NOT FOR PUBLICATION

NO. 25059

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

ROSS R. TAYLOR, Plaintiff-Appellee, v.
FRANCES M. RAABE-MANUPULE, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CIV. NO. 1RC01-6779)

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

Defendant-Appellant Frances M. Raabe-Manupule (Frances), *pro se*, appeals from the Judgment filed on March 20, 2002 (March 20, 2002 Judgment), in the District Court of the First Circuit (district court) in favor of Plaintiff-Appellee Ross R. Taylor (Ross). Specifically, Frances challenges the "Order Denying Defendant's Motion to Set Aside Default Filed on 1/8/02" entered by Judge David W. Lo on February 7, 2002 (February 7, 2002 Order). The default had been entered by Judge Rhonda A. Nishimura against Frances when Frances failed to appear at a January 7, 2002 pretrial conference. As a result of this entry of default, Ross won on his Complaint for Summary Possession of property Ross rented to Frances and for damages from Frances, and Frances lost on her Counterclaim against Ross alleging unlawful retaliatory eviction motivated by complaints Frances made to the City and County of Honolulu for violations of the building code. We vacate the March 20, 2002 Judgment and remand for further proceedings.

BACKGROUND

On September 1, 1999, Ross, as Managing Agent, and Frances, as Tenant, signed a Hawai‘i Association of Realtors Standard Form Rental Agreement (Rental Agreement) pertaining to the three-level dwelling located at 1939 Lusitana Street, Honolulu, Hawai‘i 96813, Tax Map Key No. 2-2-012-026-0000 (the property). Frances occupied the property with her four minor children, Leopele S. A. Raabe (Leopele), Xavier U. I. Raabe-Manupule, Bridget R. S. I. Manupule, and Susannah E. V. Manupule. The Rental Agreement specified that the term of the rental was four months from September 1, 1999, through December 31, 1999, the rent was $1,200.00 per month, and indicated that Frances had received a copy of the (a) Inventory and Condition Form and (b) the House Rules of Condominium or Co-op. Neither of the latter two items are in the record.

On July 2, 2001, Ross wrote Frances a letter noting that, as of December 31, 1999, her tenancy was on a month-to-month basis and that, effective September 1, 2001, the rent was being increased from $1,200.00 to $1,350.00 per month.

Allegedly, on July 31, 2001, Frances petitioned for a temporary restraining order (TRO) against Ross alleging harassment and requesting the court to order Ross to lower the rent. Allegedly, on or around August 23, 2001, the district court denied the petition.

On August 23, 2001, Ross "hand-delivered" a letter to Frances giving her forty-five days' "Notice of Termination of Tenancy at 1939 Lusitana Street, Honolulu, Hawai‘i" (Notice). The Notice specified that Frances must "vacate the Premises and remove all your personal property and rubbish from the premises, including your two (2) derelict cars that are in the yard and driveway, by **12:00 a.m., Monday, October 8, 2001.**" (Emphasis in the original.) The Notice also stated that if Frances did not vacate the premises as requested, she could

> be liable for a sum, not to exceed twice the monthly rent, computed and prorated on a daily basis for each day [she] remain[ed] in possession. In addition, if [Ross was] required to bring a summary possession action to have [her] removed . . . [she] could be liable for . . . attorney's fees and costs.
>
> . . . Reasonable and necessary charges, if any, for cleaning, damage, and other legal charges, will be deducted from [the] security deposit.

On October 8, 2001, at 1:13 p.m., Ross filed a complaint, Civil No. 1RC01-06779, in the district court, alleging that (a) there was an expired rental agreement for the property, (b) Frances had been given written notice to vacate the premises by 12:00 a.m., October 8, 2001, (c) Frances was still in possession of the property, and (d) rent of "$87.10 per day, plus interest, attorney's fees, and costs pursuant to [Hawaii Revised Statutes (HRS)] 521-71" was due for every day Frances remained in possession of the property. The summons was served on Frances on October 9, 2001. On October 16, 2001, Frances entered a general denial. After a pretrial conference on October 22, 2001, and a trial on

October 25, 2001, Judge Yvonne Shinmura orally awarded possession of the property to Ross effective October 31, 2001, and continued the case regarding damages. On October 29, 2001, Judge David L. Fong entered a Judgment for Possession and a Writ of Possession, both in favor of Ross and against Frances, effective October 31, 2001, at 5:00 p.m. Frances complied with the writ.

On November 6, 2001, Frances filed a counterclaim seeking "$500,000.00 plus right to reside" and alleging the following:

> Sept 99 I rented a 3 level home, 3rd level found to be illegal built without a permit by [Ross]. Citation by City and County Building Code not satisfied/not complied. Retaliatory eviction ensued self [and] 4 minor children one of whom is U.S. military personel illegal retalitory eviction during U.S. war, elec. code violation harassment etc.

On November 9, 2001, Ross replied to Frances' counterclaim by denying the allegations and asserting various affirmative defenses.

A pretrial hearing occurred on November 26, 2001, and the trial was scheduled for December 14, 2001. On December 12, 2001, Frances moved for a continuance of the trial date to Friday, January 11, 2002, because she was having problems getting legal representation. On December 12, 2001, Judge Nishimura partially granted Frances' motion and set a "pre-trial" to occur on 9:30 a.m., Monday, January 7, 2002.

Ross' "Memorandum in Opposition to Defendant/Counterclaim Plaintiff's Motion to Set Aside Default Entered 1/7/02, Filed 01/08/02" states that "[o]n January 7, 2002, [Frances] failed to appear at the pretrial conference in the instant case. Because

[Frances] failed to appear at the pretrial conference, [Judge] Nishimura dismissed [Frances'] counterclaim with prejudice and entered Default in favor of [Ross] and against [Frances]."

At 10:47 a.m. on January 8, 2002, Frances filed a "Motion to Set Aside Default" stating that "I was busy with family obligations, holiday, etc. . . . the pretrial date slipped my mind and I forgot, I assumed the date of pretrial was [January 10,] 2002. I was stupid and forgetful and I am truly sorry."

On January 17, 2002, Ross filed a response opposing the January 8, 2002 "Motion to Set Aside Default." In his corresponding memorandum in opposition, Ross argued that (1) he would suffer prejudice if forced to incur additional attorney fees and costs, (2) Frances did not set forth or have a meritorious defense, and (3) Frances' failure to appear did not constitute "excusable neglect." After a hearing on January 22, 2002, Judge Lo entered the February 7, 2002 Order.

On March 12, 2002, Ross filed a "Non-Hearing Motion for Default Judgment" (March 12, 2002 "Motion for Default Judgment"). Attached to the March 12, 2002 "Motion for Default Judgment" was the Declaration of Brett P. Ryan, the attorney for Ross, and the Declaration of Ross R. Taylor, listing the damages sustained as a result of Frances' breach of the Rental Agreement[1]:

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[1]/ In his January 25, 2002 declaration, Ross declared, in relevant part, as follows:

(continued...)

Holdover Tenancy Rent (24 days x 87.10 per day)	$ 2,090.40
Cleaning Inside	$ 802.08
Paint Inside	$ 1,041.66
Replace Burner Bowls	$ 39.06
Replace Toilet and Repair Second Toilet	$ 210.42
Refrigerator	$ 898.93
Replace and Install Broken Door	$ 520.00
Remove Lychee Tree	$ 286.46
Attorney's Fees and Costs Incured [sic] in Obtaining Writ of Possession pursuant to HRS §666-14	$ 5,116.81
Lost Rent (One Month)	$ 1,350.00
TOTAL DAMAGES	**$12,355.82**

[1/](...continued)

64. When [Frances] first occupied the Subject Property, there was a lychee tree in the yard that had been there for over 70 years.

65. Before [Frances] occupied the house, the lychee tree always thrived.

66. After [Frances] moved into the Subject Property, [Frances] admitted to her neighbor, Ms. Anna Yuen, that [Frances] had poisoned the lychee tree because she did not like people coming in the yard to take fruits from the lychee tree.

67. The lychee tree that had been there for over 70 years is now dead.

. . . .

71. The cost to remove the lychee tree and grind the stump is $286.46.

In her handwritten declaration dated April 19, 2002, Frances responded, in relevant part, as follows:

(8) Remove Lychee tree claim I dispute entire amount = [0]. [Ross'] claim that I poisoned lychee tree is false and erroneous. Lychee tree produced only ONE shriveled fruit during our tenancy. Tree was old and sick on move in Sept 1999. 2 decades earlier tree trunk had been cut to height of 5 ft 3 inch with a trunk circumfrence at base of at least 9 feet. Tree trunk 2nd limbs infested with beetlebore, ant colonies visibly mobile in beetle bore. Small . . . cherry tree growing out of heart of tree trunk. Last remaing green lychee foliage seen Dec 2000!! I love trees, sad to see this one on it's last legs. Death of tree not fault of tenant but due to combination of overzealous pruning in past (5 ft. trunk height X 9 ft circumference!!!) Insect infestation, age and possible environmental factors. Landlord assumed responsib for care and cleaning of yard on our move in = verbal agreement. Tenant can be in no way held responsible for death of tree. [Hawaii Revised Statutes (HRS)] 521-32 HRS 521-42 HRS 521-8[.]

The following amounts were included in the March 12, 2002 Default Judgment and the March 20, 2002 Judgment, both entered by Judge Fong in favor of Ross and against Frances:

Principal Claimed	$12,355.82
Interest 10% x 92 days (10/8/01 to 1/7/02)	$ 311.43
Attorney's Fees see ¶s 6-9 of Dec. of Brett P. Ryan	$ 4,215.64
Costs of Court	$ 100.00
Sheriff's Fees	$ 25.00
Sheriff's Mileage	$ 2.00
Other Costs	$ 0.00
Total Default Judgment Amount	$17,009.89

On April 19, 2002, at 3:36 p.m., Frances filed a "Motion to Set Aside [March 20, 2002] Judgment." This was a tolling motion. Hawai‘i Rules of Appellate Procedure (HRAP) Rule 4(a)(3) (2003). It is alleged that both the "Motion to Set Aside [March 20, 2002] Judgment" and the April 26, 2002 "Motion for Protective Order" were orally denied on May 13, 2002. There being nothing in writing entered on the record disposing of these motions, by rule it was denied on the ninety-first day after it was filed. HRAP Rule 4(a)(3).

On April 19, 2002, at 3:38 p.m., Frances prematurely filed a notice of appeal. This notice is "considered as filed immediately after the time the judgment becomes final for the purpose of appeal[.]" HRAP Rule 4(a)(2). Attached to Frances' notice of appeal was Frances' hand-written three-page single-space narrative of alleged facts disputing Ross' declaration and the damages listed therein. In relevant part, Frances wrote:

> I owe no money for turning decaying 60 yr old plus home into a home that is habitable. Conditions R. Taylor asks money for existed in home prior to my tenancy Sept 1999-Oct 2001.
>
> I rented decaying older home Sept 1999 at 1939 Lusitana St. because NO OTHER RENTAL WAS AVAILABLE TO ME. House was in poor repair but [Ross] promised to fix etc. after we were "settled in". . . . House could not pass building code entire 26 months of tenancy.

Also attached to the notice of appeal were a copy of the March 20, 2002 Judgment, a copy of the first page of a Quitclaim Deed dated January 23, 1992, naming the grantors and grantees of the property, (Grantees: John K. Akaka, Annie K. Akana, Abraham K. Akaka, Susan A. Taylor, Joseph K. Akaka, Daniel K. Akaka, Mark K. Akaka) a copy of a City and County of Honolulu (C&CH) April 23, 2001 Notice of Violation (circuit panel breaker replacements needed, electrical permit required), and a copy of a C&CH June 13, 2001 Notice of Violation (alterations to attic made without building permit, additional alterations needed to bring property within housing code, building permit required).

> On or about April 9, 2002, [Frances] was served with an Order for Examination of Judgment Debtor pursuant to HRS § 636-4 and Rule 69 [District Court Rules of Civil Procedure (DCRCP)]. On April 22, 2002, [Frances] appeared for the examination, however, after being sworn in by the court clerk, [Frances] refused to answer any of counsel's questions.

"Memorandum in Opposition to Defendant's Motion for Protective Order Filed 04/26/02."

On April 26, 2002, Frances filed a "Motion for Protective Order" against "continued harassment of myself for money I do not owe[,]" asking the court to "[a]llow [Frances] DUE PROCESS, allow [Frances] to defend self[,]" and stating "[Frances] cannot withdraw

[Frances'] motion to set aside judgment, [Frances'] appeal, and [Frances'] motion for protective order until all pursuit of money and judgement against self/family are dropped and settlement made on [Frances'] BEHALF[.]" Attached to the April 26, 2002 "Motion for Protective Order," in addition to the same materials supplied with the notice of appeal, was a copy of an April 5, 2001 letter from Frances to Ross complaining about problems with a circuit breaker and a water leak near the downstairs toilet.

It is alleged that Frances' April 26, 2002 "Motion for Protective Order" was denied at a May 13, 2002 hearing. There being nothing in writing entered on the record disposing of Frances' April 26, 2002 "Motion for Protective Order," it was denied on the ninety-first day after it was filed. HRAP Rule 4(a)(3).

POINTS ON APPEAL

Although Frances lists thirty points of error, many are repeated. We interpret Frances' points to be as follows:

1. The district court erred by denying Frances' January 8, 2002 "Motion to Set Aside Default" and by failing to set aside the March 20, 2002 Judgment.

2. The district court abused its discretion by dismissing Frances' July 31, 2001 petition for a TRO and erred by denying Frances' April 26, 2002 "Motion for Protective Order," because Frances presented substantial evidence of harassment.

3. Pursuant to 50 U.S.C. app. § 593 (2000), the Soldiers' and Sailors' Civil Relief Act of 1940 (the SSCRA), the district court erred by not staying the eviction proceedings because Leopele was a member of the Hawai‘i Army National Guard (HARNG) and the United States was at war, i.e., the President had declared war against terrorism.

4. The judge at the October 25, 2001 proof hearing (Judge Shinmura) was biased.

STANDARDS OF REVIEW

Motion to Set Aside Default

"An order denying a motion for relief from a judgment made pursuant to [Hawai‘i Rules of Civil Procedure (HRCP)] Rule 60(b) is reviewed on appeal under the abuse of discretion standard." Hawai‘i Housing Authority v. Uyehara, 77 Hawai‘i 144, 147, 883 P.2d 65, 68 (1994). "To constitute an abuse of discretion, a court must have 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 Investment Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citation omitted). "[D]efaults and default judgments are not favored . . . any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits." Lambert v. Lua, 92 Hawai‘i 228, 235, 990 P.2d 126, 133 (App. 1999) (quoting BDM v. Sageco, Inc., 57 Haw.

73, 76, 549 P.2d 1147, 1150 (1976)). Accordingly, the Hawai‘i Supreme Court has stated that

> [i]n general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act. The mere fact that the nondefaulting party will be required to prove his [or her] case without the inhibiting effect of the default upon the defaulting party does not constitute prejudice which should prevent a reopening.

BDM, 57 Haw. at 77, 549 P.2d at 1150; *see* Rearden Family Trust v. Wisenbaker, 101 Hawai‘i 237, 65 P.3d 1029 (2003).

Plain Error

HRAP Rule 28(b)(4) provides that "[p]oints not presented in accordance with [HRAP Rule 28(b)] will be disregarded, except that the appellate court, at its option, may notice a plain error not presented." "[T]his court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998) (citing State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988)).

> This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993) (quoting Fox, 70 Haw. at 55-56, 760 P.2d at 675-76).

> In civil cases, the plain error rule is only invoked when "justice so requires." We have taken three factors into account in deciding whether our discretionary power to notice plain error ought to be exercised in civil cases: (1) whether consideration of the issue not raised at trial requires additional facts; (2) whether its resolution will affect the integrity of the trial court's findings of fact; and (3) whether the issue is of great public import.

Montalvo v. Lopez, 77 Hawai'i 281, 290, 884 P.2d 345, 353 (1994) (citing Fox, 70 Hawai'i at 56 n.2, 760 P.2d at 676 n.2 (citation omitted)).

Judicial Bias

The Hawai'i Supreme Court has stated that

> [i]n the administration of justice by a court of law, no principle is better recognized as absolutely essential than that [in] every case, be it criminal or civil, . . . the parties involved therein are entitled to the cold neutrality of an impartial judge. The right of litigants to a fair trial must be scrupulously guarded.

Aga v. Hundahi, 78 Hawai'i 230, 242, 891 P.2d 1022, 1034 (1995) (citing Peters v. Jamieson, 48 Haw. 247, 262, 397 P.2d 575, 585 (1964)) (quotation marks omitted). The Hawai'i Supreme Court has also said, however, that "reversal on the grounds of judicial bias or misconduct is warranted only upon a showing that the trial was unfair." Aga, 78 Hawai'i at 242, 891 P.2d at 1034 (citations omitted). "Unfairness, in turn, requires a clear and precise demonstration of prejudice. . . . [S]tanding alone, mere erroneous or adverse rulings by the trial judge do not spell bias or prejudice[.]" Id. (citations and quotation marks omitted).

This court has noted that Hawaii Revised Statutes § 601-7(b) (1993) requires that "a judge shall be disqualified whenever a party files a legally sufficient affidavit showing bias

or prejudice but contains the critical requirement that the affidavit be timely filed before the hearing or the action or proceeding and, if not, that good cause shall be shown." Yorita v. Okumoto, 3 Haw. App. 148, 152, 643 P.2d 820, 824 (1982).

DISCUSSION

Frances' opening brief does not follow the thirty-five-page limitation requirement of HRAP Rule 28(a) and, in the statement of the case and the argument sections, does not provide "record references" as required by HRAP Rule 28(b). The Hawai‘i Supreme Court has observed that an "[appellant's] failure to conform his brief to the requirements of HRAP Rule 28(b) burdens both the parties compelled to respond to the brief and the appellate court attempting to render an informed judgment." Housing Fin. and Dev. Corp. v. Ferguson, 91 Hawai‘i 81, 85, 979 P.2d 1107, 1111 (1999) (citation omitted). HRAP Rule 30 provides that "[w]hen the brief of an appellant is . . . not in conformity with [the HRAP], the appeal may be dismissed or the brief stricken[.]"

Although non-conforming briefs make review difficult, Hawai‘i appellate courts have "consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible," Schefke v. Reliable Collection Agency, Ltd., 96 Hawai‘i 408, 420, 32 P.3d 52, 64 (2001), and have often addressed the merits of an appeal, regardless of the nonconformity

of the briefs. *See, e.g.,* Housing Fin. and Dev. Corp., 91 Hawai'i at 85, 979 P.2d at 1111-12; O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 385, 885 P.2d 361, 363 (1994). This policy is particularly important when the appellant files *pro se*.

More significantly, Frances failed to provide a transcript of the January 22, 2002 hearing on Frances' January 8, 2002 "Motion to Set Aside Default" and the May 13, 2002 hearing on Frances' "Motion to Set Aside [March 20, 2002] Judgment." This court, in Tradewinds Hotel, Inc. v. Cochran, 8 Haw. App. 256, 799 P.2d 60 (1990), disregarded defendant's arguments that the lower court erred as to various motions and instructions because the defendant failed to provide a transcript of the proceedings below or satisfy the requirements of HRAP Rule 28. Id. at 266, 799 P.2d at 66-67. In Marn v. Reynolds, 44 Haw. 655, 361 P.2d 383 (1961), the Hawai'i Supreme Court dismissed an appeal because the record failed to include a trial transcript. Id. at 664, 361 P.2d at 388. The Marn court said, however, that although the findings of a trial court "cannot be passed upon in review, in the absence of the evidence upon which the findings were based[,]" an appellate court may review an appeal "where [the] evidence is not necessary for the disposition of [the] appeal on its merits." Id. at 663, 361 P.2d at 388 (citation omitted).

1.

Frances argues that the district court erred when it entered the February 7, 2002 Order.

In district court, default is entered pursuant to DCRCP Rule 55(a) which reads, in relevant part, as follows: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and the fact is made to appear by affidavit or otherwise, the clerk shall enter that party's default."[2]

As noted above, Frances appeared and entered a general denial on October 16, 2001. The question is whether Frances' subsequent failure to appear at the scheduled pretrial hearing on January 7, 2002, was a failure to "otherwise defend" authorizing default to be entered against her. Specifically, can a defendant who has entered a general denial be defaulted for a failure to attend a subsequent pretrial conference?

The Hawai‘i Supreme Court has stated that "where we have patterned a rule of procedure after an equivalent rule within the

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[2/] District Court Rules of Civil Procedure Rule 37(b)(2)(C) permits the court, in situations where the party "fails to obey an order to provide or permit discovery," to enter "a judgment by default against the disobedient party." The instant case does not involve a failure to obey an order to provide or permit discovery. If it did, the following rule of Long v. Long, 101 Hawai‘i 400, 69 P.3d 528 (App. 2003), would apply: "[I]n most circumstances, . . . courts should give advance warning before resorting to dismissal or default sanctions for a party's failure to comply with a discovery order." Id. at 406, 69 P.3d at 534 (quoting 7 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 7.50[2][d] at 37-86 (3d ed. 2002) (footnote omitted)).

[Federal Rules of Civil Procedure (FRCP)], interpretations of the rule 'by the federal courts are deemed to be highly persuasive in the reasoning of this court.'" Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 251-52, 948 P.2d 1055, 1092-93 (1997) (citations omitted).

DCRCP Rule 55(a) is textually identical to FRCP Rule 55(a). In First Hawaiian Bank v. Powers, 93 Hawai'i 174, 184, 998 P.2d 55, 65 (App. 2000), this court examined MOORE'S FEDERAL PRACTICE to help it interpret DCRCP Rule 55(a) and concluded that, like FRCP Rule 55(a), DCRCP Rule 55(a) was "designed to operate at the initial stages of a lawsuit" and that the "otherwise defend" language of DCRCP Rule 55(a) should not be expanded to justify a default after an initial responsive pleading or action constituting a defense. First Hawaiian Bank, 93 Hawai'i at 185, 998 P.2d at 66 (quoting 10 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 55.10[2][b] (3d ed. 1998)). In First Hawaiian Bank, this court held that DCRCP Rule 55(a) did not allow the district court to enter a default and default judgment against a defendant for "allegedly failing to appear at a pre-trial conference" where the defendant satisfied the "otherwise defend" requirement of DCRCP Rule 55(a) by filing an answer to the complaint. First Hawaiian Bank, 93 Hawai'i at 184-85, 998 P.2d at 65-66 (noting defendant also made several motions to dismiss and several trips from the

mainland to attend other pretrial conferences); *see* Gonsalves v. Nissan Motor Corp in Hawai'i, Ltd., 100 Hawai'i 149, 159-60, 58 P.3d 1196, 1206-07 (2002) (default not warranted under HRCP 55(a) for defendant's failure to respond to plaintiff's amended pleading given rigorous defense as evidenced by defendant's multiple pleadings and motions).

As noted above, Frances entered a general denial on October 16, 2001, and filed a counterclaim on November 6, 2001. The failure by Frances to attend the January 7, 2002 pretrial conference did not authorize an entry of default or a default judgment. The district court erred (1) on January 7, 2002, when it dismissed Frances' counterclaim with prejudice and entered default in favor of Ross and against Frances and (2) on February 7, 2002, when it entered the February 7, 2002 Order.

2.

Frances argues that the district court abused its discretion on or around August 23, 2001, when it denied Frances' petition for a TRO, and erred on May 13, 2001, when it denied Frances' April 26, 2002 "Motion for Protective Order." Because Frances failed to provide transcripts of the TRO proceedings or the May 13, 2002 hearing on the April 26, 2002 "Motion for Protective Order," we have no basis upon which to review the district court's

decisions.[3] *See* Tradewinds Hotel, Inc., 8 Haw. App. at 266, 799 P.2d at 66-67; HRAP Rule 10(b)(1)(A)[4]; *see also* section (4) below.

(3)

Frances argues that the district court should have stayed the eviction proceedings pursuant to the SSCRA, because Leopele was a member of the HARNG "during a time of war."

The SSCRA protects persons in the military service of the United States, in certain cases, from the enforcement of civil liabilities. "The public policy behind the [SSCRA] is to allow military personnel to fulfil their duties unhampered by obligations incurred prior to their call.[5] [T]his Act applies in times of peace, as well as war, [but] it is not to be applied for any

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[3]/ Ross argues in his "Memorandum in Opposition to Defendant/Counterclaim Plaintiff's Motion to Set Aside Default Entered 1/7/02, Filed 01/08/02[,]" *via* the declaration of his attorney, Brett P. Ryan, that Frances' petition was dismissed for "failure to present a *prima facie* case."

[4]/ Hawai'i Rules of Appellate Procedure Rule 10(b)(1)(A) provides, in relevant part, the following:

> When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

[5]/ 50 U.S.C. app. § 510 (2000) states, in relevant part, the following:

> In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation[.]

unwarranted purpose." Omega Industries, Inc. v. Raffable, 894 F. Supp. 1425, 1434 (1995) (citation omitted) (footnote added).

50 U.S.C. app. § 511 (2000) defines "person in military service" as follows:

> (1) The term "person in military service" as used in this Act [50 U.S.C. §§ 501-593], shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term "military service", as used in this Act [50 U.S.C. §§ 501-593], shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service.

Consequently, the application of the SSCRA is dependent on whether the person is in "Federal service on active duty[.]"

Frances alleges that "my 18 year old son Leopele left for Military training with the [HARNG] on June 20, 2002." Such service is not "Federal service on active duty[.]".[6]

[6/] The Washington Court of Appeals, in a case involving a National Guard member's eligibility for resident tuition, observed that "the National Guard reserve is primarily composed of civilians who principally serve on weekends. As such, they are not considered 'military personnel' until the governor of the state or the President of the United States calls them to active service." Ward v. Washington State University, 39 Wash. App. 630, 634, 695 P.2d 133, 136 (1985) (citing 10 U.S.C. § 262 (reserve component purpose to provide trained units available for active duty in armed forces during national emergency or when national security requires) and 50 U.S.C. app. § 511 (military service signifies service on active duty) (West 1981)).

10 U.S.C. § 101 (2000) defines the term "Army National Guard of the United States" to mean "the reserve component of the Army whose members are members of the Army National Guard." It also defines the term "active duty" as "full-time duty in the active military service of the United States[,]" and states that "[s]uch term does not include full-time National Guard duty." (Emphasis added.)

Leopele's high school student and Junior Reserve Officer's Training Corps status and Frances' reference to Leopele as "Student Soldier of the Month April 2002," indicate that his military service was something other than "active duty." Moreover, although Frances states that Hawai'i Army National Guard

(continued...)

Even if Leopele and his HARNG unit were in Federal service on active duty, Frances was not entitled to a stay of the eviction under the Act. Frances was Leopele's custodial parent, not Leopele's dependent,[7] and Leopele was not legally obligated to pay the rent.

In 50 U.S.C. app. § 530 (2000), the SSCRA provides, in relevant part, the following:

> (a) No eviction or distress shall be made during the period of military service in respect of any premise for which the agreed rent does not exceed $1,200 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon

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[6] (...continued)
(HARNG) units were activated, Frances does not argue and the record does not indicate that Leopele or his HARNG unit were called into Federal service on active duty.

[7] Nothing in the record suggests that the dependancy roles reversed when Leopele joined the HARNG. The California Court of Appeals has stated that "the majority of jurisdictions . . . hold that . . . enlistment [into the armed forces] constitutes an emancipation during its continuance[.]" Argonaut Insurance Exchange v. Kates, 137 Cal. App. 158, 164, 289 P.2d 801, 805-06 (1955) (footnote omitted). The courts cited by the California Court of Appeals, however, based their decisions on the shift in custody and support from the parents to the government. "By the son's enlistment, his custody was placed in the United States Army. We cannot presume that the federal government did not and would not make full and adequate provision for his support, maintenance, medical care, and education if required." Kates, 137 Cal. App. at 160, 289 P.2d at 803 (quoting Corbridge v. Corbridge, 102 N.E.2d 764, 768 (1952)).

Courts have carved out exceptions to the general rule. In Koon v. Koon, 50 Wash.2d 577, 313 P.2d 369 (1957), the Washington Supreme Court held that military service did not change the fact of dependancy or emancipate the minor because the minor was supported by and resided in the home provided by his mother during the period of his military service. Id. at 580, 313 P.2d at 371-72. The Ohio Court of Appeals in Omohundro v. Omohundro, 8 Ohio App.3d 318, 457 N.E.2d 324 (1982), held that a minor who entered the United States Army reserve to attend a drug rehabilitation program and to finish high school was not emancipated because the minor's absence for training was only temporary and upon his return home, his mother resumed support. Id. at 320-21, 457 N.E.2d at 326-27. Clearly, enlistment in the armed services constitutes emancipation only where the degree of custody and support maintained by the service surpasses that provided by the parent. As noted above, Leopele lived with Frances and was dependant upon her for support during his service with the HARNG. Leopele was Frances' dependent.

> application therefor or granted in an action or proceeding affecting the rights of possession.

In Pfeiffer v. Garvey, 61 F. Supp. 570 (E.D. Penn. 1945), the United States District Court for the Eastern District of Pennsylvania held that a man living with his aunt while in the Navy could not stay eviction proceedings because the aunt was the lessee and the man did not have any obligation to pay rent for the leased premises. Id. at 570-71. Similarly, in the instant case, Frances signed the Rental Agreement and she was not a "person in military service" entitled to protection under the Act.

50 U.S.C. § 521 (2000) also provides that "[a]t any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant . . . may, in the discretion of the court in which it is pending . . . be stayed . . . unless in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."[8] *See* Cornell Leasing Corp. v. Hemmingway,

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[8/] 50 U.S.C. § 521 (2000) provides, in relevant part, as follows:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [50 U.S.C. §§ 501 et seq.], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

147 Misc.2d 83, 86, 553 N.Y.S.2d 285, 287 (1990). Leopele was not a defendant in this case.

(4)

Referring to the October 25, 2001 proof hearing, Frances contends as follows:

> Judge [Shinmura] did not allow me to enter all of my evidence saying I lacked "foundation." Judge yelled at my ineptness many times during proceedings. Judge stated on several times that she did not want persons who were not lawyers in her courtroom. Judge did not take the arguments that the eviction was retaliatory, that eviction was further harassment, ... Judge did not take argument that Taylor/Akaka clan was displacing a member of the United States Military during a declared time of war. Judge didn't want my daughter to testify and was angry with me for suggesting it. . . . [Ross'] lawyer claimed in court that I was evicted for attempting to get a TRO against [Ross]; he said they didn't like us anymore. That statement alone should prove retaliation. I was evicted because I stood up for myself against an abusive harassing landlord and turned same landlord in to the C&C for building code violations[.] I represented myself as a non lawyer despite the Judges [sic] numerous objections to and debilitating, discouraging comments on my non-lawyer status and attempts to represent myself. I was scared and confused when the Judge blatantly stated that she did not appreciate nor want non lawyers in her courtroom over and over. I was deprived of my right to have an impartial Judge for my trial.
>
> Judge showed us no mercy. First make rental homes unattainable and then make tenants guilty for being unable to locate new rentals. Make adequate legal representation unattainable, then punish and chastise individuals for being unknowledgeable, not having any legal representation and trying to represent selves[.]

The contention by Frances that she "was deprived of [her] right to have an impartial Judge for [her] trial" indicates her failure to understand that, because she had previously been held to be in default, she did not have a trial. The October 25, 2001 hearing was held pursuant to DCRCP Rule 55(b)(2) for Ross to prove his damages.

HRAP Rule 10(a)(4) states that "[t]he record on appeal shall consist of . . . the transcript of any proceedings prepared

pursuant to the provisions of Rule 10(b)[.]" HRAP 10(b)(1)(A) requires the following:

> When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

It is well settled that "[t]he burden is upon appellant in an appeal to show error by reference to matters in the record and he or she has the responsibility of providing an adequate transcript." Bettencourt v. Bettencourt, 80 Hawai‘i 225, 230, 909 P.2d 553, 558 (1995) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)). *See* State v. Hawaiian Dredging Co., 48 Haw. 152, 158, 397 P.2d 593, 598 (1964) ("It is elementary that an appellant must furnish to the appellate court a sufficient record to positively show the alleged error.") (Citation omitted.)

Adverse court rulings, by themselves, even if erroneous, "do not spell bias or prejudice[.]" Aga, 78 Hawai‘i at 242, 891 P.2d at 1034. Frances failed to provide a transcript of the October 25, 2001 proof hearing for the record. In her reply brief, she acknowledges her mistake and states:

> I have no manner in which to discern a transcript was necessary part of my appeal. Certainly I was never allowed to participate in or attend a hearing in the District Court regarding this case and under such circumstances am not aware of what hearing on which date would be correct to include.

This statement is contradicted by the record. Because she was accusing the trial judge of bias and, as evidence thereof, was citing the judge's actions at the October 25, 2001 proof hearing, Frances was required to include a transcript of the October 25, 2001 proof hearing in the record on appeal. Without a transcript of the October 25, 2001 proof hearing, there is no basis for this court to review the judge's actions and the validity of the allegations by Frances.

CONCLUSION

Accordingly, we vacate the March 20, 2002 Judgment in favor of Plaintiff-Appellee Ross R. Taylor and against Defendant-Appellant Frances M. Raabe-Manupule and remand the matter to the district court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai‘i, July 29, 2003.

On the briefs:

Frances M. Raabe-Manupule,
Defendant-Appellant, *pro se*.

Chief Judge

Mark T. Shklov and
Brett P. Ryan
for Plaintiff-Appellee.

Associate Judge

Associate Judge