

NO. 24670

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

GLENAYRE ELECTRONICS, INC., Plaintiff/Counterclaim
Defendant-Appellee, v. GENERAL TELCOURIER, INC.,
doing business as Pager One,
Defendant/Counterclaimant-Appellant, and JOHN
DOES 1-10, MARY ROES 1-10, DOE PARTNERSHIPS 1-10,
DOE CORPORATIONS 1-10, and OTHER ENTITIES 1-10,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 98-0098)

MEMORANDUM OPINION

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

Plaintiff/Counterclaim Defendant-Appellee Glenayre Electronics, Inc. (Glenayre), delivered eight electronic circuit boards ordered by Defendant/Counterclaimant-Appellant General Telcourier, Inc., a Hawai'i corporation doing business as Pager One (Pager One), in 1996. Pager One refused to pay for the electronic circuit boards delivered by Glenayre. On January 9, 1998, Glenayre filed a suit against Pager One for breach of a contract. More than two years later, on June 30, 2000, Pager One filed a counterclaim alleging, among other things, fraudulent inducement.

On October 9, 2001, Judge Sabrina S. McKenna entered an Amended Judgment in favor of Glenayre in the amount of

\$44,474.49, plus \$50,000 in attorneys' fees and \$4,850.47 in costs.

On appeal, Pager One challenges (1) the discovery abuse sanction which precluded it from presenting evidence on its counterclaim of fraudulent inducement, (2) the summary judgment denying its counterclaim of fraudulent inducement, and (3) the order requiring it to pay to Glenayre (a) \$50,000 in attorney fees and (b) \$4,850.47 in costs. We affirm (1), (2), and (3), except for \$2,195.43 of the \$50,000 in attorney fees.

FACTUAL BACKGROUND

David R. Williams (Williams) is the president and day-to-day manager of Pager One. Pager One sells digital pagers and provides paging services to customers in the State of Hawai'i. Glenayre is a Canadian manufacturer of electronic equipment with its principal place of business in North Carolina. Glenayre sells, among other things, pager equipment to interested buyers.

Around 1988, Pager One placed its first order with Glenayre for an electronic paging terminal for its paging business. A paging terminal is an electronic device that (1) receives incoming telephone calls for specific pager numbers, (2) processes those calls into messages, and (3) transmits those messages to individual pagers. This terminal was installed around Thanksgiving 1988. This terminal was a Glenayre Model 3000M (Glenayre 3000M).

In connection with Pager One's purchase of the Glenayre 3000M, Glenayre sales staff orally represented to Pager One that "as long as the [Glenayre 3000M] was operating, [Glenayre] would back it up with servicing." As Williams explained in his deposition,

[t]hey [Glenayre] told me straight out as long as I had [the Glenayre 3000M] in service that they would back it with support. And if we needed to, the [Glenayre 3000M] go [sic] down or we had trouble with the [Glenayre 3000M], all we had to do is pick up the telephone and call Vancouver and we would have somebody on the line to help us. And [Glenayre] would do that for as long as we had the [Glenayre 3000M] in service. [The Glenayre sales person] told me that several times quite clearly.

In 1994, Pager One replaced the Glenayre 3000M with a new paging terminal, the Glenayre Model 3000L (Glenayre 3000L), in order to increase paging capacity. The price of the Glenayre 3000L was approximately \$100,000. In connection with Pager One's acquisition of the Glenayre 3000L, Glenayre orally represented that Glenayre would "provide servicing for the [Glenayre 3000L] and its components as long as the [Glenayre 3000L] was running."

In 1996, in order to boost paging capacity and capability, Pager One ordered eight additional electronic circuit boards from Glenayre for the Glenayre 3000L. Glenayre charged Pager One \$24,606.49 for the eight additional circuit boards.

Pager One technician Dan Smith installed the circuit boards into Pager One's Glenayre 3000L within a week of receipt. The circuit boards have been in operation since that time,

without problems. Pager One never paid Glenayre for the eight circuit boards delivered in 1996.

In his deposition taken on May 19, 1999, Williams testified, in relevant part, as follows:¹

So finally an agreement was cut that they would ship the cards COD, and so I agreed to that. I says "That is fine." I said "We will be more than happy to handle it on a COD basis." And so the cards were shipped with the understanding that they were being sent COD.

When the cards got here, they weren't COD. They were just a straight net 30-day type thing. So they did not live up to their agreement with me to ship them COD.

Around February 2000, Pager One received notice from Glenayre that Glenayre would no longer provide service and support for the Glenayre 3000M and Glenayre 3000L. Pager One alleged that had it known that service and support for the Glenayre 3000M and Glenayre 3000L would be discontinued before Pager One replaced both terminals, Pager One would not have purchased the terminals from Glenayre. According to Williams, if Glenayre would not provide perpetual service and support for the

¹ In contrast, in its settlement conference statement filed on November 23, 1999, Defendant/Counterclaimant-Appellant General Telcourier, Inc., a Hawai'i corporation doing business as Pager One (Pager One), explained as follows:

There was a specific understanding that [Pager One] would have credit for the purchase of the equipment as it had always purchased equipment on a credit basis and would not have to pay immediately for the equipment. [Pager One] and [Glenayre] had done business for many years with no record of any defaults by [Pager One]. Upon delivery of equipment, immediate payment was demanded. At about the same time, [Pager One's] sister company, Industrial Communications, Inc. ("Industrial") in Salt Lake City, Utah, had delivered equipment to [Glenayre] for repair. When [Pager One] refused to make payment immediately for the new equipment, [Glenayre] wrongfully withheld repairing the other equipment for Industrial and that company was damaged as a result.

Glenayre 3000M and Glenayre 3000L as it orally represented in 1988 and again in 1994, the terminals would become "immediate junk." For that reason, Pager One's position was that Glenayre should "pay for [Pager One] to replace [the Glenayre 3000M and Glenayre 3000L] with other equipment, with another manufacturer that will support it for [Pager One]." Williams testified "that it will cost [Pager One] approximately \$200,000.00 to purchase replacement terminals that can be supported with service."

PROCEDURAL BACKGROUND

On January 9, 1998, Glenayre filed a complaint (Complaint) against Pager One in the Circuit Court of the First Circuit, State of Hawai'i (circuit court), to obtain payment for the eight circuit boards delivered to Pager One in 1996. In its Complaint, Glenayre prayed for a judgment of \$24,606.49, plus interest, and attorney's fees, costs, and expenses. On January 27, 1998, Pager One filed its answer denying Glenayre's Complaint and asserting various defenses.

On February 13, 1998, Glenayre served its first set of interrogatories on Pager One via the United States mail. When Pager One failed to respond in a timely manner, Glenayre's attorney sent Pager One's attorney (PO's Attorney #1) a letter reminding Pager One about the interrogatories sent on February 13, 1998. When no answers were forthcoming, Glenayre filed "Plaintiff Glenayre Electronic, Inc.'s Motion to Compel

Answers to Plaintiff's First Request for Answers to Written Interrogatories" (Glenayre's First Motion to Compel) on August 5, 1998. Pager One answered Glenayre's interrogatories on September 2, 1998. Glenayre withdrew Glenayre's First Motion to Compel on September 15, 1998.

Also on September 15, 1998, PO's Attorney #1 filed a "Motion for Leave to Withdraw As Counsel for Defendant General Telcourier, Inc. dba Pager One." On October 6, 1998, the court approved the appearance of Pager One's new counsel (PO's Attorney #2) in place of PO's Attorney #1.

On August 12, 1998, Glenayre served its first request for production of documents on Pager One via the United States mail. When Pager One failed to respond in a timely manner, Glenayre's attorney sent PO's Attorney #1 a letter dated September 18, 1998, reminding Pager One about the production request sent on August 12, 1998. When no response was forthcoming, Glenayre's attorney sent PO's Attorney #2 a letter dated October 29, 1998, (Letter #2) reminding Pager One about the production request sent on August 12, 1998. When Pager One failed to respond to Letter #2, Glenayre, on December 31, 1998, filed "Plaintiff Glenayre Electronic, Inc.'s Motion to Compel Defendant General Telcourier, Inc., dba Pager One to Respond to Plaintiff's First Request for Production of Documents" (Glenayre's Second Motion to Compel). On January 19, 1999, Pager

One filed a memorandum in opposition to Glenayre's Second Motion to Compel. On January 22, 1999, Glenayre replied to Pager One's memorandum in opposition. Judge Gail Nakatani held a hearing on Glenayre's Second Motion to Compel on January 27, 1999.

Following the hearing, Judge Nakatani, on February 5, 1999, granted Glenayre's Second Motion to Compel.

On August 12, 1998, Pager One served its first request for production of documents on Glenayre via hand delivery. When Glenayre failed to respond in a timely manner, PO's Attorney #2 filed, on January 20, 1999, "Defendant General Telcourier, Inc.'s Motion to Compel Plaintiff Glenayre Electronics, Inc. to Respond to Defendant General Telcourier, Inc. dba Pager One's First Request for Production of Documents" (Pager One's Motion to Compel). Glenayre filed a memorandum in opposition to Pager One's Motion to Compel on February 3, 1999. Pager One replied to Glenayre's memorandum in opposition on February 8, 1999. Judge Nakatani granted Pager One's Motion to Compel on March 5, 1999.

On January 3, 2000, Glenayre filed "Plaintiff Glenayre Electronic, Inc.'s Motion to Enforce Settlement or in the Alternative, to Continue Trial" (Glenayre's Motion to Enforce Settlement). On January 4, 2000, Pager One filed a memorandum in opposition to Glenayre's Motion to Enforce Settlement. On January 11, 2000, Judge Kevin S. C. Chang denied Glenayre's

request to enforce settlement and granted Glenayre's request to continue the trial.

On June 30, 2000, Pager One, with permission of the court, filed a counterclaim (Counterclaim) against Glenayre, alleging, in relevant part, as follows:

9. At the time of [Pager One's] initial acquisition of equipment, and continuing thereafter, [Glenayre] represented to [Pager One] that it would provide service, repair and maintenance for the equipment as long as the equipment was in service for [Pager One's] customers.

. . . .

13. [Pager One] reasonably relied on such representations and was induced to purchase in excess of \$100,000 of equipment from and after the original acquisition.

14. In or about 1996, a dispute arose over the payment for certain equipment purchased by [Pager One] by [sic] [Glenayre].

15. Thereafter, [Glenayre] wrongfully withheld servicing and products from [Pager One] and [Pager One's] affiliated company, Industrial Communications, Inc., a Utah corporation.

. . . .

21. As a result of [Glenayre's] breach of warranty, [Pager One] has been damaged in an amount that shall be shown prior to or at the time of trial.

. . . .

25. As a direct and proximate result of [Glenayre's] negligence, [Pager One] was damaged in an amount that shall be shown prior to or a[t] the time of trial.

. . . .

31. As a direct and proximate result of such false representations and/or fraud, [Pager One] has been damaged in an amount that shall be shown prior to or at the time of trial.

. . . .

33. The acts, conduct and omissions of [Glenayre] constitute willful, malicious, and oppressive conduct and evidence such conscious indifference and gross negligence and are of such character and violate of [sic] public policy that [Pager One] is entitled to punitive damages in an amount that shall be shown prior to or at the time of trial.

In its Counterclaim, Pager One also asked for an award of attorney fees and costs.

On July 18, 2000, Glenayre filed an answer to Pager One's Counterclaim.

On September 19, 2000, Glenayre filed "Plaintiff Glenayre Electronic, Inc.'s Motion for Summary Judgment" (Glenayre's First Motion for Summary Judgment). Pager One filed a memorandum in opposition to Glenayre's First Motion for Summary Judgment on September 29, 2000. Glenayre replied to Pager One's memorandum in opposition on October 4, 2000. Judge McKenna held a hearing on Glenayre's First Motion for Summary Judgment on October 9, 2000. Following the hearing, Judge McKenna, on October 11, 2000, denied Glenayre's First Motion for Summary Judgment.

On October 23, 2000, PO's Attorney #2 filed a "Motion to Withdraw as Counsel for Defendants General Telcourier, Inc. dba Pager One" (PO's Attorney #2's Motion to Withdraw as Counsel). On October 25, 2000, Glenayre filed a memorandum requesting that PO's Attorney #2's Motion to Withdraw as Counsel not affect the trial scheduled for the week of February 19, 2001. On November 3, 2000, Judge McKenna granted PO's Attorney #2's Motion to Withdraw as Counsel. Pager One's new counsel (PO's Attorney #3) appeared on behalf of Pager One on November 27, 2000.

On August 2, 2000, Glenayre served its second set of interrogatories and its second request for production of documents on Pager One. When Pager One failed to respond in a timely manner, Glenayre's attorney sent PO's Attorney #2 three letters reminding Pager One about the interrogatories and production requests delivered on August 2, 2000. When adequate responses were not forthcoming, Glenayre, on October 19, 2000, filed "Plaintiff Glenayre Electronic, Inc.'s Motion to Compel Answers to Interrogatories and Production of Documents" (Glenayre's Third Motion to Compel). At the hearing on November 27, 2000, Judge McKenna granted Glenayre's Third Motion to Compel and orally ordered Pager One to comply with Glenayre's discovery requests no later than December 4, 2000. The "Order Granting Plaintiff Glenayre Electronic, Inc.'s Motion to Compel Answers to Interrogatories and Production of Documents, Filed October 19, 2000" entered on December 6, 2000 (December 6, 2000 Discovery Order) ordered Pager One

1) to respond to Plaintiff's Second Request for Answers to Interrogatories, and 2) produce all documents in its possession, custody, or control which are responsive to Request Nos. 1, 2, 3, 4, 5, 6, 7, 10, 12, 13, 14, 15, 16, and 19 of Plaintiff's Second Request for Production of Documents. Defendant . . . Pager One is to comply with this order by the close of business on December 4, 2000.

On December 29, 2000, Glenayre filed "Plaintiff Glenayre Electronic, Inc.'s Motion for Sanctions for Failure to Comply with Discovery Order" (Glenayre's Motion for Discovery Sanctions) and "Plaintiff Glenayre Electronic, Inc.'s Motion for

Summary Judgment" (Glenayre's Second Motion for Summary Judgment). Glenayre's Motion for Discovery Sanctions was based on Pager One's failure to comply with the December 6, 2000 Discovery Order.

Pager One filed memoranda in opposition to both motions on January 26, 2001. The memorandum in opposition to Glenayre's Motion for Discovery Sanctions asserted that "[a] good faith effort has been made to comply with the Discovery Order entered herein[,] " that Pager One "has answered [Glenayre's] second set of interrogatories to the best of its ability[,] " and that "[b]ank records, financial statements and tax returns of [Pager One] are private and confidential and are not appropriate subjects for discovery in this proceeding."

Glenayre replied to Pager One's memoranda in opposition on January 30, 2001.

Judge McKenna held a hearing on the two motions on February 5, 2001. Following the hearing, Judge McKenna, on February 13, 2001, entered two orders. The first order granted Glenayre's Motion for Discovery Sanctions, sanctioned Pager One for failure to comply with the December 6, 2000 Discovery Order, and struck Pager One's (a) defenses and (b) Counterclaim. The second order entered summary judgment against Pager One in the principal amount of \$24,606.49 plus \$19,868 in contractual interest, plus \$12.13 in per diem interest from February 16,

2001, until entry of judgment. The second order also ordered that Glenayre "shall be awarded attorneys' fees and costs in an amount to be determined upon the submittal of a supplemental Affidavit by [Glenayre's] counsel."

On February 23, 2001, Glenayre filed "Plaintiff Glenayre Electronic, Inc.'s Motion for Attorneys' Fees and Costs" (Glenayre's Motion for Fees and Costs) which stated, in relevant part, as follows:

Pursuant to Hawaii Revised Statutes ("H.R.S.") § 607-14, Glenayre requests attorneys' fees as follows: (1) 25% of the judgment amount on its Complaint, including prejudgment interest in the amount of **\$11,118.62**, and (2) reasonable attorneys' fees incurred in responding to Pager One's Counterclaim, not to exceed 25% of the amount sued for, in the amount of **\$44,577.48**. Glenayre further requests an award of costs in the amount of **\$4,850.47** based on H.R.S. § 607-9.

(Emphases in the original.) The \$11,118.62 amount is 25% of the \$44,474.49 judgment. The \$44,577.48 amount is based on the amount of time the attorneys spent on the Counterclaim.

Pager One filed a memorandum in opposition to Glenayre's Motion for Fees and Costs on March 12, 2001. Glenayre replied to Pager One's memorandum in opposition on March 14, 2001.

Judge McKenna held a hearing on Glenayre's Motion for Fees and Costs on March 19, 2001. Following the hearing, Judge McKenna, on March 27, 2001, entered an order awarding Glenayre "attorneys' fees pursuant to H.R.S. § 607-14 on the Complaint and

Counterclaim in the amount of \$50,000, and costs in the amount of \$4,850.47, for a total of \$54,850.47."

Pager One filed a notice of appeal on April 25, 2001, but, on August 21, 2001, in appeal No. 24225, the Hawai'i Supreme Court dismissed the appeal as premature. The October 9, 2001 Amended Judgment followed. Pager One filed a timely notice of appeal on November 6, 2001.

On June 6, 2001, PO's Attorney #3 filed a "Motion to Withdraw as Counsel for Defendant General Telcourier, Inc., dba Pager One" (PO's Attorney #3's Motion to Withdraw as Counsel). On June 12, 2001, the circuit court granted PO's Attorney #3's Motion to Withdraw as Counsel. Pager One's new counsel (PO's Attorney #4) assumed responsibility for Pager One's case on May 14, 2001. PO's Attorney #4 is handling Pager One's case on appeal.

POINTS ON APPEAL

In its opening brief, Pager One contends that the circuit court erred when it: (1) awarded discovery abuse sanctions precluding Pager One from presenting evidence on its fraudulent inducement counterclaim, (2) granted summary judgment on Pager One's fraudulent inducement counterclaim, and (3) awarded attorney fees and costs, and set the amount.

STANDARDS OF REVIEW

A. Discovery Abuse Sanctions

The circuit court's imposition of discovery abuse sanctions is reviewed for abuse of discretion. Kawamata Farms v. United Agri Prods, 86 Hawai'i 214, 241, 948 P.2d 1055, 1082 (1997) (citing Aloha Unlimited, Inc. v. Coughlin, 79 Hawai'i 527, 532-33, 904 P.2d 541, 546-47 (App. 1995)). A court abuses its discretion if it 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).

B. Summary Judgment

The circuit court's grant or denial of summary judgment is reviewed *de novo* under the same right/wrong standard applied by the circuit court. Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (citation omitted); Amfac, Inc., 74 Haw. at 104, 839 P.2d at 22 (citation omitted). "Summary judgment is appropriate 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 judgment as a matter of law." Roxas, 89 Hawai'i at 116, 969 P.2d at 1234

(citation omitted); see also Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted). In a motion for summary judgment, "'we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.'" Morinoue v. Roy, 86 Hawai'i 76, 80, 947 P.2d 944, 948 (1997) (quoting Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)) (brackets omitted).

C. Attorney Fees

"[A]ttorney fees are chargeable against the opposing party when so authorized by statute, rule of court, agreement, stipulation, or precedent." Lee v. Aiu, 85 Hawai'i 19, 32, 936 P.2d 655, 668 (1997). The question whether the circuit court is authorized to award attorney fees pursuant to Hawaii Revised Statutes (HRS) § 607-14 (Supp. 2001) is a question of law reviewable under the right/wrong standard. See Leslie v. Estate of Tavares, 93 Hawai'i 1, 994 P.2d 1047 (2000); TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 990 P.2d 713 (1999). The amount of attorney's fees awarded by the circuit court is reviewed under

the abuse of discretion standard. Piedvache v. Knabusch, 88 Hawai'i 115, 118, 962 P.2d 374, 377 (1998) (citing First Hawaiian Bank v. Smith, 52 Haw. 591, 592, 483 P.2d 185, 186 (1971); Sharp v. Hui Wahine, Inc., 49 Haw. 241, 244, 413 P.2d 242, 245, *reh'g denied* 49 Haw. 257, 414 P.2d 82 (1966); Powers v. Shaw, 1 Haw. App. 374, 377, 619 P.2d 1098, 1101 (1980)).

DISCUSSION

A.

In its opening brief, Pager One contends that the circuit court abused its discretion when it ordered discovery sanctions that precluded Pager One from presenting evidence on its counterclaims and defenses. We disagree. The record shows that (1) Glenayre filed three motions to compel discovery, two of which were granted, (2) Glenayre reminded Pager One on numerous occasions about its responsibility to submit responses to Glenayre's discovery requests, (3) Pager One filed non-responsive documents to Glenayre's discovery requests in more than a few instances, and (4) Pager One failed to comply with the court's November 27, 2000 oral order and December 6, 2000 Discovery Order. Our decision is that the circuit court acted within its discretion when it concluded that Pager One acted in a manner sufficient to justify the sanctions imposed in this case.

B.

In its opening brief, Pager One argued, in relevant part, as follows:

The trial court clearly erred by excluding Mr. Williams' sworn affidavit and deposition testimony regarding Pager One's damages. His testimony regarding the same was admissible under the Hawaii Rules of Evidence ("HRE") and sufficient to raise a genuine issue of material fact about damages.

Mr. William [sic] testified by affidavit that "I have investigated the marketplace for replacement terminals for the 3000M and 3000L terminals and have determined that it will cost [Page One] [sic] approximately \$200,000.00 to purchase replacement terminals that can be supported with service." This evidence should have been admitted by the trial court.

(Brackets in original; citations and record references omitted.)

1.

At the outset, we note that Pager One only challenges the circuit court's grant of summary judgment on its Counterclaim alleging fraudulent inducement. Pager One does not dispute the grant of summary judgment on Glenayre's original complaint to recover the cost of the eight circuit boards or the grant of summary judgment on the other claims contained in Pager One's Counterclaim. Since summary judgment on Glenayre's original complaint and Pager One's other counterclaims have not been challenged consistent with the procedures set forth in Hawai'i Rules of Appellate Procedure Rule 28(b)(4), which require points of error to be set forth in separately numbered paragraphs²,

² Hawai'i Rules of Appellate Procedure Rule 28(b) states, in relevant part, as follows:

(continued...)

those rulings by the circuit court remain undisturbed on appeal. Thus, this discussion only considers whether or not the circuit court erred when it granted summary judgment on Pager One's counterclaim of fraudulent inducement. With regard to Glenayre's complaint to recover the cost of the eight circuit boards delivered to Pager One in 1996, Pager One owes Glenayre "the principal sum of \$24,606.49 plus contractual interest calculated at the rate of 18% per annum . . . through February 15, 2001 plus per diem interest of \$12.13 until entry of judgment."

2.

HRCF Rule 56(c) states, in relevant part, that

[t]he judgment sought shall be rendered forthwith 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 judgment as a matter of law.

In Fujimoto v. Au, 95 Hawai'i 116, 19 P.3d 699 (2001), the Hawai'i Supreme Court identified the elements of fraudulent inducement as follows:

To constitute fraudulent inducement sufficient to invalidate the terms of a contract, there must be (1) a representation of a

²(...continued)

Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections . . . :

. . . .

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency.

material fact, (2) made for the purpose of inducing the other party to act, (3) known to be false but reasonably believed true by the other party, and (4) upon which the other party relies and acts to [his or her] damage.

95 Hawai'i at 157, 19 P.3d at 740 (brackets in original; block quotation and citation omitted). Damage within the context of a fraudulent inducement claim refers to the existence of substantial pecuniary losses. See Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 286, 768 P.2d 1293, 1301 (1989).

In Glenayre's Second Motion for Summary Judgment, Glenayre attacked Pager One's fraudulent inducement counterclaim on the grounds that, among other things, Pager One could not demonstrate that Glenayre's representation regarding terminal servicing and support resulted in pecuniary losses to Pager One's business operations. Pager One, through Williams, argued that if Glenayre would not support the Glenayre 3000M and 3000L as it represented in 1988 and again in 1994, Pager One's Glenayre terminals would become "immediate junk." Believing that discontinuation of Glenayre support warranted replacement of Pager One's Glenayre 3000M and 3000L, Williams remarked, "I think what [Glenayre] should do is pay for me to replace [the Glenayre 3000M and 3000L] with other equipment, with another manufacturer that will support it for me." The "Declaration of David R. Williams" attached to Pager One's Memorandum in Opposition to Glenayre's Second Motion For Summary Judgment stated, in relevant part, that "I [Williams] have investigated the marketplace for

replacement terminals for the [Glenayre] 3000M and 3000L terminals and have determined that it will cost [Pager One] approximately \$200,000.00 to purchase replacement terminals that can be supported with service." Pager One did not introduce any documents or other evidence corroborating Pager One's beliefs on this matter.

HRCP Rule 56(e) states, in relevant part, that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Hawai'i Rules of Evidence (HRE) Rule 802 (1993) states, "Hearsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii supreme court, or by statute."

Does Williams' statement that "I have investigated the marketplace for replacement terminals for the [Glenayre] 3000M and 3000L terminals and have determined that it will cost [Pager One] approximately \$200,000.00 to purchase replacement terminals that can be supported with service" satisfy the requirement of HRCP Rule 56(e)? The answer is no because the "fact" that it will cost approximately \$200,000 is based on statements made by one or more persons other than Williams and no pertinent exception to the hearsay rule stated in HRE Rule 802 is applicable in this case. It follows that Pager One offered

nothing that could be considered in support of its allegation of substantial pecuniary losses in its fraudulent inducement counterclaim.

C.

Pager One contends that the circuit court erred when it
(1) awarded any attorney fees in favor of Glenayre and
(2) awarded attorney fees in the amount of \$50,000.

HRS § 607-14 (Supp. 2001) states, in relevant part,
that

[i]n all the courts, in all actions in the nature of assumpsit . . . , 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 percent of the judgment.

In this particular case, the Complaint for \$24,606.49 was in the nature of assumpsit, the Counterclaim for \$200,000 was partially in the nature of assumpsit, and HRS § 607-14 authorizes the award of attorney fees for both the Complaint and the Counterclaim. The summary judgment being valid, the award of an amount of attorney fees to Glenayre is valid.

Regarding the maximum limit imposed by HRS § 607-14, this court concluded in Rodrigues v. Chan, 5 Haw. App. 603, 608, 705 P.2d 67, 71 (1985), that

where the plaintiff prevails on both his complaint and on the defendant's counterclaim, the maximum amount of § 607-14 attorney's fees awardable is computed by applying the schedule to the judgment amount in plaintiff's favor and to the amount sued for in the counterclaim separately and adding the resulting products.

Regarding the reasonableness of the attorney fees taxed, this court will not disturb the ruling of the circuit court absent an abuse of discretion. TSA Int'l, 92 Hawai'i at 253, 990 P.2d at 723. In Sharp, the Hawai'i Supreme Court spoke about the award of reasonable attorney fees as follows:

Generally, in order to justify a finding of "reasonable" attorney's fee, there must be evidence, or a proper showing made, in support of such finding.

. . . .

This does not necessarily mean that the allowance or award of an attorney's fee must always be predicated on evidence presented in its support. The trial judge is, more or less, knowledgeable as to what is reasonable as an attorney's fee. There may well be instances where the amount requested as a fee would and could hardly give rise to a question in the mind of the trial judge in the light of his legal, as well as judicial, experience and would not require evidentiary support to win appellate approval. In the final analysis, the question is one of abuse of discretion; and, if the amount of the fee allowed or awarded appears to the appellate court to be disproportionate to the extent of legal services normally required to be expended in a case of the nature of the one before the trial judge in which the fee was allowed or awarded, his allowance or award of a "reasonable" attorney's fee must then stand the scrutiny of the reviewing court on the record.

Sharp, 49 Haw. at 250-51, 413 P.2d at 248 (citations omitted).

This precedent, however, does not relieve Glenayre of its HRS § 607-14 obligation to provide the circuit court with "an affidavit stating the amount of time the attorney spent on the action[.]"

In this instance, Glenayre presented "an affidavit stating the amount of time the attorney spent" on the Counterclaim. It did not present an affidavit stating the amount

of time the attorney(s) spent on the Complaint. The affidavit it presented justified the following amounts:

Attorney Fees	Gross Income Taxes	Courtesy Discounts
\$ 3,601.00	\$ 150.05	
6,388.75	162.04	\$ 2,500
<u>43,402.50</u>	<u>1,600.23</u>	<u>5,000</u>
\$ 53,392.25	\$ 1,912.32	\$ 7,500

The amount of \$53,392.25 plus \$1,912.32 minus \$7,500 equals \$47,804.57. This amount is awardable pursuant to HRS § 607-14, and is within the 25% of \$24,606.49 plus 25% of \$200,000 limit imposed by HRS § 607-14 and Rodrigues, 5 Haw. App. at 608, 705 P.2d at 71. This \$47,804.57 amount also is within the amount the circuit court determined was reasonable.

CONCLUSION

Accordingly, we affirm the circuit court's Amended Judgment entered on October 9, 2001, disposing of all claims and counterclaims in the case and awarding judgment in favor of Glenayre and against Pager One:

1. For the amount of \$44,474.49 for all claims stated by Glenayre in its Complaint;
2. On Pager One's June 30, 2000 Counterclaim;
3. For per diem interest of \$12.13 from February 16, 2001 until the entry of the Amended Judgment on October 9, 2001;
4. For \$47,804.57 of the \$50,000 attorney fees awarded; and

5. For costs in the amount of \$4,850.47.

We remand for amendment of the Amended Judgment by reducing the amount of the attorney fees awarded from \$50,000 to \$47,804.57, a reduction of \$2,195.43.

DATED: Honolulu, Hawai'i, February 3, 2003.

On the briefs:

Michael L. Freed (Michael L. Freed & Associates) for Defendant/ Counterclaimant-Appellant.	Chief Judge
Michiro Iwanaga and Mary L. Lucasse (Burke, Sakai, McPheeters, Bordner, Iwanaga & Estes) for Plaintiff/Counterclaim Defendant-Appellee.	Associate Judge Associate Judge