NO. 23763

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

NENITA RETOTAL and BENJAMIN P. SANCHEZ, JR., Plaintiffs-Appellants, v. HAWAII BALLROOM DANCE ASSOCIATION, EUGENE ICHINOSE, WILBERT K. SAKAMOTO, ALFRED G. AGBAYANI, JACKIE UYEDA, and ROBERT FUKUMOTO, Defendants-Appellees, and JOHN DOES 1-50, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 97-3588)

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

Plaintiffs-Appellants Nenita Retotal (Retotal) and Benjamin P. Sanchez, Jr. (Sanchez) (collectively Plaintiffs) appeal from the August 24, 2000 Final Judgment entered by Circuit Court Judge Dexter Del Rosario in favor of Defendants-Appellees Hawaii Ballroom Dance Association (HBDA), Eugene Ichinose (Ichinose), Wilbert K. Sakamoto (Sakamoto), Alfred G. Agbayani (Agbayani), Jackie Uyeda (Uyeda), and Robert Fukumoto (Fukumoto) (collectively Defendants). We affirm.

BACKGROUND

HBDA is a Hawaiʻi nonprofit corporation started in 1959 by Ichinose and his late wife, Harriet Ichinose. HBDA is dedicated to uplifting the lives of the people of Hawaiʻi through the medium of ballroom dance recreation. HBDA is a statewide organization and, at the time of trial, it consisted of over 20

chapters and approximately 2,500 members. Telemarks is the organization of instructors within HBDA and its financial records are part of HBDA's records. Ichinose testified that Telemarks is an organizational unit with its own officers and, for some purposes, its own money.[1]

---

[1] The Bylaws of Defendant-Appellee Hawaii Ballroom Dance Association (HBDA) as of September 9, 1996, in evidence as Exhibit A-43, state as follows:

IV.

CHAPTERS AND THE TELEMARKS ORGANIZATIONS

. . . .

4. The Telemarks organization, establishment and governance. The instructors and instructional staff of this corporation may organize as The Telemarks. The Telemarks may adopt rules and regulations for its governance; provided, that The Telemarks shall always be governed by, and its rules and regulations shall be subject to, the Charter of Incorporation and the Bylaws of this corporation and to such rules, regulations and policies adopted by the membership or the Council of this organization.

V.

MEMBERSHIP

. . . .

2. Classes of membership. There shall be four classes of membership in this organization: regular, associate, life and honorary.

a. Regular. A regular member is a dues paying member who is entitled to all rights and privileges of membership, including the right to vote.

b. Associate. . . .

c. Life. A life member is a non-dues paying member who is entitled to the same rights and privileges as regular members, including the right to vote.

d. Honorary. . . .

(continued...)

Ichinose served as the Dance Director of HBDA from 1959 until his retirement in 1997. Retotal has been an HBDA member since 1991. Sanchez has been an HBDA member since 1985.

Pursuant to Hawaii Revised Statutes (HRS) § 415B-45 (1993), "[a]ll books and records of a [nonprofit] corporation may be inspected by any member or member's agent or attorney, for any proper reason at any reasonable time." According to the 1996 HBDA Bylaws (Bylaws), "[t]he Treasurer's books and accounts shall be open at all times for inspection by any member of the

---

[1](...continued)

3. Qualifications for membership.

a. Regular and associate members. Every regular or associate member shall be a member of a chapter or The Telemarks. The Telemarks members are regular members. . . .

b. Life and honorary members. Neither a life nor an honorary member need be a member of a chapter. Life and honorary members shall be admitted on a two thirds vote of all voting members of the Council.

. . . .

VII.

COUNCIL

1. Council membership. There shall be a Council consisting of the officers of the corporation, the Dance Director, the president of each chapter and the president of The Telemarks. . . .

. . . .

3. Powers and functions. The Council shall be the governing body of the corporation, with full power and authority to manage, conduct, and control the assets, business and affairs of the corporation, subject, however, at all times to the direction and authority of the voting members of the corporation.

corporation and shall be audited at least once a year by the auditor."

The initial complaint filed by Retotal on September 3, 1997, alleged that "Ichinose uses the funds of HBDA . . . for his personal benefit and to the detriment of [Retotal] and the other members of HBDA" and sought an audit of the income and expenses of HBDA. It further alleged that "annual elections for officers of HBDA have been improperly conducted" and "the improper conduct of these elections has been orchestrated by Eugene Ichinose for the purpose of electing his cronies and excluding anyone from office who might question Eugene Ichinose's use of HBDA's funds[.]" It sought an order "that the next annual elections (state-wide and for each branch) be monitored by the League of Women Voters or a similar dis-interested organization."

The Fourth Amended Complaint was filed by Plaintiffs on January 7, 1999. It asserted two counts. Count I was Retotal's individual claim. It stated that "Retotal made formal request to review the books and records of HBDA and this request was refused by HBDA[.]" It prayed for reimbursement of the substantial attorney fees and costs caused her by HBDA's violation of its Bylaws and HRS § 415B-45.

Count II was a derivative action asserted by Plaintiffs. It alleged that: (a) "it appears that funds of HBDA have been paid out for purposes contrary to the non-profit status

of HBDA and the general benefit of HBDA's membership"; (b) HBDA refused an audit of HBDA's books and records; (c) "Plaintiffs will fairly and adequately represent the interest of the HBDA membership by reviewing the books and records of HBDA and by seeking reimbursement of any mis-spent funds of HBDA"; and (d) Defendants are liable for the reimbursement to HBDA for such mis-spent funds. It prayed for orders "that Defendants produce all of their books and records covering the finances of HBDA for the 10-year period commencing January 1, 1988," and that HBDA be reimbursed (i) by the Defendants responsible for improperly paying and/or receiving funds from HBDA, and (ii) by the Defendants "for all attorneys' fees and costs paid to both the Plaintiffs' attorney and the Defendants' attorney in this lawsuit."

The bench trial commenced on November 1, 1999, and concluded on November 8, 1999. On August 24, 2000, Final Judgment was entered in favor of Defendants and against Plaintiffs.

With those findings of fact and conclusions of law challenged by Plaintiffs in this appeal outlined in bold, the August 24, 2000 Findings of Fact (FsOF), Conclusions of Law (CsOL) and Order, state, in relevant part, as follows:

FINDINGS OF FACT

. . . .

I. THE PARTIES

. . . .

6. The records of HBDA were maintained by volunteers, and there was no reliable indexing system for locating files.

7. [Ichinose] served as the dance director of HBDA from 1959 and was the driving force behind the success of HBDA until he retired in 1997.

8. Mr. Ichinose was not compensated for his services from 1959 until 1989. Starting in 1989, Mr. Ichinose received six hundred dollars a month.[2]

. . . .

14. [Sakamoto] joined HBDA in 1976 and was elected auditor of HBDA in 1980. Mr. Sakamoto served as auditor until 1999.

. . . .

16. Mr. Sakamoto was a Certified Public Accountant from 1961 to 1995.

. . . .

22. In 1996, Mr. Fukumoto was elected treasurer of HBDA and served until his term expired in April of 1999.

23. During his term as treasurer, Mr. Fukumoto would submit treasurer's reports to the HBDA council on a monthly basis. The council would vote on whether or not to approve the report.

24. [Uyeda] was the treasurer prior to Mr. Fukumoto.

25. Mr. Uyeda did not turn over any of his financial records to Mr. Fukumoto.

---

[2] The answering brief reports, in relevant part, as follows:

> Mr. Ichinose was not compensated for his services from 1959 through 1988. Starting in 1989, Mr. Ichinose received $600 a month. This amount increased over the years and at the time of his retirement Mr. Ichinose was receiving $1,500 a month.
>
> HBDA did not provide Mr. Ichinose with a retirement plan. Upon retirement in 1997, Mr. Ichinose was provided a fully funded $10,000.00 retirement fund for his thirty-nine years of service. The retirement check was approved by the HBDA council.

(Record citations omitted.)

26. [Retotal] joined HBDA in 1991.

27. [Sanchez] joined HBDA in 1985.

28. Mr. Sanchez was elected vice-president of HBDA in 1997 and served until his term expired on March 31, 1998.

29. Mr. Sanchez is only a party to Count II of the complaint. Count I is Retotal's individual claim for refusal to provide the books and records, and Count II is Retotal and Sanchez' claim that funds of HBDA have been misspent. See Plaintiff's Fourth Amended Complaint.

II. COUNT I

. . . .

31. On August 7, 1997, Jack C. Morse ("Morse"), Mrs. Retotal's attorney, mailed a letter to Mr. Agbayani requesting a meeting on August 26, 1997. Attached to the letter was a copy of an unfiled complaint, summons and an initial request for production of documents. The request for production of documents requested all financial record of HBDA from January 1, 1992 to the present; all federal and state tax returns filed by HBDA for the years 1991 to present; all federal and state income tax returns filed by Mr. Ichinose; all by-laws [sic] and every document that Defendants claim permitted all payments by HBDA from January 1, 1992 to present; all letters, documents, communications, memoranda and other indicia of each and every request for an accounting of HBDA finances from January 1, 1992 to present; and all documents and policies which govern and/or guide the Defendants in making payments to dance instructors of HBDA from January 1, 1992 to present.

. . . .

34. Mr. Agbayani presented the August 7 letter to the HBDA council at the monthly meeting on August 8, 1997.

35. At the August 8 council meeting, the council designated David Lowry ("Mr. Lowry"), Mr. Sakamoto and Mr. Agbayani to address the August 7 letter.

. . . .

37. Everyone at the HBDA executive committee meeting agreed that the financial records would be made available to Mrs. Retotal.

. . . .

39. At the August 26 meeting, both Mr. Agbayani and Mr. Lowry informed Mrs. Retotal and Morse that the HBDA records would be made available to Mrs. Retotal, but it would take a little time to locate the records.

. . . .

43. On August 28, 1997, Mr. Agbayani, Mr. Lowry, Mr. Sakamoto, Mr. Fukumoto and Mr. Ichinose attended a meeting at the Jack-In-The-Box in Mapunapuna.

44. The purpose of the August 28 meeting at Jack-In-The-Box was to determine where the HBDA records requested by Mrs. Retotal were located and which records were readily available.

45. At the August 28 meeting, Mr. Fukumoto was asked if he could provide treasurer's reports for the last fiscal year, his first year as treasurer of HBDA, and he stated that he could.

46. On August 29, 1997, Mr. Agbayani called Morse and informed him that Mrs. Retotal could inspect the twelve (12) treasurer's reports for the prior HBDA fiscal year.

47. Mr. Agbayani also informed Morse that HBDA would seek legal advice from counsel before turning over any records other than financial records. Mr. Agbayani never told Morse that no other records would be produced.

48. On September 3, 1997, Mr. Agbayani was served with the complaint and summons in this case.

49. On September 9, 1997, Mr. Agbayani mailed a letter to Morse stating that HBDA's financial records were available to Mrs. Retotal and the treasurer's reports for 1996 were enclosed with the letter.

50. By October 8, 1997, HBDA's Ekonomik check register for the five fiscal years beginning April 1992 through April 1997; all monthly bank statements; the annual financial reports with the exception of 1997; tax returns; and payroll records were made available for Mrs. Retotal to inspect.

51. Mr. Agbayani never refused to provide the books and records of HBDA to Mrs. Retotal.

52. Mrs. Retotal never asked Mr. Ichinose for the books and records of HBDA.

53. Mr. Ichinose never refused anyone, including Mrs. Retotal, access to the books and records.

54. Mrs. Retotal never asked Mr. Sakamoto for the books and records of HBDA.

55. There was never any intent on Mr. Sakamoto's part to withhold or delay the turning over of the records requested by Mrs. Retotal.

56. Mr. Fukumoto turned over the records in his possession, and they were mailed to Mrs. Retotal on September 9, 1997, after she refused to inspect them. . . .

III. COUNT II

57. Count II of Plaintiffs' Fourth Amended Complaint is Plaintiffs' alleged derivative action. Plaintiffs allege in Count II that funds of HBDA have been paid out for purposes contrary to the non-profit status of HBDA and the general benefit of HBDA's membership. Plaintiffs claim Mr. Ichinose, Mr. Sakamoto, Mr. Agbayani, Mr. Uyeda, and Mr. Fukumoto are liable for reimbursement to HBDA for misspent funds. . . .

58. Plaintiff's Retotal and Sanchez made no effort to obtain the action they so desired from HBDA, i.e., for HBDA to seek reimbursement of misappropriated monies, nor are there particular facts alleged in the complaint to justify their failure to do so. Thus, HBDA was never given any opportunity to investigate or correct any alleged wrongdoing. . . .

59. Mr. Ichinose was authorized to co-sign checks on behalf of HBDA. . . .

60. Mr. Ichinose never misappropriated funds of HBDA nor spent monies contrary to the purpose of HBDA.

61. The council of HBDA consists of the elected officers and the presidents of each local council.

62. The ten thousand dollar ($10,000) check given to Mr. Ichinose was approved by the council of HBDA before it was given to him.

. . . .

64. During his tenure as auditor, Mr. Sakamoto audited the books of HBDA on an annual basis as required by the by-laws [sic] of HBDA and reported his findings to the members and the council of HBDA.

65. Based upon his 30 plus years as a licensed CPA, his experience as a legislative auditor and chief auditor for the State of Hawaii, Mr. Sakamoto never saw any evidence that HBDA funds were misappropriated or that funds were spent contrary to the purpose of HBDA.

. . . .

68. Mr. Fukumoto never misspent any of the monies of HBDA.

69. Mr. Fukumoto never spent any funds of HBDA for purposes contrary to the general benefit of the association's membership.

70. Mr. Sanchez has no personal knowledge of any misspent funds.

71. Mrs. Retotal is a bookkeeper, not an accountant, and she is not qualified as an expert with regards to the Internal Revenue Code.

72. Plaintiffs' expert, Joseph H. Wikof ("Mr. Wikof"), did not audit the books of HBDA.

73. Mr. Wikof was unable to offer an opinion as to whether any funds of HBDA had been misappropriated because he had not reviewed the information necessary to make such a determination.

. . . .

75. Mr. Wikof did not review the records from the Las Vegas Showcase and was unable to determine whether the function was proper for a 501(c)(3) corporation.

76. Mr. Wikof did not have enough information to draw a conclusion as to whether the fundraising activities of the Las Vegas Showcase would be subject to excise tax.

77. The Las Vegas Showcase function was within the charitable exemption granted by the Internal Revenue Service.

78. The monies remaining after the Las Vegas Showcase were deposited into HBDA accounts (the Harriet Ichinose Memorial Building Fund and into Telemark). No funds were disbursed to outside entities.

79. Mr. Wikof testified that if a prize or award (such as baseball hats, jackets or trophies) was given for length of service achievement or safety achievement, then it would not be taxable.

80. Mr. Wikof testified that it is common for nonprofit organizations to have a member look at the financial information.

. . . .

CONCLUSIONS OF LAW

. . . .

3. Plaintiffs have failed to establish that Mrs. Retotal was refused access to the books and records of HBDA.

4. Defendants never refused to open the books of HBDA to Mrs. Retotal.

5. There has been no violation of the By-Laws [sic] of HBDA or of Hawaii Revised Statute [§] 415B-45.

6. . . . [D]irectors and officers must use corporate funds for corporate purposes only or they will be liable for misappropriation. Lussier v. Mau-Van Development, 4 Haw. App. 359, 667 P.2d 804 (1983). Plaintiffs have failed to establish that funds were misspent or paid out for non-corporate purposes or for purposes contrary to the non-profit status of HBDA. Plaintiffs have also failed to establish the amount of funds which were allegedly misspent.

7. . . . [T]he duty owed by a director to a corporation is a fiduciary one. Lum v. Kwong, 39 Haw. 532 (1952). Plaintiffs have failed to prove that any Defendant breached a fiduciary duty to HBDA or failed to act within the scope of their authority as set forth by the By-Laws [sic] of HBDA.

8. Mr. Sakamoto properly audited the books of HBDA and reported his findings to the members and the council as required by the By-Laws [sic] of HBDA.

9. According to Rule 23.1 of the Hawaii Rules of Civil Procedure,

> . . . the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership devolved upon him by operation of law. The complaint shall also allege with particularity the efforts made by the plaintiff to obtain the action he desires from the directors or comparable authority and from the shareholders or members and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. . . .

10. There is no evidence that the two (2) Plaintiffs in this matter fairly and adequately represent the interests of the two thousand five hundred (2500) members of HBDA or any similarly situated HBDA members.

11. Furthermore, Plaintiffs have not complied with the requirements of Rule 23.1 Hawaii Rules of Civil Procedure in that Plaintiffs never alleged nor proved that they made any efforts to obtain the actions they desired from the HBDA council. Plaintiffs also failed to allege or prove that such efforts would have been futile. Count II is therefore dismissed with prejudice as being an improper derivative action.

12. Plaintiffs have failed to prove Counts I and II of their Fourth Amended Complaint and therefore are not entitled to attorneys' fees or costs. Furthermore, the general rule requires each party to the litigation to pay his own counsel fees. The court cannot assess costs or attorneys' fees in the absence of a statute, rule, agreement, or case law. Nakata v. Nakata, 7 Haw. App. 636, 793 P.2d 1219 (1990).

13. No attorneys' fees are provided by stipulation or agreement in the case at bar and no statutory authority exists in this jurisdiction for the awarding of attorneys' fees. Plaintiffs have failed to cite any authority entitling them to attorneys' fees and therefore are not entitled to attorneys' fees.

14. Hawaii Rules of Civil Procedure (HRCP) [Rule] 54(d) provides that, "except when express provision therefore is made

> either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" The award of a taxable cost is within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." Bjornen v. State Farm Fire and Cas. Co., 81 Haw. 105, 107, 912 P.2d 602, 604 (App. 1996).
>
> **15. Plaintiffs failed to show fault on the part of the Defendants in the course of litigation.**
>
> **16. Defendants, as the prevailing party, are entitled to taxable costs.**

(Record citations omitted; footnote added.)

On September 11, 2000, pursuant to Hawai‘i Rules of Civil Procedure (HRCP) Rule 54(d) and HRS § 607-9 (1993), Defendants filed a Motion for Taxation of Costs in the amount of $16,201.60. This appeal was filed before this motion was heard or decided.

POINTS ON APPEAL

Plaintiffs assert the following points on appeal:

> 1. The trial court erred when it entered its Final Judgment on August 24, 2000 insofar as it awarded judgment in favor of Defendants. . . .
>
> 2. The trial court erred when it refused to allow Plaintiff Retotal to review the records of Telemarks.
>
> 3. The trial court erred in refusing to admit the following oral evidence at trial, all of which was relevant to the issues raised pursuant to HRE [Hawai‘i Rules of Evidence] Rule 402 and was not otherwise inadmissable.
>
> (a) 11/2/99. Defendants' objection of "relevancy" was sustained and the court refused to accept Plaintiff's offer of proof "that Mr. Ichinose went in the back room with the ballots, came back out, put names on the board in '96 as to who the winners were, which did not include Ms. Retotal. In fact, it was Mr. Fukumoto who was now involved in this lawsuit as Treasurer and that there was no way to double check, cross check the ballots. And, further, that Mr. Ichinose was not on the Election Committee but simply took over that duty himself."

(b) 11/2//99. Defendants' objection "irrelevant, immaterial" was sustained which precluded Retotal from testifying about her personal observations showing that Ichinose was in sole control of HBDA.

(c) 11/2/99. Defendants' objection of "irrelevant" was sustained, which precluded Ichinose's testimony on whether he paid income tax on his $10,000.00 gift from HBDA.

(d) 11/2/99. Defendants' objections of lack of foundation, irrelevance, immateriality "perhaps will invade attorney-client privilege" was sustained. This ruling denied Plaintiffs the opportunity to find out why on the one hand Ichinose testified that the Telemarks' records were available for review but, on the other hand, he resisted review of the Telemarks' records when Plaintiffs' sought to compel their discovery.

(e) 11/2/99. Defendants' objection of "irrelevant and immaterial" sustained, which precluded evidence about Ichinose's inconsistent positions regarding the availability of the Telemarks' records.

(f) 11/1/99. Defendants' objection of relevancy or materiality sustained which denied Plaintiffs the opportunity to present evidence that Sakamoto, Agbayani, Ichinose and Fukumoto engineered spending $50,000.00 of HBDA's membership funds to hire an attorney to assist in stonewalling Retotal's request to review HBDA's financial records.

(g) 11/8/99. Defendants' objection of relevancy and materiality and motion to strike granted. This precluded evidence about Ichinose's sole control of the HBDA Council meetings.

(h) 11/8/99. Defendants' objection of relevancy and materiality sustained, which precluded evidence of Mr. Ichinose's sole control of Council meetings. The offer of proof was: "Mr. Shiriwastaw would further testify that he heard Mr. Ichinose, at various times, refer to people who objected to what he was saying as stupid. Mr. Shiriwastaw would also testify that after he had made some requests for further data, such as data for Treasurer's reports that was not given, such as requesting that a budget be presented to the Council which had never previously been done, Mr. Ichinose called him a son of a bitch.

(i) 11/8/99. Defendant's objection to "relevancy" sustained, which precluded evidence showing that the HBDA Council was not presented with

Treasurer's reports in sufficient detail so that the Council could make any knowledgeable approval thereof.

(j) 11/8/99. The trial judge's previous ruling precluding any testimony about the 1996 HBDA election (see item 3(a) above) was repeated which precluded testimony that Ichinose personally ran the election even though he was not on the Election Committee, that Ichinose took the ballots to a back room and later came back and said that he had counted them and Fukumoto was the new Treasurer, having defeated Retotal, and that Ichinose then destroyed the ballots so that there was no way to double check the election results.

4. The trial court erred when it granted ROP's [Reinwald O'Connor & Playdon] Motion to Quash Plaintiff's Trial Subpoena for Allen Arakaki on the basis that it was "highly prejudicial." The trial court quashed the subpoena which precluded Plaintiffs from offering proof that Ichinose's many gifts paid out of HBDA's funds "should be treated as income [and] withholding be taken" therefrom.

5. The trial court erred when it refused to admit into evidence at trial the following exhibits offered by Plaintiffs:

(a) Exhibit 5. Defendants' objection on "relevance and materiality" was sustained.

(b) Exhibits 9 and 10 show the three reform candidates, Agbayani, Sanchez and Kazunaga, running for HBDA offices in the 1997 election. Defendants' objection on the basis of relevancy were sustained by the trial court.

6. The trial court erred when it entered the . . . Findings of Fact and Conclusions of Law [set out above in bold print].

(Record citations omitted.)

RELEVANT STANDARDS OF REVIEW

1.

Abuse of Discretion

An abuse of discretion occurs when the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a

party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citation omitted).

2.

Admissibility Of Evidence

> [D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court. Kealoha v. County of Hawaii, 74 Haw. 308, 319, 844 P.2d 670, 676, *reconsideration denied,* 74 Haw. 650, 847 P.2d 263 (1993). "[T]he trial court's determination of preliminary factual issues concerning the admission of evidence will be upheld unless clearly erroneous." State v. McGriff, 76 Hawaii 148, 157, 871 P.2d 782, 791 (1994) (citation omitted).

State v. West, 95 Hawai'i 452, 456-57, 24 P.3d 648, 652-53 (2001) (brackets and parenthetical in original). "On appeal, we review the trial court's decisions made pursuant to Hawaii Rules of Evidence (HRE) Rule 401 [Definition of 'relevant evidence'] under the right/wrong standard of review[.]" Walsh v. Chan, 80 Hawai'i 188, 195, 907 P.2d 774, 781 (App. 1995) (citation omitted).

3.

Findings of Fact

We review a trial court's FsOF under the clearly erroneous standard.

> "A [FOF] is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." State v. Kane, 87 Hawaii 71, 74, 951 P.2d 934, 937 (1998) (quoting Aickin v. Ocean View Investments Co., 84 Hawaii 447, 453, 935, P.2d 992, 998 (1997) (quoting Dan v. State, 76 Hawaii 423, 428, 879 P.2d 528, 533 (1994))). A FOF is also clearly erroneous when "the record lacks substantial evidence to support the finding." Alejado v. City and County of Honolulu,

> 89 Hawaii 221, 225, 971 P.2d 310, 314 (App.1998) (quoting Nishitani v. Baker, 82 Hawaii 281, 287, 921, P.2d 1182, 1188 (App.1996). See also State v. Okumura, 78 Hawaii 383, 392, 894 P.2d 80, 89 (1995). "We have defined 'substantial evidence' as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Roxas v. Marcos, 89 Hawaii 91, 116, 969 P.2d 1209, 1234 (1998) (quoting Kawamata Farms v. United Agri Products, 86 Hawaii 214, 253, 948 P.2d 1055, 1094 (1997) (quoting Takayama v. Kaiser Found. Hosp., 82 Hawaii 486, 495, 923 P.2d 903, 912 (1996) (citation some internal quotation marks, and original brackets omitted))).

State v. Kotis, 91 Hawai'i 319, 328, 984, P.2d 78, 87 (footnote omitted) (brackets in original).

4.

Conclusions of Law

> Hawaii appellate courts review conclusions of law *de novo*, under the right/wrong standard. See Associates Fin. Services Co. of Hawaii, Inc. [v. Mijo], 87 Hawaii [19] at 28, 950, P.2d [1219] at 1228. "Under the right/wrong standard, this court 'examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answers to it.'" Estate of Marcos, 88 Hawaii at 153, 963 P.2d at 1129 (citation omitted).
>
> Robert's Hawaii School Bus., Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawaii 224, 239, 982, P.2d 853, 868 (1999).

Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999) (quotations and brackets in original).

DISCUSSION

1.

Plaintiffs' first point of error is an overly generalized challenge to the trial court's August 24, 2000 judgment in favor of Defendants. Therefore, we will not discuss it.

2.

Plaintiffs have waived the right to challenge the court's denial of their request for the production of records.[3]

Plaintiffs challenge the December 3, 1998 "Order Denying in Part and Granting in Part Plaintiffs' Second Motion for Order Compelling Discovery and for Sanctions Against Defendants Filed on 9/24/98" (December 3, 1998 Order), wherein Circuit Court Judge Kevin Chang ordered, *inter alia*:

> 1. Plaintiffs having failed to make a showing that their request for the balance of invoices to Hawaii Ballroom Dance Association ("HBDA") is reasonably calculated to lead to the discovery of admissible evidence, said request is denied without prejudice.
>
> 2. Plaintiffs having failed to make a showing that the invoices to Telemark for which payments have been made from January, 1992 to the present are reasonably calculated to lead to the discovery of admissible evidence, said request is denied without prejudice.

At the commencement of trial on November 1, 1999, the following colloquy occurred:

---

[3] Although in the "Statement of Points" of their opening brief, Plaintiffs contend that "[t]he trial court erred when it refused to allow Plaintiff Retotal to review the *records of Telemarks*," under "Questions Presented" they ask, "Did the trial court err when it refused to allow Retotal to review *financial records of HBDA*?" (Emphases added.) Telemarks being an organization within HBDA whose "financial records are part of HBDA's records," we address this as a single issue regarding the records of HBDA.

While this issue is one of the primary points on appeal, it is not addressed in the body of the argument. In fact, the argument fails to address any of the six points on appeal. In other words, the opening brief violates Hawai‘i Rules of Appellate Procedure Rule 28(b)(7) (2001) which requires the opening brief to contain: "The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived."

THE COURT: Before you begin, I have a few questions for Mr. Morse to clarify, matter that was raised in the plaintiffs' trial brief, in order to assist the Court in understanding the evidence to be presented and the reliefs sought.

Mr. Morse.

MR. MORSE: Yes, sir.

THE COURT: It's the Court's understanding, and correct the Court if the Court is incorrect, that Count I is a personal claim by Retotal for reimbursement of the cost that plaintiff had incurred in obtaining Hawaii Ballroom Dancing's compliance with opening of their books; is that correct?

MR. MORSE: I think that's generally correct, your honor. I would extend it a little bit, that once this lawsuit got going, and it took a long time to obtain records and some records we have never yet gotten that were requested, so the cost of this lawsuit basically is what she is seeking.

THE COURT: And Count II is a derivative claim that arises from information that was learned by the plaintiffs after the information or books were opened; is that correct?

MR. MORSE: Again, I don't know it was all learned after but a lot of it was learned when some -- when these records were produced, whatever records were produced. Some of the information, of course, was known before the lawsuit was filed.

THE COURT: The Court in reviewing the Fourth Amended Complaint, in particular, on page 5, the relief prayed for, with or comparing them with the plaintiff's trial memorandum --

MR. MORSE: I'm sorry, what page was that, your honor?

THE COURT: What the Court is seeking is some clarification. On page 5 of the Fourth Amended Complaint where it states "wherefore plaintiffs pray for judgment as follows".

MR. MORSE: I'm with you.

THE COURT: As to number one, "this Court order defendants produce all of their books and records covering the finances of HBDA for a 10-year period." Is that a matter that you are seeking?

MR. MORSE: Your honor, we have done -- I think we've done all we can. They have produced some records. They have refused to produce others and in one case, indeed on our second motion to compel, Judge Chang ruled in their favor on one item that we could not get the Telemarks records. We are not at this time seeking any more records, if that was -- if that's the Court's question.

THE COURT: That's the Court's question.

MR. MORSE: Yes, sir.

Plaintiffs present no argument or authority in support of their contention that the trial court erred in entering the December 3, 1998 Order. Although Plaintiffs' presentation of this issue on appeal is murky at best, what is clear is that the issue was waived at trial. Plaintiffs' request for production of documents relating to both Telemarks and HBDA was denied, pretrial, without prejudice. At the commencement of trial, the court gave Plaintiffs the opportunity to revisit the issue. Plaintiffs declined, stating clearly and unambiguously to the trial court, "We are not at this time seeking any more records." Plaintiffs now invite this court to guess at the reasoning behind their current challenge to the December 3, 1998 Order, and we decline. The trial court's findings that "Plaintiffs have failed to establish that Mrs. Retotal was refused access to the books and records of HBDA" and "Defendants never refused to open the books of HBDA to Mrs. Retotal" are supported by substantial evidence and are not clearly erroneous.

3.

The trial court was correct in ruling immaterial and irrelevant certain oral evidence proffered by Plaintiffs.

HRE Rule 401 (1993) defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Plaintiffs contend that "[t]he trial court erred in refusing to

admit . . . oral evidence at trial [listed above in Plaintiffs' points on appeal no. 3], all of which was relevant to the issues raised pursuant to HRE Rule 402[4] and was not otherwise inadmissible." The court ruled, pursuant to HRE Rule 401, that the proffered evidence in question was not relevant and, therefore, HRE Rule 402 is inapposite.

Each of Plaintiffs' arguments as to the evidence excluded is quoted above in its entirety. Plaintiffs offer no other arguments as to the alleged relevance of this evidence. Our search of the record reveals none.

There being no showing to the contrary, we conclude the trial court was right in excluding, pursuant to HRE Rule 401, the particular evidence challenged in this alleged point of error. Further, even were we to assume in favor of Plaintiffs that the evidence had been relevant, "[e]ven an erroneous exclusion of relevant evidence does not necessarily call for reversal of the trial court, if no prejudice results." Wakabayashi v. Hertz Corp., 66 Haw. 265, 272, 660 P.2d 1309, 1314 (1983) (citing Kekua v. Kaiser Found. Hosp., 61 Haw. 208, 218, 601 P.2d 364, 371 (1979); Lyon v. Bush, 49 Haw. 116, 123, 412 P.2d 662, 667 (1966); Berkson v. Post, 38 Haw. 436, 439 (1949)). Plaintiffs do not

---

[4] Hawai'i Rules of Evidence Rule 402 (1993) states "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." (Emphases added.)

suggest they were prejudiced by these exclusions and we conclude they were not.

4.

The trial court acted within its discretion when it granted Defendants' Motion to Quash Retotal's Trial Subpoena for Allen Arakaki.

Allen Arakaki (Arakaki) is a Certified Public Accountant who was retained by Defendants as an expert witness regarding Plaintiffs' misappropriation claim. Arakaki was listed to testify as an expert for the defense but was not called by Defendants to testify at trial. When Plaintiffs attempted to subpoena Arakaki as a witness in their case-in-chief, the trial court granted Defendants' motion to quash the subpoena pursuant to City and County v. Bonded Investment Co., 54 Haw. 385, 507 P.2d 1084 (1973). The trial court specifically found that

> based on the representations from both counsel that Mr. Arakaki possesses no unique knowledge regarding this case that would not be available to other certified public accountants. The Court also is going to find pursuant to the Bonded Investment Company case that as a matter of fairness, and there being an absence of good cause, the Court is going to grant the motion to quash the subpoena regarding Allen Arakaki.

We agree with the trial court's reliance on Bonded Investment as the rule in this case. Bonded Investment is a condemnation case involving expert appraisers who were hired by the City but not called upon to testify. The Hawai‘i Supreme Court decided that

> [the experts] possessed no unique knowledge with regard to the instant case as would an eyewitness of an automobile accident. [Plaintiffs] were seeking expert testimony on the subject of fair market value favorable to them. This could be acquired by hiring their own expert appraisers. Further, there was no showing of

> good cause why the City's experts should have been called rather than any others. [Plaintiffs] have not shown the unavailability of other competent expert appraisers in this case. Therefore, as a matter of fairness, and in the absence of good cause, the trial court, in its discretion, correctly disallowed [Plaintiffs] from using the City's expert appraisers.

Id. at 391, 507 P.2d at 1089. In the instant case, Plaintiffs failed to show the unavailability of other competent expert witnesses to testify as desired.[5]

5.

> The trial court acted within its discretion when it refused to admit into evidence Exhibits 5, 9, and 10 offered by Plaintiffs.

Without arguing or otherwise supporting this contention, Plaintiffs contend that the trial court erroneously refused to admit three proffered exhibits into evidence. In making these decisions, the trial court explained that "just for guidance to counsel, the Court in ruling on motions of relevance is guided in large part by the Fourth Amended Complaint." After

[5] Plaintiffs contend that the quashed subpoena "precluded Plaintiffs from offering proof that Ichinose's many gifts paid out of HBDA's funds . . . 'should be treated as income [and] withholding be taken' therefrom." (Record citations omitted, brackets in original.) Plaintiffs refer to the following rejected offer of proof: "MORSE: I offer to prove that through Mr. Arakaki that he would testify as an expert, as a CPA and as a specialist in nonprofit corporations, that no gifts over $25 can be made by a nonprofit corporation under the rules of the IRS." However, Plaintiffs had their own CPA expert witness, Wikoff. In deposition testimony, only Arakaki, not Wikoff, testified as to the $25 gift issue. Plaintiffs' Counsel wanted to call Arakaki because "when [defendants'] get to call Mr. Arakaki on their case, they will limit his testimony to only certain issues less than were in his deposition, and then they'll argue to you that I'm not allowed to ask Mr. Arakaki the other questions about what he did testify to in his deposition." Plaintiffs showed no cause for not obtaining their own expert in that area. The court found that "Arakaki possesses no unique knowledge regarding this case that would not be available to other certified public accountants."

a review of the record, we disagree with Plaintiffs as to all three exhibits.

Plaintiffs' proffered Exhibit 5, a letter from Plaintiffs' counsel to Agbayani asking for the HBDA membership list, was refused by the court on Defendants' argument that it "has no relevancy or materiality to any of the personal claim [sic] of Ms. Retotal or to the derivative claim of misspent monies."

Plaintiffs' counsel stated, "Your honor, the relevancy and materiality is that the people on this committee, three-person committee that was appointed, Mr. Agbayani, Mr. Lowry and Mr. Sakamoto, have done their best to keep the facts away from the membership of HBDA and even as part of that, as we will show later on, never gave us a membership list. That's part of their scheme to stop the membership from knowing what's going on in this case. And it is relevant for that." We agree with the trial court's decision to sustain the objection based on the grounds that the evidence was not material or relevant to Plaintiffs' Fourth Amended Complaint.

We are unable to determine exactly what Plaintiffs proffered as Exhibit 9. Exhibit 10 is an oath of office. The only information this court has uncovered in the record with regard to Exhibits 9 and 10 is the following argument to the court by Plaintiffs' counsel:

> Mr. Sanchez would have testified that exhibit 9 was put together by the three reform candidates, himself, Ms. Kazuanga, and Mr. Agbayani; that Mr. Sanchez indeed was the person who called Mr. Agbayani and requested him to run as president and which is contrary to Mr. Agbayani's statement.
>
> Exhibit 10, Your Honor, is the oath of office which we offered and was refused by the court. Mr. Sanchez would testify that this oath of office by Judge Lewis at the time was extraordinary and was done on April 1 because Mr. Ichinose, after the election, had scheduled a meeting on August 4 or 5 of the old officers with the obvious intention to change the bylaws or do other things in detriment before the new officers could be put into office and declared as the new officers, which is usually done at the next meeting and that that's why exhibit 10 was done.

Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(A) requires that "when the point involves the admission or rejection of evidence," the opening brief shall contain "a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected[.]" Plaintiffs do not, however, in either their opening or reply briefs, describe or explain the relevance of Exhibits 9 and 10. They merely state that the trial court erred in refusing to admit them. During trial, Plaintiffs' counsel argued, "One of the issues in this case repeatedly brought up by [defense counsel] is why did [Retotal] file this lawsuit. This is background, one of -- what happened here is one of the reasons that wound up in this lawsuit being filed. And if you'll recall, the original lawsuit included a count regarding elections."

Although Plaintiffs' original complaint, filed September 3, 1997, contained a specific count regarding HBDA elections, this count was not present in Plaintiffs' Fourth Amended Complaint, filed January 7, 1999. As to this issue, the

court specifically explained that "the election is not relevant to any of these matters that are raised in these claims or prayed for" in the Fourth Amended Complaint. We agree with the trial court.

We recognize that count I of the Fourth Amended Complaint prayed for reimbursement of attorney fees incurred in pursuing the first, second, third, and fourth complaints. However, Plaintiffs do not cite any authority for an award of such attorney fees. "It is well-settled that 'no attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation, or agreement.'" MFD Partners v. Murphy, 9 Haw. App. 509, 512, 850 P.2d 713, 715 (App. 1993) (citation omitted). In MFD Partners, Plaintiff's counsel was the attorney on the briefs for Murphy.

6.

FOF no. 77 is clearly erroneous but the error is harmless.

Upon a review of the record, we determine that only one of the trial court's FsOF challenged by Plaintiffs is clearly erroneous. We agree with Plaintiffs that the record lacks sufficient evidence to support FOF no. 77 wherein the court found that "[t]he Las Vegas Showcase function was within the charitable exemption by the Internal Revenue Service."

According to the portion of the transcript cited by the trial court as its basis for this FOF, the trial court appears to

have based the finding solely upon testimony by the HBDA auditor, Sakamoto. However, Sakamoto's testimony on this issue is invalid because Sakamoto was not qualified to testify as to this issue. Defense counsel objected to Plaintiffs' redirect examination of Sakamoto regarding the qualification of Sakamoto to testify as to Internal Revenue Code § 501(c)(3), because it had "not been qualified that [Sakamoto] has any particular tax skills and tax interpretation under 501(c)(3)." The court sustained the objection on this ground.

Although FOF no. 77 is clearly erroneous, the error is harmless. HRE Rule 103(a) (1980) guides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]" Thus, HRCP Rule 61 (1980), states that

> [n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Similarly, after a bench trial, the court's judgment is reversible when: "(1) all of the competent evidence is insufficient to support the judgment; or (2) it affirmatively appears that but for the incompetent evidence (or the improper use of the competent evidence), the trial court's decision would have been otherwise." Santos v. Perreira, 2 Haw. App. 387, 394,

633 P.2d 1118, 1124 (1981) (citing Associated Engineers & Constrs. v. State, 58 Haw. 187, 567 P.2d 397, *reh. denied*, 58 Haw. 322, 568 P.2d 512 (1977).

Plaintiffs have not made any attempt to demonstrate that the erroneous finding affects a substantial right or is inconsistent with substantial justice. All of the competent evidence adduced is sufficient to support the trial court's judgment and there is no suggestion that the trial court's decision would have been otherwise but for the improper evidence cited as its basis for FOF no. 77.

7.

> The conclusions of law challenged by Plaintiffs are right except for harmless error.

After a review of the record and Plaintiffs' arguments to the contrary, we conclude that the trial court's CsOL challenged by Plaintiffs are right.

As to CsOL nos. 6, 7, 10, 12, 13, 15, and 16, Plaintiffs' failure to designate where in the record one might find support for these challenges "would cast upon this court the burden of searching through a voluminous record to find . . . whether or not each of the trial judge's conclusions of law was founded upon established fact and correct principle. These are sufficient grounds . . . for refusal to consider the exceptions." Ryan v. City and County of Honolulu, 33 Haw. 92, 95-96 (1934).

As a further note regarding CsOL nos. 12 and 13, Plaintiffs' counsel cites no basis for an award of attorney fees. As noted previously, "It is well-settled that 'no attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation, or agreement.'" MFD Partners v. Murphy, 9 Haw. App. 509, 512, 850 P.2d 713, 715 (App. 1993) (citation omitted).

CsOL nos. 3 and 4 appear to be mislabeled FsOF, and they are not clearly erroneous.

As to COL no. 5, based upon a review of the record, we agree with the trial court's conclusion that Plaintiffs failed to establish a violation of either the Bylaws or HRS § 415B-45.

Challenging COL no. 8, Plaintiffs contend that "Sakamoto never audited the books of HBDA as he admitted during his trial testimony and as the trial judge agreed." Plaintiffs point to the following colloquy, which occurred during direct examination of Plaintiffs' expert witness, Joseph Wikoff:

> Q. (By Mr. Morse) Did you review some of the financial statements that Mr. Sakamoto prepared annually?
>
> A. Well, I don't know who prepared the financial statements. I saw some financial statements. There's no attachment identifying them as either audited financial statements or -- and there's no indication of an auditor or an individual taking responsibility for those financial statements.
>
> MR. MORSE: I think Your Honor will recall Mr. Sakamoto testified that he was, in fact, auditing his own financial statements, and those were before the court last week.
>
> MR. PLAYDON: Let me object. That's colloquy of counsel. That's not testimony from this witness.
>
> THE COURT: That's correct. He already testified that he cannot audit something he's done himself. Ask your next question.

This dialogue is irrelevant to the trial court's COL no. 8 in light of the fact that the Bylaws specifically require the treasurer's books and accounts to be "audited at least once a year by the auditor."

CsOL nos. 10 and 11 are based upon HRCP Rule 23.1. Challenging COL no. 10, Plaintiffs assert that "[t]here is no evidence that Plaintiffs did not fairly and adequately represent the interests of the HBDA membership in this case." (Emphasis in original.) In their reply brief, Plaintiffs cite Lewis v. Curtis, 671 F.2d 779, 788 (3rd Cir. 1982) *cert. den.* 459 US 880 (1982), as authority that "[t]he burden is on the defendant to demonstrate that the representation will be inadequate." Recently, in Fujimoto v. Au, 95 Hawai'i 116, 150, 19 P.3d 699, 733 (2001), the Hawai'i Supreme Court confirmed that this is the rule in Hawai'i.

It follows that COL no. 10 is right but irrelevant. The relevant question is whether there is any evidence that the Plaintiffs did not fairly and adequately represent the interests of the members of the HBDA. The trial court did not answer this question. Nevertheless, the answer is no. Defendants point to no such evidence, nor have we found any upon our review of the record. It follows that the fair and adequate representation requirement of HRCP Rule 23.1 requirement was satisfied.

As to COL no. 11, Plaintiffs contend that Circuit Court Judge Eden Hifo's ruling on April 8, 1998, which allowed Plaintiffs to amend their complaint by adding the derivative action count, proves that they adequately pleaded this count. We disagree.

Considering Plaintiffs' second motion to amend complaint,[6] filed March 16, 1998, Judge Hifo ruled that

> with respect to the substitution of the new cause of action in Count II, the court finds that Rule 23.1 of the Hawaii Rules of Civil Procedure is, of course, the applicable rule for a derivative action, that it appears that it is a derivative action attempted to be pleaded, and that the case law regarding that most applicable is found in Chambrella versus Rutledge 69 Haw 271 at Pages 275 and 282, the 1987 decision written by Justice Nakamura. And in reviewing that the court finds that the allegations in Exhibit A are not any more particularized than they were as described by the opinion in Chambrella.

Following the more recent ruling in Fujimoto, however, the trial court was correct in concluding in COL no. 11 that "Plaintiffs have not complied with the requirements of Rule 23.1 [HRCP] in that Plaintiffs never alleged nor proved that they made any efforts to obtain the actions they desired from the HBDA council[,]" and that "Plaintiffs also failed to allege or prove that such efforts would have been futile."

With respect to the demand requirement set out in HRCP Rule 23.1, the Fujimoto court stated that

---

[6] Plaintiffs' first motion to amend complaint, filed January 16, 1998, was withdrawn on February 9, 1998. Plaintiffs' second motion to amend complaint resulted in Plaintiffs' First Amended Complaint, filed on April 21, 1998.

> to show futility the shareholder or [member] must demonstrate such a degree of antagonism between the directors and the corporate interest that the directors would be incapable of performing their duty. . . . [A] derivative action plaintiff should not be able to circumvent the Rule 23.1 director-demand requirement with a bare allegation that a majority of the directors are wrongdoers.

Fujimoto at 732, 19 P.3d at 149 (quoting Elgin v. Alfa Corp., 598 So.2d 807, 815 (Ala. 1992) (footnote omitted)) (internal citations omitted).

Plaintiffs' challenge to COL no. 11 references only the following portion of the Fourth Amended Complaint:

> 21. Based upon Sakamoto's misrepresentations of having audited HBDA's books and records, a majority of the Council has continually acted to protect Ichinose from any meaningful review of the books and records of HBDA, even to the extent of authorizing payment to an attorney of up to $50,000 instead of authorizing an audit of the books and records at the estimated cost of $10,000. It would accordingly be an act of futility to request that the Council seek reimbursement from the Defendants of any HBDA funds that were mis-spent under Ichinose's direction.

In other words, Plaintiffs contend that they were excused from the HRCP Rule 23.1 requirement that they prove "the efforts made by the plaintiff to obtain the action the plaintiff desires from the directors" because a majority of the directors were wrongdoers. Even assuming that a majority of the directors were wrongdoers, however, that fact fails to demonstrate such a degree of antagonism between the directors and the corporate interest such that the directors would be incapable of performing their duty and, therefore, fails to satisfy the Fujimoto requirement. It follows that the HRCP Rule 23.1 requirement that they prove "the efforts made by the plaintiff to obtain the action the plaintiff desires from the directors" was not satisfied.

8.

Three Final Issues

In their opening brief, Plaintiffs present the following arguments they failed to present as points of error:

A. ROP has been in conflict of interest from the inception of this case.

B. Ichinose's sole control of HBDA's funds violated HBDA's By-laws [sic] and put HBDA at risk of losing its IRS Section 501(c)(3) exemption.[7]

---

[7] We are uncertain exactly which Bylaws Plaintiffs contend were violated. Although Plaintiffs' opening and reply briefs fail to identify pertinent Bylaws, it appears that the following were in effect at the commencement of this case and would have been relevant to this allegation:

XI.

CONTRACTS, DEBTS, CHECKS, DEPOSITS ETC.

_____. . . .

2. Checks. All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issue [sic] in the name of the corporation shall be signed by the President and the Treasurer. The Council may expressly delegate the authority to sign such instruments to either the President or the Treasurer alone or to any other officer or officers or agent or agents of the organization. The delegation of authority to sign may be general or confined to specific instances.

. . . .

XV.

NON-PROFIT

The corporation is not organized for profit and it shall not issue any stock, and no part of its assets, income, or earnings shall inure to the benefit of or be distributed to any of its members, Council members, or officers, except that the organization may pay reasonable compensation for services actually rendered to the corporation and make payments and distributions in furtherance of the purposes set forth in Article III above. . . . Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, or the corresponding provision of any future United States Internal Revenue Law, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code of 1954, or the corresponding provision of any future United States Internal Revenue Law.

C. The stonewalling tactics by the individual defendants to protect Ichinose and Sakamoto are clear from the undisputed evidence.

a.

Plaintiffs' allegation of Reinwald O'Connor & Playdon's (ROP) conflict of interest lacks merit.

In Plaintiffs' Pre-Trial Statement, filed November 4, 1998, Plaintiffs alleged, in relevant part, as follows:

> The firm of [ROP] is, and has been at all times, in conflict of interest by purporting to represent HBDA while also representing the individual Defendants in this case. This firm has collected attorneys' fees paid out of memberships' funds of HBDA while advocating positions contrary to the interests of the HBDA membership. Accordingly, all attorneys' fees received by this firm should be reimbursed to HBDA.

In his closing arguments to the court, Plaintiffs' counsel argued:

> Your Honor, the next point is the conflict of interest. We are asking, as we have in several of our recent filings, that the funds paid to [ROP] be reimbursed to the corporation either by the five defendants or by [ROP] or both. Mr. Playdon stood up last week and said we're not defendants in this case. Well, they're not a defendant in this case. My understanding of the law, Your Honor, is that when a conflict of interest is first noted, it should be brought to the attention of whoever is running the forum, in this case, to the trial judge. We have done that. We have done that several times, and we have pointed out the conflict of interest. There is no possible way that [ROP] could continue to represent Mr. Ichinose on the one hand and the Association on the other hand. Because of this conflict of interest, they should be repaying the funds because they have purported to represent HBDA.

Defense counsel countered in his closing arguments:

> Now, I'm not going to address the conflict of interest question because it simply doesn't exist. It is not a count. It is not a part of it. If the court wants argument, I'll be happy to submit it. But from my perspective, there is no conflict of interest. There never has been and there never would be. Each one of these individuals was acting within the course and scope of his authority as an officer and a director of the Association. There has been no showing that any of them deviated from the course and the scope of their activities as officers of this association during their period and tenure. So there is no conflict of interest. There has been no showing of any proof that requires any of these individuals to respond. There has been a

> total failure of plaintiff to demonstrate any right to relief under either Count I or Count II.

Although, contrary to HRAP Rule 28(b)(4) (2000), the issue was not raised in the points on appeal and therefore will be disregarded absent plain error, Mroczkowski v. Straub Clinic & Hospital, Inc., 6 Haw. App. 563, 565, 732 P.2d 1255, 1257 (1987), we will discuss this issue and its lack of merit.

Plaintiffs offer only the following legal authority in support of their contention that ROP acted under a conflict of interest: "HBDA is a nominal Defendant and a real-party Plaintiff. Chambrella v. Rutledge, 69 Haw. 271, 275, 282, 740 P.2d [1008] (1987)." They do not otherwise offer authority to address the multitude of issues that surround their allegation of ROP's impropriety.

Although it is true that "the corporation is in the anomalous position of being both a plaintiff and a defendant[,]"[8] "[m]ost derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit." Hawai‘i Rules of Professional Conduct (HRPC) Rule 1.13, comment 12.

Although most case law supports the contention that a lawyer or law firm should not represent both the corporation and

[8] Musheno v. Gensemer, 897 F. Supp. 833, 835 (1995).

its officers in a derivative action,[9] there is also the following contrary interpretation of the issue.

> [T]he corporation is both a passive plaintiff and a named defendant.
>
> Although the corporation appears as a party on both sides of the lawsuit, its true interest lies with the plaintiff shareholder; it is only nominally a defendant. Therefore [defense counsel] represents only the interests of the individual directors who have allegedly harmed the corporation, and the plaintiff's counsel actually represents the interest of the corporation, to which any recovery will be returned. [Defense counsel] is not representing adverse interests because the corporation *has no* interest as a defendant' it is merely required to be named as one.

Robinson v. Snell's Limbs and Braces of New Orleans, Inc., 538 So.2d 1045, 1048-49 (La. App. 1989) (emphasis in original).

The commentary to the HRPC offers the following guidance:

---

[9] Hicks v. Edwards, 75 Wash. App. 156, 163, 876 P.2d 953, 957 (1994) (noting the following):

> Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 216 n.10 (N.D. Ill. 1975) ("This consent rationale seems peculiarly inapplicable to a derivative suit, because the corporation must consent through the directors, who . . . are the individual defendants"), aff'd in part, rev'd in part, 532 F.2d 1118 (7th Cir. 1976); Clark v. Lomas & Nettleton Fin. Corp., 79 F.R.D. 658 (N.D. Tex. 1978) (citing Cannon and similar cases); Frank v. Ducy, 1986 WL 1964, at *2 (N.D. Ill. No. 85C9642, Feb. 10, 1986) ("Courts have been increasingly reluctant to permit a single lawyer or law firm to represent both a corporation and the individual directors in shareholder's derivative actions"); Horowitz v. Horowitz, 151 A.D.2d 646, 542 N.Y.S.2d 708 (1989); Tydings v. Berk Enters., 80 Md. App. 634, 639, 565 A.2d 390, 393 (1989) ("Representation of a corporation as an entity and the majority of its directors, individually, creates a possible conflict of interest for the attorney, particularly where the corporation's interests are adverse to those of the directors") (citing Model Rules of Professional Conduct); Rowen v. LeMars Mut. Ins. Co., 230 N.W.2d 905, 914-15 (Iowa 1975) ("It is also well established that a potential conflict of interest exists when the same law firm attempts to represent the nominal corporate defendant in a derivative action while at the same time representing the corporate insiders accused of wrongdoing") (citing numerous cases).
>
> Hicks, 75 Wash. App. at 163-64, n.10, 876 P.2d at 957, n.10.

> [12] The question can arise whether counsel for the organization may defend [a derivative] action. The proposition that the organization is the lawyer's client does not alone resolve the issue.
>
> Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

HRPC Rule 1.13 (1994), comment 12.

Conflict of interest issues are overseen by the HRPC and depend upon the factual circumstances of each case. Although the HRPC offer some guidance, they leave open questions not yet addressed by Hawai‘i appellate courts as to whether and when an opposing party may raise the issue against opposing counsel.

HRPC Rule 1.13(e) provides, in relevant part, as follows:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Conflict of Interest: General Rule]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comments to HRPC Rule 1.13 include:

> Derivative Actions
>
> [11] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

HRPC Rule 1.7 (1994) provides the general rule regarding conflicts of interest:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comments to HRPC Rule 1.7 include:

> **Conflict Charged by an Opposing Party**
>
> [15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Although ROP's representation of HBDA is governed by HRPC Rule 1.13, it is further guided by the provisions HRPC Rule 1.7, if the representation of the individual defendants is either directly adverse to that of HBDA or materially limited ROP's responsibilities to HBDA. We conclude that the circumstances of this case implicate HRPC Rule 1.7, and required (1) ROP's reasonable belief that representing the individual defendants would not adversely affect its representation of or

relationship with HBDA, and (2) to obtain the consent of its clients.

The statement by defense counsel during closing arguments indicates that ROP believed that the representation was not adverse. The fact that the propriety of joint representation in derivative actions has not been addressed in this jurisdiction and that authorities in other jurisdictions are split on the issue, is evidence of the reasonableness of ROP's belief. Plaintiffs have offered no evidence to the contrary. Although the record does not evidence whether ROP obtained consent for the representation, Plaintiffs make no showing that ROP has failed to do so. HRPC Rule 1.7, Comment 15, advises that the responsibility lies with the lawyer undertaking the representation to resolve questions of conflict of interest, but does not require the attorney to place evidence of consent on the record. Without evidence to the contrary, it cannot be decided that ROP neglected this duty.

Generally, "[o]nly one who stands in the relationship of client to an attorney has standing to object to such attorney's representation of a conflicting interest,"[10] but Plaintiffs were permitted to challenge the joint representation under HRPC Rule 1.7 if the representation "clearly call[ed] in

[10] 7 AM. JUR. 2D *Attorneys at Law* § 197 (1997).

question the fair or efficient administration of justice." HRPC Rule 1.7, Comment 15.

Research reveals that most cases dealing with the issue of a non-client alleging opposing counsel's conflict of interest do so in the context of motions to disqualify the alleged infringing lawyer. See, *e.g.* Silver v. Castle Memorial Hospital, 53 Haw. 98, 488 P.2d 142, (1971); Lau v. Valu-Bilt Homes, Ltd., 59 Haw. 283, 297, 582 P.2d 195, 204 (1978); Decaview Distribution Co., Inc. v. Decaview Asia Corp., 2000 WL 1175583 (N.D. Cal. 2000). In Decaview, the court instructed that

> [o]nly under certain, narrowly defined, circumstances would a non-client litigant have standing to move to disqualify opposing counsel: 'Recognizing the potential abuses of the Rules in litigation . . . the burden of proof must be on the nonclient litigant to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceedings.'

2000 WL 1175583 at *8 (quoting Coyler v. Smith, 50 F. Supp. 2d 966, 971 (C.D. Cal. 1999) (internal citation and quotation marks omitted.)

Of guidance are Hawai‘i Supreme Court cases considering the question of whether a former client may raise an objection to opposing counsel's representation based on the ground of conflict of interest. Although these cases are not directly on point with derivative actions, they are instructive on this issue.

In Silver, the appellant, a client in a previously litigated case, brought a motion to disqualify opposing counsel for an alleged conflict of interest for the first time on appeal.

The supreme court denied relief, pointing out that the appellant had "other opportunities to file [a] motion to disqualify [opposing counsel] before causing all the parties, including the trial court, to expend the time and money in a protracted litigation on the merits of the case." Id. at 105, 146. In the case before us, Plaintiffs did not, at trial, and do not now request that ROP be disqualified from jointly representing HBDA and the individual Defendants. However, as in the Silver case, Plaintiffs had ample opportunity to present evidence of the alleged conflict to the trial court, and did not. Here, Plaintiffs are not even former clients of ROP. The supreme court having denied relief to a former client, it follows that the trial court reasonably denied relief to nonclients.

Of further guidance is that, although prior to the adoption of HRPC Rule 1.7, the Hawai‘i Supreme Court has advised:

> [I]n the absence of evidence of actual prejudice, one, who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly in order to reserve it from the most expedient time, may be deemed to have waived that right.

Lau, 59 Haw. at 297, 582 P.2d at 204. See also Lussier v. Mau-Van Development, Inc., 4 Haw. App. 359, 667 P.2d 804 (1983). Lau also addressed conflict of interest arising in regard to a former client from a case previously litigated. We take guidance from this decision. There, the appellants knew of opposing counsel's conflict, yet did not file their motion to disqualify until more than one year after filing their original complaint and less than

48 hours before trial. The trial court found that appellants used the late motion for disqualification to delay the trial in order to obtain additional time for preparation. Notably, the supreme court observed that there was no evidence that opposing counsel had used confidential information communicated by the appellants, and, therefore, appellants had suffered no actual prejudice by opposing counsel's representation. While the supreme court admonished opposing counsel for representing an interest adverse to its clients, the court also refused to "encourage such questionable conduct" as engaged in by appellants, holding that under the circumstances, "evidence of actual prejudice to the former clients is required in order that former counsel be disqualified." Id. at 297, 204. Although Plaintiffs did not seek to disqualify ROP, we conclude that Lau's actual prejudice requirement applies. Lau's circumstances differ somewhat from those of the instant case, but we note that like the Lau appellants, Plaintiffs were aware of the alleged conflict (evidenced by Plaintiffs' counsel's September 27, 1997 letter to defense counsel), yet not only did they not move the court to disqualify ROP, they did not otherwise attempt to litigate the issue. They merely "raised the issue" by citing it to the court as a ground for relief in the form of reimbursement of costs and allegedly improper disbursements.

Furthermore, assuming Plaintiffs had standing to raise such an issue regarding opposing counsel, they failed to prove

that a conflict of interest existed. Now, they ask this court to conclude, on bare allegations, absent evidence or legal authority, that their allegation is a fact. The trial court declined to grant such relief based on Plaintiffs' unsubstantiated allegation. Absent a factual basis to determine otherwise, we conclude that the trial court was correct.

We highlight the facts that Plaintiffs merely voiced their allegation to the trial court, chose not to litigate the issue, and then complained about it on appeal. This knowing lack of action, coupled with no showing of actual prejudice, constitutes waiver of the issue.

b.

The record fails to support the allegation that Ichinose's sole control of HBDA's funds violated the Bylaws and put HBDA at risk of losing its IRS Section 501(c)(3) exemption.

The following quotation of the transcript shows that the allegation that Ichinose's sole control of HBDA's funds violated the Bylaws and put HBDA at risk of losing its IRS Section 501(c)(3) exemption related only to Ichinose's actions pre-trial:

> THE COURT: . . . it is unclear to the Court as to what relief is being sought here. For example, it indicates that you wish to stop Eugene Ichinose from violating HBDA's bylaws regarding payment of funds and the allegation is that Mr. Ichinose was provided blank checks for his signature.
>
> . . . .
>
> THE COURT: As to the first, what is the claim being made and what is the relief sought?

> MR. MORSE: I understand Mr. Ichinose has now retired and this is moot. As far as future relief, it's moot.

The Bylaw apparently in question states, "The Council may expressly delegate the authority to sign such instruments to either the President or the Treasurer alone. . . . The delegation of authority to sign may be general or confined to specific instances." Plaintiffs have offered no evidence that Ichinose was not delegated general authority to disburse funds in the name of the corporation and, thus, have not proven the allegation that Ichinose violated this Bylaw.

Similarly, there is no evidence or authority that Ichinose's violation of the Bylaws put HBDA at risk of losing its IRS Section 501(c)(3) exemption.

c.

> This court will not consider Plaintiffs' repeated attempt to raise an issue waived at trial.

Plaintiffs' argument "C" represents a final redundant attempt to argue that "Retotal never got all of HBDA's financial records for review. The Defendants refused to produce Telemarks' records and the trial court unfortunately approved this refusal." (Record citations omitted.) As discussed *supra*, Plaintiffs expressly waived this issue at the commencement of trial, and we will not entertain it on appeal.

CONCLUSION

Accordingly, we affirm the circuit court's August 24, 2000 Final Judgment in favor of Defendants-Appellees Hawaii Ballroom Dance Association, Eugene Ichinose, Wilbert K. Sakamoto, Alfred G. Agbayani, Jackie Uyeda, and Robert Fukumoto.

DATED: Honolulu, Hawai‘i, March 7, 2002.

On the briefs:

Jack C. Morse
for Plaintiffs-Appellants.

Chief Judge

George W. Playdon, Jr.,
Kelvin H. Kaneshiro, and
Charles S. O'Neill, Jr.
(Reinwald O'Connor &
Playdon, of counsel),
for Defendants-Appellees.

Associate Judge

Associate Judge