NO. 23380

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

REINWALD O'CONNOR & PLAYDON, Plaintiff-Appellee, v.
BURT L. SNYDER, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 99-4517)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Burt L. Snyder (Snyder) appeals the circuit court's April 5, 2000 "Judgment Based on Order Granting Plaintiff Reinwald O'Connor & Playdon's Motion for Summary Judgment Filed January 24, 2000" (April 5, 2000 Judgment) in favor of Plaintiff-Appellee Reinwald O'Connor & Playdon (ROP) in the amount of $51,291.75 computed as follows:

Principal	$25,000.00
Interest as of March 31, 2000	22,000.00
Attorney fees and costs	4,291.75
Total	$51,291.75[1]

Specifically, Snyder challenges the circuit court's (1) March 29, 2000 "Order Granting Plaintiff's Motion for Summary Judgment Filed on January 24, 2000" in favor of ROP on ROP's complaint, and (2) certification of the April 5, 2000 Judgment pursuant to Hawaiʻi Rules of Civil Procedure (HRCP) Rule 54(b) that it was a

[1] Plus interest after March 31, 2000, to April 4, 2000, at the rate of $8.22 per day.

final judgment notwithstanding the fact that Snyder's counter-claim had not been decided. We affirm.

BACKGROUND

Snyder is a licensed attorney-at-law. In 1982, in the First Circuit Court, Civil No. 70038, Harry T. Soukop (Soukop) filed a complaint against Snyder alleging, among other things, professional malpractice.

The circuit court's July 26, 2000 "Findings of Fact,[2] Conclusions of Law, and Order Granting Plaintiff's Motion for Summary Judgment" states, in relevant part, as follows:

> **FINDINGS OF FACT**
>
> 1. On March 10, 1982, an action was filed in the First Circuit Court of the State of Hawaii as Civil No. 70038 entitled Harry T. Soukop v. Burt L. Snyder, et al. (the "Civil Action").
>
> 2. Alexander C. Marrack (hereinafter "Marrack"), a partner of [ROP], then known as Reinwald O'Connor Hoskins Marrack & Playdon was engaged as lead trial counsel by a legal malpractice insurance carrier to defend the interests of [Snyder] and his former law firm in the Civil Action.
>
> 3. Marrack enlisted the assistance of Marilyn P. Lee (hereinafter "Lee"), as associate of [ROP], in the defense of [Snyder] in the Civil Action.
>
> 4. In the summer of 1983, [Snyder] caused boxes of documents to be delivered to [ROP], which [Snyder] believed to contain documents for defense of the Civil Action.
>
> . . . .

[2] This matter having been decided by summary judgment, these findings of fact are statements of fact rather than findings of fact. In his points on appeal, Defendant-Appellant Burt L. Snyder (Snyder) does not specifically challenge any of these statements of fact. In footnote 2 of his amended opening brief, he argues "that there were issues of material fact, specifically, the amount due, if any, on the promissory note which was the basis of the Complaint." In footnote 3, he argues "that there were issues of the defense of recoupment which, if proven, would raise the issue as to any amount owing."

6. The boxes of documents were kept on the floor in Lee's office against a wall near her door.

7. Shortly after receiving the boxes, Lee advised Marrack that the boxes had been removed from her office.

8. After a diligent search, Lee concluded that the boxes had been removed from her office by the after-hours cleaning crew, and that the boxes had been disposed of.

. . . .

12. Lee also informed [Snyder] of the loss of the boxes within a day of discovering their loss sometime in August, 1983.

13. In 1985, primary responsibility for the defense of [Snyder] in the Civil Action was transferred to John A. Hoskins (hereinafter "Hoskins"), another partner of [ROP].

. . . .

16. [Snyder] complained to Hoskins about the loss of the boxes prior to the start of the trial of the Civil Action.

17. Trial of the Civil Action commenced on July 27, 1987 with Hoskins as lead trial counsel, and final arguments were presented on August 4, 1987.

18. A judgment was ultimately entered against [Snyder] and in favor of Soukop in the Civil Action.

. . . .

20. After the trial, [Snyder] told Hoskins that [Snyder] did not want [ROP] to represent him further on the Civil Action, and that [Snyder] would negotiate directly with Soukop and Soukop's attorney for reduction of the judgment in the Civil Action.

21. After the conclusion of representation of [Snyder] in the Civil Action, [Snyder] was indebted to [ROP] in the amount of $64,132.94 for unpaid attorneys' fees and costs incurred in the Civil Action.

. . . .

23. [Snyder] told Hoskins that [Snyder] had negotiated a 60% reduction of the judgment in the Civil Action, and he wanted a similar reduction in the outstanding attorneys' fees and costs due and owing to [ROP].

24. An agreement was reached in principle between [ROP] and [Snyder] on or about January 31, 1990, whereby [ROP] agreed to reduce the balance of its then-outstanding account receivable, totaling $62,456.53 as of August 1, 1987, with interest, to $25,000.00 on account of [Snyder's] complaint concerning loss of the boxes.

25. On May 7, 1990, [Snyder] executed a Promissory Note for $25,000.00 in Hoskins' presence, and delivered it to Hoskins, together with an initial payment of $1,000.00 representing interest payments on the Promissory Note for the period February 1, 1990 through May 31, 1990.[3]

. . . .

28. Sometime after January, 1994, [ROP] destroyed and discarded its files pertaining to the Civil Action.

29. [Snyder] made the following payments to [ROP] on the Promissory Note:

DATE	AMOUNT
May 7, 1990	$1,000.00
December 27, 1995	$ 500.00
January 9, 1996	$2,000.00
March 28, 1996	$2,000.00
April 7, 1997	$1,000.00
June 23, 1997	$1,000.00
September 29, 1997	$1,000.00

30. No further payments have been made on the Promissory Note since September 29, 1997.

31. In a number of written communications by [Snyder] to [ROP] between May, 1990 and September, 1997, [Snyder] claimed a lack of funds as a reason for his failure to make timely payments due under the Promissory Note. No other reason was ever given for non-payment.

32. At no time during the period May, 1990 to September, 1997 did [Snyder] ever assert in writing that he retained claims for negligence and breach of contract against [ROP] pertaining to loss of the boxes during the Civil Action.

33. All payments made by [Snyder] on the Promissory Note to [ROP] were voluntarily made without protest of any kind.

34. On December 6, 1999, [ROP] filed its Complaint against [Snyder] seeking recovery of all amounts due on the defaulted Promissory Note.

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[3] The terms of the note were as follows: June 1990-January 1991 - $250/month; February 1991-January 1995 - $500/month; February 1995 - balance due.

35. [Snyder] filed a Counterclaim against [ROP] dated December 24, 1999[4] alleging negligence and breach of contract regarding loss of the boxes during the Civil Action.[5]

36. On January 24, 2000, [ROP] filed a Motion for Summary Judgment against [Snyder] on [ROP's] Complaint.

37. On March 29, 2000, an Order was entered granting [ROP's] Motion for Summary Judgment against [Snyder] on [ROP's] Complaint, and Judgment was entered thereon on April 5, 2000.

38. [Snyder] has admitted that his Counterclaim against [ROP] is barred by any applicable statutes of limitations.

39. On June 2, 2000, [ROP] filed the instant Motion for Summary Judgment on [Snyder's] Counterclaim.

. . . .

CONCLUSIONS OF LAW

. . . .

B. Waiver is defined as an intentional relinquishment of a known right, a voluntary relinquishment of rights, and the relinquishment or refusal to use a right. Association of Owners of Kukui Plaza v. Swinerton & Walberg, 68 Haw. 98, 108 (1985).

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[4] This Counterclaim was filed on December 30, 1999.

[5] The December 30, 1999 Counterclaim alleged, in relevant part, as follows:

7. [Snyder] informed [Plaintiff-Appellee Reinwald O'Connor & Playdon [(ROP)] that there were affirmative defenses that were fully supported by documentary evidence. That affirmative defense was based upon the contract at issue which provided for contingent liability. The contingency never arose and, therefore, there was no contractual liability.

8. Documentation supporting the affirmative defense was deliver [sic] by [Snyder] to [ROP] for safekeeping and for use in the trial of the case.

9. [ROP] failed to properly keep the evidence safe and a [sic] a result of [ROP's] negligence, the documentary evidence supporting the defense was destroyed before copies could be made and before the documents would be use [sic] in the case.

10. Such failure to keep the evidence entrusted to the law firm secure amounts to negligence in the practice of law, breach of the law firm's contractual responsibility to [Snyder] and otherwise wrongful conduct.

C. To constitute a waiver, there must have existed a right claimed to have been waived, and the waiving party must have had knowledge, actual or constructive, of the existence of such a right at the time of the purported waiver. Honolulu Fed. Sav. & Loan Ass'n v. Pao, 5 Haw. App. 478, 484 (1983).

. . . .

G. [Snyder] waived his claims against [ROP] as alleged in the Counterclaim.

H. Estoppel *in pais* is estoppel by conduct. To constitute an estoppel in pais, [Snyder] must have made some representation, the effect of which is to influence the conduct of [ROP] and induce [ROP] to change its position so as to materially injure [ROP] if [Snyder] is allowed to deny the truth of the matter. Fred v. Pacific Indemnity Co., 53 Haw. 384, 388 (1972).

I. To invoke the doctrine of estoppel *in pais*, [ROP] must show that it detrimentally relied on a representation or conduct of [Snyder], and that such reliance was reasonable. The reliance element can be dispensed with in order to prevent manifest injustice. Waugh v. University of Hawaii, 63 Haw. 117, 130 (1980).

J. [ROP] is entitled to invoke the doctrine of estoppel *in pais* to preclude [Snyder] from asserting his Counterclaim herein.

K. [Snyder's] claims as alleged in the Counterclaim are barred by the doctrine of estoppel *in pais*.

L. Recoupment describes a claim [Snyder] can assert against [ROP] where it arises out of the same transaction as [ROP's] claim; it is in the nature of a defense and can only be asserted to reduce, diminish, or defeat [ROP's] claim. Pacific Concrete Federal Credit Union v. Kauanoe, 62 Haw. 33 (1980). It can be raised without regard to a statute of limitations which would otherwise apply if the [Snyder] brought an affirmative action based upon the same claim.

M. Recoupment is both a common law doctrine, and is also codified in Hawaii Revised Statutes § 490L3-305(a)(3).

N. [Snyder's] claims alleged in the Counterclaim did not arise out of the same transaction as [ROP's] action for collection of amounts due on [Snyder's] Promissory Note.

. . . .

P. [ROP's] Complaint was one to collect a compromised debt.

Q. [Snyder's] Counterclaim was based on [ROP's] actions which occurred in 1983 during the term of the lawyer-client relationship between [ROP] and [Snyder] in the Civil Action.

R. Sufficient time transpired between the time of the termination of the lawyer-client relationship between [ROP] and [Snyder] in the Civil Action and the commencement of negotiations in 1990 leading to the execution of the Promissory Note by [Snyder] which was the subject of [ROP's] Complaint so that the events are not part of the same transaction.

S. The common law and statutory defenses of recoupment are not available to [Snyder] on his Counterclaim.

(Footnotes added.)

Snyder's affidavit attached to the February 10, 2000 "Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment Filed January 24, 2000" (February 10, 2000 Memorandum) states, in relevant part, as follows:

1. On or about February 1, 1982, a Complaint was filed against [Snyder] and others . . . alleging, among other things, that there was contractual liability to plaintiff therein based upon a contingent guaranty in the contract.

2. [ROP] was retained by the insurer for [Snyder] and when the only remaining matter at issue was a contractual claim, the insurer notified [Snyder] that it would not longer provide legal counsel.

. . . .

5. [Snyder] informed the law firm that there were affirmative defenses that were fully supported by documentary evidence. That affirmative defense was based upon the contract at issue which provided for contingent liability. The contingency never arose and, therefore, there was not contractual liability.

6. Documentation supporting the affirmative defense was deliver [sic] by [Snyder] to [ROP] for safekeeping and for use in the trial of the case.

7. [ROP] failed to properly keep the evidence safe and as a result of the law firm's negligence, the documentary evidence supporting the defense was destroyed before copies could be made and before the documents could be used in the case.

8. Such failure to keep the evidence entrusted to the law firm secure amounts to negligence in the practice of law, breach of the law firm's contractual responsibility to [Snyder] and otherwise wrongful conduct.

9. Because [Snyder] was denied the evidence which was fully exculpatory, judgment was entered on the contract against [Snyder] in the amount of $81,268.54.

10.[ROP] billed [Snyder] for services allegedly rendered and the promissory note which is the subject of this case arose out of the billing for those fees.

. . . .

12. However, due to the relationship of the parties, [Snyder] does not have available to him his records and documents which are, presumably, in the possession of [ROP]. By letter dated January 22, 2000, [Snyder] sought records from [ROP] as any client might from his attorney. No records have been produced. . . . Without those records, [Snyder] is not able to present additional facts be [sic] way of Affidavits to oppose the motion and seeks a refusal of this application or a continuance pursuant to HRCP Rule 56(f).

Snyder's Counterclaim alleged, in relevant part, as follows:

7. [Snyder] informed [ROP] that there were affirmative defenses that were fully supported by documentary evidence. That affirmative defense was based upon the contract at issue which provided for contingent liability. The contingency never arose and, therefore, there was no contractual liability.

8. Documentation supporting the affirmative defense was deliver [sic] by [Snyder] to [ROP] for safekeeping and for use in the trial of the case.

9. The law firm failed to properly keep the evidence safe and a [sic] a result of [ROP's] negligence, the documentary evidence supporting the defense was destroyed before copies could be made and before the documents could be use [sic] in the case.

10. Such failure to keep the evidence entrusted to [ROP] secure amounts to negligence in the practice of law, breach of [ROP's] contractual responsibility to [Snyder] and otherwise wrongful conduct.

11. Because [Snyder] was denied the evidence which was fully exculpatory, judgment was entered on the contract against [Snyder] in the amount of $81,268.54.

STANDARD OF REVIEW

A. Summary Judgment

We review a circuit court's award of summary judgment *de novo* under the same standard applied by the circuit court. As we have often articulated,

> [s]ummary judgment is appropriate if the pleadings, deposition, answers to interrogatories, and admissions on

> file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> See Hawai‘i Rules of Civil Procedure (HRCP) Rule 56(c) (1990). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716, (1982) (citations omitted).
>
> "The evidence must be viewed in the light most favorable to the non-moving party." In other words, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion."
>
> Morinoue v. Roy, 86 Haw. 76, 80, 947 P.2d 944, 948 (1997).

Estate of Doe v. Paul Revere Ins. Group, 86 Hawai‘i 262, 269-70, 944 P.2d 1103, 1110-11 (1997) (internal citations omitted).

B. HRCP Rule 54(b) Certification

A circuit court's decision to enter an HRCP Rule 54(b) certification is reviewed on appeal under a dual standard. The extent of a lower court's power to enter an HRCP Rule 54(b) certification of finality is a question of law, reviewed *de novo*. FFG, Inc. v. Jones, 6 Haw. App. 35, 45, 708 P.2d 836, 844 (1985). However, a circuit court's decision to utilize its power under HRCP Rule 54(b) is reviewed under the abuse of discretion standard. Id. at 45, 708 P.2d at 844.

DISCUSSION

A.

Snyder contends that the circuit court was wrong when it decided that it had the power to cause its April 5, 2000

summary judgment deciding ROP's Complaint to be a final judgment while leaving Snyder's Counterclaim undecided. In his Amended Opening Brief, Snyder contends that "[t]he Counterclaim that [Snyder] filed was in the nature of a defense, a claim in 'recoupment.'" We conclude that the Counterclaim is more than that. If Snyder's "Counterclaim" is only a recoupment defense, his "Counterclaim" is not a "counterclaim" and no HRCP Rule 54(b) certification would be necessary. However, Snyder's Counterclaim is also a counterclaim because it sought damages for negligence (malpractice) and/or breach of contract in handling Snyder's malpractice defense. It prayed that Snyder "be awarded Judgment against [ROP] herein in the amount as shown at trial."

We note in passing that in light of Finding of Fact No. 38, it is difficult to understand why the circuit court chose the HRCP Rule 54(b) route rather than enter summary judgment on the Counterclaim.

B.

Presuming that the circuit court considered Exhibits R, S, and T of the affidavit of Lori K. Isaki (Lori), Snyder contends that the circuit court erred when it did so. In Snyder's words,

> [ROP] submitted a reply which included a Supplemental Affidavit of Lori K. Isaki. [Lori] states that she is the Accounting Supervisor for [ROP] and on that basis alone attests to

> Exhibits R, S and T which was part of the reply. Those exhibits each refer to handwritten memoranda from John A. Hoskins to [Snyder]. While the memoranda are attached a [sic] Exhibits, the documents are not properly authenticated nor are they admissible in support of [ROP's] position and should have been disregarded by the lower court.

Exhibit "R" is a January 31, 1990 letter from John A. Hoskins (Hoskins) to Snyder stating, "Pursuant to our discussions, enclosed is the revised promissory note compromising the outstanding receivable for $25,000, with the first payment of $250.00 due on February 1, 1990."

Exhibit "S" is an August 1, 1990 handwritten note from Hoskins to "Lori" stating as follows:

> January 8, 1988 was this firm's last communication with Mr. Snyder as client in this matter. See attached letter.
>
> Therefore, six year period would expire 1/9/94.
>
> Please calendar this date to begin active follow up on 5/7/90 promissory note.

Exhibit "T" is a May 7, 1990 handwritten note from Hoskins to "Lori" stating as follows:

> 1. The outstanding receivable at $64,132.94 has been compromised for $25,000$\underline{00}$.
>
> 2. Enclosed is the original signed promissory note for $25,000, signed by Burt L. Snyder this morning.
>
> 3. Also enclosed is Snyder's check #5664 for $1,000$\underline{00}$, representing the $250/month interest payments for Feb-May, 1990.
>
> 4. Please set up a monthly reminder system:
>
> June 1990 - Jan 1991 - $250/month (interest only);
> Feb 1991 - Jan 1995 - $500/month (P & I);
> Feb 1995 - balance due.

Snyder contends that Lori's affidavit does not set forth such facts as would be admissible in evidence because her "affidavit was not made on personal knowledge" and, therefore, violates HRCP Rules 56(c) and (e). We agree with Snyder that Exhibits R, S, and T of Lori's affidavit cannot be considered as evidence of any fact that is not based on her personal knowledge. This decision has no impact in this appeal, however, because of various statements of fact by Snyder, including the following statements of fact in Snyder's Amended Opening Brief:

> Trial was held on the contractual claim in 1987 and judgement was entered in the amount of $81,268.54.
>
> [ROP] claimed that there was an outstanding receivable based upon billings to [Snyder] of $62,456.53 for the services rendered. Complaints were made as to the amount of the bill and in early 1990 [Snyder] executed a Promissory Note in the amount of $25,000 to pay for the attorney's fees.
>
> Payments were made on an untimely basis and on December 6, 1999 [Snyder] filed suit based upon the promissory note for the sum of $46,000.

(Record citations omitted.)

C.

In Pacific Concrete F.C.U. v. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980), the Hawai‘i Supreme Court stated:

> The term "recoupment" developed under principles of common law and described a claim that defendant could assert against plaintiff only if it arose from the same transaction as plaintiff's claim. It is in the nature of a defense and can only be asserted to reduce, diminish or defeat the plaintiff's claims. A unique characteristic of common law recoupment is that it permits the defendant to raise a claim without regard to the statute of

> limitations which would apply if the defendant brought an affirmative action on the same claim."

Id. at 338, 614 P.2d at 939.[6]

In Kauanoe, the lender sued to collect the balance due on two loans. The borrower filed a counterclaim alleging a violation of the "Truth in Lending" statute (TALA) in the making of the loans. The lender argued that the borrower's counterclaim was barred by TALA's one-year statute of limitations. The supreme court concluded that since the TALA violation arose out of the original loan transactions, the defense of recoupment applied to reduce, diminish, or defeat the lender's claim. Id. at 340-341, 614 P.2d at 940-941.

The January Note (Promissory Note) is a negotiable instrument as defined in the Uniform Commercial Code (UCC), HRS § 490:3-104 (1993). HRS § 490:3-305 (1993) states, in relevant part, as follows:

> **Defenses and claims in recoupment**. (a) . . . [T]he right to enforce the obligation of a party to pay the instrument is subject to the following:
>
> . . . .

---

[6] Hawai'i's definition of "recoupment" differs from New Hampshire's definition which states as follows:

> The doctrine of recoupment in a contract action permits the defendant to reduce or eliminate the plaintiff's damages, or seek its own damages in excess of the damages claimed by the plaintiff, either because the plaintiff has not complied with a cross obligation of the contract or because the plaintiff violated another duty under the contract. If recoupment is used merely to defeat the plaintiff's claim, rather than to recover excess amounts, it is known as "defensive recoupment."

Bezanson v. Hampshire Meadows Development Corp., 742 A.2d 112, 115-17 (N.H. 1999) (citations omitted).

> (3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

Snyder is the obligor and ROP is the original payee. The recoupment defense (negligence/malpractice and breach of contract) arose from the transaction (costs and attorney fees for legal services) that gave rise to the Promissory Note.

ROP contends that "the promissory note in question was a novation of [Snyder's] antecedent debt owed to [ROP] for legal services performed on [Snyder's] behalf." In other words, ROP contends that the Promissory Note was a substitute contract. Assuming it is, the question is whether a promissory note as a substitute contract bars Snyder's right to assert his recoupment defense. In light of HRS § 490:3-305(a)(3) quoted above, the answer is no. That, however, is not the end of the inquiry.

In the usual situation contemplated by HRS § 490:3-305(a)(3), the obligor gives the obligor's promissory note to the original payee in payment of goods and/or services from the original payee and the obligor's recoupment defense subsequently arises and/or the obligor subsequently becomes aware that the obligor has a recoupment defense authorizing partial or total nonpayment of the note. The unique feature in this case is that Snyder was fully aware of his alleged recoupment defense before and when he executed and delivered the Promissory Note as

a compromise full payment of his disputed debt for costs and attorney fees. This unique feature is the basis for Conclusion of Law R's conclusion that the Promissory Note is "not part of the same transaction[,]" Conclusion of Law G's conclusion that Snyder waived the claims/defenses asserted in his Counterclaim, and Conclusion of Law K's conclusion that the claims/defenses asserted by Snyder in his Counterclaim are barred by the doctrine of estoppel *in pais*.

Snyder ignores Conclusions of Law G and K. His only response is that

> [r]ecoupment is a defense that goes to the foundation of [ROP's] claim by deducting from [ROP's] recovery; it is available to [Snyder] so long as plaintiff's claim survives. Distribution Services, Ltd. v. Eddie Parker Interests, Inc., 897 F.2d 811 (5th Cir. 1990). Therefore, regardless of how much time a lapsed [sic], recoupment remains a viable theory.

It appears that Snyder believes that (a) a defendant cannot waive his right to assert the defense of recoupment or (b) Snyder compromised the amount of the disputed debt but did not waive his right to assert the defense of recoupment against a claim for the unpaid part of the compromised amount. We disagree with both (a) and (b).

Conclusions of Law B and C define "waiver" as follows:

> B. Waiver is defined as an intentional relinquishment of a known right, a voluntary relinquishment of rights, and the relinquishment or refusal to use a right. Association of Owners of Kuki Plaza v. Swinerton & Walberg, 68 Haw. 98, 108 (1985).
>
> C. To constitute a waiver, there must have existed a right claimed to have been waived, and the waiving party must have had knowledge, actual or constructive, of the existence of such a right at the time of the purported waiver. Honolulu Fed. Sav. & Loan Ass'n v. Pao, 5 Haw. App. 478, 484 (1983).

In addition to the definitions stated in Conclusions of Law B and C, waiver has also been defined as "the intentional relinquishment of a known right, or such conduct as warrants an inference of such surrender, and it is not essential to its application that prejudice results to the party in whose favor the waiver operates." Hewahewa v. Lalakea, 35 Haw. 213, 219 (1939).

The Promissory Note states, in relevant part, as follows:

> [Snyder] is indebted to [ROP] for legal services rendered in the matter of Soukop v. Snyder. [ROP] claims that the amount due is $62,456.53, as of August 1, 1987, plus interest, no part of which has been paid. [Snyder] and [ROP] wish to compromise the claim to a sum certain to be evidenced by this Note.
>
> FOR VALUE RECEIVED, [Snyder] promises to pay to the order of the law firm of [ROP], the sum of [$25,000], with interest at the rate of 12 percent per annum until paid, payable at the rate of:
>
> a) $250.00 per month, commencing February 1, 1990 to and including January 1, 1991; and thereafter at
>
> b) $500.00 per month, commencing February 1, 1991.
>
> All unpaid principal and accrued but unpaid interest shall be due and payable on February 1, 1995.

Snyder's full knowledge of his alleged recoupment defense before and when he executed the Promissory Note as a compromise full payment of his disputed debt for costs and attorney fees, combined with the above-quoted language of the Promissory Note, causes us to agree with Conclusion of Law G that, as a matter of law, Snyder waived his right to assert the defense of recoupment in this case. In other words, when Snyder,

knowing that he had an alleged recoupment defense, signed a Promissory Note stating that (a) he "is indebted to [ROP] for legal services rendered[,]" (b) ROP claims that the amount due is $62,456.53, and (c) Snyder and ROP "wish to compromise the claim to a sum certain[,]" Snyder waived his right to assert his alleged recoupment defense.

D.

In Defendant's February 10, 2000 Memorandum, Snyder states, in relevant part, as follows:

> [ROP] is the payee on the note and dealt with [Snyder] on all matters relating to the issuance of the note. As such, [ROP] is not a holder in due course.
>
> . . . .
>
> Recoupment describes a claim that the defendant can assert against plaintiff where it arises out of the same transaction as the plaintiff's claim; it is in the nature of a defense and can only be asserted to reduce, diminish or defeat the plaintiff's claim. . . .
>
> . . . [H]ere, [Snyder] raised the recoupment doctrine in his counterclaim.
>
> . . . .
>
> [Snyder] has submitted his affidavit in support of his position. However, due to the relationship of the parties, [Snyder] does not have available to him his records and documents which are, presumably, in the possession of [ROP]. By letter dated January 22, 2000, [Snyder] sought records from [ROP] as any client might from his attorney. No records have been produced. To obtain them, [Snyder] has prepared necessary discovery devices to obtain his own records and files, including al[l] correspondence in the possession of [ROP]. Without those records, [Snyder] is not able to present additional facts be [sic] way of Affidavits to oppose the motion and seeks a refusal of the application or a continuance pursuant to HRCP Rule 56(f) which provides:
>
> > **(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken

> or discovery to he bad or may make such other order as is just.

In other words, Snyder alleges that he is unable to present affidavits in support of his recoupment defense because ROP lost his files and destroyed its files in his case. He does not explain why the files are necessary for the affidavits. Based on his alleged inability allegedly caused by ROP, Snyder seeks a denial of the summary judgment or a permanent continuance. In light of our decision in part C above, we conclude that this point on appeal is moot.

CONCLUSION

Accordingly, we affirm the circuit court's April 5, 2000 "Judgment Based on Order Granting Plaintiff Reinwald O'Connor & Playdon's Motion for Summary Judgment Filed January 24, 2000" in favor of Plaintiff-Appellee Reinwald O'Connor & Playdon and against Defendant-Appellant Burt L. Snyder in the amount of $51,291.75.

DATED: Honolulu, Hawai‘i, April 17, 2001.

On the briefs:

Burt L. Snyder
Defendant-Appellant, *pro se*.

Chief Judge

Gilbert D. Butson
(of counsel, Reinwald O'Connor & Playdon, LLP)
for Plaintiff-Appellee.

Associate Judge

Associate Judge