NO. 24369

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

VINCENT F. SAGE, individually and as Trustee of the Vincent F. Sage Revocable Trust dated August 17, 1975, Plaintiff-Appellant, Cross-Appellee, v. MALIA AHARONI FOUZAILOV and SUSAN AHARONI, fka SUSAN SAGE, Defendants-Appellees, Cross-Appellants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 99-2293)

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

Plaintiff-Appellant, Cross-Appellee Vincent F. Sage (Sage), individually and as Trustee of the Vincent F. Sage Revocable Trust dated August 17, 1975, appeals from the May 31, 2001 Final Judgment of the Circuit Court of the First Circuit, State of Hawaiʻi (the circuit court) that: (1) dismissed with prejudice all claims and allegations made in the Complaint filed by Sage on June 10, 1999 against his former wife, Defendant-Appellee, Cross-Appellant Susan Aharoni, formerly known as Susan Sage (Aharoni), and his former stepdaughter, Defendant-Appellee, Cross-Appellant Malia Aharoni Fouzailov (Fouzailov), (collectively, Defendants); and (2) awarded Defendants $714.09 for costs incurred. The Final Judgment was entered

> [p]ursuant to that certain "Order Granting In Part And Denying In Part [Defendants'] Motion For Summary Judgment (filed October 8, 1999)" filed November 26, 1999; that certain "Order Granting [Fouzailov's] Renewed Motion For

> Summary Judgment Based Upon Recent Determination Of The Law Of The Case (filed 2/20/01)" filed March 20, 2001; and that certain "Order Granting In Part And Denying In Part Defendants' Motion For An Award Of Attorney's Fees And Costs (filed 3/28/01)" filed even date herewith[.]

Defendants cross appeal, challenging the circuit court's denial of their request for an award of attorney's fees.

We affirm.

BACKGROUND

Aharoni and Sage were married from February 23, 1993 to July 28, 1998. It was the third marriage for both. Fouzailov is Aharoni's adult daughter from Aharoni's second marriage.

Aharoni and her second husband, Rafael Aharoni (Rafael) formerly owned a fully furnished five-bedroom, four-bath house with a swimming pool, located on Diamond Head Road (the Diamond Head house). Incident to their divorce, a receiver was appointed by the Family Court of the First Circuit (the family court) to sell the Diamond Head house and its furnishings. The Divorce Decree dissolving Aharoni and Rafael's marriage apparently provided that if Aharoni and Rafael could not agree on a division of their household furniture and furnishings prior to the closing of the sale of the Diamond Head house, "the household furniture and furnishings shall be sold prior to closing and the proceeds divided equally." The record does not indicate whether Aharoni and Rafael ever agreed on a division of their household furniture and furnishings.

On January 8, 1993, Sage submitted a Deposit, Receipt, Offer and Acceptance (DROA), offering to buy the Diamond Head

house, including its furniture and furnishings (valued at $100,000), for $1,760,000. On January 25, 1993, Sage's DROA was apparently presented to the family court judge presiding over Aharoni and Rafael's divorce.

On February 23, 1993, Sage and Aharoni were married.

On March 11, 1993, title to the Diamond Head house was conveyed by a Receiver's Deed to Sage personally. The Receiver's Deed did not convey to Sage any furniture or furnishings in the Diamond Head house.

On August 13, 1996, "in contemplation of the settlement of the Linda Wyratsch litigation[1] and associated items," Sage and Aharoni entered into an agreement that divided all their marital assets and assigned responsibility for their debts (the Agreement).[2] The Agreement provided for the sale of the Diamond Head house and payment of the first mortgage on the Diamond Head house, for which both Sage and Aharoni were liable. The Agreement also provided:

> After payment of costs and expenses of sale, the balance of the net proceeds thereof shall be divided equally between [Sage] and [Aharoni].
>
> From the share of the said net proceeds awarded to [Sage], he shall be responsible for and shall pay:
>
> 1) that certain second mortgage in the approximate amount of $250,000.00 held by First Hawaiian Bank which was taken out to fund the opening of two Diamond Company stores.

[1/] It is not clear from the record on appeal what the Linda Wyratsch litigation was about.

[2/] Defendant-Appellee, Cross-Appellant Susan Aharoni (Aharoni) apparently treated the Agreement as an agreement in contemplation of divorce.

> 2) that certain third mortgage held by First Hawaiian Bank in the approximate sum of $118,000 used to fund settlement with Linda Wyratsch[.]
>
> 3) that certain unsecured debt in the sum of $150,000 owed to Malia and Boaz Fouzailov for monies borrowed and used in Diamond Company operations[.]
>
> [Sage] shall also pay the balance of the settlement monies due Linda Wyratsch in the approximate sum of $200,000.00 which said sum may be a lien against the real property (house) until paid.
>
> [Aharoni] waives any interest in any assets of [Sage] as more particularly defined and described in Exhibit "A" attached.
>
> Other than as herein particularly set forth each party retains all right title and interest in the various loans and assets attributed to each as also described in Exhibit "A" attached, and neither party shall make any additional claims against the property of the other so listed in Exhibit "A" other than as herein set forth.

(Emphasis added.) Attached as Exhibit "A" to the Agreement was a legal-sized sheet of paper, on which had been handwritten the various assets and liabilities attributed to Sage and Aharoni. Exhibit "A" did not list any household furniture or furnishings as an asset of either party. However, Exhibit "A" did list the following as an asset of Aharoni: "All assets listed in [Aharoni's] name without [Sage's]." Similarly, Exhibit "A" listed as an asset of Sage "[a]ll assets listed in [Sage's] name without [Aharoni's]."

On May 28, 1997, Aharoni filed a complaint for divorce against Sage in the family court (the Divorce Lawsuit).

On September 29, 1997, Fouzailov filed a complaint in the circuit court (Civil No. 97-3983-09) against the Diamond Company, Inc. and Sage, individually and as Trustee of the Vincent F. Sage Revocable Trust dated August 17, 1975, seeking

repayment of a $154,000 unsecured loan that Fouzailov had made to Sage (Fouzailov's Lawsuit).

On July 20, 1998, just as the Divorce Lawsuit was concluding, Sage's attorney, Richard Hacker, wrote a letter to a family court judge,[3] requesting, in relevant part, that the Divorce Decree that had been proposed by Aharoni's attorney

> not be entered by the [c]ourt for the following reasons:
>
> 1. There is a disagreement regarding some $200,000.00 worth of household furnishings and art work which the [sic] belongs to [Sage] but was removed by [Aharoni].
>
> . . . .
>
> It is my opinion that the issue of the $200,000.00 worth of household furnishings and art work must be decided by the [c]ourt.

(Emphasis in original.) Aharoni's attorney responded with a letter to the judge, dated July 23, 1998, rebutting Sage's claim, in pertinent part, as follows:

> I also disagree that there is an issue regarding "$200,000.00 worth of household furnishings and art work". [Aharoni] certainly never "removed" any such property as alleged by [Sage]. Before the Diamond Head Road property was sold this past April, [Sage] removed most of the household furniture, furnishings, and effects while [Aharoni] was in Israel. Although [Aharoni] wasn't pleased that he did so, she didn't make an issue (and isn't making an issue) of it. The "division" is done and [Sage] can keep whatever he took as his personal effects. As far as [Aharoni] is concerned, the August 13, 1996 Agreement addressed all of the parties' assets and debts, and no issues remain. She certainly doesn't have "$200,000.00 worth of household furnishings and art work" as alleged by [Sage].
>
> . . . .
>
> If [Sage] can prove that there has been a concealment or secreting of "$200,000.00 worth of household furnishings and art work" by [Aharoni], he has remedies under Rule 60, Hawaii Family Court Rules. I would suggest to the [c]ourt that he will never file such a motion because he will never

[3/] The letter was addressed to the Honorable R. Mark Browning.

> have any such proof because it is non-existent. [Aharoni] doesn't have "$200,000.00 worth of household furnishings and art work". If anyone does, it's [Sage] and he can keep it.

(Emphases in original.)

A few days later, on July 27, 1998, the family court[4] entered a final Divorce Decree that divided the assets of Sage and Aharoni in accordance with the Agreement. The Divorce Decree did not mention Sage's allegedly stolen furniture and artwork. Additionally, the Divorce Decree did not divide any household furnishings or artwork of Sage and Aharoni but provided instead: "Each party shall be awarded any other assets titled in his or her name without the other party's name being on title."

On August 19, 1998, Sage filed a Notice of Appeal from the Divorce Decree. Thereafter, on November 27, 1998, Sage and Aharoni filed a stipulation to dismiss the notice of appeal, which was approved by supreme court Justice Paula A. Nakayama.

On June 10, 1999, Sage filed the underlying lawsuit in the circuit court, alleging, in relevant part, as follows:

> 4. On January 9, 1998, [Aharoni] served [Sage] a complaint for divorce filed in the First Circuit Court.
>
> 5. In September 1998, a divorce decree was entered which provided, among other things, that the property held in the names of the individual parties would remain with that party.
>
> 6. The furniture and other personal property located in the Sages' Diamond Head house was purchased by [Sage] at auction and it remained his property.
>
> 7. Upon information and belief, the personal property in the Diamond Head house of the Sages is in the possession of [Defendants].

[4/] Judge Karen M. Radius signed the Divorce Decree for Judge R. Mark Browning.

> 8. As a result of this wrongful conversion, [Sage] has been damaged in an amount to be proven at the time of trial.

Sage requested that the circuit court "order the return of the furniture and personal property of [Sage] or, in the alternative, damages in an amount to be shown at the time of trial" or "[s]uch other relief as the [c]ourt deems just and proper."

On July 1, 1999, the circuit court, Judge Sabrina McKenna presiding, entered Findings of Fact, Conclusions of Law, and Order, resolving Fouzailov's Lawsuit in Fouzailov's favor. Relying on Exhibit "A" to the Agreement, in which Sage had handwritten that he owed $150,400 to Fouzailov and her husband,[5] the circuit court awarded Fouzailov "$177,903.25 as of June 14, 1999; along with per diem interest of $47.76 beginning June 15, 1999 and continuing thereafter until the date of filing of the judgment herein; along with legal interest accruing thereon at the statutory rate from and after the date the judgment is filed." The circuit court also awarded Fouzailov $25,984.19 as reasonable attorney's fees, plus costs in the amount of $780.62.

On October 8, 1999, Defendants filed a Motion for Summary Judgment against Sage in this lawsuit. Defendants claimed that summary judgment was appropriate because: (1) Sage's claim was barred by the doctrines of *res judicata* and collateral estoppel since Sage could have raised the identical

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[5/] Plaintiff-Appellant, Cross-Appellee Vincent F. Sage, individually and as Trustee of the Vincent F. Sage Revocable Trust dated August 17, 1975, had claimed various offsets against the promissory note he had executed in favor of Defendant-Appellee, Cross-Appellant Malia Aharoni Fouzailov and her husband, Boaz.

claim in the Divorce Lawsuit; and (2) Sage's claim was time barred by Hawaii Revised Statutes (HRS) § 580-56 (1993).[6] Attached to the motion was an affidavit signed by Aharoni, in which Aharoni related the history of the events leading to this lawsuit and denied taking or having possession of $200,000 worth of artwork or furnishings. Attached to Aharoni's affidavit were copies of the Agreement, court documents from the Divorce Lawsuit and the Fouzailov Lawsuit, and an affidavit by Defendants' attorney, attesting that he had reviewed the file in the Divorce Lawsuit "on three occasions in the past year, most recently on October 1, 1999[, and t]here have been no further motions, pleadings, or filings of any kind whatsoever since the Stipulation for Dismissal (filed in the Hawaii Supreme Court on November 27, 1998) was also filed in the First Circuit Court divorce file on November 30, 1998." There was no affidavit by Fouzailov attached to Defendants' Motion for Summary Judgment.

In a memorandum in opposition to Defendants' Motion for Summary Judgment, Sage pointed out that: (1) he had acquired title to the Diamond Head house and its contents at an auction; (2) the Divorce Decree was silent on the issue of the furniture

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[6/] Hawaii Revised Statutes § 580-56(d) (1993) provides, in pertinent part:

> (d) Following the entry of a decree of divorce, or the entry of a decree or order finally dividing the property of the parties to a matrimonial action if the same is reserved in the decree of divorce, or the elapse of one year after entry of a decree or order reserving the final division of property of the party, a divorced spouse shall not be entitled to dower or curtesy in the former spouse's real estate, or any part thereof, nor to any share of the former spouse's personal estate.

and artwork he had acquired at the auction and left it to the parties to prove their claim to personal property held in their respective names during the marriage; and (3) Aharoni had proposed during the Divorce Lawsuit that the Divorce Decree include the following paragraph, which was ultimately not included in the final Divorce Decree because it was not consistent with Exhibit "A" to the Agreement:

> (iv) Household Furniture, Furnishings, and Effects.
>
> The parties' household furniture, furnishings, and effects have already been divided by the parties to their mutual satisfaction. Therefore, each party shall be awarded the household furniture, furnishings, and effects in his or her possession or under his or her control.

Defendants' Motion for Summary Judgment was heard before the circuit court, Judge Gail Nakatani (Judge Nakatani) presiding, on October 29, 1999. At the hearing, the following colloquy occurred:

> [DEFENDANTS' ATTORNEY]: . . . We indicated, Your Honor, that my clients never took the property. Number two, this whole matter was raised in the [f]amily [c]ourt by [Sage] in the case, denied, he was unhappy, he appealed, then withdrew his appeal. Res judicata and collateral estoppel should bar this case, Your Honor.
>
> And, number 3, this case was barred by the Section in 580, I think it's 580, Your Honor, the [f]amily [c]ourt statute which requires that property matters be resolved at the time of trial but prior to the entry of judgment and according to the cases that we cited. That becomes a final order ten days -- actually, on the eleventh day, after the final judgment of -- or the divorce decree is entered. We don't see how they have a case here, Your Honor.
>
> In opposition, they came back and said, well, my client, [Aharoni], renewed the property. But something very important is missing, that is, the foundation for making that statement. There is no foundation. It's a follow-up conclusory statement without any supporting evidence to indicate how [Sage] knew that my client took the property out of his house, which is rather extraordinary.
>
> In response, well, we then came to this [c]ourt with the affidavit that [Sage], the declaration that [Sage] had filed down the hallway six months ago before Judge Chang, in

which he said, well, the reason I know this on information and belief is other people have told me. Your Honor, it's blatant hearsay, it's inadmissible in court. And as a result none of the statements made by [Sage] in this case create any material issues of fact. They don't have a case.

. . . .

THE COURT: All right. [Sage's attorney.]

[SAGE'S ATTORNEY]: When I read the motion and the memorandum, the issues seemed to me to be directed solely to two issues, one is this res judicata argument and the other was the statutory argument. And I answered those.

We now have a third argument that has popped up in the reply and I'll address myself to that. But let's take the res judicata argument.

I think we live and die by what the decree says. I think probably the parol evidence rule would forbid the inference of all of the letters that were passed back and forth between counsel and even the proposed decrees that were passed back and forth.

We look at the decree and what does it tell us about the personal property? There's nothing specific about it other than the line that says: As to property titled by the parties during the marriage, that stays with them.

We have filed an affidavit indicating that the property was -- the home was acquired at an auction as well as the personal property by [Sage] alone. And [Sage] concludes and states that the personal property and the artwork is his alone. So that's what the decree says and that's -- that's the status of the record based upon what's been presented to this court.

Now, and then we roll into their next argument. They say well, the statute says that after a year you can't do anything about property division in [f]amily [c]ourt. Well, that's right, after a year you can't do anything about property in [f]amily [c]ourt. But that doesn't leave you without a remedy. And the course -- and the cases cited by us in the [i]ntermediate [c]ourt and the [s]upreme [c]ourt say, well, in that situation you're going to have to go to another court.

In one -- in one situation it was they did not make a disposition of real property owned jointly in the divorce decree. So the court said well, as a result of the divorce it now becomes tenants in common and you have to go to [c]ircuit [c]ourt and file a partition to the property. Well, that's the same thing that's occurred here except it's personal property. So we are in court saying that the personal property is ours and they have it.

Now, we have this new argument. And I say new because if you look at the motion for summary judgment and you look at the memo, there's not one word, not one word in there about her one-line conclusion that she didn't take the

property. He argues that well, we have a conclusion in our affidavit likewise, or declaration in this case.

Well, what's good for the goose is good for the gander. They can't rely on a conclusion if we can't rely on the conclusion. And really, the focus of their motion had nothing to do with that, it was just one line that they had put in twenty pages of text and affidavits.

So --

THE COURT: I mean, but on the one hand she would know whether she took it, she would have personal knowledge of that.

[SAGE'S ATTORNEY]: Right.

THE COURT: And on the other hand, there is the question of your client's personal knowledge. So --

[SAGE'S ATTORNEY]: But -- but --

THE COURT: -- you're right, they're conclusory statements but one appears to be based on personal knowledge whereas the other is not.

[SAGE'S ATTORNEY]: But she says in her affidavit, Your Honor, that he took the property, the exact same allegation that's being used against us. And that all goes together. In other words, he took the property, I didn't take the property, he said I didn't take the property, she took the property, don't they cancel each other out.

What it -- what it really doesn't answer is this question, Your Honor. Remember this lawsuit is against both [Aharoni] and [Fouzailov]. There's no affidavit from [Aharoni] that says [Fouzailov] doesn't have the property, and that would be hearsay anyway, there's no affidavit from [Fouzailov] at all that says that she doesn't have the property. There's nothing in the record from [Fouzailov] from any source, either from [Aharoni] or from [Fouzailov] that the property is not with [Fouzailov] now.

And I would argue that the conclusionary statement by [Aharoni] really leaves a lot to be desired. She could have given the property to [Fouzailov], [Fouzailov] removed the property from the house. There's all kinds of questions in which -- the way in which the way in which [sic] that property was removed and by whom and who has possession of the property now. So even looking at their best scenario, there is nothing about the issue of where the property is with [Fouzailov].

And, Your Honor, I would say this. Because the way in which this motion was developed, I think under Rule 56,F, we should have some time to do some discovery. We have information about another family member that [sic] has seen this property in [Fouzailov's] house --

THE COURT: Did you make a 56,F request, counsel?

[SAGE'S ATTORNEY]: No, I did not, Your Honor, because the focus of the motion and the memorandum didn't say one word about -- and we're contending that [Aharoni] doesn't have the property. The only time it appears is in one little phrase in her declaration. So --

THE COURT: Well, you know, you have to state with particularity what it is that you wish to do for purposes of a 56,F request, and that normally is required by an affidavit and that is absent here.

[SAGE'S ATTORNEY]: I understand that, Your Honor, but they have attached the affidavit of [Sage] where he indicates that a family member of [Aharoni] saw the property in Israel, who was visiting there. And we're not going to get that family member to come forth voluntarily so we're going to have to subpoena him to take his deposition.

But under any circumstance the issue relating to [Fouzailov] remains.

THE COURT: All right. [Defendants' attorney]?

[DEFENDANTS' ATTORNEY]: Yes, Your Honor. We, under the [s]upreme [c]ourt cases here we don't have to make a case ourselves. All we have to do -- in fact the [s]upreme [c]ourt here has ruled that we don't even have to present affidavits, depositions or any sworn testimony. They have to produce the case. They haven't done so. They didn't move for Rule 56,F.

This came up other [sic] logically, we moved for summary judgment on the issues we had. We could not anticipate that he's going to change his story for this judge. They came back with their answering brief and they said, oh, she took the property. Well, when you look at the [sic] suddenly at Judge Chang's affidavit that he was looking at, that's when the difference first appears. So this had had a very orderly progression and we didn't try and pull anything on them.

THE COURT: I'm trying to understand your first statement about as the movant you have no burden in a motion for summary judgment.

[DEFENDANTS' ATTORNEY]: Right, Your Honor.

THE COURT: I think you're mistaken.

[DEFENDANTS' ATTORNEY]: There are cases, the only allegation is that [Aharoni], took the property. That is their only allegation. Everything grows out of that like a tree. That allegation is not only rebutted by [Aharoni's] statement but they have no evidence showing anything on personal firsthand knowledge otherwise.

THE COURT: All right. This motion is taken under advisement.

On November 26, 1999, Judge Nakatani entered a written "Order Granting in Part and Denying in Part [Defendants'] Motion for Summary Judgment" (Judge Nakatani's November 26, 1999 Order) that granted Aharoni's motion and dismissed Aharoni from this lawsuit but denied the motion as to Fouzailov.

On May 1, 2000, Fouzailov filed a Motion for Summary Judgment. Many of the exhibits that had been attached to Defendants' earlier Motion for Summary Judgment were also attached to Fouzailov's Motion for Summary Judgment. Also attached to Fouzailov's motion was a Declaration by Fouzailov, which included the following paragraphs:

> 4. I deny in all respects Sage's claim that I have in my house in Israel, or in any other property under my control and possession, any furniture and art works owned by [Sage];
>
> 5. I further deny in all respects that I saw or took part in any taking, storing, selling or transfer of any of [Sage's] furniture or art works;
>
> 6. I have never seen any of [Sage's] artwork or furniture other than in his home at Diamond Head Road in Honolulu, Hawaii;
>
> 7. This lawsuit against me is unfounded, and harassment to get back at me and my mother, and to force us to incur additional attorneys fees and costs.

On June 8, 2000, Fouzailov's May 1, 2000 Motion for Summary Judgment was heard by the circuit court, Judge Colleen Hirai (Judge Hirai) presiding. Judge Hirai apparently denied the motion based on the "law of the case" doctrine.[7]

[7/] The record on appeal does not appear to contain any written order entered by Judge Colleen Hirai, denying Fouzailov's May 1, 2000 Motion for Summary Judgment, and the transcripts of the hearing on the motion were not ordered by any of the parties to this appeal.

On July 13, 2000, Fouzailov filed a Hawai‘i Rules of Civil Procedure (HRCP) "Rule 60(b) Motion to Vacate and Amend, Nunc Pro Tunc, Order Filed Herein Novmber [sic] 26, 1999" (Fouzailov's Rule 60(b) motion). Fouzailov sought an amendment of that part of Judge Nakatani's November 26, 1999 Order "so as to eliminate any prejudice relating to her recent filing of a Motion for Summary Judgment before [Judge Hirai], which was heard by Judge Hirai on June 8, 2000, and denied by Judge Hirai based upon the 'law of the case.'" Fouzailov sought specifically to amend the final paragraph of Judge Nakatani's November 26, 1999 Order to read as follows:

> IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Motion be, and hereby is, denied as to Defendant Malia Aharoni Fouzailov without prejudice, with leave to refile said Motion as long as it is accompanied by a sworn statement by Defendant Fouzailov.

(Emphasis in original.) A memorandum in support of Fouzailov's motion explained that Judge Hirai's denial of Fouzailov's May 1, 2000 Motion for Summary Judgment was a "surprise" because Judge Hirai "deemed Judge Nakatani's earlier decision as to Fouzailov a decision 'on the merits,' and thereafter denied Fouzailov's (now-supported) Motion on the basis of 'law of the case.'" Clarification of Judge Nakatani's order was needed, Fouzailov stated, because

> [i]t was never clear whether Judge Nakatani was making a procedural ruling, i.e., motion denied because of lack of Fouzailov's sworn statement, or whether Judge Nakatani was making a decision on the merits, i.e., that Sage had somehow raised material factual questions simply because Fouzailov had failed to submit any sworn statement.

(Emphasis in original.) Fouzailov's Rule 60(b) motion was apparently heard by Judge Nakatani on July 19, 2000 and subsequently denied by an order filed on August 9, 2000. The August 9, 2000 order does not indicate the basis for Judge Nakatani's denial, and the transcripts of the July 19, 2000 were not made a part of the record of this appeal. However, a July 20, 2000 minute order signed by a circuit court clerk indicates that Judge Nakatani denied Fouzailov's motion because she believed that Fouzailov "HAD ONE OPPORTUNITY TO FILE A MOTION FOR SUMMARY JUDGMENT REGARDLESS IF MOTION WAS FILED PREMATURELY."

On January 19, 2001, Sage filed a motion to set aside Judge Nakatani's November 26, 1999 Order. In a supporting memorandum, Sage explained that following the entry of Judge Nakatani's November 26, 1999 Order, he had employed various discovery efforts to determine what had happened to the furniture and artwork that Aharoni denied taking from the Diamond Head house. On January 9, 2001, just by accident, he learned that Aharoni had consigned a number of items in the Diamond Head house to an antique store at Kilohana Square shopping mall and that "three shipments of furniture and art objects" had been sent from the antique store to Aharoni's home in California. Sage contended that since Aharoni had "clearly lied to the [c]ourt" and "[t]hat lie was the basis for her removal from the case[,]" "[t]he law requires that she be reinstated as a defendant, and the [c]ourt should award attorneys' fees and costs to [Sage]

which were incurred to [sic] defending against the lies and in uncovering the falsehoods."

On January 19, 2001, Sage also filed a Motion to Name Additional Witnesses and for Further Discovery, based on the newly discovered evidence discussed in his motion to set aside Judge Nakatani's November 26, 1999 Order.

Sage's January 19, 2001 motions were heard on February 8, 2001 by Judge Dan T. Kochi (Judge Kochi), who denied both motions by orders filed on March 2, 2001. Judge Kochi's written order denying Sage's January 19, 2001 motion to set aside Judge Nakatani's November 26, 1999 Order does not indicate the basis for the order, and the transcripts of the February 8, 2001 hearing were not ordered by any party for inclusion in the record on appeal. However, on February 13, 2001, "by order of the court[,]" a circuit court clerk signed minutes indicating that Judge Kochi saw no reason to overturn Judge Nakatani's November 26, 1999 Order because having heard the arguments of counsel and reviewed the pleadings in this case, he found that Sage's claims were based on the 1993 Receiver's Deed, which transferred title to Sage of only the Diamond Head house, "with no mention of furniture." Judge Kochi also determined that the family court had already ruled in the Divorce Lawsuit on the division of the personal property of Sage and Aharoni.

On February 20, 2001, Fouzailov filed a Renewed Motion for Summary Judgment Based Upon Recent Determination of Law of

the Case (Fouzailov's Renewed Motion for Summary Judgment). Fouzailov claimed that the following holdings by Judge Kochi at the February 8, 2001 hearing established the "'law of the case,' and consequently, [Fouzailov] can have no liability herein as a matter of law":

> (1) all disputes regarding tangible personal property were resolved by the July 27, 1998 Divorce Decree between [Aharoni] and [Sage]; and (2) [Aharoni] committed no wrongdoing because she did not take any furnishings or artwork which belonged to [Sage].

Fouzailov's Renewed Motion for Summary Judgment was heard by Judge Kochi on February 28, 2001. Judge Kochi orally ruled as follows:

> Judge Nakatani granted [Aharoni] summary judgment based upon the fact that the items in dispute were divided as a result of the divorce which occurred between [Sage] and [Aharoni], which this [c]ourt affirmed, and with regard to those items in dispute the [f]amily [c]ourt had decided were the property of [Aharoni] and inasmuch as that same property is in dispute with regard to [Fouzailov], that if those properties were or belonged to [Aharoni] there is no action or no claim which [Sage] can bring with regard to those same properties. And, therefore, the [c]ourt is granting [Fouzailov's] motion for summary judgment.

Judge Kochi entered a written order granting Fouzailov's Renewed Motion for Summary Judgment on March 20, 2001.

On March 28, 2001, Defendants filed a Motion for an Award of Attorney's Fees and Costs, which was heard by Judge Kochi on April 19, 2001. Following the hearing, Judge Kochi orally ruled, in relevant part, as follows:

> Looking at this case, it appears that it arises out of the divorce, and the [c]ourt in the divorce action decided with regard to the property rights that arose from, I guess, an initial contract.
>
> But once the [c]ourt made a decision, then that merged into the decision, and so we don't have a contract at this point. What we have is a dispute as to what the effect of the [c]ourt's decision was in that case, in which [Sage]

> claims that the property belongs to him, and that [Defendants] wrongfully took the property from him or has possession or dispose [sic] of the property, his properties, and so it appears to be a claim in tort.
>
> And on that basis, the [c]ourt is denying the request for attorney's fees, however, I believe that [Defendants are] entitled to [their] costs as the prevailing party, and therefore, will award the costs requested.

On May 29, 2001, Judge Kochi entered a written Order Granting in Part and Denying in Part Defendants' Motion for an Award of Attorney's Fees and Costs. The written order denied Defendants' motion for an award of attorney's fees but awarded Defendants $714.09 in costs against Sage.

The Final Judgment was entered on May 31, 2001, and this appeal and cross-appeal followed.

DISCUSSION

A. Sage's Appeal

Sage contends that the circuit court erred when it: (1) granted Fouzailov's Renewed Motion for Summary Judgment; (2) denied his January 19, 2001 motion to set aside Judge Nakatani's November 26, 1999 Order granting summary judgment to Aharoni; and (3) denied his January 19, 2001 Motion to Name Additional Witnesses and for Further Discovery. We disagree.

Pursuant to HRCP Rule 56(b), "[a] party against whom a claim . . . is asserted . . . may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof[.]" Pursuant to HRCP Rule 56(c), summary judgment may be granted only "if the pleadings, depositions,

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 a judgment as a matter of law."

The burden is on the moving party to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to a judgment as a matter of law. GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995). This burden has two components.

First, the moving party has the burden of production. That is, the moving party must produce support for its claim that

> (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, . . . and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law.

Id. at 521, 904 P.2d at 535 (citation omitted). It is only when the moving party satisfies its initial burden of production that the burden "shift[s] to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." Id.

Second, the moving party has the ultimate burden of persuasion. Id. That is, the moving party must convince the court that "no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law." Id.

"The evidentiary standard required of a moving party in meeting its burden on a summary judgment motion depends on whether the moving party will have the burden of proof on the issue at trial." Id. "Where the defendant is the moving party, there is no genuine issue as to any material fact and the defendant is entitled to a judgment as a matter of law if, upon viewing the record in the light most favorable to the plaintiff, it is clear that the plaintiff would not be entitled to recover under any discernable theory." Abraham v. Onorato Garages, 50 Haw. 628, 631-32, 446 P.2d 821, 825 (1968). A defendant moving for summary judgment

> "may discharge his [or her] burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent." [10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2727], at 130 (footnote omitted); *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) (One moving for summary judgment under Fed. R. Civ. P. 56 need not support his [or her] motion with affidavits or similar materials that negate his opponent's claims, but need only point out to the district court that there is absence of evidence to support the opponent's claims.) For "[i]f no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless . . . ." 10A Wright, Miller & Kane, *supra*, at 130.

First Hawaiian Bank v. Weeks, 70 Haw. 392, 396-97, 772 P.2d 1187, 1190 (1989) (footnote omitted).

Based on our review of the record, we conclude that in entering the orders that Sage challenges on appeal, Judge Kochi correctly concluded, based on the literal language of the Divorce Decree entered in the Divorce Lawsuit, that the family court had divided the personal property of Sage and Aharoni by awarding each of them "any other assets titled in his or her name without

the other party's name being on title[.]" In order to establish his claim for conversion of the furniture and artwork in the Diamond Head house at trial, therefore, Sage was required to establish that the title to the furniture and artwork he claimed was in his name alone.

In filing his complaint and in defending against the various motions for summary judgment that were filed in this case, Sage claimed that his title to the furniture and artwork in the Diamond Head house was established by: (1) the DROA he submitted to the receiver, offering to purchase the Diamond Head house and its contents; and (2) the Receiver's Deed, conveying the Diamond Head house to Sage. However, despite ample opportunity to conduct discovery, Sage never supplied any evidence that his DROA for the contents of the Diamond Head house was accepted by the receiver.[8] Moreover, the Receiver's Deed to Sage, on its face, did not convey to Sage the contents of the Diamond Head house, including the furniture or artwork to which Sage claimed he held title.

Under the standard set forth in First Hawaiian Bank v. Weeks, therefore, the circuit court did not err when it granted Fouzailov's Renewed Motion for Summary Judgment and refused to set aside Judge Nakatani's November 26, 1999 Order or allow Sage to add additional witnesses or conduct further discovery. To the

[8/] As noted above, the Divorce Decree dissolving Aharoni and Rafael Aharoni's (Rafael) marriage provided that the household furniture and furnishings in the Diamond Head house would be sold only if Aharoni and Rafael were unable to agree on a division of such furniture and furnishings.

extent that Judge Kochi may have modified prior rulings of Judges Nakatani and Hirai, we also conclude that there were cogent reasons to support the modifications. See Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 135, 920 P.2d 334, 349 (1996) (holding that a judge is allowed to modify a prior decision of another judge if either cogent reasons support such a modification, or exceptional circumstances are present).

B. Defendants' Appeal

1.

Defendants contend that: (1) the circuit court erred in denying their October 8, 1999 Motion for Summary Judgment as to Fouzailov on grounds that Fouzailov, by failing to submit an affidavit, had failed to adequately support the motion; and (2) the circuit court erred and abused its discretion in denying their motion for attorney's fees.

We agree that the circuit court mistakenly held that a defendant moving for summary judgment has to produce some evidence in support of his or her motion.

It is explicitly stated in HRCP Rule 56(b) that no affidavit is necessary to support a defendant's motion for summary judgment:

> (b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted . . . may move with or without supporting affidavits for a summary judgment in the party's favor[.]

(Emphasis added.) The Hawai'i appellate courts have repeatedly affirmed that a defendant need not supply supporting evidence

with a summary judgment motion if the plaintiff has not met his or her burden by producing evidence that would support his or her claim at trial. McLellan v. Atchison Ins. Agency, Inc., 81 Hawai'i 62, 66, 912 P.2d 559, 563 (App. 1996); First Hawaiian Bank v. Weeks, 70 Haw. at 396-97, 772 P.2d at 1190. See also GECC Fin. Corp. v. Jaffarian, 79 Hawai'i at 521, 904 P.2d at 535.

However, inasmuch as the circuit court later granted summary judgment in Fouzailov's favor, it is unnecessary to set aside the order denying Fouzailov's October 8, 1999 motion.

2.

The general "American Rule" is that "each party is responsible for paying for his or her own litigation expenses." TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 263, 990 P.2d 713, 733 (1999). One exception to this rule is that "attorneys' fees may be awarded to the prevailing party where such an award is provided for by statute, stipulation, or agreement." Id. at 263, 990 P.2d at 733. In requesting an award of attorney's fees and costs against Sage, Defendants claimed that HRS § 607-14 (Supp. 2002) authorized the award. That statutory provision currently states, as it did when Defendants made their request, in relevant part, as follows:

> **Attorneys' fees in actions in the nature of assumpsit, etc.** In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action

> and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

(Emphases added.)

In orally denying Defendants' request for attorney's fees, the circuit court reasoned as follows:

> Looking at this case, it appears that it arises out of the divorce, and the [c]ourt in the divorce action decided with regard to the property rights that arose from, I guess, an initial contract.
>
> But once the [c]ourt made a decision, then that merged into the decision, and so we don't have a contract at this point. What we have is a dispute as to what the effect of the [c]ourt's decision was in that case, in which [Sage] claims that the property belongs to him, and that [Defendants] wrongfully took the property from him or has possession or dispose [sic] of the property, his properties, and so it appears to be a claim in tort.
>
> And on that basis, the [c]ourt is denying the request for attorney's fees . . . .

Defendants contend that Judge Kochi erred in denying their request because it is well-settled "that a lawsuit which is based upon a previous judgment is ex contractu, because the judgment is an implied contract at law."

The Hawai‘i Supreme Court has explained that assumpsit is "a common law form of action which allows for the recovery of damages for *non-performance of a contract*, either express or implied, written or verbal, as well as quasi contractual obligations." TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai‘i at 264, 990 P.2d at 734 (emphasis in original, internal quotation marks omitted). Additionally, "[t]he mere fact that [a plaintiff's] claims relate to a contract between the parties does

not render a dispute between the parties an assumpsit action." Id. In the TSA case, for example, TSA's allegations were that: (1) it was fraudulently induced to enter into an agreement, and (2) the defendant's nondisclosure of various appraisals constituted a breach of fiduciary duty that caused TSA to mistakenly enter the Agreement. The supreme court held that these claims sounded in tort, not breach of contract. Id. Therefore, the supreme court reversed an award of attorney's fees to TSA, the prevailing party.

In light of TSA, we conclude that Judge Kochi correctly determined that Sage's claim for conversion of personal property, although related to the agreement and the Divorce Decree, sounded in tort and had little, if anything, to do with "non-performance" of a contract.

CONCLUSION

In light of the foregoing discussion, we affirm the following orders and judgment entered by the circuit court: (1) the Final Judgment entered on May 31, 2001; (2) the "Order Granting Defendant Fouzailov's Renewed Motion for Summary Judgment Based Upon Recent Determination of Law of the Case (filed 2/20/01)" entered on March 20, 2001; (3) the "Order Denying Plaintiff Vincent F. Sage's Motion to Set Aside Order Granting in Part and Denying in Part Defendants Fouzailov and Aharoni's Motion for Summary Judgment Entered on November 24, 1999 (filed 1/19/01)" entered on March 2, 2001; (4) the "Order

Denying Plaintiff Vincent F. Sage's Motion to Name Additional Witnesses and for Further Discovery (filed 1/19/01)" entered on March 2, 2001; and (5) the "Order Granting in Part and Denying in Part Defendants' Motion for an Award of Attorney's Fees and Costs (filed 3/28/01)" entered on May 29, 2001.

DATED: Honolulu, Hawai‘i, October 30, 2003.

On the briefs:

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