NOT FOR PUBLICATION

NO. 24051

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

BENJAMIN PAUL KEKONA, and TAMAE M. KEKONA,
Plaintiffs-Appellees and Cross-Appellants
v.
PAZ FENG ABASTILLAS, also known as Paz A. Richter,
ROBERT A. SMITH, personally, ROBERT A. SMITH,
Attorney at Law, A Law Corporation,
STANDARD MANAGEMENT, INC., WESTERN SURETY COMPANY,
and MICHAEL BORNEMANN, Defendants-Appellants
and Cross-Appellees,
and
U.S. BANCORP MORTGAGE COMPANY, an Oregon Company,
JOHN DOES 1-10, DOE CORPORATIONS 1-10,
and DOE ENTITIES 2-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 93-3974)

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

The Defendants-Appellants and Cross-Appellees (Defendants) in this case are the following: (a) Paz Feng Abastillas (Abastillas), (b) Standard Management, Inc., (SMI), which is a corporation wholly owned by Abastillas, (c) attorney Robert A. Smith (Smith), who is the employer and live-in-boyfriend of Abastillas, (d) Robert A. Smith, Attorney at Law, A Law Corporation (RASCORP), which is Smith's wholly-owned law corporation, (e) Dr. Michael Bornemann (Dr. Bornemann), who is a friend and client of Abastillas, Smith, and RASCORP, and (f) Western Surety Company (WSC), which is the company that issued notary bonds on behalf of Abastillas and Smith.

The Defendants appeal from the Amended Revised Final Judgment entered on February 26, 2001 in favor of the Plaintiffs-Appellees and Cross-Appellants Benjamin Paul Kekona and Tamae M. Kekona (the Kekonas or Plaintiffs). The Kekonas cross-appeal. We affirm in part and reverse in part.

BACKGROUND

In 1989, SMI filed First Circuit Court Civil No. 89-3517 against the Kekonas for breach of a partnership agreement pertaining to the operation of a tram concession at Hanauma Bay in Honolulu, Hawai'i. The Kekonas counterclaimed and filed a third-party complaint against Abastillas, Smith, and SMI. The jury awarded the Kekonas $152,500 against SMI for breach of contract;[1/] $281,250 against Abastillas for fraud;[2/] and $270,000 against Smith for malpractice.[3/] In a Memorandum Opinion entered in appeal No. 18388 on November 25, 1997, this court reviewed the circuit court's September 2, 1994 Revised Final Judgment as to All Claims and All Parties entered in Civil No. 89-3517 and vacated all but the $152,500 judgment against SMI and $25,000 of the judgment against Abastillas.

[1/] $22,000 special damages, $100,000 general damages, and $30,000 attorney fees.

[2/] $200,000 general damages, $25,000 punitive damages, and $56,250 attorney fees.

[3/] $270,000 general damages.

In their Motion for Reassignment or Recusal filed in the instant appeal, Smith and Abastillas report that

> [o]n remand, [Smith] made a Rule 68 offer of $6,000, which the Kekonas accepted. On the day of trial of their damages against Abastillas, the Kekonas settled with Abastillas for $3,000. The Kekonas now have a judgment for $6,000 against [Smith] and $25,000 (punitive damages) against Abastillas.

It appears that (1) Abastillas paid the $3,000 and (2) the Kekonas also had an $8,128.27 judgment for costs against Abastillas and SMI. In other words, at the time of trial in the instant case, the combined total of the principal due from various parties was $191,628.27 ($152,500 plus $25,000, plus $6,000, plus $8,128.27).

While the above was occurring, the factual basis for the instant appeal commenced when, on June 1, 1993, eleven days after the May 21, 1993 jury verdict in Civil No. 89-3517, two improved real estate properties were transferred to Dr. Bornemann. The first property was the residence of Smith and Abastillas at 47-186 Kamehameha Highway in Kaneohe, Hawai'i (Kaneohe property). This Kaneohe property was owned by SMI and RASCORP. On June 1, 1993, (1) SMI and RASCORP recorded a transfer of the Kaneohe property to Abastillas, and (2) Abastillas recorded a transfer of the Kaneohe property to Dr. Bornemann. In the documents, Smith had notarized the signatures of Abastillas, and Abastillas had notarized the signatures of Smith.

The second property was Apartment #1809 in the Honolulu Park Place Condominium, 1212 Nuuanu Avenue, Honolulu, Hawai'i

(HPP property). This HPP property was owned by Abastillas and she transferred it to Dr. Bornemann.

On October 13, 1993, the Kekonas commenced the instant case by filing a complaint alleging that the transfers of the Kaneohe property and the HPP property were an unlawful attempt by the judgment debtors to avoid the claims assertable by the Kekonas as judgment creditors. Count I alleged fraudulent transfers, Count II alleged violations of Hawai'i's Racketeer Influenced and Corrupt Organizations (RICO) law, Hawai'i Revised Statutes (HRS) Chapter 842 (Supp. 2005), Count III alleged a conspiracy to fraudulently transfer, and Count IV alleged notary misconduct. Counts I, II, and III were filed against Abastillas, Smith, SMI, and Dr. Bornemann.[4/] Count IV was filed against Abastillas and Smith. WSC was later added as a Doe Defendant to Count IV because WSC had issued the statutorily required $1,000 notary bonds on behalf of Abastillas and Smith. On September 26, 1995, the court denied the July 18, 1995 motion by Abastillas, Smith, and WSC for summary judgment on Count IV. On April 19, 1999, the court granted the February 25, 1999 motion by Abastillas and Smith for a dismissal of Count II. The jury trial commenced on May 10, 1999. Judge Rhonda Nishimura presided.

On May 20, 1999, after both parties rested, the court denied a motion by the Kekonas seeking a directed verdict that

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[4/] Mortgagee U.S. Bancorp Mortgage, Co. was also named as a defendant, but the claims against it were later voluntarily dismissed.

the deeds were void because of the defective notarizations. After counsel for the Kekonas presented his closing argument to the jury, the court granted a motion by the Defendants to dismiss the mental and emotional distress claims asserted by the Kekonas.

On May 20, 1999, the court instructed the jury, in relevant part, as follows:

> Plaintiffs are required to prove that Defendants fraudulently conveyed property by a preponderance of the evidence.
>
> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer or incurred the obligation with the actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> In determining actual intent, consideration may be given to one, some or all of the following:
>
> . . . .
>
> (2) The debtor had retained possession or control of the property transferred after the transfer.
>
> (3) The transfer or obligation was concealed.
>
> (4) Before the transfer was made or obligation was incurred, the debtor was sued or threatened with suit:
>
> (5) The transfer was of substantially all the debtor's assets;
>
> . . . .
>
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (10) The transfer had occurred shortly before or shortly after a substantial debt was incurred ; . . . .
>
> . . . .
>
> A transfer without consideration by one who is indebted is presumptively fraudulent, regardless of the actual intent of the transferor.
>
> . . . .
>
> Knowledge that a transaction will operate to the detriment of creditors is sufficient for actual intent.
>
> If the conveyance is made under such circumstances that the

result must necessarily be to hinder and delay creditors, it will be presumed that this was the intent of the transferor in making it.

Fraudulent intent can be found on the basis of circumstantial evidence, direct proof will rarely be available.

A conveyance of real estate by one who is debtor or potential debtor to another, to be held wholly or in part in trust by the other person for the debtor, is a fraud on the creditor or potential creditor whether so intended or not.

A fraudulent conveyance occurs where an owner or co-owner of property conveys that property to a third person in order to deprive a creditor or potential creditor of the property out of which that creditor or potential creditor may recover.

. . . .

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

. . . .

Any transfer whereby the transferee gives less than "reasonably equivalent value" in exchange for the transfer from the debtor and has the effect of reducing the debtor's assets by a certain sum may be avoided. The transferee's intent need not be shown if there is less than reasonably equivalent value.

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation.

. . . .

A person taking a transfer in good faith and for a reasonably equivalent value is entitled to protection to the

extent of the value given the debtor for the transfer.

. . . .

Even if the Kekonas prove an actual intent to hinder, delay, or defraud the Kekonas, if Defendant Bornemann took the property in good faith and for a reasonably equivalent value, then the transfer and/or transfers are not voidable.

If you find that no fraudulent conveyance exists, a conspiracy cannot exist as it cannot stand alone as a single claim. In other words, membership or participation in a conspiracy to commit a wrongful act is by itself not a basis for liability. Conspirators have no liability unless a wrongful act is committed by one or more of the conspirators in furtherance of the conspiracy causing another party to sustain injury, damage, loss or harm.

The existence of a civil conspiracy must be established by clear, cogent and convincing evidence.

A conspiracy to commit fraudulent transfers is a combination of two or more persons or entities who, pursuant to an agreement, tacit or implicit, delay, hinder or defraud a creditor of one or more of the persons or entities.

. . . .

A conspiracy to commit fraudulent transfers is a combination of two or more persons or entities who, pursuant to an agreement, tacit or implicit, delay, hinder or defraud a creditor of one or more of the persons or entities.

. . . .

Proof of a slight connection to a conspiracy is sufficient to support such accountability.

A party damaged by a conspiracy to fraudulently transfer property so as to prevent the party from collecting on a debt or a judgment may sue for damages.

. . . .

One who has a beneficial interest in a document, no matter how small or nominal his interest therein, cannot act as a notary public relative to that document.

For the official misconduct of a notary public, the notary shall be liable to the party injured thereby for all the damages sustained.

. . . .

You are not permitted to award a party speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably probable.

Compensation must be reasonable. You may award only such

damages as will fairly and reasonably compensate the plaintiffs for the damages which you find from a preponderance of all the evidence in the case which have been sustained as legal cause of the occurrence.

If you find the Defendants or some of them are liable to the Plaintiffs for any of the claims they have made, then Plaintiffs will be entitled to an award of damages, and it is your responsibility to set the amount of those damages.

You must determine the amounts of special damages to which the Plaintiffs are entitled.

To determine the amount of special damages to which Plaintiffs are entitled you should consider the following:

1. The loss of monies and other value by the Plaintiffs; and,

2. Any other actual losses suffered by the Plaintiffs.

Special damages are those elements of damages which fix the amount precisely or permit you to determine the amount with reasonable certainty from the evidence.

Interest lost by Plaintiffs may be recovered as an item of damages. Interest on judgments represents delay damages.

In Hawaii, interest at the rate of ten percent a year, and no more, shall be allowed on any judgment recovered before any Court in the State.

Under Hawaii law in order to recover punitive damages plaintiffs must prove by clear and convincing evidence that a particular defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference in civil obligations or that there has been such an entire want of care which would raise the presumption of a conscious indifferences [sic] to consequences.

Punitive damages are not awarded for mere inadvertence, mistake or errors of judgment by that person.

Punitive damages may be awarded even if Plaintiff(s) suffered only nominal special or general damages.

Punitive damages are those damages awarded to punish a wrongdoer.

When the court asked if there were any objections to the special verdict form, the following was stated:

MR. SMITH: Just a matter of putting on the record the double recovery positions which are apparent in several parts of the form. And it's my understanding Your Honor has taken the position that there's not to be any number of double recovery so if the jury starts ordering the same figures in multiple places, the court will cure that problem.

THE COURT: And we will address that at the appropriate time.

The special verdict form advised the jury that the Kaneohe property was subject to a valid $174,000 mortgage to U.S. Bancorp. On May 21, 1999, by a special verdict, the jury decided Counts I, III, and IV in favor of the Kekonas. It answered the following questions as follows:

Question no. 1. "Do you find by a preponderance of the evidence that [Abastillas, RASCORP, or SMI] transferred the Kaneohe property with the actual intent of hindering, delaying or defrauding the [Kekonas]." The jury's answer was yes.

Question no. 2. "Please identify the Defendants who transferred the Kaneohe property with the actual intent of hindering, delaying or defrauding the [Kekonas]." The jury identified Abastillas, RASCORP, and SMI.

Question no. 6. "Do you find by a preponderance of the evidence that Dr. Bornemann took the Kaneohe property in good faith and for reasonably equivalent value?" The jury's answer was no.

Question no. 9. "What, if any, is the amount of the damages that should be awarded to the Plaintiffs for the fraudulent transfer of the Kaneohe property?" The jury's answer was $29,064 special damages and $17,436 general damages against Abastillas; $6,000 special damages and $3,600 general damages against RASCORP; and $156,564 special damages and $93,936 general damages against SMI.

Question no. 10. "Do you find by clear and convincing evidence that two or more Defendants conspired to harm the [Kekonas] by fraudulently transferring the Kaneohe property?" The jury's answer was yes.

Question no. 11. "Please identify the Defendants who were involved in the conspiracy as to the Kaneohe property." The jury identified Abastillas, Smith, RASCORP, Dr. Bornemann, and SMI.

Question no. 12. "What, if any, is the amount of the damages that should be awarded to the Plaintiffs from the conspiracy as to the Kaneohe property?" The jury's answer was $100,000.

Question no. 13. "Do you find by a preponderance of the evidence that [Abastillas] transferred the HPP apartment property with the actual intent of hindering, delaying or defrauding the [Kekonas]? The jury's answer was yes.

Question no. 17. "Do you find by a preponderance of the evidence that Dr. Bornemann took the HPP apartment in good faith and for reasonably equivalent value?" The jury's answer was no.

Question no. 19. "What, if any, is the amount of the damages that should be awarded to the Plaintiffs against Paz F. Abastillas for the fraudulent transfer of the HPP apartment?" The jury's answer was $15,128 special damages and $9,076 general damages.

Question no. 20. "Do you find by clear and convincing evidence that two or more Defendants conspired to harm the [Kekonas] by fraudulently transferring the HPP apartment?" The jury's answer was yes.

Question no. 21. "Please identify the Defendants who were involved in the conspiracy as to the HPP apartment." The jury identified Abastillas, Smith, and Dr. Bornemann.

Question no. 22. "What, if any, is the amount of the damages that should be awarded to the Plaintiffs from the conspiracy as to the HPP apartment?" The jury's answer was $100,000.

Question no. 23. "Do you find by a preponderance of the evidence that [Abastillas or Smith] engaged in official misconduct relating to the acknowledgment of deeds to the Kaneohe property or the HPP apartment?" The jury's answer was yes.

Question no. 24. "What, if any, is the amount of the damages that should be awarded to the Plaintiffs arising from the notary misconduct?" The jury's answer was $95,500 special damages and $57,300 general damages against Abastillas and the same against Smith.

Question no. 25. "Do you find by clear and convincing evidence that punitive damages should be awarded to the [Kekonas] against any of these Defendants?" The jury's answer was yes. The jury then decided that each of the following should pay

$250,000 punitive damages: Abastillas, Smith, RASCORP, SMI, and Dr. Bornemann.

Pursuant to the jury's special verdict, a judgment was entered on July 12, 1999, ordering the following Defendants to pay the following special and general damages relating to the following items:

Item	Kaneohe	HPP	Notary
Abastillas	$29,064 $17,436	$15,128 $ 9,076	$95,500 $57,300
Smith			$95,500 $57,300
SMI	$156,564 $93,936		
RASCORP	$6,000 $3,600		

Pursuant to the jury's special verdict, the July 12, 1999 judgment also (1) imposed a joint and several $100,000 liability against Abastillas, Smith, RASCORP, SMI, and Dr. Bornemann for their conspiracy to fraudulently transfer the Kaneohe property; (2) imposed a joint and several $100,000 liability against Abastillas, Smith, and Dr. Bornemann for their conspiracy to fraudulently transfer the HPP property; (3) ordered Abastillas, Smith, RASCORP, SMI, and Dr. Bornemann each to pay $250,000 punitive damages; and (4) voided the deeds involved in the transfer of the Kaneohe property and the HPP property to Dr. Bornemann.

In response to Dr. Bornemann's July 22, 1999 Motion for

New Trial And/Or to Eliminate Verdict for Conspiracy Damages And/Or to Eliminate Punitive Damages, the court entered an October 6, 1999 order stating, in relevant part:

> 3. The . . . Court finds that the punitive damages assessed against [Dr. Bornemann] in the amount of $250,000 was excessive and hereby reduces the amount of punitive damages to $75,000.
>
> 4. There shall be a new trial solely on the question of punitive damages awarded to [the Kekonas] against [Dr. Bornemann] unless, within seven (7) calendar days after service of a copy of this Order on [the Kekonas'] attorney, [the Kekonas] file with the clerk for the court a written consent to reduce the verdict to $75,000.00 for punitive damages awarded to [the Kekonas] against [Dr. Bornemann].

Subsequently, at a jury trial with Judge Victoria Marks presiding, the court instructed the jury, in relevant part:

> The proper measure of punitive damages is (1) the degree of intentional, willful, wanton, oppressive, malicious or grossly negligent conduct that formed the basis for the prior award of damages against [Dr. Bornemann], and (2) the amount of money required to punish [Dr. Bornemann], considering his financial condition. In determining the degree of [Dr. Bornemann's] coduct, you must analyze his state of mind at the time he committed the conduct which formed the basis for the prior award of damages against [Dr. Bornemann]. Any punitive damages you award must be reasonable.
>
> The following factors should be considered by you: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from [Dr. Bornemann's] conduct as well as the harm that actually has occurred to the Kekonas; (b) the degree of reprehensibility of [Dr. Bornemann's] conduct, the duration of that conduct, [Dr. Bornemann's] awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to [Dr. Bornemann] of his wrongful conduct and the desirability of removing that profit and of having [Dr. Bornemann] also sustain a loss; (d) the financial position of [Dr. Bornemann]; and (e) all the costs of litigation.

On November 2, 2000, the jury decided that Dr. Bornemann should pay $594,000 in punitive damages.

On November 30, 2000, the court entered a Revised Final Judgment combining both jury verdicts, adding a $1,000 judgment against WSC, and assessing $7,424.39 costs jointly and severally

against Abastillas, Smith, RASCORP, SMI, and Dr. Bornemann.

On February 26, 2001, after sundry post-judgment motions were filed, heard, and decided, Judge Marks entered an Amended Revised Final Judgment that increased the judgment against WSC to $2,000 and assessed $1,235.53 additional costs against Dr. Bornemann.[5/]

[5/] The Amended Revised Final Judgment entered on February 26, 2001 awarded the following to the Kekonas:

1. Against Defendant PAZ FEND ABASTILLAS, also known as Paz A. Richter:

a. Count I (fraudulent transfer of the Kaneohe property):

$29,064 (Special Damages)
$17,436 (General Damages)

b. Count I (fraudulent transfer of #1809 Honolulu Park Place):

$15,128 (Special Damages)
$9,076 (General Damages)

c. Count IV (illegal notary)

$95,500 (Special Damages)
$57,300 (General Damages)

d. Punitive Damages:

$250,000

2. Against Defendant Robert A. Smith, personally:

a. Count IV (illegal notary)

$95,500 (Special Damages)
$57,300 (General Damages)

b. Punitive Damages:

$250,000

3. Against Defendant Robert A. Smith, Attorney At Law, A Law Corporation:

a. Count I (fraudulent transfer of the Kaneohe property):

$6,000 (Special Damages)
$3,600 (General Damages)

b. Punitive Damages:

These appeals and cross-appeal were assigned to this court on May 20, 2002.

$250,000

4. Against Defendant Standard Management, Inc.:

a. Count I (fraudulent transfer of the Kaneohe property):

$156,564 (Special Damages)
$ 93,936 (General Damage)

b. Punitive Damages:

$250,000

5. Against Defendant Michael Bornemann:

a. Punitive Damages:

$594,000

6. Count III (conspiracy to commit fraudulent conveyances):

a. Related to the Kaneohe property:

Against Defendants Paz Feng Abastillas; Robert A. Smith, personally; Robert A. Smith, Attorney At Law, A Law Corporation; Standard Management, Inc.; and Michael Bornemann, jointly and severally:

$100,000

b. Related to #1809, Honolulu Park Place:

Against Defendants Paz Feng Abastillas; Robert A. Smith, personally; and Michael Bornmann, jointly and severally:

$100,000

7. Against Defendant Western Surety Company:

$2,000

8. Costs of suit:

Against Defendants Paz Feng Abastillas; Robert A. Smith, personally; Robert A. Smith, Attorney at Law, A Law Corporation; Standard Management, Inc.; and Michael Bornemann, jointly and severally:

$7,424.39

Against Defendant Michael Bornemann, individually:

$1,235.53

POINTS ON APPEAL AND CROSS-APPEAL

1. Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the circuit court reversibly erred by instructing the jury that fraudulent transfers could be proven by a preponderance of the evidence. They contend that clear and convincing evidence should have been required.

2. Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the circuit court reversibly erred (a) in holding that the common law "preferential transfer" rule was abrogated by HRS 651C-8 (1993), and (b) in not instructing the jury to consider the common law "preferential transfer" rule as a defense.

3. Notwithstanding their agreement to this instruction, Abastillas, SMI, Smith, and RASCORP contend that the circuit court reversibly erred when it instructed the jury that "proof of slight connection to conspiracy is sufficient to support such accountability[.]"

4. Abastillas, SMI, Smith, and RASCORP contend that the circuit court reversibly erred when it failed to grant their motions for summary judgment, directed verdict, or new trial on Count IV, the Kekonas' illegal notary claim. WSC contends that the circuit court reversibly erred in denying partial summary judgment, directed verdict, or JNOV on Count IV.

5. Notwithstanding their agreement at trial to these instructions, Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann

contend that the circuit court erred by giving the conspiracy instructions because "the vast majority of cases [from other jurisdictions] . . . have refused to allow conspiracy actions for fraudulent transfer[; when] there is no tort, there can be no conspiracy[.]"

6. Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the circuit court reversibly erred in refusing, post-judgment pursuant to a Hawai'i Rules of Civil Procedure Rule 60(b) motion, (a) to reduce the Kekonas' judgment to the statutory limits specified in HRS § 651C-7, and (b) to vacate the general, conspiracy, and punitive damages awarded.

7. The Kekonas contend that "[t]he trial court erred and abused its discretion in awarding the Kekonas only $2,000 in damages against [WSC], where the special, general and punitive damages caused by the wrongful notarizations of Smith and Abastillas exceeded $1,000,000."

8. Dr. Bornemann contends that the circuit court reversibly erred by forcing Dr. Bornemann, during the second jury trial, "to present his entire defense during his cross-examination in the plaintiff's case."

DISCUSSION

1.

Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the court reversibly erred when it instructed the jury that fraudulent transfers could be proven by a preponderance

of the evidence. They contend that clear and convincing evidence was required. We disagree.

The following parts of Hawai'i's Uniform Fraudulent Transfer Act (1993)[6/] are relevant:

> **§ 651C-4 Transfers fraudulent as to present and future creditors.** (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

[6/] In 1985, the Hawai'i Legislature enacted the Uniform Fraudulent Transfer Act (UFTA) into law as Hawaii Revised Statutes (HRS) Chapter 651C. The Judiciary Committee explained the purpose and content of the UFTA:

> The purpose of this bill is to enact the Uniform Fraudulent Transfer Act, which would promote national uniformity in determining and proving fraudulent transfer cases.
>
> Your Committee heard favorable testimony on the bill from the Hawaii Commission for Promulgation of Uniform Legislation. The Uniform Act was brought about to remedy the varying standards used in different states to prove fraud. Since the intent to hinder, delay or defraud creditors is seldom susceptible of direct proof, courts have relied on badges, or indicia, of fraud and assigned different weights to them, from jurisdiction to jurisdiction.
>
> Presently, there is no Hawaii statutory law which directly addresses the problem of fraudulent transfers. Case law has provided guidance. The leading case in this area is Achiles v. Cajiles, 39 Haw. 493 (1952). The Court there indicated eight badges, or indicia of fraud. The Uniform Act would increase the number of indices and categorize these into two divisions. One category would only pertain to present creditors. The other category would pertain to both present and future creditors. The Uniform Act also seeks to minimize or eliminate the diversity of standards from different jurisdictions by providing that the proof of certain fact combinations would conclusively establish fraud. In absence of evidence of the existence of such facts, proof of a transfer would depend on evidence of actual intent.
>
> The Uniform Act is necessary to conform with the new Bankruptcy Act of 1978 and the Uniform Commercial Code.
>
> Your Committee on Judiciary is in accord with the intent and purpose of S.B. 1404 and recommends that it pass Second Reading and be placed on the calender for Third Reading.

Sen. Stand. Comm. Rep. No. 372, in 1985 Senate Journal, at 1051.

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
(B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;
(2) The debtor had retained possession or control of the property transferred after the transfer;
(3) The transfer or obligation was disclosed or concealed;
(4) Before the transfer was made or obligation was incurred, the debtor was sued or threatened with suit;
(5) The transfer was of substantially all the debtor's assets;
(6) The debtor had absconded;
(7) The debtor had removed or concealed assets;
(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(10) The transfer had occurred shortly before or shortly after a substantial debt was incurred; and
(11) The debtor had transferred the essential assets of the business to a lienor who had transferred the assets to an insider of the debtor.

Transfers fraudulent as to present creditors. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for other than a present, reasonably equivalent value, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

. . . .

[§ 651C-8] Defenses, liability, and protection of transferee. (a) A transfer or obligation is not voidable under section 651C-4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 651C-7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c),

or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or
(2) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;
(2) Enforcement of any obligation incurred; or
(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under section 651C-4(a)(2) or section 651C-5 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or
(2) Enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

(f) A transfer is not voidable under section 651C-5(b):

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

. . . .

Supplement of provisions. Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

Black's Law Dictionary (5th ed.) explains the difference between "actual" and "constructive" fraud:

> Fraud is either *actual* or *constructive*. Actual fraud consists in deceit, artifice, trick, design, some direct and active operative of the mind; it includes cases of intentional and successful employment of any cunning, deception, or artifice used to circumvent or cheat another. It is something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception. Constructive fraud consists in any act of commission or omission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. Or, as otherwise defined, it is an act, statement or omission which operates as a virtual fraud on an individual, or which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design[.]

HRS §§ 651C-4(a)(2) and 651C-5 are the "constructive fraud" part of the UFTA. In many states, no distinction is made between the HRS § 651C-4(a)(1) "actual intent" part of the UFTA and the HRS §§ 651C-4(a)(2) and 651C-5 "constructive fraud" part of the UFTA and the clear and convincing evidence burden of proof is imposed for both parts.[7/]

In Washington, the following distinction is made:

> Under Washington's UFTA, the actual intent to defraud must be demonstrated by "clear and satisfactory proof". Clearwater v. Skyline Const. Co. Inc., 67 Wash.App. 305, 321, 835 P.2d 257 (1992), review denied, 121 Wash.2d 1005, 848 P.2d 1263 (1993). In contrast, constructive fraud must be shown by "substantial evidence". Clearwater, at 321, 835 P.2d 257.

Sedwick v. Gwinn, 873 P.2d 528, 531 (Wash.App. 1994).

Other states impose a "more probable than not" burden of proof for both parts.[8/]

We conclude that the "more probable than not" burden of

[7/] Eli's, Inc. v. Lemen, 591 N.W.2d 543, 555 (Neb. 1999); Ralfs v. Mowry, 586 N.W.2d 369, 373 (Ia. 1998); McCain Foods, USA Inc. v. Central Processors, Inc., 275 Kan. 1, 61 P.3d 68 (2002); Bueneman v. Zykan, 52 S.W.3d 49 (Mo. App. 2001); Heimbinder v. Berkovitz, 175 Misc. 2d, 808, 670 N.Y.S. 2d 301 (N.Y.Sup. Ct. 1998); Abood v. Nemer, 128 Ohio App.3d 151, 713 N.E.2d 1151 (1998); Sedwick v. Gwinn, 873 P.2d 528, 533 (Wash. App. 1994).

[8/] Preferred Funding, Inc. v. Jackson, 185 Or. App. 693, 61 P.3d 939 (Jan. 8, 2003); Whitehouse v. Six Corp., 48 Cal. Rptr.2d 600, 603-4 (2d Dist. 1995).

proof is applicable to the "constructive fraud" part of Hawai'i's UFTA. We now must decide the burden of proof applicable to the HRS § 651C-4(a)(1) "actual intent" part of Hawai'i's UFTA. In this case, the court decided, in relevant part:

> THE COURT: The court notes that with the enactment of the UFTA in the mid-1980s there has been no Hawaii case law that sets forth the particular standard of proof for actual fraud. Therefore the court already adopted [In Re Ayala] in the Ninth Circuit as the closest parallel or analogy which gives some instruction for the standard of proof for an actual fraudulent transfer.

The Ayala case cited is a 1989 bankruptcy case reported in 107 B.R. 271. The Bankruptcy Code, 11 U.S.C.A. § 727(a)(2)(B), permits a creditor to prove that discharge should be denied by proving the debtor transferred property after the filing of the petition with the intent to hinder, delay, or defraud the creditor. The Bankruptcy Court concluded that the degree of the creditor's burden of proof was the preponderance of the evidence degree rather than the clear and convincing evidence degree.

In Standard Management, Inc. v. Kekona, 98 Haw. 95, 43 P.3d 232 (App. 2001), this court recognized that actual fraud has different varieties.[9/] The following are the elements of "garden

---

[9/] The following discussion in Standard Management, Inc. v. Kekona, 98 Haw. 95, 99, 43 P.3d 232, 236 (App. 2001), describes a type of fraud that is more than garden variety fraud:

> Furthermore, where fraud is alleged as grounds for an IAE [Independent Action in Equity], the plaintiff must show that the perjury relied upon as the basis for fraud is more than garden-variety fraud. Geo. P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 48 (1st Cir.1995) ("there is also little doubt that fraud cognizable to maintain an untimely independent attack [under Federal Rules of Civil Procedure Rule 60(b)] (FN2) upon a valid and final judgment has long been regarded as requiring more than common law fraud") (citations omitted). The actuating fraud must be such that "it prevented [the movant] from presenting his case[.]" Id. (citation omitted).

variety actual fraud":

> To support a finding of fraud, it must be shown that "the representations were made and that they were false, . . . (and) that they were made by the defendant with knowledge that they were false, (or without knowledge whether they were true or false) and in contemplation of the plaintiff's relying upon them and also that the plaintiff did rely upon them." Hong Kim v. Hapai, 12 Haw. 185, 188 (1899).

Kang v. Harrington, 59 Haw. 652, 656, 587 P.2d 285, 789 (1978). The burden of proving garden variety actual fraud is the clear and convincing evidence burden. See Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 386, 14 P.3d 1049, 1067 (2000); Dobison v. Bank of Hawaii, 60 Haw. 225, 226, 587 P.2d 1234, 1235 (1978).

The following considerations lead us to conclude that the burden of proving an HRS § 651C-4(a)(1) fraudulent transfer is the preponderance of the evidence burden rather than the clear and convincing evidence burden:

A. The fraudulent transfer described in HRS § 651C-4(a)(1) may involve much less than garden variety actual fraud. The UFTA permits a creditor to prove that a fraudulent transfer occurred by proving that the debtor transferred the property with any one of the following three intents: (a) to hinder; (b) to delay; or (c) to defraud. In other words, a gift made to a third party with an intent to hinder or delay payment to the creditor is a fraudulent transfer. This is much less than garden variety actual fraud.

Standard Management, Inc. v. Kekona, 98 Hawai'i 95, 43 P.3d 232 (App. 2001).

B. HRS § 651C-4(b) contains a non-exclusive list of objective factors that may be considered when "determining actual intent under subsection (a)(1)[.]" The fact that these historically have been labeled as "badges of fraud" does not change the fact that they are more accurately called badges of an intent (a) to hinder; (b) to delay; or (c) to defraud.

C. This appeal does not challenge the following jury instructions:

> A transfer without consideration by one who is indebted is presumptively fraudulent, regardless of the actual intent of the transferor.
>
> . . . .
>
> Knowledge that a transaction will operate to the detriment of creditors is sufficient for actual intent.
>
> If the conveyance is made under such circumstances that the result must necessarily be to hinder and delay creditors, it will be presumed that this was the intent of the transferor in making it.
>
> Fraudulent intent can be found on the basis of circumstantial evidence, direct proof will rarely be available.
>
> A conveyance of real estate by one who is debtor or potential debtor to another, to be held wholly or in part in trust by the other person for the debtor, is a fraud on the creditor or potential creditor whether so intended or not.
>
> A fraudulent conveyance occurs where an owner or co-owner of property conveys that property to a third person in order to deprive a creditor or potential creditor of the property out of which that creditor or potential creditor may recover.

2.

Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the trial court reversibly erred in (a) holding that the common law "preferential transfer" rule was abrogated by HRS § 651C-8, and (b) not instructing the jury to consider the common law "preferential transfer" rule as a defense. We disagree.

In 1935, the Hawai'i Supreme Court explained the "preferential transfer" doctrine as follows:

> [I]t is not fraudulent for a debtor in failing circumstances to prefer one or more of his *bona fide* creditors to the exclusion of other creditors, he having a legal right, although insolvent or in failing circumstances, to prefer one or more of his creditors by giving security for and limited to the amount of his valid debt notwithstanding that the claims of other creditors will thereby be delayed or defeated; that such a preference although it may exhaust or reduce the assets of the debtor so as to leave other creditors unpaid and without the means of collecting their claims does not of itself hinder, delay or defraud creditors within the meaning of a fraudulent conveyance to deprive them of any legal rights.

In re Application of Sec. Inv. Co., 33 Haw. 364, 369 (1935).

Some state courts have continued to recognize "preferential transfers" even after their state legislatures adopted the UFTA. For example, Dr. Bornemann cites Wyzard v. Gollar, 23 Cal. App. 4th 1183, 28 Cal. Rptr. 2d 608 (1994). In Wyzard, after an attorney's client realized that a sizable judgment would be rendered against him in a lawsuit, he executed a promissory note to the attorney for the attorney fees that he owed in connection with the case, the note being secured with the client's only substantial assets, interests in real property. After obtaining a judgment in the lawsuit, the plaintiff filed an action against the attorney, challenging the security interests conveyed to him by his client as a fraudulent transfer of assets. The trial court granted the attorney's motion for summary judgment. In affirming the trial court, the California Court of Appeal gave the following lengthy, but informative, discussion of the UFTA's predecessor, the Uniform Fraudulent Conveyance Act (UFCA), and the "preferential transfer" defense:

Mr. Wyzard's [the creditor] argument to the trial court, and to this court, is that the deeds of trust to Mr. Goller [the debtor's lawyer] were made "with actual intent to hinder, delay, or defraud" Mr. Wyzard as a creditor of Mr. Manning. Mr. Wyzard invokes Civil Code section 3439.04: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: (a) With actual intent to hinder, delay, or defraud any creditor of the debtor."

Before proceeding with a discussion of this provision, we note the statute to which it would be opposed according to appellant's argument. Civil Code section 3432, enacted as part of the 1872 Field Codes, provides that "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Even before enactment of the Field Codes, it had been recognized that a failing or insolvent debtor could prefer one creditor over another. (See *Randall v. Buffington* (1858) 10 Cal. 491, 494 ["it is difficult to perceive how the payment of a debt which [is] justly owed, and which was past due, can be tortured into an act to hinder, delay, and defraud creditors"]; *Wheaton v. Neville* (1861) 19 Cal. 41, 46.) Subsequent cases continued the judicial refusal to set aside a preferential transfer solely because it worked a preference. (See *McGee v. Allen* (1936) 7 Cal.2d 468, 474, 60 P.2d 1026; *Bradley v. Butchart* (1933) 217 Cal. 731, 20 P.2d 693.) If the transfer was for fair consideration and not fraudulent, the only basis to set it aside was through bankruptcy, which now reaches transfers made within 90 days of the adjudication. (11 U.S.C. § 547(b)(4)(A); see *McGee v. Allen, supra,* 7 Cal.2d at p. 474, 60 P.2d 1026.)

The general rule permitting a debtor to prefer one creditor or group of creditors over others has long been subject to exceptions in cases of fraud. The subject was dealt with by the National Conference of Commissioners on Uniform State Laws which, in 1918, proposed what became the Uniform Fraudulent Conveyance Act (the Uniform Act). By 1984, the Uniform Act had been adopted in 25 jurisdictions. (See 7A West's U.Laws Ann. (1984) Bus. & Fin. Laws, comrs. note, p. 639.) California was one of them; it adopted the uniform law in 1939. (Stats.1939, ch. 329, § 9, p. 1669.) Civil Code section 3439.07, which was taken directly from section 7 of the Uniform Act, declared conveyances made to hinder, delay or defraud present or future creditors to be fraudulent.

As a result of major changes in the Bankruptcy Act and the Uniform Commercial Code, and in recognition of other changes in the law, the Commissioners undertook a study and revision of the Act in 1978. The result was the 1984 version, which, like its predecessor, has been widely adopted. (7A West's U.Laws Ann., *op. cit. supra,* Bus. & Fin. Laws, comrs. note, p. 639.) The California version was enacted in 1986, and was in effect when the conveyances at issue in this case were made. (See Stats.1986, ch. 383, § 2.) (The law has been retitled; it is now the Uniform Fraudulent Transfer Act; see Civ.Code, § 3439.)

Civil Code section 3439.04 combines the substance of several separate provisions of the former Act. (See *Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123, 10 Cal.Rptr.2d 55.) We have quoted the language pertinent to this case, which appears in subdivision (a). The redrafted provision is substantially the same as Civil Code section 3439.07 of the former Act. Civil Code section 3439.12 of the new Act provides in part that provisions of the new law,

insofar as they are substantially the same as provisions of the former statute, "shall be construed as restatements and continuations, and not as new enactments."

We therefore turn to the principal issue on this appeal: whether a preferential transfer, if made for proper consideration ("value" under the new law; see Civ.Code § 3439.03), but with recognition that the transfer will effectively prevent another creditor from collecting on his debt, is one made with "actual intent to hinder, delay, or defraud" that creditor.

As we have discussed, California cases predating the Act rejected the claim that debtor's preference of some creditors over others is improper as to those who are not preferred. Later cases reached the same result on the basis of Civil Code section 3432, without discussion of the Act. (See *U.S. Fid. & Guar. Co. v. Postel* (1944) 64 Cal.App.2d 567, 572, 149 P.2d 183 ["[t]he statutory right of a debtor to prefer one creditor to another is based upon the principle that in the absence of fraud the owner of property may do with it as he pleases . . . , nor does the fact that such preference hinders or delays other creditors in the collection of their claims render it void, nor the fact that the preferred creditor had knowledge that such consequences would follow the preference"]; *United States v. Eleven Certain Parcels of Land* (S.D.Cal.1942) 45 F.Supp. 289 [preference of one creditor over another proper under California law even if insolvency results].)

This has been the rule for over 400 years, since the Statute of Elizabeth in 1571. (13 Eliz., ch. 5 (1571); see 1 G. Glenn, Fraudulent Conveyances and Preferences (rev. ed. 1940) §§ 58, 289, pp. 79, 488.) Cases decided under the law of jurisdictions that adopted the Uniform Act reached the same result under section 7 of the uniform law. (See *Irving Trust Co. v. Kaminsky* (D.N.Y.1937) 19 F.Supp. 816.)

The *Irving Trust Co.* decision, a leading case, pointed out that a transfer made in good faith to secure an antecedent debt is declared to be for fair consideration, and does not amount to an act to "hinder, delay or defraud" an unpreferred creditor. (19 F.Supp. at p. 818.)

The New Jersey Supreme Court summarized the rule in the following terms: "We start with the proposition that a preference as such is not a fraudulent conveyance. True, a creditor who collects from an insolvent debtor fares better than other claimants. Yet if the transfer were set aside in favor of another creditor, there would be but a substitution of one preference for another. For that reason a preference cannot be undone by a competing creditor whether the preference was obtained through judicial process or by a transfer from the debtor, and the Uniform Fraudulent Conveyance Act did not alter that proposition." (*Smith v. Whitman* (1963) 39 N.J. 397 [189 A.2d 15, 18]; see also *Marroquin v. Barrial* (1959) 174 Cal.App.2d 540, 543 [345 P.2d 30]; *In re Olson* (D., Minn.1984) 45 B.R. 501, 505; *Peoples-Pittsburgh T. Co. v. Holy Family P. Nat. C. Ch.* (1941) [341 Pa. 390] 19 A.2d 360, 361; *American Cas. Co. of Reading Pa. v. Line Materials Indus.* (10th Cir.1964) 332 F.2d 393, 396; *Manello v. Bornstine* (1954) 44 Wash.2d 769 [270 P.2d 1059]; *Boston Trading Group, Inc. v. Burnazos* (1st Cir.1987) 835 F.2d 1504, 1508 [hypothetical debtor who owes $10,000 to A and $20,000 to B, but has only $8,000, which he uses to satisfy his debt to A, does not make "fraudulent conveyance" under the Uniform Act because payment satisfies a debt owed to legitimate creditor; "B must find a remedy in bankruptcy, or in some other,

law"].)

> We conclude that the transfer to Mr. Goller, in payment for his legal services, while a preference, is not for that reason a transfer made to "hinder, delay or defraud" Mr. Wyzard.

Wyzard v. Gollar, 23 Cal. App. 4th at 1188-91, 28 Cal. Rptr. 2d at 610-12.[10/]

Abastillas, Smith, RASCORP, SMI, and Dr. Bornemann proposed the following jury instructions:

> A preferential transfer occurs when a debtor transfers property of equivalent value to a pre-existing, *bona fide* creditor in return for the discharge of a legitimate antecedent (old) debt. In other words, a preferential transfer occurs when the creditor is an "old" creditor, and the transfer discharges an old (and real) debt. A preferential transfer is not illegal under the law. In other words a *preferential* transfer is not an unlawful *fraudulent* transfer. A preferential transfer is valid and lawful.
>
> Such a transfer is called a "preferential" transfer because the law allows a debtor to choose which of two or more creditors he or she wishes to pay. The debtor thus has a legal right to "prefer" that creditor over another.
>
> Let me give you an illustration. Mary owes Alice $10,000, and Mary also owes Ted $10,000. Mary's debts thus total $20,000. Mary has only $10,000 in cash and owns nothing else. She can give her entire $10,000 to Ted, to "discharge" or pay her debt to him, even though Alice gets nothing, if it is Ted, and not Alice, that she prefers to pay.
>
> . . . .
>
> If the transfer in question was preferential, and not fraudulent, then the actual intent of the debtor is irrelevant. That is, even if the debtor had an actual intent to hinder, dely, and defeat another creditor, it does not matter: you cannot find the transfer fraudulent, no matter what the debtor's intent, if the transfer was preferential.
>
> By the same token, if the transfer in question was preferential, and not fraudulent, the badges of fraud are likewise irrelevant because the badges are circumstantial evidence of actual intent to hinder, delay, and defeat, and actual intent to hinder, delay, and defeat is irrelevant, as I have just explained.

Dr. Bornemann proposed the following jury instruction:

10/ We disagree with the holding in Wyzard v. Gollar. We would have concluded that the following questions were genuine issues of material fact: (1) did the debtor make the transfer with actual intent to hinder, delay, or defraud the creditor and, if so, (2) did the transferee take in good faith and for a reasonably equivalent value?

"In the absence of fraud, and even though insolvent, debtors Abastillas and SMI may pay Defendant Bornemann in preference to the Kekonas, or may give to Defendant Bornemann security for the payment of his demand in preference to the Kekonas."

Abastillas and Smith contend "that the preferential transfer rule applies even if the transferee knows that (1) there is an unpaid creditor (even a judgment creditor); (2) the debtor is giving a preference; (3) the debtor is insolvent; (4) and the debtor actually intends to defeat the other creditor (has a fraudulent intention)." We disagree and conclude that Hawai'i's UFTA replaced the preferential transfer rule.[11/]

[11/] There are material differences between the conclusions stated in parts "3" and "4" of this opinion and the following opinion interpreting and applying Hawai'i law:

> The common law of fraudulent conveyances, from the Statute of Elizabeth (13 Eliz. Chap. 5 (1570)) is part of the common law of Hawaii. *Achiles v. Cajigal,* 39 Haw. 493 (1952). The common law rule on fraudulent conveyances was that any conveyance made with the intent to hinder, delay, or defraud creditors is void, unless the recipient of the property both acts in good faith and gives value for the property. *Achiles,* 39 Haw. at 496.
>
> . . . .
>
> Direct evidence of whether a person intended to hinder, delay, or defraud his creditors is difficult to obtain. For that reason, the common law of Hawaii recognized certain "badges of fraud" or indicators of fraud, the presence of which indicate that a fraudulent conveyance has occurred. *Achiles,* 39 Haw. at 497; *Sylvester v. Sylvester,* 723 P.2d 1253, 1257 (Alaska 1986) (although no Hawaii court has examined the common law badges of fraudulent conveyance since territorial days, there is no reason to believe that Hawaii will not recognize the badges). Utilization of the badges of fraud is favorable to the creditor because by simply showing the existence of badges of fraud, a creditor's burden is satisfied. Plaintiffs urge the Court to find a fraudulent conveyance upon a showing of the badges alone.
>
> . . . .
>
> This Court finds that the common law of Hawaii makes a distinction in analysis between pre-existing creditors--those creditors whose claims predated the questioned conveyance (*Achiles*) and subsequent creditors--creditors who became creditors subsequent to the questioned conveyance (*Middleditch*). Although a pre-existing creditor need only

HRS § 651C-4 specifies as follows:

> **§ 651C-4 Transfers fraudulent as to present and future creditors.** (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;

HRS § 651C-8 specifies as follows:

> **[§ 651C-8] Defenses, liability, and protection of transferee.** (a) A transfer or obligation is not voidable under section 651C-4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

HRS § 651C-4(a)(1) specifies what is a fraudulent transfer. HRS § 651C-8(a) specifies what HRS § 651C-4(a)(1) fraudulent transfers are not voidable. HRS § 651C-8(a) protects creditor transferees and buyer transferees. It does not protect debtor-transferors. HRS § 651C-8(a) does not specify that a transfer in violation of HRS § 651C-4(a)(1) is not a violation of HRS § 651C-4(a)(1) if it is to "a person who took in good faith and for a reasonably equivalent value[.]" In other words, a transfer

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show badges of fraud to establish an inference of fraud, a subsequent creditor must show fraud in fact or actual intent to defraud. 37 Am.Jur.2d, *Fraudulent Conveyances*, §§ 139, 143 (1968); *Lippi v. City Bank*, 955 F.2d 599, 607 (9th Cir.1992) (citing *Metzger v. Lalakea*, 32 Haw. 706 (1933), for Hawaii common law of fraudulent conveyances and subsequent creditors); *Metzger*, 32 Haw. at 720 (subsequent creditor may set aside a conveyance only when debtor conveyed with intent to defraud creditors, the transfer was secret, or the debtor transferred with the intention of entering a new and hazardous business, the risk of which would be placed upon subsequent creditors); *Middleditch*, 19 Haw. 413-14 (husband's purchase of residence in wife's name cannot be attacked by subsequent creditors absent a finding of actual intent to defraud, even though intended for the very purpose of keeping property secure from subsequent claims against husband).

Sherry v. Ross, 846 F.Supp. 1424, at 1428-29 (D. Haw. 1994) (footnote omitted).

that is a fraudulent transfer pursuant to HRS § 651C-4(a)(1) continues to be a fraudulent transfer notwithstanding the fact that the transfer is not voidable because the HRS § 651C-8 defense is validly asserted by the creditor transferee or buyer transferee.

3.

Smith and Abastillas contend that the circuit court plainly erred by instructing the jury that "[p]roof of slight connection to conspiracy is sufficient to support such accountability."[12/] In this case, we disagree.

The Hawai'i Rules of Appellate Procedure Rule 28(b) (2005) states, in relevant part:

12/ The following is the precedent cited for this instruction:

United States v. Inafuku, 938 F.2d 972 (9th Cir., Haw. 1991) (The principles of conspiracy allow a defendant to be punished for becoming a party to an agreement to facilitate the commission of substantive offenses, regardless of whether that defendant is also to be punished for those substantive offenses themselves. Under these principles, at the point of entering into an agreement, a conspirator becomes accountable for all conduct of the conspiracy, and proof of a slight connection to the conspiracy is sufficient to support such accountability. When one agrees to be a member of a conspiracy, one agrees to all acts that have been or will be committed by the conspiracy, and, by virtue of that agreement, is responsible for such acts regardless of one's role in their commission.

United States v. Batimana, 623 F.2d 1366, 1370 (9th Cir., cert. denied, 449 U.S. 1038, 101 S.Ct. 617, 66 L.Ed.2d 500 (1980) (The test for admissibility of out-of-court statements of a co-conspirator is whether there is sufficient, substantial evidence apart from the statements which establishes a prima facie case of the conspiracy and the defendant's slight connection to the conspiracy.)

United States v. Weiner, 578 F.2d 757 (9th Cir. Haw. 1978) (In this case the disputed statements were clearly made during and in furtherance of the conspiracy. The only question is whether there was sufficient independent evidence of a conspiracy and the defendants' connection to it. The quantum of independent proof necessary for the application of the coconspirator hearsay exception is sufficient, substantial evidence to establish a prima facie case that the conspiracy existed and that the defendant was a part of it. Once the existence of a conspiracy has been established, independent evidence is necessary to show prima facie the defendant's connection with the conspiracy, even if the connection is slight.)

> (b) Opening Brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
>
> . . . .
>
> (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. Where applicable, each point shall also include the following:
>
> . . . .
>
> (B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;
>
> . . . .
>
> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented[.]

The relevant precedent is that "'[w]hen jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.'" State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995) (quoting State v. Kelekolio, 74 Haw. 479, 514-15, 849 P.2d 58, 74 (1993) (citations omitted).

At trial, none of the defendants objected to this instruction. We conclude that, when read and considered as a whole, the instructions given pertaining to the law of conspiracy were not prejudicially insufficient, erroneous, inconsistent, or misleading. It follows that they are not plain error.

4.

As noted above, when SMI and RASCORP deeded the Kaneohe property to Abastillas, and Abastillas deeded the Kaneohe property to Dr. Bornemann, Smith notarized the signatures of Abastillas, and Abastillas notarized the signature of Smith.

HRS § 456-14 (1993) states as follows:

> **Notary connected with a corporation or trust company; authority to act.** It shall be lawful for any notary public, although an officer, employee, shareholder, or director of a corporation or trust company to take the acknowledgment of any party to any written instrument executed to or by the corporation or trust company, or to administer an oath to any shareholder, director, officer, employee, or agent of the corporation or trust company, or to protest for nonacceptance or nonpayment of bills of exchange, drafts, checks, notes, and other negotiable instruments which may be owned or held for collection by the corporation or trust company; provided it shall be unlawful for any notary public to take the acknowledgment of any party to an instrument, or to protest any negotiable instrument, where the notary is individually a party to the instrument.

(Emphasis added.)

Abastillas, Smith, and WSC contend that the only disqualifying interest under HRS § 456-14 is a beneficial, pecuniary interest which the notary derives from the instrument as grantee thereof. We disagree that the only way the notary can derive a beneficial, pecuniary interest is by being a grantee thereof. Assuming the notary must have a beneficial, pecuniary interest in the instrument, a decision that Abastillas and Smith used the instrument to accomplish a fraudulent transfer is a decision that they had a beneficial, pecuniary interest in the instrument.

Second, Abastillas, Smith, and WSC contend that the "corporate exception" stated in HRS § 456-14 validated Smith's

notarizations of the signatures of Abastillas. The question is whether the "corporate exception" applies to a lawyer's professional business corporation authorized pursuant to Rule 6 of the Rules of the Supreme Court of the State of Hawai'i (2006). We conclude that it does not.

Third, Abastillas, Smith, and WSC contend that the one defect in RASCORP's deed back to Abastillas was cured when that part of the transaction was re-done and re-executed with "confirmatory" deeds in which Smith's corporate signature on the RASCORP deed to Abastillas and the signature of Abastillas on the deed to Dr. Bornemann were notarized by an independent notary. We disagree. These allegedly curative actions were taken after the occurrence of the transfers and the commencement of this case.

Fourth, Abastillas, Smith, and WSC contend that the Kekonas did not sustain any damages which were proximately caused by any of the alleged illegal notarizations. In light of the fact that, absent these illegal notarizations, the transfers would not have occurred, this is not necessarily true.

5.

Notwithstanding their agreement at trial to the conspiracy instructions to the jury, Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the circuit court erred by giving the conspiracy instructions because "the vast majority of cases [from other jurisdictions] . . . have refused to allow conspiracy actions for fraudulent transfer[; when] there is no

tort, there can be no conspiracy[.]"

The Kekonas did not have a lien on the subject properties at the time of the allegedly fraudulent transfers. In the past, it has been held that a general creditor, without a lien, had no interest in a debtor's property, and could not be legally injured by the fraudulent transfer of a debtor. See, Dano v. Sharpe, 236 Mo. App. 113, 152 S.W.2d 693 (1941). More recently, however, courts have decided that the UFCA and the UFTA make a fraudulent transfer a "legal wrong" such that a conspiracy action could be brought pursuant to it. Summers v. Hagen, 852 P.2d 1165 (Alaska 1993); McElhanon v. Hing, 151 Ariz. 386, 392-93, 728 P.2d 256, 262-63 (App. 1985), *vacated in part on other grounds,* 151 Ariz. 403, 728 P.2d 273 (1986), *cert. denied,* 481 U.S. 1030, 107 S.Ct. 1956, 95 L.Ed.2d 529 (1987); Dalton v. Meister, 71 Wis. 2d 504, 239 N.W.2d 9 (1976). The following passage from McElhanon v. Hing persuasively sets out the reasoning:

> Hing suggests that a cause of action for participating in a fraudulent conveyance should be limited, as other courts have done, to instances where a creditor has an actual, present lien against a debtor. *Adler v. Fenton,* 65 U.S. (24 How.) 407, 16 L.Ed. 696 (1861); *Hadden v. United States,* 130 F.Supp. 610 (1955); *Lamb v. Stone,* 28 Mass. (11 Pick.) 527 (1831); *see generally,* Annot., "Right of Creditor to Recover Damages for Conspiracy to Defraud Him of Claim," 11 A.L.R. 4th 345 (1982). The principle behind the "lien requirement" rule is that until a creditor obtains a lien, giving him vested or specific rights in the debtor's property, the debtor is legally free to do what he will with his property. *Adler v. Fenton.* . . .
>
> . . . .
>
> There is another view which holds that a general or judgment creditor does suffer a legal wrong from a fraudulent conveyance. *Celano v. Frederick,* 54 Ill.App.2d 393, 203 N.E.2d 774 (1964); *Smith & Crittenden v. Sands,* 17 Neb. 498, 23 N.W. 356 (1885); *Dalton v. Meister,* 71 Wis.2d 504, 239 N.W.2d 9 (1976) (11 A.L.R. 4th

> 332). We agree that a lien is not necessary before there is an actionable wrong. Arizona's adoption of the Uniform Fraudulent Conveyance Act, A.R.S. §§ 44-1001 to 44-1013 (UFCA) is particularly persuasive on this point. The UFCA makes such transfers unlawful as against creditors without a lien and even as to creditors without a judgment. We are not relying on the UFCA per se but on the public policy thereby adopted.
>
> We agree with the reasoning of the Wisconsin Supreme Court in *Dalton v. Meister*, where the court recognized a cause of action for conspiracy to commit a fraudulent conveyance. The court held that upon passage of the Uniform Fraudulent Conveyances Act, a conveyance to defraud a general creditor became a legal wrong, properly the subject of a suit for civil conspiracy. The cause of action requires a combination of two or more persons who, by some concerted action, accomplish some unlawful purpose or by unlawful means accomplish some purpose not itself unlawful. The term "unlawful" means not only criminal acts, but includes all willful, actionable violations of civil rights such as a fraudulent conveyance against a general creditor. The court noted that a conspirator, in this instance a bank, is not exonerated from liability because it may not have benefitted from the fraudulent conveyance. We therefore have concluded that a fraudulent conveyance against a judgment creditor is a legal wrong which may be the subject of a complaint for damages arising out of a conspiracy to commit a fraudulent conveyance.

McElhanon v. Hing, 151 Ariz. at 392-93, 728 P.2d at 262-63 (footnote omitted).

According to the Hawai'i Supreme Court, "'the accepted definition of a [civil] conspiracy is a combination of two or more persons or entities by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.'" Robert's Hawai'i School Bus, Inc. v. Laupahoehoe Transp. Co., Inc. 91 Hawai'i 224, 252 n.28, 982 P.2d 853, 881 n.28 (1999)(quoting Duplex Printing Press Co. v. Deering, 254 U.S. 443, 466, 41 S.Ct. 172 (1921))(brackets omitted, brackets added).

Clearly, the enactment of the UFTA by the Hawai'i legislature made fraudulent transfers a "legal wrong". We can think of no valid reason why those who conspire to make a fraudulent transfer before a creditor obtains a lien should

escape civil liability for damages caused by the conspiracy.

6.

Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the circuit court reversibly erred in refusing, post-judgment pursuant to a Hawai'i Rules of Civil Procedure Rule 60(b) motion, (a) to vacate the compensatory (special and general) damages and punitive damages awarded, and (b) to reduce the Kekonas' judgment to what they say are the statutory limits mandated by HRS Chapter 651C-7(a)(1).

The first question is whether the court was authorized to award compensatory damages and punitive damages. Compensatory (special and general) damages are commonly granted in common law fraud cases. See, e.g., Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1978). It is also generally accepted that a successful plaintiff, in an action for civil conspiracy, may recover compensatory damages directly resulting from the wrongful act in pursuit of the conspiracy.[13/] See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 108 F.3d 522 (4th Cir. 1997); Chrysler Credit Corp. v . Whitney Nat. Bank, 51 F.3d 553 (5th Cir. 1995); Nerbonne, N.V. v. Lake Bryan Intern. Properties, 689 So. 2d 322 (Fla. App. 1997); Koster v. P & P Enterprises, Inc., 248 Neb. 759, 539 N.W. 2d 274 (1995); Keviczky v. Lorber, 290 N.Y. 297, 49 N.E. 2d 146 (1943).

[13/] General principles governing the recovery of punitive damages apply in civil conspiracy cases. See, e.g., Martin v. Robbins, 628 So. 2d 614 (Ala. 1993); Horn v. Ruess, 72 Ariz. 132, 231 P.2d 756 (1951); Solis v. Calvo, 689 So. 2d 366 (Fla. App. 1997); Stoner v. Wilson, 140 Kan. 383, 36 P.2d 999 (1934).

In some states, courts applying the UFTA (or similar statutes) allow limited compensatory damages. For example, in Marine Midland Bank v. Burkoff, 120 A.D.2d 122, 132, 508 N.Y.S.2d 17, 24-25 (1986), a New York Supreme Court noted that "a [money] judgment may be granted only where the grantee has disposed of the wrongfully conveyed property or depreciated it." See also Northern Tankers (Cyprus) Ltd. v. Backstrom, 968 F.Supp. 66 (D. Conn. 1997)(damages limited to value of property transferred); Miller v. Kaiser, 164 Colo. 206, 433 P.2d 772 (1967); Damazo v. Wahby, 269 Md. 252, 305 A.2d 138 (1973). These states have refused to allow punitive damages. Id.

Courts in other states have ruled that while damages are not available under the UFTA (or similar statutes), conspiring to violate the UFTA can lead to liability for "the value of the property fraudulently transferred or the amount of the debt, whichever is less." McElhanon v. Hing, 151 Ariz. at 394, 728 P.2d at 264; Summers v. Hagen, 852 P.2d at 1170. According to these courts, conspiracy damages should only be awarded when the statutory remedies are inadequate.[14/] McElhanon v. Hing, 151 Ariz. at 393, 728 P.2d at 263; Summers v. Hagen, 852 P.2d at 1170.

The court of at least one state has interpreted the UFTA to allow plaintiffs to request any of the common law

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[14/] Like the courts cited in the preceding paragraph, these courts specifically mention that damages are appropriate (1) when the fraudulently transferred property has been damaged in some way or (2) when the property has been conveyed out of the courts' reach.

remedies, including punitive damages, generally appropriate in fraud cases. The Ohio Supreme Court said this about Ohio's fraudulent transfer statute:

> R.C. 1336.11 provides that, "[i]n any case not provided for in sections 1336.01 to 1336.12, inclusive, of the Revised Code, the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress, or coercion, mistake, bankruptcy, or other invalidating cause shall govern."
>
> The appellate court's construction of R.C. 1336.11, which allowed the application of common-law remedies not set forth in this statute, is reasonable. [FN3] Otherwise, the purpose of this section is questionable.
>
> FN3. There appear to be relatively few cases concerning the application of common-law remedies under the statute. The Supreme Court of Pennsylvania stated that: "As this act does not specify a particular course of procedure, that previously existing and any necessary modification thereof, may be adopted, in order to enable the one attacking the 'conveyance' to obtain the rights accorded by the statute." *Schline v. Kine* (1930), 301 Pa. 586, 591, 152 A. 845.
>
> We recognize that punitive damages have not been allowed in fraudulent conveyance actions in some other jurisdictions. The Colorado Supreme Court refused to allow punitive damages and concluded that its statute allows only for the voiding of a conveyance. *Miller v. Kaiser* (1967), 164 Colo. 206, 433 P.2d 772. C.R.S. 1963, 59-1-17, a part of the Colorado statute of frauds, provided that fraudulent conveyances "shall be void." Compared to Colorado's single remedy, Ohio's version of the Uniform Fraudulent Conveyance Act is more comprehensive and provides several remedies. See R.C. 1336.09, 1336.10 and 1336.11.
>
> Public policy supports this interpretation of the statute. "The purpose of the Uniform Fraudulent Conveyance Act is primarily for the benefit of creditors, not grantees. It is a remedial statute and a liberal construction should be given it to accomplish its purpose of giving speedy relief against a fraudulent debtor." *Running v. Widdes* (1971), 52 Wis.2d 254, 259, 190 N.W.2d 169.
>
> Because the action herein is not specifically provided for in either of the remedy sections, R.C. 1336.11 allows that the rules of law and equity may govern. We hold that common-law remedies, including the law of fraud, may be applied when appropriate in fraudulent conveyance cases pursuant to R.C. 1336.11.
>
> Previous case law has established that punitive damages and attorney's fees are permissible in cases of fraud involving malicious and intentional conduct. The requirements for punitive damages were set forth in paragraph one of the syllabus in *Columbus Finance v. Howard* (1975), 42 Ohio St.2d 178 [71 O.O.2d 174], 327 N.E.2d 654, as follows: "In an action for wrongful

> execution, actual malice, fraud or insult on the part of the wrongdoer must be shown in order to justify an award of punitive damages." The court defined actual malice, at page 184, to include " 'intentional, reckless, wanton, wilful and gross acts which cause injury to persons or property.' " In *Detling v. Chockley* (1982), 70 Ohio St.2d 134, 138 [24 O.O.3d 239], 436 N.E.2d 208, this court also stated that actual malice signifies, *inter alia*, intent, deliberation or a willful design to do another injury. Thus, recent pronouncements of this court are consistent in defining malice to include intentional or deliberate behavior.
>
> Moreover, the court in *Detling, supra,* stated, at page 136, that, "[t]he rationale for allowing punitive damages has been recognized in Ohio as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct: 'The principle of permitting damages, in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt, and malignant motive and design, which prompted him to the wrongful act.'" (Citations omitted.)
>
> Applying these principles to the case *sub judice,* Interstate ceased operations and transferred its accounts to two successor corporations with essentially the same business, employees and facilities. The trial court found that Interstate's decision to wind down was designed, in part, to avoid the Locafrance judgments against it. Thus, the record indicates that Interstate's actions were willful, intentional and deliberate as required by this court's definition of malice for an award of punitive damages. We conclude that there was sufficient evidence of malice to warrant imposition of punitive damages. Alternatively, Interstate's conduct, by definition of a fraudulent conveyance set forth in R.C. 1336.07, constitutes a fraud, as required by *Howard, supra,* for an award of punitive damages.
>
> Considering the facts in this case, punitive damages are appropriate to deter the delinquent judgment debtor from attempting to avoid paying the judgments. Setting aside the conveyance and other remedies set forth in R.C. 1336.10 and 1336.11 would not be a sufficient deterrent to discourage appellants and other debtors from making fraudulent conveyances to avoid creditors. Without punitive damages as a deterrent, the purpose of the Fraudulent Conveyance Act would be severely weakened.
>
> Furthermore, this court has concluded that, "[i]f punitive damages are proper, the aggrieved party may also recover reasonable attorney fees." *Howard, supra*, at 183, 327 N.E.2d 654. Therefore, we find [sic] that punitive damages and attorney's fees were properly awarded by the trial court.

Lochafrance United States Corp. v. Interstate Distribution Services, Inc., 6 Ohio St. 3d 198, 201-03, 451 N.E.2d 1222, 1225 (1983). See also Dalton v. Meister, 71 Wis.2d at 522-23, 239 N.W.2d at 19 (holding that plaintiff's conspiracy action against

a defendant provided the plaintiff "with damage remedies that are independent of those provided under [Wisconsin's fraudulent transfer statute]"). We agree with the Lochafrance United States Corp. opinion.

The second question is whether there is evidence in the record supporting the compensatory damages awarded. Dr. Bornemann notes that "no [Hawai'i] appellate decision has ever authorized and [sic] recovery of general, conspiracy or punitive damages because of a fraudulent transfer." (Footnote omitted.) More specifically, SMI and RASCORP contend that "[t]he Kekonas' underlying claim (from Civil No. 89-3517) is about $335,000 as of the present date ($191,000 plus interest from 12/7/93[)] [Ex. 148]. That is the most they can recover." Dr. Bornemann states that "Plaintiffs received $432,000 for fraudulent conveyance and $200,000 for conspiracy. There was no evidence that they suffered additional harm because of the conspiracy." Abastillas, SMI, Smith, RASCORP, and Dr. Bornemann contend that the $100,000 awarded for each of the two conspiracies was speculative and constituted a double recovery.

HRS § 478-3 (1993) states as follows: "Interest at the rate of ten per cent a year, and no more, shall be allowed on any judgment recovered before any court in the State, in any civil suit."

In his closing argument to the jury, counsel for the Kekonas stated, in relevant part:

> Question No. 9. What is the amount of the damages that should be awarded to the plaintiffs for the fraudulent transfer? As against Miss Abastillas, since our judgment against her is for twenty-five thousand, we would ask that you put in twenty-five thousand. As far as RAS Corp, since that's one and the same with Mr. Smith, we would ask for six thousand. And as for SMI, since it valued the property at one hundred seventy-five thousand, say one seventy-five. Half of that difference is eighty-seven thousand five hundred dollars.
>
> As far as general damages, what was the delay that was caused by all of these concocted documents? That is interest at 10 percent.
>
> . . . .
>
> We would ask that you put in thirteen thousand seven hundred fifty. Figure out the interest for each one. Three thousand three hundred dollars, about 55 percent, and forty-five thousand one twenty-five with regards to SMI. You folks will have to do the calculations as to the interest, but it's about twenty-five total.
>
> The key question, No. 7. What is the amount of punitive damages that should be awarded against any of the defendants? And because of the way in which this is written, we have to ask. Six figures isn't enough for Smith and Abastillas. They ain't gonna pay six figures. So let's ratchet it up seven figures. Maybe the Kekonas' grandchildren will get the seven figures someday.
>
> We are asking in punitive damages against Miss Abastillas . . . one million dollars, against Mr. Smith for one million dollars, and against RAS Corp for one million dollars, Michael Bornemann one million dollars, and SMI one million dollars.

It appears that the jury started with the amounts owed in Civil No. 89-3517 as special damages and then added the statutory interest to those amounts. It is obvious that the general damages awarded by the jury is sixty percent of the special damages (ten per cent per annum for six years). As noted previously, at the time of trial, the total principal due was $191,628.27 ($152,500 against SMI, plus $25,000 against Abastillas, plus $6,000 against Smith, plus $8,128.27 against SMI and Abastillas). The jury awarded the following special damages:

Item	Kaneohe	HPP	Notary
Abastillas	$ 29,064	$15,128	$95,500
Smith			$95,500
SMI	$156,564		
RASCORP	$ 6,000		

The $29,064 appears to be the $25,000 plus one half of the $8,128.27. The $156,564 appears to be the $152,500 plus one half of the $8,128.27. The $6,000 was assessed against RASCORP. Two times $95,500 is $191,000. The basis for the $15,128 is not so obvious although it appears to have some relationship to the $8,128.27.

There being no HRS § 651C-8(a) defense, Hawai'i's UFTA protected the right of the Kekonas to obtain payment of those amounts from the net values of the Kaneohe property and the HPP property. In light of those facts, what compensatory damages did the Kekonas suffer from the violation of, and the conspiracy that resulted in the violation of, Hawai'i's UFTA?

In this appeal, the Kekonas offer scant explanation in support of the compensatory damages awarded. In their opening brief, the Kekonas contend that "the special, general and punitive damages caused by the wrongful notarizations of Smith and Abastillas exceeded $1,000,000." They cite no evidence in support of this allegation. In their answering brief to the Abastillas/Smith opening brief, the Kekonas argue that the jury

> properly found that Smith's and Abastillas' illegal notarizations each caused $95,500 in damages (largely by shielding the income from and depreciation on the Kaneohe Residence from the Kekonas),

> and properly awarded delay damages of $57,300 (or 6 years of delay, at 10% per year) as urged by the Kekonas in closing argument[.]

In their answering brief to WSC's opening brief, the Kekonas argue, in relevant part:

> Clearly, the damages caused by their frenzied, fraudulent transfers was to prevent the Kekonas from collecting on their 1993, $191,000 Judgment. Additional damages were the statutory interest that the Kekonas lost. Smith and Abastillas benefitted hugely from their attempted deception: they continued to collect the income from, and they continued to occupy, the Kaneohe Residence, and they also claimed depreciation for 1993.
>
> The jury (and Judge Nishimura) both realized and understood that the illegal notarizations proximately caused the damages to [the] Kekonas, and both realized that the amount of the damages were appropriate. But for the wrongful notarizations, the deeds (Exs. 40 and 41) could not have been recorded, and the Kekonas could have executed upon the Kaneohe Residence.

These arguments suggest that the jury was authorized to award the Kekonas (a) interest at ten percent per annum on the unpaid principal, and (b) the income and depreciation they would have had from the Kaneohe Residence had it been transferred to them rather than fraudulently transferred. We agree with "(a)". The argument presented by "(b)" is an alternative, not a supplement, to "(a)". Otherwise, it would be a double recovery. Assuming "(b)" is a valid alternative, there is no evidence to support (1) a finding of the value of "(b)" or (2) a conclusion that the value of "(b)" is greater than the value of "(a)". Therefore, the Kekonas have presented no valid basis for challenging "(a)".

There is no evidence supporting the jury's award of (1) $100,000 general damages caused by the conspiracy to fraudulently transfer the Kaneohe property and (2) $100,000 general damages caused by the conspiracy to fraudulently transfer the HPP property.

The third question is whether the evidence supports the punitive damages awarded.[15/] In a memorandum filed on December 29, 2000, the Kekonas stated:

> [Dr. Bornemann's] argument is nothing more than a rather brazen, self-serving attempt to keep and retain the $302,000 in rentals and tax benefits which he wrongfully received in exchange for taking part in the conspiracy to defraud. It is also a rather brazen attempt to avoid having to pay the Kekonas' litigation costs of over $200,000 which are part of punitive damages awards in Hawaii. Taken to its logical conclusion, [Dr. Bornemann's] argument would actually provide incentives for others to take part in conspiracies to fraudulently transfer properties.

(Emphasis in the original.)

In another memorandum filed on December 29, 2000, the Kekonas stated:

> 5. The evidence also clearly showed that the Kekonas had reasonably expended at least $200,000 in fees and costs seeking to set aside these fraudulent transfers. [Dr. Bornemann's] own tax returns showed that [Dr. Bornemann] had received rental income and substantial depreciation tax benefits of over $302,000 from 1993 to 1999. Based upon this evidence, a reasonable jury could properly decide to award substantial punitive damages against [Dr. Bornemann] both in order to remove his "profit" from the fraud, and also in order to restore the Kekonas' lost fees and costs.

In this case, the evidence supports the punitive damages awarded.

7.

The HRS (Supp. 2004) states, in relevant part:

> **§ 456-5 Official bond.** Each notary public forthwith and before entering upon the duties of the notary's office shall execute, at the notary's own expense, an official surety bond which shall be in the sum of $1,000. Each bond shall be approved by a judge of the circuit court.
>
> The obligee of each bond shall be the State and the condition contained therein shall be that the notary public will

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15/ The facts that may be considered by the trier of fact in awarding punitive damages and the appellate standard of review of an award of punitive damages are stated in Ditto v. McCurdy, 86 Hawai'i 93, 947 P.2d 961 (App. 1997).

> well, truly, and faithfully perform all the duties of the notary's office which are then or may thereafter be required, prescribed, or defined by law or by any rule made under the express or implied authority of any statute, and all duties and acts undertaken, assumed, or performed by the notary public by virtue or color of the notary's office. The surety on any such bond shall be a surety company authorized to do business in the State. After approval the bond shall be deposited and kept on file in the office of the clerk of the circuit court of the judicial circuit in which the notary public resides. The clerk shall keep a book to be called the "bond record", in which the clerk shall record such data in respect to each of the bonds deposited and filed in the clerk's office as the attorney general may direct.
>
> **§ 456-6 Liabilities; limitations on; official bond.** (a) In the performance of a notarial act, a notary's liability shall be limited to a failure by the notary to perform properly the actions required for the jurat, acknowledgment, or other notarial act. The notary's liability shall not be based on statements in a notarized document apart from the notarial certificate.
>
> (b) For the official misconduct or neglect of a notary public or breach of any of the conditions of the notary's official bond, the notary and the surety on the notary's official bond shall be liable to the party injured thereby for all the damages sustained. The party shall have a right of action in the party's own name upon the bond and may prosecute the action to final judgment and execution.

The Kekonas contend that "[t]he trial court erred and abused its discretion in awarding the Kekonas only $2,000 in damages against [WSC], where the special, general and punitive damages caused by the wrongful notarizations of Smith and Abastillas exceeded $1,000,000." We conclude that the trial court did not err.

> The interpretation of a statute is a question of law reviewable de novo.
>
> > When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Ka Paʻakai O Kaʻaina v. Land Use Comm'n, 94 Hawaiʻi 31, 41, 7 P.3d 1068, 1078 (2000) (internal quotation marks and citations omitted) (quoting Amantiad v. Odum, 90 Hawaiʻi 152, 160, 977 P.2d

160, 168 (1999)).

When read together with HRS § 456-5, HRS § 456-6 does not extend the liability of the surety on the notary's official bond beyond the limits of the $1,000 surety bond for that notary.

8.

In response to Dr. Bornemann's motion, the court gave the Kekonas a choice (a) to agree a judgment for $75,000 punitive damages from Dr. Bornemann, or (b) the court would order a new trial solely on the question of the amount, if any, of the punitive damages payable by Dr. Bornemann. After the Kekonas refused to agree to a judgment for punitive damages in the amount of $75,000, a second jury decided that Dr. Bornemann should pay punitive damages in the amount of $594,000. The evidentiary part of the second jury trial commenced on Wednesday, October 25, 2000. More than four months prior, the June 8, 2000 pre-trial order entered by Judge Victoria S. Marks stated, in relevant part: "5. Witnesses only to be called to the stand one time." At the trial, the following witnesses were called by the Kekonas in the following order:

October 25, 2000	Benjamin Kekona, William Carroll, Dr. Bornemann
October 26, 2000	Dr. Bornemann
October 31, 2000	Dr. Bornemann, Robert Bright, Tamae Kekona

The following was the only witness called by Dr. Bornemann:

October 31, 2000	John Shin

On October 26, 2000, before counsel for the Kekonas continued his examination of Dr. Bornemann, counsel for Dr. Bornemann stated "Dr. Bornemann's request that we be allowed to reserve cross examination of Dr. Bornemann slash presentation of Dr. Bornemann's direct until such time as his part of the case comes before the Court." The basis stated was that "because, Judge, otherwise you're basically preempting the [Dr. Bornemann's] right to present his case." The court denied the request, noting that it "had asked initially, you know, way back when if everyone had read the guidelines for trial. And in those guidelines it said, you know, a witness is on the stand one time." On October 31, 2000, after the Kekonas finished calling witnesses their case, counsel for Dr. Bornemann restated his objection to the fact that he could not call Dr. Bornemann as a witness.

In this appeal, Dr. Bornemann contends that the circuit court erred because, by not permitting him to defer cross-examination, the court (1) deprived Dr. Bornemann's lawyer of the ability (a) to fashion a coherent defense and (b) to broach new subjects of inquiry, (2) disregarded the traditional sequence of presentation in civil cases without stating any reason, and (3) denied Dr. Bornemann's right to testify in response to Mrs. Kekona's testimony that Dr. Bornemann could easily pay $1,000,000 in damages.

Dr. Bornemann failed to state any specifics in support of contention (1)(a). Contention (1)(b) is not true.

Contention (3) is not true because Dr. Bornemann obviously anticipated this evidence before he testified. Contention (2) is true. However, under the Hawai'i Rules of Evidence (HRE) Rule 611(a), a trial judge "shall exercise reasonable control" over the manner and order in which witnesses are interrogated. In light of the record, we conclude that the trial court did not abuse its discretion on this issue.

9.

The Kekonas state that

> [i]f for any reason this Court materially reverses the February 26, 2001 Amended Final Revised Judgment, then Kekonas pray (1) that this Court will reverse and remand this cause back to the trial court for trial on the Hawaii RICO claim; (2) that this Court would grant summary judgment setting aside the transfers of the Kaneohe Residence as a matter of law; and (3) that this Court would vacate and set aside the inadequate bond requirements established by the lower court.

Assuming we are materially reversing the February 26, 2001 Amended Final Revised Judgment, we summarily deny these requests by the Kekonas.

CONCLUSION

Accordingly, we affirm the Amended Revised Final Judgment entered on February 26, 2001, except that we vacate (1) the $100,000 general damages judgment related to the Kaneohe property against defendants Paz Feng Abastillas, Robert A. Smith, personally, Robert A. Smith, Attorney At Law, A Law Corporation, Standard Management, Inc., and Michael Bornemann, jointly and severally, and (2) the $100,000 general damages judgment related to #1809, Honolulu Park Place against defendants Paz Feng Abastillas; Robert A. Smith, personally, and

Michael Bornmann, jointly and severally. We remand for entry of an amended Amended Revised Final Judgment.

DATED: Honolulu, Hawai'i, June 8, 2006.

On the briefs:

Robert A. Smith
for Defendants-Appellants
and Cross-Appellees
Paz F. Abastillas, Robert A.
Smith, Attorney at Law, A Law
Corporation, Standard
Management, Inc., and Western
Surety Company.

Peter Van Name Esser and
Edward J. Bubee
for Defendant-Appellant and
Cross-Appellee
Michael Bornemann.

Fred Paul Benco
for Plaintiffs-Appellees
and Cross Appellants.

James A. Burns
Chief Judge

Corinne K.A. Watanabe
Associate Judge

Associate Judge