiable reliance.

Hamamoto's attorney, Brooks, admitted that he knew the fee simple interest was not for sale. In fact, it was as early as February 23, 1988 that Brooks knew of the Estate's position regarding the sale of the fee simple interest. Brooks testified at a deposition, taken during Plaintiffs' lawsuit against him, that Plaintiffs had this information before the sale of the Building closed. Plaintiffs' real estate agent McCain knew this fact as well. Armed with this knowledge, Plaintiffs could have walked away from the deal if Plaintiffs' long term goal was to purchase the fee simple interest. Hamamoto repeatedly testified that he trusted Brooks and McCain to protect his interests, and one interest Hamamoto claimed he had was in the purchase of the fee simple interest. Plaintiffs cannot now assert on appeal that the court erred in directing verdicts for Defendants, where Plaintiffs' own representatives had knowledge of the unavailability of the fee simple interest. Imperial Fin. Corp., 53 Haw. at 206, 490 P.2d at 664 (the general rule is that an

agent's knowledge that the agent has a duty to communicate to his principal is imputed to the principal). This imputed knowledge negated the material element of reliance.

4. Negotiations with the Steiner Estate.

Plaintiffs argue that Defendants "told [Hamamoto] that the [Estate was] very reasonable in [its] prior negotiations[.] . . . The jury could have found fraudulent inducement or intentional or negligent misrepresentation by [this] representation[]." Here again, the directed verdicts in favor of Defendants on this claim were proper because Plaintiffs could not establish the material element of reliance.

First, Hamamoto testified that no one ever told him that NMFC or Tokioka was aware of the ground lease negotiations between ISL and the Estate.[15] Furthermore, the evidence established that Hamamoto placed his reliance on information given to him by his representatives, and not on any information that NMFC, ISL or their respective representatives may or may not have provided. Even assuming there was some truth to the claim that Defendants failed to disclose that the Estate could be unreasonable in renegotiating a new ground rent, there was no reliance by Hamamoto on this lack of disclosure. Hamamoto testified that Brooks repeatedly told him not to worry about the

[15] In his deposition, Hamamoto testified that the only conversation he had with Kimura, Tokioka's subordinate, prior to the sale of the Building, was a telephone conversation about asbestos.

lease renegotiations with the Estate. Brooks felt he could negotiate a favorable lease because one of the Estate's trustees was Brooks's colleague in his law firm. Hamamoto testified that he relied on his own representatives' interpretation of what would occur during the lease renegotiation with the Estate, and not anyone else's. And as a general matter, we question whether there can ever be justifiable reliance upon the amorphous assertion that a party is "reasonable" in contract negotiations.

B. Judicial Notice and Jury Instructions.

Plaintiffs raise issues of judicial notice and jury instructions. Plaintiffs claim that the court "clearly erred by failing to take judicial notice of HAWAII REVISED STATUTES §§ 467-14,[16] 490-1-201,[17] and Section 16-99-3 of the HAWAII REAL ESTATE COMMISSION RULES,[18] despite Hamamoto's request, and further compounded it's [(sic)] error by ruling this matter was best addressed by jury instructions, but, then refusing to allow these jury instructions." (Typesetting in the original; footnotes added.)

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[16] HRS § 467-14 (Supp. 2001) lists various kinds of conduct that may result in disciplinary actions against real estate brokers and salespersons.

[17] HRS § 490:1-201 (1993 & Supp. 2001) provides definitions of terms generally utilized in Hawai'i's Uniform Commercial Code. At trial, Plaintiffs requested that the court take judicial notice of the meaning of the term "good faith." HRS § 490:1-201(19) (1993) defines the term as "honesty in fact in the conduct or transaction concerned.".

[18] Hawaii Administrative Rule (HAR) Rule § 16-99-3 governs the conduct of business by real estate brokers and salespersons.

However, the court neither granted nor denied Plaintiffs' request for judicial notice. The court deferred consideration of Plaintiffs' request for judicial notice until the court and the parties could address proposed jury instructions, and Plaintiffs acquiesced in this procedure:

> THE COURT: The judicial notice of these applicable statutes will be taken up, I think, at the appropriate time. Evidentiary purposes, they are not factual issues or things that relate to any facts in this case. So deal with it at that point in time. Plus, I assume, [since] I haven't had a chance to look at your instructions[,] that they are in your instructions anyway, correct me if I'm wrong."
> MR. AU: They should be, Your Honor.

The subject of judicial notice was not raised again below. It appears that Plaintiffs abandoned their request for judicial notice and instead relied on similar substance in their proposed jury instructions. Hence, if there was error in this respect, it was either invited, cf. Struzik v. City and County of Honolulu, 50 Haw. 241, 245, 437 P.2d 880, 883 (1968) (appellant cannot predicate trial error upon jury instructions she requested), or waived. Cf. Craft v. Peebles, 78 Hawai'i 287, 294, 893 P.2d 138, 145 (1995) ("It is well settled that objections not raised or properly preserved at trial will not be considered on appeal." (Citation omitted.)). In either event, we will not review it on appeal. In any event, the underlying issue remains the same as we turn to the disputed jury instructions.

Four of Plaintiffs' proposed jury instructions, which incorporated certain parts of HRS § 467-14 and Hawai'i

Administrative Rules § 16-99-3, were refused by the court over Plaintiffs' objection:

> The licensee shall ascertain and disclose all material facts concerning every property for which the licensee accepts the agency, so that the licensee may fulfill its obligation to avoid error, misrepresentation, or concealment of material facts.
>
> A real estate licensee shall not make any false promises concerning any real estate transaction of a character likely to mislead another.
>
> A real estate licensee shall not engage in conduct constituting fraudulent or dishonest dealings.
>
> Hawaii Revised Statutes § 467-14 prohibits a real estate licensee to:
>
> (1) make any misrepresentation concerning any real estate transaction;
> (2) make any false promise concerning any real estate transaction of a character likely to mislead another;
> (3) without first having obtained the written consent to do so of both parties involved in any real estate transaction, act for both the parties in connection with the transaction, or collect or attempt to collect commissions or other compensation for the licensee's services from both of the parties;
> (4) any other conduct constituting fraudulent or dishonest dealings;
> (5) fail to maintain a reputation for or record of competency, honesty, truthfulness, financial integrity, and fair dealing.

Instead of Plaintiffs' proposed instructions, the court provided the following:

> The rules of agency apply to the relationship between a real estate agent, a broker and a principal. The law imposes upon a real estate agent and a broker, a fiduciary obligation of utmost good faith, integrity, honesty, and loyalty, as well as a duty of due care and diligence. In particular, a real estate agent and broker bears a duty to make a full, fair, and timely disclosure to the principal, of all facts within the agent's knowledge which are, or may be, material to the transaction and which might affect the principal's rights and interests or influence his action.

> A real estate licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field.
>
> The licensee shall endeavor to eliminate any practices in the community which could be damaging to the public or to the dignity and integrity of the real estate profession.
>
> A real estate licensee shall not, without first having obtained the written consent, to do so of both parties involved in any real estate transaction, act for both the parties in connection with the transaction, or collecting or attempt to collect commissions or other compensation for the licensee's services from both of the parties.
>
> The breach by a real estate broker of the duty of full disclosure deprives him of his right to a commission.

It was not error for the court to have refused Plaintiffs' proposed jury instructions. When read as a whole, the jury instructions ultimately given by the court were not "prejudicially insufficient, erroneous, inconsistent, or misleading." Opupele, 88 Hawai'i at 438, 967 P.2d at 270 (citation and internal quotation marks omitted). The instructions given adequately and fully covered the law applicable to the case, incorporated parts of the statutes and rules urged by Plaintiffs upon the court, sufficiently addressed Plaintiffs' theory of the case and expressed principles substantially similar to those embodied in the jury instructions proposed by Plaintiffs. "It is prejudicial error for the court to refuse to give an instruction relevant under the evidence which correctly states the law unless the point is adequately and fully covered by other instructions given by the court. Correlatively, jury instructions must be considered as a whole.

Moreover, a refusal to give an instruction that correctly states the law is not error if another expressing a substantially similar principle is given." Herbert, 90 Hawaiʻi at 467, 979 P.2d at 63 (brackets, ellipsis, citations and internal quotation marks and block quote format omitted).

C. Expert Testimony.

On appeal, Plaintiffs contend the court abused its discretion when it "refused to allow [Plaintiffs' expert witness] Kenneth Chong to testify at trial except on matters raised by the expert's deposition," and when it "preclud[ed] Kenneth Chong's expert opinion whether the various real estate licensees breached their statutory duty of care." We disagree with Plaintiffs.

With respect to the first issue in dispute, the court did not abuse its discretion in confining Kenneth Chong's (Chong) testimony to matters upon which he had been deposed. At trial, Plaintiffs elicited the following testimony from Chong:

> MR. AU: Is there any duty or responsibility on the part of the principal broker to disclose to the buyer or his representative the physical condition of the building as it related as to possible toxic substances?
> THE WITNESS: Yes.
> MR. AU: Why?
> THE WITNESS: The law requires not only should a buyer's agent ascertain and disclose material facts to the client, but so should the seller's agent. As long as you accept agency, you have the job to do your homework, check, find out and investigate and then make your decision. If Mr. Tokioka or Mr. Kimura did not know about hazardous materials or asbestos, they could have checked, find out and then turned whatever information was obtained over to the buyer. They could have also simply given a set of the drawings and maps to the buyer.

Counsel for NMFC and Tokioka, Robert P. Richards (Richards), objected to the last sentence of this testimony and asked to be heard outside the presence of the jury. Richards informed the court that

> [Chong] in deposition made very definitive statements in terms of what his opinions were as to the principal broker and those opinions were specifically limited. And they were limited to the failure to disclose renegotiation and the failure to disclose asbestos with knowledge. He assumed that [Kimura] had failed to disclose it. There was no disclosure in the deposition as to what he should have done if he hadn't known about asbestos. That's one thing. But he has now indicated that we should have turned over plans and specifications. That was never disclosed in deposition . . . [t]hat was not only never disclosed in the deposition, but in the deposition he specifically said with regard to plans and specifications, that that is a buyer's obligation and he did not place that obligation on the seller.

This argument prompted the court's review of Chong's deposition testimony. During his deposition, Chong had testified that

> it is not common practice and would not be standard of care for a broker to go back to all the drawings and check. [Buyer relies] on the environmental specialists to come in and do the checking as to asbestos.

After review, the court found that Richards was correct in his averments, and thus sustained NMFC's and Tokioka's objection to Chong's testimony that Defendants "could have also simply given a set of the drawings and maps to the buyer." Pointing out that the proffered testimony also violated a motion *in limine*, Richards then successfully requested that the court instruct the jury to disregard the testimony.

Earlier in the trial, NMFC and Tokioka had moved *in limine* to restrict the testimony of Plaintiffs' expert witnesses

to that testified to during their respective depositions. Plaintiffs agreed to this motion, stating:

> MR. AU: . . . I agree that anything not said in depos cannot be used by <u>any</u> expert in this case. I agree, Judge.

(Emphasis added.) The only exception to this order *in limine* was Plaintiffs' expert Karla Redding, who, the parties agreed, could modify her opinions at trial. The excluded testimony was a clear violation of the court's earlier order *in limine* confining the expert witnesses' testimony at trial to their respective deposition testimonies.

We acknowledge that in <u>Lussier v. Mau-Van Development, Inc.</u>, 4 Haw. App. 359, 667 P.2d 804 (1983), we stated that, generally, a motion in limine is not a ruling on the admissibility of evidence, but rather "a protective order against prejudicial questions, statements, and evidence." <u>Id.</u> at 393, 667 P.2d at 826 (citations omitted). The supreme court reiterated this principle in <u>Craft</u>, <u>supra</u>. Citing <u>Lussier</u>, the supreme court explained that "a trial court's ruling on a motion in limine is not a final ruling on the admissibility of the evidence in question, but only preliminary in nature, and subject to reconsideration as the evidence in the trial is fully developed." <u>Craft</u>, 78 Hawai‘i at 296, 893 P.2d at 147 (citation omitted).

However, Chong's testimony -- that the seller "could have also simply given a set of the drawings and maps to the

buyer" -- was not only in violation of the court's order *in limine*, but surprise testimony as well. Chong had testified to a different opinion during his deposition. Chong's different opinion at trial was never disclosed to the parties, even after Defendants requested supplementation of Plaintiffs' answers to interrogatories regarding their experts' opinions. Under these circumstances, exclusion of the testimony was not an abuse of discretion.

Plaintiffs also argued below that Chong's testimony was proper rebuttal testimony to Kimura's and Tokioka's testimonies that neither knew about asbestos nor asked Yamashiro about asbestos. Plaintiffs argued that Chong's testimony would rebut Kimura's and Tokioka's testimonies, in that "there's a duty to investigate on the part of the seller's broker and provide information on toxic substances," something which Chong had previously opined without objection from Defendants.

However, in Takayama, supra, the supreme court stated that, "as a general rule, a party is bound to give all available evidence in support of an issue in the first instance it is raised at trial and will not be permitted to hold back evidence confirmatory of its position to offer on rebuttal." Takayama, 82 Hawaiʻi at 496, 923 P.2d at 913. In other words, "in the interests of expediency and limiting surprise, all evidence in support of a party's position should be presented when the issue

it addresses is first presented." Id. at 497, 923 P.2d at 914.

Plaintiffs had the burden of proving that the Defendant real estate licensees breached a duty owed to Plaintiffs. Chong had previously testified about the duty to investigate as well as disclose. Thus, Chong's opinion was not true rebuttal testimony, and on this basis as well, the court did not abuse its discretion:

> Thus, as in the present case, if the evidence sought to be presented on rebuttal is both confirmatory of a party's case and negative of a potential defense, and, if the party seeking to present evidence on rebuttal has previously broached the issue of the potential defense during its case-in-chief and presented other evidence refuting the potential defense, it is not an abuse of discretion for the trial court to disallow the presentation of the new evidence sought to be introduced on rebuttal, despite the fact that the evidence rebuts the position taken by the opposition immediately preceding it.

Id. at 497, 923 P.2d at 914.

Plaintiffs also complain that Chong should have been allowed to conclude that the various real estate licensee Defendants breached their statutory duty of care. However, Chong testified at length about the different standards of care owed by real estate licensees under Hawaiʻi law, detailing the duties required of the specific Defendants, and was able to provide his expert opinion as to whether those standards were met by Defendants. Chong penultimately testified that Melchin, Tokioka, Kimura and Yamashiro breached certain duties as real estate agents or brokers, including the alleged duties to provide Plaintiffs with material facts surrounding the ground lease, to

aid Plaintiffs in meeting with the Estate, and to ascertain and disclose to Plaintiffs the physical condition of the Building as it related to toxic substances. Chong's proposed testimony was merely an ultimate conclusion that the law and the evidence presented at trial could point to without his conclusory opinion. It was an ultimate conclusion that would have "merely told the jury what result to reach[,]" and as such, would have been unhelpful to the jury. Yip, 92 Hawaiʻi at 108, 987 P.2d at 1006 (citation and internal quotation marks omitted).

> Though "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact[,]" [Hawaii Rules of Evidence (HRE)] Rule 704, to be "otherwise admissible" expert opinion must "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" HRE Rule 702.

Id. at 109, 987 P.2d at 1007. Hence, in this respect as well, the court did not abuse its discretion in excluding the proffered expert testimony.

D. Keith Steiner's Notes.

Plaintiffs claim that the court erred by "disallowing the written notes of Keith Steiner, which were used to refresh his recollection at trial. . . . regarding his conversations with [Yamashiro] and the instruction that he was not to meet with Hamamoto or his agents."

At trial, the ISL Defendants used Steiner's notes, which he made in February 1988, to refresh his memory about a conversation he had with Plaintiffs' attorney, Brooks. Steiner

testified that his notes helped him recall that he had told Brooks the fee simple interest in the Building was not for sale and that he would not discuss renegotiation of the lease with Brooks unless Brooks had authorization from ISL. The ISL Defendants did not ask a question about the substance of the document itself. They used it solely to refresh Steiner's recollection about his conversation with Brooks. Also, neither Plaintiffs nor the ISL Defendants ever moved to admit the document.

On cross-examination, Au attempted to inquire about Steiner's notes. Au asked Steiner, "and in the memorandum, you indicated that unless the seller authorized discussions that you did not want to talk to the buyer, did you not?" An objection to this question was sustained, on the ground that it misstated Steiner's testimony. Then, Au asked, "did ISL, up to the closing of the sale, ever authorize you to talk to the buyer?" An objection to this question was also sustained, as beyond the scope of direct examination. In an ensuing bench conference, Au argued that his line of questioning was proper cross-examination, based upon Defendants' direct examination. Au asserted that all he wanted to elicit was testimony that Steiner had noted "that he would not discuss further with ISL, unless Franklin Tokioka called or ISL gave him authority."

Essentially, Au wanted to elicit testimony from Steiner

that, “Steiner made it very clear in his notes he was not going to talk to [Plaintiffs] at all.” In passing, we note that even if the court had allowed Au to continue in his line of questioning, it was clear from Steiner’s testimony that neither ISL nor Tokioka told him that he could not talk to Plaintiffs for any purpose. Steiner’s testimony was that he would not discuss the specific topic of lease renegotiations unless he had ISL’s permission.

Nevertheless, on appeal, Plaintiffs argue, for the first time, that under HRE Rules 612 (1993)[19] and 106 (1993),[20] they were entitled to offer Steiner’s notes into evidence.

HRE Rule 106 clearly fails to help Plaintiffs, because Steiner’s notes were never introduced into evidence as an exhibit or read to the jury by Defendants. See State v. Corella, 79 Hawai‘i 255, 263, 900 P.2d 1322, 1330 (App. 1995) (for purposes of HRE Rule 106, “we do not perceive any difference between a writing introduced as a trial exhibit and a writing read into the

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[19] Hawaii Rules of Evidence (HRE) Rule 612 (1993), provides, in pertinent part, that “[i]f a witness uses a writing to refresh the witness’ memory for the purpose of testifying, either: (1) While testifying, or (2) Before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.”

[20] HRE Rule 106 (1993) provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

record by counsel").

And we need not address HRE Rule 612, because Plaintiffs waived any objection based on that rule. Cf. Craft, 78 Hawai'i at 294, 893 P.2d at 145 ("It is well settled that objections not raised or properly preserved at trial will not be considered on appeal." (Citation omitted.)); Lee v. Kimura, 2 Haw. App. 538, 546, 634 P.2d 1043, 1049 (1981) ("where the ground of an objection could have been removed if presented at that time, then the objection is waived" (citations omitted)).

Here, where Plaintiffs never moved to have Steiner's notes introduced at trial, thus precluding exercise of the court's discretion, under HRE Rule 612, to allow introduction thereof, and failed below to argue HRE Rule 612 as a basis for admission, Plaintiffs waived the argument on appeal.

E. Damages.

Plaintiffs claim that the court erred by allowing Paul Chun (Chun) and Daniel Motohiro (Motohiro) to testify, over Plaintiffs' hearsay objections, that ISL and CB sustained damages on their counterclaim of $20,989.00 and $67,149.00, respectively, for the time that Chun, Motohiro, and ISL and CB personnel had spent on this litigation.

Here, we agree with Plaintiffs. The testimonies were hearsay and Defendants failed to establish any hearsay exception for the testimonies. We therefore reverse the corresponding

awards of damages.

HRE Rule 801 (1993) defines hearsay as a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."

Chun testified that he "inquired with [his] management people how much time they spent on this case in doing depositions, time in trial[.]" Au unsuccessfully objected on the basis of hearsay. Chun further testified that "the executives gave me the time they spent[.]" Then Chun testified, "I got the hours for the executives, I gave it to our [Human Resources] Director, and she . . . gave me a total figure so that I couldn't go back and try to figure out exactly how much the executives were making." This testimony was hearsay.

Likewise, Motohiro testified that five individuals provided him with the hours each spent in preparing for this litigation. Motohiro testified that he had no idea how each person spent the time reported. Motohiro then testified that he gave the information to his human resources department, which then furnished him with CB's "damages." This testimony was also hearsay.

The foregoing hearsay testimony does not meet any of the exceptions to the hearsay rule. There was no attempt by ISL or CB to call any of the executives or employees to testify as to

the hours each spent on this litigation and his or her corresponding compensation. Defendants ISL and CB suggest that the testimony was admissible under the hearsay exception found in HRE Rule 803(b)(6) (1993).[21] We do not accept their suggestion, for there was no document here proffered, nor any of the foundational requirements of HRE Rule 803(b)(6) presented. We can only conclude that the court erred in admitting Chun's and Motohiro's testimonies. There was otherwise no evidentiary basis upon which the jury could legitimately determine ISL's and CB's damages in this respect. ISL and CB having failed in this particular burden of proof, the subject damages awards must be reversed.

F. Jury Verdict.

On appeal, Plaintiffs claim that the court erred in denying Plaintiffs' motion for a new trial, because (1) the jury returned an irreconcilably inconsistent and defective verdict, and (2) there was less than the statutory requirement for a valid jury verdict of at least ten out of twelve jurors in agreement. We conclude that these claims lack merit. The court did not

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[21] HRE Rule 803(b)(6) (1993) provides that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness." (Enumeration omitted.)

abuse its discretion in denying Plaintiffs' motion for a new trial.

1. The Jury Returned a Consistent Verdict.

"A conflict in the jury's answers to questions in a special verdict will warrant a new trial only if those answers are irreconcilably inconsistent. However, the verdict will not be disturbed if the answers can be reconciled under any theory." Craft, 78 Hawai'i at 307, 893 P.2d at 158 (citations and internal quotation marks omitted). "The theory, however, must be supported by the trial court's instructions to the jury." Carr v. Strode, 79 Hawai'i 475, 489, 904 P.2d 489, 503 (1995) (citation omitted).

On appeal, Plaintiffs claim that the jury's verdict was irreconcilably inconsistent and defective because "Hamamoto could not have 'fully performed' under the DROA but also 'willfully, wantonly, or recklessly' breach[ed] the same DROA contract." Plaintiffs' claim lacks merit.

Plaintiffs' discomfort springs from the following special interrogatories and answers marked with an "X" by the jury:

> 6. Breach of Contract
>
> Did Plaintiffs prove each of the following elements by a preponderance of the evidence:
>
> . . . .
>
> (b) Plaintiffs fully performed the contract:
>
> Yes __X__ No ____

. . . .

11. Breach of Contract (DROA Indemnification Provision)

Did [ISL] prove each of the following elements by a preponderance of the evidence:

. . . .

(b) [Hamamoto] and Hamamoto [Corp.] failed to perform their obligations under the DROA by suing [ISL] for the subsequent discovery of asbestos in the building:

Yes __X__ No ____

. . . .

(c) Plaintiffs' breach caused [ISL] to suffer special damages?

Yes __X__ No ____

. . . .

12. . . . . Tortious Breaches of Contracts

. . . .

(b) If you answered "yes" to question 11(c), did [ISL] also prove each of the following elements by clear and convincing evidence:

(1) [Hamamoto] and Hamamoto [Corp.] willfully, wantonly, or recklessly breached the DROA indemnification provision:

Yes __X__ No ____

(Underlining in the original.) However, Plaintiffs fail to appreciate that special interrogatories 6 and 11 addressed two completely different issues. The part of special interrogatory 6 quoted above devoted itself entirely to the question whether Plaintiffs fulfilled the terms and conditions of the DROA, an inquiry covering the time period February to May 1988. The jury found that Plaintiffs performed their part of the bargain during this period. In contrast, special interrogatory 11, and consequently 12, asked the jury to determine whether Plaintiffs,

in filing a lawsuit some eight years after the sale of the Building, against the ISL Defendants over the discovery of asbestos in the Building, breached their duty under the surviving indemnification provision.

Thus, the jury's verdict was neither defective nor inconsistent because the duty to indemnify was a surviving duty wholly separate and distinct from the duty to close on the original DROA. See Thermoid Co. v. Consolidated Products Co., 81 A.2d 473, 476 (N.J. 1951) ("It is well established that an indemnity agreement may be separate and apart from the contract to which it relates, whether that contract is in existence at the time or merely anticipated." (Citation omitted.)). It was entirely plausible and consistent for Plaintiffs to successfully close the DROA, yet wrongfully breach its surviving indemnification provision by later suing the ISL Defendants over the asbestos. And the court's jury instructions properly instructed the jury to determine the existence and, if so, the breach of the two related but not mutually exclusive duties. Therefore, the jury returned a consistent verdict.

2. The Jury Verdict Complied With HRS § 635-20.

HRS § 635-20 (1993) provides that "[i]n all civil cases tried before a jury it shall be sufficient for the return of a verdict if at least five-sixths of the jurors agree on the verdict." Plaintiffs claim that "[t]he trial court erred by accepting the Jury's Verdict, when there was less than a

statutory majority in agreement." We disagree, as a review of the record shows that ten out of twelve jurors agreed on all claims and counterclaims decided by the special verdicts.

After the reading of the jury's special verdict, Au requested that the jury be polled. In honoring this request, the court stated that

> I'm not going to read every interrogatory in. I'm just going to ask them if this is their verdict in general and if they say yeah, I'm going to take it as is. If they say no, I'm going to ask specifically what is their verdict, what number or what question[.]

Au also requested that the jury be polled in two parts, first as to Plaintiffs' claims, second as to Defendants' counterclaims. Accordingly, the court explained the poll to the jury, as follows:

> THE COURT: . . . . Now I've been asked to conduct a poll of you so what I'm going to do is I'm going to have to ask each of you individually whether or not the special verdict form which was read and the answers that was [(sic)] given to it . . . is the verdict that you rendered in this case[.] . . . Now I'm not going to go over every interrogatory . . . so what I'm going to do is I will call your name and I'm going to ask you as to the plaintiffs' causes of actions and you answer yes or no. . . . But when I ask you the question, all you need to respond is yes or no, yes meaning yes, I agree with what's rendered here; no meaning no, I haven't. And if you say no, then I will ask you, okay, what in particular did you not -- were you not in agreement with in the special verdict form and you tell me and then we'll go over it. Okay.

The following colloquy took place during the court's inquiry of the first juror polled, Ms. Phyllis Orton (Orton):

> [THE COURT:] Juror seated in chair number one, Phyllis Orton. As to the Plaintiffs's causes of action?
>
> Did you understand my --
>
> THE JUROR: Not really.

> THE COURT: Okay. We had several causes of actions [(sic)] in the plaintiffs' claims. We had duty to disclose -- well, that wasn't really a cause of action. There was an interrogatory about duty to disclose. Then we had fraudulent nondisclosure, fraudulent inducement, intentional misrepresentation, negligent misrepresentation, breach of contract, breach of fiduciary duty. Those were the causes of actions as to the plaintiff, in other words, the plaintiffs' bringing of action against the defendants International Savings, et cetera?
>
> THE JUROR: There was a breach of contract.
>
> THE COURT: Okay. You feel there was a breach of contract. Okay. And you did answer yes to that? Okay. But when it came to the question eight, the defendants failed to perform its [(sic)] duty under the contract, there was a response of no to all of the defendants. Are you in agreement with that? You have to respond verbally.
>
> THE JUROR: Yes.
>
> THE COURT: Is there anything else in here that you are not clear of as far as my question is concerned?
>
> THE JUROR: No.
>
> THE COURT: In other words, so as to plaintiffs' causes of actions [(sic)], do you agree with the verdict which has been rendered?
>
> THE JUROR: Yes.
>
> THE COURT: Okay. Now, going to the defendants' causes of action, do you agree with the response that was read by the clerk in respect to the defendants?
>
> THE JUROR: Yes.

Based on his colloquy, Plaintiffs assert that Orton "disagreed with the majority and found that [the Defendants] had breached the contract." (Emphases in the original.) This assertion is without merit, stemming from Plaintiffs' obviously erroneous reading of the trial record.

If carefully read and read in its entirety, the colloquy reveals that Orton was initially -- and only initially -- confused about the court's directions. However, she overcame this confusion after the court provided a more detailed explanation. Ultimately, the court determined that Orton did, in

fact, agree with the majority as to the verdicts rendered on Plaintiffs' claims and Defendants' counterclaims. Thus, the record leaves us with only two dissenters, juror number ten, Mitsuki Uda, and juror number twelve, Ruth Chun.[22] With only two dissenters out of a panel of twelve jurors, simple math dictates that the verdict met the requirement of HRS §635-20.

V. Conclusion.

Based on the foregoing, we affirm the February 23, 2000 first amended final judgment, with the exception of special damages in favor of CB and ISL, and against Plaintiffs, in the amounts of $67,149.00 and $20,989.00, respectively, which are reversed.

DATED: Honolulu, Hawai'i, June 14, 2002.

On the briefs:

Ronald G.S. Au,
Gerald H. Kurashima,
for plaintiffs-appellants.

J. Stephen Street,
Lisa Strandtman,
for defendants-appellees.

Acting Chief Judge

Associate Judge

Acting Associate Judge

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[22] The court conducted a thorough colloquy with these jurors with respect to their individual dissenting verdicts.